

Federal Court



Cour fédérale

Date: 20211207

Docket: IMM-524-20

Citation: 2021 FC 1359

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

VISHNU RAVI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This application for judicial review concerns a decision by the Refugee Protection Division [RPD] refusing to re-open its decision denying the Applicant's refugee claim.

II. Background

[2] The Applicant has severe mental health issues related to schizophrenia, psychosis and potential alcohol dependency. These conditions were not raised, although in hindsight were apparent, at the time of the refugee hearing.

[3] The Applicant, a citizen of India, came to Canada in 2015 to study in Thunder Bay. He suffers from a number of mental health conditions and was repeatedly hospitalized for them in Canada prior to his RPD hearing. He exhibits auditory hallucinations, paranoia and distress functioning in society. He appears not to have insight into these conditions.

[4] His refugee claim was based on fear of reprisals because of his refusal to enter into an arranged marriage. He claims to have been intimidated and shunned by family and members of his village. He claimed that “people” or “thugs” followed him from India to Thunder Bay after his visit to India. He had difficulties with his father, who he saw, at times in his confessing testimony, as one of the people who were after him.

[5] As previously indicated, his mental health issues were not raised before the RPD. The RPD dismissed the Applicant’s claim on the grounds of an available Internal Flight Alternative [IFA] and credibility. It concluded that the Applicant had failed to establish that the police wanted him because of the fight with his father and that he had not provided any evidence that the “thugs” would find him in the IFA city.

[6] The Applicant did not challenge the RPD's original decision. Approximately 20 months later, he applied to have the negative decision re-opened. The Applicant filed new evidence of his condition and hospitalization although, because of his mental illness, he could not execute his own affidavit.

[7] The RPD denied the re-opening because of the 20 month delay in filing, the mental health issues were not obvious nor raised by counsel and it was unclear what impact the mental health issues might have had on the IFA finding. The RPD concluded that there was no persuasive evidence before it that there was a breach of natural justice.

[8] The right to a re-opening of an RPD decision is set out in Rule 62 of the *Refugee*

Protection Division Rules, SOR/2012-256:

Application to reopen claim

62 (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.

Form of application

(2) The application must be made in accordance with rule 50 and, for the purpose of paragraph 50(5)(a), the Minister is considered to be a

Demande de réouverture d'une demande d'asile

62 (1) À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.

Forme de la demande

(2) La demande est faite conformément à la règle 50 et, pour l'application de l'alinéa 50(5)a), le ministre est considéré comme une partie,

party whether or not the Minister took part in the proceedings.

qu'il ait ou non pris part aux procédures.

Contact information

Coordonnées

(3) If a claimant makes the application, they must include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer.

(3) Si la demande est faite par le demandeur d'asile, celui-ci indique ses coordonnées dans sa demande et, s'il est représenté par un conseil, les coordonnées de celui-ci et toute restriction à son mandat.

Allegations against counsel

Allégations à l'égard d'un conseil

(4) If it is alleged in the application that the claimant's counsel in the proceedings that are the subject of the application provided inadequate representation,

(4) S'il est allégué dans sa demande que son conseil, dans les procédures faisant l'objet de la demande, l'a représenté inadéquatement :

(a) the claimant must first provide a copy of the application to the counsel and then provide the original application to the Division, and

a) le demandeur d'asile transmet une copie de la demande au conseil, puis l'original à la Section;

(b) the application provided to the Division must be accompanied by a written statement indicating how and when the copy of the application was provided to the counsel.

b) la demande transmise à la Section est accompagnée d'une déclaration écrite indiquant à quel moment et de quelle façon la copie de la demande a été transmise au conseil.

Copy of notice of appeal or pending application

Copie de l'avis d'appel ou de la demande en instance

(5) The application must be accompanied by a copy of any notice of pending appeal or any pending application for leave to apply for judicial

(5) La demande est accompagnée d'une copie de tout avis d'appel en instance, de toute demande d'autorisation de présenter

review or any pending application for judicial review.

une demande de contrôle judiciaire en instance ou de toute demande de contrôle judiciaire en instance.

Factor

Élément à considérer

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

Factors

Éléments à considérer

(7) In deciding the application, the Division must consider any relevant factors, including

(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :

(a) whether the application was made in a timely manner and the justification for any delay; and

a) la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;

(b) the reasons why

b) les raisons pour lesquelles :

(i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or

(i) soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,

(ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.

(ii) soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

Subsequent application

Demande subséquente

(8) If the party made a previous application to reopen that was denied, the Division must consider the reasons for the denial and must not allow

(8) Si la partie a déjà présenté une demande de réouverture qui a été refusée, la Section prend en considération les motifs du refus et ne peut

the subsequent application unless there are exceptional circumstances supported by new evidence.

accueillir la demande subséquente, sauf en cas de circonstances exceptionnelles fondées sur l'existence de nouveaux éléments de preuve.

Other remedies

(9) If there is a pending appeal to the Refugee Appeal Division or a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of a claim, or dismiss the application.

Autres recours

(9) Si un appel en instance à la Section d'appel des réfugiés, une demande d'autorisation de présenter une demande de contrôle judiciaire en instance ou une demande de contrôle judiciaire en instance est fondé sur des motifs identiques ou similaires, la Section, dès que possible, soit accueille la demande de réouverture si cela est nécessaire pour traiter avec célérité et efficacité une demande d'asile, soit rejette la demande.

III. Analysis

[9] Given the teachings in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the standard of review of the RPD's refusal to re-open is reasonableness. For purposes of this matter, it is not necessary to determine whether the failure to observe a principle of natural justice attracts the correctness standard as the result in this case would be the same.

[10] It is not necessary to establish that the decision maker caused the breach of natural justice – it is sufficient if there has been such a breach. I concluded that in this context a breach of natural justice includes a breach of the principles of fairness: *Gyarchie v Canada (Citizenship and Immigration)*, 2013 FC 1063 at para 17.

[11] In this case, it is evident that the Applicant's mental illness played a role in the manner in which he was perceived by the RPD and in respect of his ability to function at the IFA.

[12] It is unfair to assess the Applicant's case, the Applicant and his credibility when he so clearly had mental illness issues at the hearing. It is not a criticism of the RPD or of the Applicant's counsel that they did not appreciate the seriousness of the illness although his testimony appeared to point to elements of delusion. For purposes of Rule 62, it is enough if the breach existed – as it did here. His illness went to matters critical to the hearing (his ability to instruct counsel or put forward a credible case and to his credibility).

[13] It was unreasonable for the RPD not to take the Applicant's mental illness into account in assessing whether its original decision met the standards of natural justice and fairness.

[14] The right to re-open is an unusual right, to be exercised carefully, but where there has been a breach of the kind in this case, equity demands that the breach be addressed.

[15] As a matter of equity and consistent with Rule 62 and with the purpose of the right to re-open, this judicial review should be granted and the matter re-opened and reviewed by a differently constituted panel.

[16] There is no question for certification.

JUDGMENT in IMM-524-20

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is to be re-opened and reviewed by a differently constituted panel. There is no question for certification.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-524-20

STYLE OF CAUSE: VISHNU RAVI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 2, 2021

JUDGMENT AND REASONS: PHELAN J.

DATED: DECEMBER 7, 2021

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