

Federal Court



Cour fédérale

Date: 20220126

Docket: IMM-6113-18

Citation: 2022 FC 90

Ottawa, Ontario, January 26, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HENRY EDGARDO ELIAS MORAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada dated November 18, 2018, concluding that he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The Applicant is a citizen of El Salvador who alleged a fear of persecution based on his hearing disability. For the reasons that follow, the application is granted.

II. Background

[3] The Applicant has been deaf his entire life and communicates through American Sign Language. He alleges that in 2007, he and his brother were victims of a kidnapping and shooting incident involving a gang as a result of which he was hospitalized for several weeks. In 2009 and 2015 he alleges experiencing threatening incidents which he attributes to his impairment. His family assisted him in hiring a smuggler to help him enter the United States in December 2016. As he has a maternal aunt residing in Hamilton, Ontario who could provide support, he chose to come to Canada to initiate a refugee claim.

[4] The Applicant's claim was supported by medical reports about his injuries and other documentation. At his request, the RPD found that the Applicant is a vulnerable person as his ability to present his case is severely impaired and agreed to priority scheduling and other accommodations.

[5] The RPD heard the claim on two dates in July and October 2018. The Applicant requested that the hearing be video recorded as audio recording would not capture the sign language interpretation. This was first refused by the RPD Panel on the basis that the Board did not have the capacity to video record proceedings. In response, the Applicant initiated an Application for Leave and Judicial Review which was withdrawn when the RPD found the necessary capacity. The Applicant then brought a motion for the Member to recuse herself for

bias, which was refused for reasons set out in the Panel's disposition of the claim. The Panel found that no reasonable person, properly informed of the circumstances, would have a reasonable apprehension of bias.

[6] Dealing with the merits of the claim, the RPD found that the Applicant embellished the nature and severity of the difficulties that he had experienced in his country and was not credible on core aspects of his claim. Little weight was given to a psychiatric report which had diagnosed severe and chronic post-traumatic stress disorder based on an hour-long interview and the Applicant's Basis of Claim Document (BOC).

[7] Further, the RPD found that the Applicant's claim lacked an objective basis to establish persecution by gangs against persons with disabilities in El Salvador.

[8] This application for judicial review followed an attempt by the Applicant to appeal the RPD decision to the Refugee Appeal Division. The appeal was rejected for want of statutory authority to hear the matter. The application for judicial review was then held in abeyance pending the decision of the Federal Court of Appeal in *Kreisham v Canada (Citizenship and Immigration)*, 2019 FCA 223 regarding the jurisdictional issue.

III. **Issues and Standard of Review**

[9] The Applicant raised a number of issues regarding the fairness and reasonableness of the RPD's decision. As I am satisfied that procedural fairness was not observed by the RPD, that is the sole issue I will address.

[10] The issue of procedural fairness is reviewable on the standard of correctness (*Mhlanga v Canada*, 2021 FC 957, at para 12; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196). Where an issue of procedural fairness arises, the Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances. No deference is owed to the decision-maker.

IV. Analysis

[11] As a general principle, the rules of procedural fairness do not require refugee claimants to be confronted about information that they are aware of and which they have, in addition, provided themselves: *Gu v Canada (Citizenship and Immigration)*, 2017 FC 543 at para 29.

[12] In this instance the Applicant was confronted with a typed statement seized from him at the Port of Entry where he crossed into Canada after a stay at a refugee shelter in Buffalo, New York.

[13] The Applicant was not provided with a copy of the statement when his interviews at the border were complete nor was it disclosed to him or his counsel before the Panel questioned him extensively about it during the hearing.

[14] In addition to pointing to the difficulties which the Applicant encountered with language and translations, counsel's oral submissions to the Panel on this point were:

It would be procedurally unfair for the Panel to place weight on these inconsistencies since I was not provided with this document until today. I have not had the opportunity to review this statement with my client, review its contents, so we submit that more [sic] weight to be put on this to draw adverse credibility inferences, this would be a breach of procedural fairness since this was not in the port of entry documentation that was provided to me.

[15] The Member found that there were significant differences between the content of the statement and the Applicant's BOC and that his inability to provide clear answers to questions about who prepared it significantly undermined his overall credibility.

[16] In my view, confronting the Applicant at the hearing with the seized statement without prior disclosure was a breach of procedural fairness.

[17] Drawing an adverse credibility conclusion based on an issue that was not put to a refugee claimant during their hearing is also a breach of procedural fairness: *Shaina v Canada (Citizenship and Immigration)* 2009 FC 149 at para 77. As stated by Justice Richard Southcott in *Huang v Canada (Citizenship and Immigration)*, 2019 FC 1123 at para 32:

...The unfairness arises when the RPD does not afford the Applicant an opportunity to address specific credibility concerns, in front of the current decision-maker before it draws adverse credibility determinations. I regard this principle as related to the Applicant's right to know the case to be met and to have an opportunity to address that case.

[18] In this instance the Panel breached the Applicant's right to be fully and fairly heard and to know the case against him because it drew adverse credibility findings without giving him an opportunity to respond to concerns which the Panel had.

[19] The Panel arrived at four of its six adverse credibility findings without allowing the Applicant to explain himself. One such issue is the Panel's finding that the Applicant's delay in leaving El Salvador undermined his credibility. At no point in the hearing did the Panel ask the Applicant why he delayed in leaving El Salvador.

[20] As colourfully described by Mr. Justice Hughes in *Ananda Kumara v Canada (Citizenship and Immigration)* 2010 FC 1172 at para 3, the Panel "simply lay in the weeds, waited until the hearing is over, then pulled out apparent contradictions and used them as the basis for disbelieving the Applicant's claim."

V. **Conclusion**

[21] The Court does not lightly arrive at a disposition of an application for judicial review on the ground of unfairness. But in this instance, it is clearly made out and the Respondent has failed to provide an answer to any of the Applicant's arguments in this regard. The Panel's credibility concerns were significant and had a direct impact on the Panel's analysis of the objective basis of the claim.

[22] In view of my conclusion that the lack of procedural fairness is dispositive and that this matter must be returned to the RPD for reconsideration by a different member, I do not believe it necessary to address the other issues raised by the Applicant.

[23] No serious questions of general importance were raised by the parties, and none will be certified.

JUDGMENT IN IMM-6113-18

THIS COURT'S JUDGMENT is that the application is granted, and the matter is remitted to the Board for consideration by a different member of the Refugee Protection Division. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6113-18

STYLE OF CAUSE: HENRY EDGARDO ELIAS MORAN v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE AT OTTAWA

DATE OF HEARING: DECEMBER 13, 2021

JUDGMENT AND REASONS: MOSLEY J.

DATED: JANUARY 26, 2022

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