

Federal Court



Cour fédérale

Date: 20220202

Docket: IMM-5733-20

Citation: 2022 FC 118

Ottawa, Ontario, February 2, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

HUSSEIN HASSAN BUKUL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada dated October 16, 2020, which dismissed his appeal of the decision of the Refugee Protection Division [RPD]. The RPD found that the Applicant is neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, C 27 [IRPA].

[2] For the reasons that follow, the application for judicial review is allowed.

I. Background

[3] The Applicant states that he is a citizen of Somalia and a member of the Madiban clan. He arrived in Canada and claimed refugee protection on August 27, 2014. In his Basis of Claim [BOC] form, the Applicant alleged that he faced a forward-looking risk of persecution in Somalia from the terrorist group Al Shabab because of his profession and business as a photographer, which entailed taking photos of private clients in a manner that was not in accordance with the group's dictates. The Applicant stated that he fled Somalia after Al Shabab threatened to kill him for refusing to desist in taking photos.

[4] The Minister of Citizenship Canada intervened in the RPD proceeding and submitted documents stating that, according to a report received from the US Department of Homeland Security and based on fingerprint comparison, the Applicant had presented himself to Canadian immigration officials using a false name and date of birth and that he had omitted to advise them of a claim for asylum made in the United States in 2001.

[5] The Applicant admitted in his testimony before the RPD that the Minister's evidence was correct and he recanted all of his BOC evidence. The Applicant testified that he had been ill-advised by members of the Somali community in Canada to conceal his time in the United States. He acknowledged that he had been granted asylum in the United States and claimed that he failed to regularize his status in that country due to his addiction to khat and alcohol and mental health

issues. He further stated that he had lost any documents he had in the United States in support of his identity.

[6] The Applicant further alleged that he feared that people in Somalia would throw stones at him because of his addiction and that as a member of a minority clan, he would not have protection from such behaviours. He also testified that he feared he would be killed by people making explosive devices.

[7] The Applicant presented an identity witness before the RPD. However, the Applicant admitted to the RPD that the evidence the identity witness presented was false regarding his age, his name and his clan affiliation and that he had coached the identity witness to present this false evidence.

[8] In its decision dated May 4, 2018, the RPD refused the Applicant's claim on the grounds of credibility and identity. The RPD found the Applicant was not excluded under article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can TS No 6, as there was no evidence that he had any rights in the United States similar to those of a national in that country. The RPD found the Applicant's credibility was fatally undermined by his failure to disclose his asylum claim in the United States until the Minister's intervention, and from the Applicant's admission that he had coached his identity witness to lie in support of his claim. The RPD also stated that it was unaware of the evidence the Applicant had presented regarding his identity in his United States claim and found the Applicant's testimony about Somalia was insufficient to establish his identity as a national of Somalia.

[9] On June 14, 2018, the Applicant filed an appeal with the RAD, asserting various alleged errors made by the RPD. The Applicant also requested that the RAD admit new evidence pursuant to Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 and that an oral hearing be held pursuant to section 110(6) of the *IPRA*.

[10] Specifically, the Applicant tendered before the RAD two letters from a psychiatrist dated May 29, 2018 and December 26, 2018 confirming that the Applicant is being treated for a schizophrenic disorder. The Applicant asserted before the RAD that the new evidence established that the Applicant suffered from hallucinations, paranoia and psychosis before being diagnosed with schizophrenia and that the evidence could not be provided earlier as he was not diagnosed and in treatment at the time of the RPD hearings. The RAD admitted both letters as new evidence.

[11] Before the RAD, the Applicant argued that the new evidence demonstrates that the Applicant suffers from schizophrenia, which supports a further ground of persecution should the Applicant be returned to Somalia on the basis of membership in a particular social group (namely, as a sufferer of a mental illness).

[12] The Applicant further asserted that this new evidence supports that it was reasonable and plausible that his mental illness affected his ability to testify at the RPD hearing. Moreover, the Applicant asserted that it was reasonable and plausible that his mental illness impacted his judgment and behaviour in being untruthful to the Canadian authorities. The Applicant asserted that this new evidence would have significantly impacted the RPD's credibility determinations.

[13] On October 16, 2020, the RAD dismissed the Applicant's appeal and confirmed the decision of the RPD. With respect to the Applicant's request for an oral hearing, the RAD declined to hold an oral hearing, stating:

[16] The Appellant has also asked me to hold an oral hearing of his appeal in accordance with subsection 110(6) of the IRPA. Where there is new evidence in a RAD appeal, the RAD *may* hold a hearing if that new evidence raises a serious issue with respect to the credibility of the appellant, is central to the RPD decision, and that, if accepted, would justify allowing or rejecting the refugee protection claim.

[17] In my independent assessment, the new evidence does not raise a serious issue with respect to the Appellant's credibility. I therefore decline to hold an oral hearing in this appeal.

[14] The RAD found that the RPD did not err in finding that the Applicant lacked credibility. The RAD noted that the Applicant had admitted before the RPD to fabricating the risk allegations in his BOC form, failed to disclose that he had been granted asylum in the United States and waited until the eleventh hour to tell the RPD that he had fabricated his claim and admitted that he counselled his identity witness to lie about his name and age. The RAD found that the RPD did not err in drawing a negative inference about the credibility of the Applicant's professed personal and national identity based on the testimony of his identity witness, nor did the RPD err in finding that the Applicant had failed to establish his identity or the bona fides of his claim.

[15] Regarding the Applicant's new evidence, the RAD accepted the diagnosis of schizophrenia given by the Applicant's psychiatrist, but noted that there was insufficient detail provided regarding when the treatment began. The RAD noted that the psychiatrist's evidence did not confirm that the Applicant was suffering from schizophrenia at the time of the RPD hearing. The RAD stated that even if it accepted that the Applicant was suffering from schizophrenia at the time

of the RPD hearing, there was no explanation as to how this affected the Applicant's testimony. The RAD's review of the transcript revealed that the Applicant testified clearly and coherently and responded to the panel's question, and as such, there was no indication that the Applicant's ability to testify was affected by any mental health issue. The RAD held it could not speculate as to how the RPD's determination may have been different had the RPD been aware of the Applicant's mental illness. The RAD further noted that after the April 2015 hearing, the Applicant was provided with an opportunity for his counsel to make written submissions regarding the Applicant's medical situation and that no submissions were submitted.

[16] Given that the Applicant's evidence was insufficient to establish his identity, the RAD declined to proceed to an assessment of the merits of the basis of his claim.

II. Analysis

[17] While a number of issues were raised on this application, I find that the determinative issue is whether the RAD's decision to not hold an oral hearing was reasonable.

[18] The Applicant submits that the RAD erred in failing to hold an oral hearing as the new evidence regarding the Applicant's diagnosis of a serious mental health illness met the three-part conjunctive test under section 110(6) of the *IRPA*. The Applicant asserts that the psychiatrist's letters raise a serious issue with respect to the credibility of the Applicant, in terms of how his illness affected his behaviour and the information he initially provided to the immigration authorities in Canada. Moreover, the Applicant asserts that credibility was central to the RAD's

decision and if the Applicant's evidence and submissions are accepted, they would be sufficient to allow his refugee claim.

[19] The Respondent asserts that the RAD did not err in refusing to exercise its discretion to hold an oral hearing. The Respondent asserts that the RAD considered the new evidence and the weakness that it contained – namely, the lack of detail regarding the central issue of how an undated diagnosis might affect the manner in which the Applicant presented his claim. The Respondent asserts that this did not raise an issue of credibility of the Applicant *per se* such that it met the test under section 110(6) of the *IRPA*.

[20] Pursuant to section 110(3) of the *IRPA*, the RAD must proceed without a hearing on the basis of the record of the proceeding of the RPD. However, where new evidence is admitted pursuant to *IRPA* s 110(4), the RAD "may hold a hearing" if the evidence (a) raises a serious issue with respect to credibility, (b) is central to the decision with respect to the refugee claims, and (c) if accepted, would justify allowing or rejecting the refugee claim, pursuant to s 110(6) of the *IRPA*.

[21] The RAD's decision on whether to hold an oral hearing in accordance with section 110(6) of the *IRPA* is based on an assessment of whether the criteria have been established and if so, whether the RAD should exercise its discretion to hold an oral hearing and is reviewable on the standard of reasonableness [see *Sanmugalingam v Canada (Citizenship and Immigration)*, 2016 FC 200 at para 36; *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 911 at para 11; *Horvath v Canada (Minister of Citizenship and Immigration)*, 2018 FC 147 at para. 18].

[22] According to the standard of reasonableness, a reviewing Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85].

[23] While I recognize that the decision to hold an oral hearing is discretionary, in my view, the RAD committed a reviewable error in failing to conduct a proper analysis of whether the criteria for holding an oral hearing set out in subsection 110(6) of the *IRPA* were met and if so, whether it should exercise its discretion and grant an oral hearing. With the exception of the RAD's conclusory statement that the new evidence does not raise a serious issue with respect to the Applicant's credibility, the decision is silent on the application of the remaining criteria set out in subsection 110(6) of the *IRPA* and the exercise of discretion.

[24] Moreover, the RAD provided no reasons as to how it came to the conclusion at paragraph 17 of its decision that the psychiatrist's evidence does not raise a serious issue regarding the Applicant's credibility. The Applicant had made a number of submissions as to how the credibility findings made by the RPD were impacted by his mental health and in particular, how his illness affected his behaviour and the information he initially provided to the immigration authorities in Canada. Nowhere in its reasons does the RAD address the Applicant's assertion that his undiagnosed mental illness impacted his vulnerability to be influenced by those in the Somali community to initially mislead the Canadian immigration authorities. In the face of the Applicant's

submissions, it was incumbent upon the RAD to justify its conclusion that the new evidence did not raise a serious issue with respect to the Applicant's credibility.

[25] As a result of the RAD's failure to conduct a proper assessment of the Applicant's request for an oral hearing, I find that the RAD's reasons are not transparent, intelligible and justified. Accordingly, I find that the RAD's decision is unreasonable and thus cannot stand.

III. Conclusion

[26] The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for redetermination.

[27] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-5733-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Refugee Appeal Division for redetermination.
2. The parties proposed no question for certification and none arises.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5733-20

STYLE OF CAUSE: HUSSEIN HASSAN BUKUL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: JANUARY 25, 2022

JUDGMENT AND REASONS: AYLEN J.

DATED: FEBRUARY 2, 2022

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