

Federal Court



Cour fédérale

Date: 20191217

Docket: IMM-1800-19

Citation: 2019 FC 1623

Winnipeg, Manitoba, December 17, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ABDIRAHMAN ALI HASSAN

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Abdirahman Ali Hassan is a citizen of Djibouti. He claimed refugee protection in 2017. He fears persecution in Djibouti due to his political activities and his membership in a minority clan. The Refugee Protection Division [RPD] rejected the claim for protection. The Refugee Appeal Division [RAD] confirmed the decision of the RPD.

[2] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c. 27 [IRPA] Mr. Hassan now seeks judicial review of the RAD decision. He submits the RAD erred in refusing to admit new evidence relating to his diabetic condition. He further submits that the RAD: (1) unreasonably concluded there was no breach of procedural fairness arising from his medical circumstances before the RPD; (2) erred in rendering negative credibility findings and assessing the evidence before it; (3) failed to reasonably consider his risk as a member of a minority sub-clan within the context of his political activities; and (4) failed to conduct an independent assessment of the evidence.

[3] I am not convinced that Mr. Hassan has demonstrated that the RAD committed any error that warrants the Court's intervention. For the reasons that follow, the application is dismissed.

II. The Decision under Review

[4] The RAD first considered an affidavit sworn by Mr. Hassan and placed before the RAD as new evidence. The RAD rejected the affidavit noting that it failed to comply with the requirements set out at subsection 110(4) of the IRPA. As no new evidence was admitted the RAD also rejected the request for an oral hearing.

[5] The RAD then addressed the alleged breach of fairness arising from Mr. Hassan's medical circumstances. The RAD noted that the RPD was aware that he was diabetic and advised him that he was free to request a break whenever necessary. It was noted that the RPD had encouraged him to advise if he did not feel well and that the transcript revealed that breaks had been granted when requested. The RAD concluded that if Mr. Hassan did feel ill, it was

incumbent on him to advise the RPD or his counsel that he was ill. He did not. The RAD concluded there had been no breach of procedural fairness.

[6] In addressing credibility the RAD found the Applicant's evidence contained unexplained contradictions and omissions regarding his political opposition activity in Djibouti. The RAD addressed each of the inconsistencies and concluded in each instance that the explanations provided were illogical or not reasonable.

[7] The RAD accepted that Mr. Hassan is a member of a minority sub-clan and found that minority clans in Djibouti face discrimination, but agreed with the RPD in finding that the discrimination did not rise to the level of persecution.

III. Issues

[8] The application raises the following issues:

- A. Did the RAD err in finding the new evidence inadmissible under subsection 110(4) of the IRPA and refusing the request for an oral hearing?
- B. Did the RAD conduct an independent assessment of the evidence?
- C. Did the RAD unreasonably conclude that:
 - i. there was no breach of procedural fairness before the RPD?
 - ii. the claim of political persecution lacked credibility?
 - iii. Mr. Hassan would not face persecution based on clan membership?

IV. Standard of Review

[9] Where an issue on judicial review involves questions of fact or mixed fact and law a reasonableness standard of review will apply. Similarly, a reasonableness standard of review is adopted where a tribunal is interpreting its own statute (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 53 and 54 [*Dunsmuir*]).

[10] In this instance, the issues raised all engage questions relating to the RAD's findings of fact, mixed fact and law or the interpretation and application of the IRPA. All of the identified issues will be reviewed against the standard of reasonableness.

[11] Reasonableness is a deferential standard. A reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47). A reasonableness review recognizes that it is not the reviewing court's role to reweigh or reassess the evidence (*Sharma v. Canada (Attorney General)*, 2018 FCA 48 at para 13).

V. Analysis

A. *Did the RAD err in finding the new evidence inadmissible under subsection 110(4) of the IRPA and refusing the request for an oral hearing?*

[12] The RAD did not err in refusing to admit Mr. Hassan's new evidence or in denying the request for an oral hearing.

[13] Subsection 110(4) of the IRPA states:

Evidence that may be presented

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Éléments de preuve admissibles

110 (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[14] Mr. Hassan's affidavit is 50 paragraphs in length and it addresses two issues: his capacity at the time of the hearing and substantive issues related to his claim. The capacity issue is addressed in three paragraphs; the remainder of the affidavit addresses issues of substance.

[15] The RAD reviewed the transcript of the proceedings before the RPD. It noted that the RPD was aware of and sensitive to the fact that Mr. Hassan had diabetes, that he required periodic breaks and may feel unwell in the course of the hearing. All requested breaks were granted and Mr. Hassan was encouraged to advise if he felt unwell. In this factual context, the RAD reasonably concluded that the limited information disclosed in the affidavit in relation to Mr. Hassan's medical circumstances was not information that complied with subsection 110(4) of the IRPA: it did not arise after the rejection of the claim; it was reasonably available at the time of the rejection; and it could reasonably have been presented at the time of the rejection.

[16] Similarly, it was reasonably open to the RAD to conclude that the remainder of the proposed new evidence addressing substantive issues was neither new nor unavailable to Mr.

Hassan. The RAD reasonably concluded that the affidavit did not meet the requirements of subsection 110(4) of the IRPA.

[17] Subsection 110(6) of the IRPA provides that the RAD “may hold a hearing” if new evidence is admitted that raises a serious issue with respect to credibility, is central to the decision and if accepted would justify allowing or rejecting the claim. In this instance, having reasonably concluded that the affidavit would not be considered on appeal, the RAD also reasonably interpreted and applied subsection 110(6) in concluding an oral hearing was not warranted.

B. *Did the RAD conduct an independent assessment of the evidence?*

[18] Mr. Hassan submits the RAD simply endorsed the RPD’s findings without conducting an independent assessment of the evidence.

[19] In advancing this position, Mr. Hassan has summarized the jurisprudence relating to the role of RAD. However, Mr. Hassan does not advance any argument in support of the assertion that the RAD did not engage in an independent assessment of the evidence.

[20] In its decision, the RAD summarizes its role noting that it “is required to independently determine whether the RPD was correct in relation to each alleged error of law, fact or mixed fact and law”. The RAD acknowledges that it may defer to the RPD’s credibility assessments “where it finds the RPD had a meaningful advantage”.

[21] The RAD indicates that it reviewed the RPD transcript. The decision demonstrates that the RAD reached its own findings on the issues before it. That the RAD's findings were consistent with or were arrived at for reasons that were also identified by the RPD does not establish that the RAD failed to engage in an independent assessment of the evidence.

C. *Were the RAD's conclusions and findings unreasonable?*

[22] Mr. Hassan challenges the reasonableness of a number of the RAD's findings, each is addressed below.

- (1) Did the RAD unreasonably conclude there was no breach of procedural fairness before the RPD?

[23] Mr. Hassan argues that the RAD erred in failing to recognize he was not in a position to properly assess his own functioning due to his medical condition and therefore unable to inform the panel of his incapacity. Second, he says that the RAD erred in finding that breaks alone were sufficient to address his cognitive impairment concerns.

[24] Mr. Hassan does not dispute that his circumstances were accommodated by the RPD. Instead he argues the RPD erred by failing to recognize and accommodate the potential consequences of his condition on his cognitive functioning, consequences that were not brought to the RPD's attention by Mr. Hassan or his counsel. Mr. Hassan submitted no evidence to the RAD corroborating the assertion that his circumstances influenced his cognitive abilities to the extent that he was unable to adequately advance his claim before the RPD.

[25] In considering Mr. Hassan's arguments the RAD reviewed the proceedings before the RPD, noted that the RPD was both aware of and made accommodation for Mr. Hassan's medical condition, and ultimately found no evidence in the record to support the breach of fairness claim. Although Mr. Hassan disagrees with this conclusion, it is not unreasonable.

- (2) Did the RAD unreasonably conclude the claim of political persecution lacked credibility?

[26] Mr. Hassan submits the RAD erred in concluding his claim of political persecution lacked credibility, arguing that the discrepancies and omissions were reasonably explained.

[27] The RAD identified a total of five discrepancies from which it drew an adverse inference:

- (1) The Applicant stated in his Schedule A form that he joined *le Mouvement des Jeunes de l'Opposition* [MJO] in 2011 but he testified before the RPD that he did so in 2013. He explained the discrepancy before the RPD as arising out of confusion over founding dates. On appeal, he explained that the discrepancy was simply a typographical error;
- (2) before the RPD, Mr. Hassan testified that he was a member of *le Mouvement pour le Renouveau Démocratique* [MRD]. This information was omitted from both his Port of Entry form and Basis of Claim [BOC] form;
- (3) in a letter submitted by the MJO in support of the claim it is stated that Mr. Hassan was a member of the MJO whereas Mr. Hassan reported that he was one of the organization's founders;

(4) the MJO letter misstates the date on which Mr. Hassan reports he was arrested; and

(5) before the RPD Mr. Hassan reported his wife was arrested and tortured in Djibouti for reasons linked to his political activity. This information was omitted from his BOC.

[28] Mr. Hasan explained the discrepancies as typographical errors or as simple omissions based on his failure to recognize the relevance or importance of the information to his claim.

[29] The RAD's negative inference related to the arrest date discrepancy is, in my view, unreasonable. The four-day discrepancy was explained on the basis that there may have been confusion between the date of arrest and date of trial. I note that the RAD acknowledged that this inconsistency was not determinative of the claim. This error does not render the decision itself unreasonable. The remaining inconsistencies when considered together provide a basis upon which the RAD could reasonably conclude that the claim lacked credibility.

(3) Did the RAD unreasonably conclude Mr. Hassan would not face persecution based on clan membership?

[30] Mr. Hassan argues that the RAD failed to consider his sub-clan membership in its proper context. In particular, he argues that based on his political activities he would not receive state protection.

[31] The RAD had previously determined the political activity claim not to be credible. As a result the RAD did not err in considering whether the documentary evidence supported persecution on the basis of the sub-clan affiliation only.

VI. Conclusion

[32] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-1800-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and
2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1800-19

STYLE OF CAUSE: ABDIRAHMAN ALI HASSAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2019

JUDGMENT AND REASONS: GLEESON J.

DATED: DECEMBER 17, 2019

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