Federal Court  Cour fédérale

Date: 20200630

Docket: IMM-3800-19

Citation: 2020 FC 738

Ottawa, Ontario, June 30, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

IHOUMA CALISTAR NWAKANME

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] on May 29, 2019 [Decision]. The RPD found that the Applicant failed to establish her identity and citizenship, and was therefore not a Convention refugee or a person in need of protection.

[2] For the reasons that follow, this application is allowed.

II. Background Facts

[3] The Applicant, Ihouma Calistar Nwakanme, states that she is a citizen of Nigeria.

[4] The Applicant came to Canada in October 2012 and made a refugee claim on the basis that her husband in Nigeria was physically abusing her.

[5] The Respondent intervened in the Applicant's claim and argued that there were reasons to doubt the Applicant's identity, and there were reasons to doubt the authenticity of her supporting documents.

[6] At the Applicant's first RPD hearing, the Member asked two observers in the hearing room to identify themselves. The Member asked the racialized observer twice if she was a refugee claimant, but did not ask the white observer about her refugee status.

[7] In response, the Applicant brought a motion for recusal and made a complaint to the IRB. The motion alleged that the Member a) made comments which demonstrated a lack of sensitivity toward the Applicant's mental health condition, b) asked inappropriate questions of a racialized observer in the hearing room, and c) made a comment about Africa which demonstrated her lack of understanding about the diversity of the countries on the continent.

[8] The same Member presided over the Applicant's second RPD hearing. The Member stated that the reasons for dismissing the motion for recusal would be included in the reasons for the Decision.

III. Decision Under Review

[9] On May 29, 2019, the Member dismissed the Applicant's refugee claim. The Member found the Applicant was not a citizen of Nigeria and had not established her personal identity on a balance of probabilities. The Member found that the Applicant's birth certificate and voter card were fraudulent because of inconsistent spellings of the Applicant's name and inconsistent addresses on the documents.

[10] As a result, the Member found that she was not required to determine whether the Applicant was a Convention refugee or person in need of protection.

[11] The Member also dismissed the motion for recusal on the basis that it did not meet the test for whether there was "a reasonable apprehension of bias" as set out by the Supreme Court in *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369 at page 394. The Member stated that it was common practice to question people present in the hearing room. The Member also found that her comment about Africa was taken out of context, and that it was made in an attempt to empathize with the Applicant.

IV. Issues and Standard of Review

[12] The Applicant argues that the decision is unreasonable for two reasons. First, the Member failed to sufficiently address one of the grounds raised in the Applicant's motion for recusal. Second, the Member's conclusion that the Applicant failed to establish her identity as a Nigerian citizen was based on faulty conclusions about the Applicant's name and a failure to consider the Applicant's medical evidence.

[13] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply on these facts: *Vavilov* at paragraph 23.

[14] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]; *Vavilov* at paragraph 99.

[15] In *Vavilov*, the requirements of a reasonable decision are re-stated as possessing "an internally coherent and rational chain of analysis that is justified in relation to the facts and law": *Vavilov* at paragraph 85.

[16] The Applicant also argues that the Member breached procedural fairness by consulting extrinsic evidence and relying on this information to make an adverse finding about the Applicant's identity.

[17] The reasonableness presumption does not apply to an issue involving a breach of natural justice or the duty of procedural fairness: *Vavilov* at paragraph 23. In considering issues of procedural fairness, the ultimate question to be answered by a reviewing Court is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56.

V. Analysis

[18] The determinative issues in this application are the failure of the RPD to adequately consider the medical reports of the Applicant and the unreasonable dismissal by the RPD of the Applicant's voter card based on an erroneous belief that there was an inconsistency in spelling. Given these errors, I find it is not necessary to review the recusal issue or consider whether consulting extrinsic evidence was procedurally unfair in this case.

[19] To assist reviewing courts, the Supreme Court set out at paragraph 101 of *Vavilov* two types of fundamental flaws that make a decision unreasonable: the first is a failure of rationality internal to the reasoning process; the second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

A. *The Medical Evidence*

[20] The Applicant argues that the Member's finding that the Applicant did not establish her identity is unreasonable. The Applicant submits that the Board misapprehended and misconstrued two medical reports that confirmed her limited ability to testify based on her cognitive and mental health issues.

[21] In support of her application, the Applicant filed a May 2013 psychological report from Dr. Devins and a September 2018 report from psychiatrist Dr. Kitamura that included the results of cognitive testing.

[22] Dr. Devins stated that the Applicant suffered from major depressive disorder, concentration and memory problems, and her mind simply went blank at times. Dr. Devins found that her "[s]tress-related cognitive problems can lead to difficulties in providing clear and consistent testimony."

[23] Dr. Kitamura administered a cognitive screening test and drew conclusions based on it as well as on the Applicant's personal history. These included that "she is prone to disorientation" and that "her moods have become more unstable [displaying] obsessive compulsive disorder type behaviours, including hoarding in her home and rearranging garbage."

[24] Dr. Kitamura made a number of professional observations about the Applicant's behaviour when he was interviewing her. He recorded that "her thought process was tangential at times and generally rigid". He found her history was consistent with posttraumatic stress disorder

(PTSD) and she continues to struggle with decreased sleep, nightmares, hyperarousal, anxiety, panic attacks and mistrust.

[25] Combining those assessments with her personal history, Dr. Kitamura found that the Applicant has a major neurocognitive disorder – dementia - due to early-onset Alzheimer's disease or frontotemporal dementia, combined with a lack of formal education and chronic anxiety disorder. Dr. Kitamura found that this made the Applicant prone to "emotional dysregulation, memory lapses, distraction, impaired processing and decision making, disorganized thinking, and confusion."

[26] The Applicant says that her cognitive issues are apparent on the face of the transcript. For example, as excerpted in her Reply, the Applicant could not remember the ages or the birth order of her children, and could not recall ever seeing her birth certificate. When asked for her father's name, the Applicant struggled to recall a name and then provided her grandfather's name. The Applicant was also unable to spell her middle name. She only knew it started with the letter "C".

[27] The Member noted that the psychological report and doctor's report state that the Applicant "confuses dates and details of past events, she requires time to recall the name of people she knows well," and that she "experiences with symptoms of consistent [sic] with cognitive decline…her memory appears to fluctuate . . .".

[28] The Member found the Applicant's testimony about her siblings was convoluted and inconsistent with her Personal Information Form [PIF]. The Member found there was no

evidence that, at the time the PIF was completed, the Applicant had memory issues, since the Applicant saw the psychologist approximately six months after the PIF was completed. However, the Member also found the Applicant's "testimony regarding her siblings is not reliable enough to base a determination regarding the claimant's identity," based on the medical reports.

[29] The Member's statement that there was no evidence that the Applicant suffered from memory issues at the time she completed her PIF was speculative at best. It does not take into account the information in both medical reports that the Applicant's "deleterious psychological after-effects persist" and her chronic PTSD is consistent with severe domestic abuse, as described in her personal narrative.

[30] The Member concluded that "despite the medical reports, the [Applicant] had full appreciation of the nature of the proceedings"; and the issues of memory and convoluted testimony arose predominantly when the Applicant was questioned about how her documents were obtained and about her family composition.

[31] The Member did not explain how the diagnosis that the Applicant suffers from "emotional dysregulation, memory lapses, distraction, impaired processing and decision making, disorganized thinking, and confusion" was considered when determining that she had full appreciation of the proceedings. Nor did the Member explain why the fact that the Applicant's issues arose when she was questioned about her documents was found to be consistent with and predicted by the medical evidence.

[32] The Respondent argues that the RPD drew a negative inference because the Applicant's testimony was largely inconsistent with her PIF.

[33] One inconsistency flows from the finding that the Applicant testified she did not give immigration officials her Registration of Birth Form which was in the record. The RPD found her statement unpersuasive because there was "no evidence that any other persons, on a balance of probabilities, would have proffered the document to the Immigration authorities". However, the Applicant's PIF states that her birth certificate was "seized by Canada Immigration at the Etobicoke CIC office" and that a photocopy was attached to the PIF.

[34] In determining that the Applicant's answer was unpersuasive, the RPD did not address the Applicant's evidence that the document was seized by officials. The RPD also did not consider that the seizure occurred six years before the hearing. Nor did the Member indicate whether or not they considered the Applicant's cognitive decline, difficulty recalling information and dementia explained her inability to recollect the events that occurred.

[35] The Respondent relies on *Shala v Canada (Citizenship and Immigration)*, 2016 FC 573 [*Shala*] to say that caution should be exercised in relying on medical reports to excuse non-credible testimony. In *Shala* the factual matrix was very different. The court arrived at that conclusion after considering that the report in question was uncorroborated. Here, there were two consistent medical reports made several years apart, both of which confirm that the Applicant suffers from a number of serious psychological and mental health issues that would affect her memory and ability to testify.

[36] There is a long line of jurisprudence in this Court confirming that medical and psychological reports must be considered by the RPD if it makes credibility findings on grounds for which that evidence is relevant: *Min v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1676 at paragraphs 5 and 6.

[37] The RPD had a duty to consider whether the assessments in the medical reports explained, in whole or in part, the problems it identified with the Applicant's evidence: *Hidad v Canada (Citizenship and Immigration)*, 2015 FC 489 [*Hidad*] at paragraph 12.

[38] By not considering the effect of the medical evidence on the Applicant's testimony, the RPD committed a reviewable error by making unreasonable credibility assessments: *Hidad* at paragraph 13.

[39] The other error of fact made by the Member flows from the analysis of the spelling of the Applicant's names which is discussed below.

B. *Spelling of the Applicant's Names*

[40] The Applicant spelled her name inconsistently throughout the proceedings. In her PIF, the Applicant spelled her middle name as both "Calist**e**r" and "Calist**a**r." The Applicant stated at the hearing that she knew her middle name was "Calistar" but that she did not know how to spell it.

[41] The Member rejected three birth certificates and three registrations of birth for the Applicant's children because the Applicant's middle name was spelled "Calist**e**r", and because it was reasonable to expect the authorities to spell the Applicant's middle name correctly. The Member did not explain how they determined that the correct spelling was "Calistar" despite the Applicant acknowledging that she did not know how to spell her middle name. The Member should have explained why the fact that six birth certificates/registrations, apparently issued over a period from 1986 to 2004, signed by five different officials each spelling the Applicant's middle name as Calister was not persuasive of the correct spelling.

[42] The Member declined to accept the Minister's submission that inconsistent spellings between the Applicant's middle and last names in her PIF was a reason to doubt her identity, considering the Applicant's level of education. At the hearing, the Applicant spelled her first name as "Ih<u>o</u>uma." When the Member raised the fact that it was spelled "Ih<u>u</u>oma" elsewhere, the Applicant replied "You know, I don't know."

[43] Even though the Applicant stated at the hearing that she did not know how her first name was spelled, the Member relied on that statement to find that "the only way she spells her name is 'IHOUMA'", which is contrary to her evidence. On the face of it, that finding is perverse; it inexplicably contradicts the evidence. It is also not clear why the Member did not apply the same logic to that discrepancy as they did in dismissing the Minister's argument – the Applicant's level of education was a problem.

[44] The Member made an error of fact concerning the Applicant's birth certificate. When considering the birth certificate at one point, the Member correctly stated that it was recorded in the name "Ihuoma." When later reviewing the Voter ID card submitted by the Applicant in support of her identity, the Member found that it was fraudulent, partly because the Applicant's name there was spelled "Ihuoma", which the Member found was "inconsistent with the spelling on the birth certificate "IH**O**UMA"" [emphasis in the Decision]. This is a mistake of fact as the Applicant's birth certificate in the underlying record clearly says "Ihuoma".

[45] The Member also failed to take into account that the Voter ID card contains security features, the lack of which generally are taken to be important indicia of a fraudulent document.

[46] The mistake of fact about the Applicant's name on her birth certificate led the Member to reject the Voter ID card, which further led the Member to reject the affidavit from the Applicant's son, since it had the same address as the "fraudulent" Voter ID card.

[47] The only issue determined by the RPD was that the Applicant had not proven her identity. This error caused the RPD to base its decision on an erroneous finding of fact made without regard for the material before it contrary to paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7.

VI. Summary and Conclusion

[48] A review of the two medical reports and the consideration given to them in the reasons for the Decision leads me to find that the Member either misapprehended or failed to fully

appreciate the degree of the Applicant's functional impairment as disclosed by the medical evidence; in any event, the Member failed to meaningfully account for that evidence. When that error is coupled with the misapprehension of fact concerning the Applicant's first name on the birth certificate, the Decision is unreasonable. It is not justified, transparent or intelligible.

[49] The Decision is not reasonable. As set out in this judgment and reasons, the Member did not explain their findings with a line of analysis that could reasonably lead from the evidence in the record to the conclusion at which it arrived. The reasoning in that respect is not rational or logical given the evidence: *Vavilov* at paragraph 102.

[50] For all the reasons set out above, I find that the Decision must be set aside and returned for redetermination by another member of the RPD.

[51] There is no serious question of general importance for certification on these facts.

[52] No costs are awarded.

JUDGMENT IN IMM-2888-19

THIS COURT'S JUDGMENT is that:

1. The application is allowed.

2. The Decision is set aside and the matter is returned for redetermination before a different member of the RPD.

3. There is no serious question of general importance for certification.

4. No costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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