Federal Court  Cour fédérale

Date: 20210128

Docket: IMM-7277-19

Citation: 2021 FC 100

Ottawa, Ontario, January 28, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ISSAKHA HAMID, HAMID

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Hamid Issakha Hamid, the Applicant, seeks judicial review of a decision of the Refugee Appeal Division [RAD], dated November 7, 2019, dismissing his appeal of a decision by the Refugee Protection Division [RPD], which denied him the status of refugee or person in need of protection, as defined by sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], because his refugee protection claim lacked credibility.

[2] This is the second application for judicial review of a RAD decision relating to the Applicant. For the reasons that follow, this application will be dismissed.

II. **Background**

[3] The Applicant is of Chadian origin. He belongs to the Gorane ethnic group and the Gorane-Kreda subgroup.

[4] The basis of the Applicant's claim relates to a conflict with another ethnic group, the Zaghawa, which arose from the death of a child at a sports event on November 26, 2016. An escalation of the violence between the two groups subsequently resulted in the death and wounding of several members of the Gorane community. The police refused to intervene, the Applicant says, because they were Zaghawa. The Applicant decided to mobilize the Gorane youth of his region, to set up an association [the Association] to support the victims and to organize demonstrations aimed at denouncing the Zaghawa community.

[5] The Applicant states that the demonstrations were suppressed by the police. On February 12, 2017, he and members of his Association were arrested and placed in detention by agents of the National Security Agency, accused of wanting to join a group of Chadian insurgents living in southern Libya. While the Applicant was in detention in N'Djamena, the security agents sought to extract information from him, and he was tortured. Two months later, the convoy carrying the Applicant and other detainees to another detention facility was reportedly attacked by soldiers who began killing the prisoners. The Applicant managed to flee and to seek refuge with an uncle

who subsequently assisted him in obtaining travel documents and leaving the country. His employer provided him with a letter to facilitate his visa application for the United States and a leave certificate indicating that they approved a period of vacation from May 15 to June 30, 2017. The applicant obtained a visa for the U.S. on May 18, 2017.

[6] On June 14, 2017, the Applicant arrived in the U.S. On July 1, 2017, he came to the Canadian border and claimed refugee protection. His claim was heard and determined by the RPD in September 2017.

[7] The RPD did not believe the Applicant's narrative because of a number of inconsistencies and omissions in his evidence. The Applicant claimed that he founded the Association whereas the documentary evidence he submitted demonstrated that it was created in France, he did not participate in its creation and was not a member of the executive as he had asserted. At most, he was an active member in his community, the RPD found.

[8] In the view of the RPD, the Applicant's documentary evidence did not support his account of the problems he had experienced, notably that he had been part of the arrest and detention of Association members and the soldier's attack on the convoy of prisoners. The RPD found other contradictions in the Applicant's evidence and the documentary evidence including his record of employment.

[9] In general, the RPD was dissatisfied with the answers provided by the Applicant to explain the contradictions, omissions and inconsistencies.

[10] The RPD's decision was upheld by the RAD on January 26, 2018. However, that decision was overturned by the Federal Court on December 11, 2018 on the ground that the RAD had erred in following an earlier decision which called for deference to the RPD's findings of fact. However, as highlighted by Justice Diner in *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 CF 1145, this was not the appropriate standard of review. The Court sent the matter back for redetermination: *Hamid v Canada (Minister of Citizenship and Immigration)* 2018 FC 1246.

[11] The Applicant submitted additional evidence on June 26, 2019 in support of the redetermination of the appeal. The RAD refused to admit the Applicant's new evidence and the appeal was denied a second time on November 7, 2019. This application for judicial review concerns that decision.

III. **Issue**

[12] The central issue in this application is whether the RAD's decision was reasonable and in particular with respect to the admissibility of the new evidence submitted by the Applicant.

IV. **Relevant Legislation**

[13] The following legislative provisions of the *Immigration and Refugee Protection Act,* SC 2001, c 27:

Appeal	**Appel**
110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	**110 (1)** Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
[…]	[…]
Evidence that may be presented	**Éléments de preuve admissibles**
(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.	**(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.
[…]	[…]

Hearing	**Audience**
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	**c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[14] The following legislative provisions of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*] apply:

Documents or written submissions not previously provided — person	**Documents ou observations écrites non transmis au préalable — personne en cause**
29 (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the	**29 (1)** La personne en cause qui ne transmet pas un document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou

written submissions in the appeal unless allowed to do so by the Division.

Documents — new evidence

(3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister.

Factors

(4) In deciding whether to allow an application, the Division must consider any relevant factors, including

(a) the document's relevance and probative value;

(b) any new evidence the document brings to the appeal; and

(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with

transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.

Documents — nouvelle preuve

(3) La personne en cause inclut dans la demande pour utiliser un document qui n'avait pas été transmis au préalable une explication des raisons pour lesquelles le document est conforme aux exigences du paragraphe 110(4) de la Loi et des raisons pour lesquelles cette preuve est liée à la personne, à moins que le document ne soit présenté en réponse à un élément de preuve présenté par le ministre.

Éléments à considérer

(4) Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :

a) la pertinence et la valeur probante du document;

b) toute nouvelle preuve que le document apporte à l'appel;

c) la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations

the appellant's record, respondent's record or reply record.	écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.

V. **Standard of Review**

[15] As determined by the Supreme Court of Canada in Canada (Citizenship and Immigration) v Vavilov, 2019 SCC 65 [Vavilov] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in Vavilov, none of them arise in the present case.

[16] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable (Vavilov at para 83).

VI. **Analysis**

[17] As discussed by Justice Gascon in *Tsigehana v Canada (Citizenship and Immigration)*, 2020 FC 426 at para 34, factual findings, assessing credibility, and drawing reasonable inferences all lie at the heart of the RAD's and RPD's specific expertise and knowledge under the *IRPA*. They deserve deference and are entitled to judicial restraint by the reviewing court applying the reasonableness standard.

[18] Similarly, the Court should afford deference when the RAD is interpreting its enabling statute and determining whether new evidence is admissible pursuant to subsection 110(4) of the *IRPA*: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 26 [*Singh*]. This Court does not determine whether the new evidence at issue should have been admitted by the RAD, but rather, whether the RAD's decision not to admit the new evidence is reasonable: *Warsame v Canada (Citizenship and Immigration)*, 2019 FC 920 at para 30; *Bilbili v Canada (Citizenship and Immigration)*, 2017 FC 1188 at para 19; *Walite v Canada (Citizenship and Immigration)*, 2017 FC 49 at para 30.

[19] The second RAD member considered and rejected the Applicant's request to present new evidence. The Applicant does not contest the RAD's determination regarding some of the rejected evidence but challenges the refusal to admit the following documents:

(1) A letter from the Applicant's employer, dated October 24, 2017;

(2) A letter from the Association Tchadienne de Soutien aux Victimes ("ATSV"), dated March 20, 2019;

(3) A letter from the Canadian office of the Parti pour les Libertés et le Développement ("PLD Canada"), dated May 1, 2019; and

(4) An International Crisis Group report on Chad, dated December 5, 2018, which was referenced in the letter from the ATSV.

[20] The letter dated October 24, 2017 from the Applicant's employer in Chad confirmed that the Applicant had worked for the employer from June 2013 until February 12, 2017 and referred to elements of the Applicant's claim regarding the abuse he had suffered from the Chad authorities, the role of the uncle and the reasons for the issuance of the leave certificate. The letter writer did not indicate how he was aware of the information other than his employment status.

[21] For the letter to be admissible, the Applicant had to establish that the evidence arose after the rejection of his claim or was not reasonably available or that he could not reasonably have been expected in the circumstances to have presented it at the hearing. An explanation of how the evidence meets the requirements of s 110 (4) must be provided under Rule 29 (3) of the *RAD Rules*. In deciding whether to allow the application, under Rule 29 (4) the RAD member must consider any relevant factors including the document's relevance and probative value.

[22] The RAD member accepted that the letter was written after the RPD decision but found that the content referred to matters which preceded the RPD hearing and that no explanation had been provided as to why the letter could not have been submitted before the hearing. The Applicant's former counsel filed a Memorandum of Argument before the appeal in which she argued as follows:

> Nous déposons par la même occasion une lettre de l'employeur confirmant les faits et corroborant le témoignage de l'appelant. Cette lettre a été rédigée après 1a décision et confirme l'émission du certificat de travail pour des motifs humanitaires. Le critère de la nouveauté est rencontré ainsi que la pertinence et crédibilité. Nous vous demandons donc d'accepter ces documents.

[23] This argument speaks to the relevance of the document but does not explain why the evidence had not been obtained prior to the determination of the RPD hearing. On this application, Mr. Hamid argues that it was the questions raised by the RPD Board member regarding the certificate of leave the employer had provided him that gave rise to the filing of this additional document. He says that it was those questions, testing his credibility, which made it both relevant and necessary for him to obtain a further letter from the employer. But that explanation does not appear to have been provided to the RAD. Moreover, the burden of proof of his refugee claim before the RPD rested with the Applicant. The fact that he did not know what questions he would face or how his credibility would be assessed did not relieve him of this burden. It was not the role of the RAD to provide the Applicant with an opportunity to bolster the record submitted before the RPD but rather to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected.

[24] The letter dated March 20, 2019 from the President of the ATSV was rejected on credibility grounds. While an error in the acronym for the organization was minor and could have been overlooked, the letter on its face contradicted the Applicant's original claim and his testimony before the RPD. The letter indicates that the Applicant was an active member of the ATSV, based in France, whereas he had claimed and testified that he created an association in Chad, not France. Moreover, he had testified that the ATSV members in France were aware of

his situation in Chad and yet the letter from the President made no mention of his alleged arrest, detention and torture.

[25] The RAD member found that the May 1, 2019 letter from PLD Canada was not relevant as it described the same events as in the Applicant's claim and provided no new information other than the fact that he is a member of the organization. That fact, the RAD found, was not relevant to the credibility concerns about the specific events allegedly lived by the Applicant in Chad, which were the subject of the appeal, and not his activities in Canada.

[26] The RAD rejected the International Crisis Group report because it does not provide any information different from that contained in the National Documentation Packages for Chad that the RAD reviewed, including the most recent package, dating from September 2018. The appeal was not based on the information contained in the report relating to country conditions but rather the specific events that the Applicant claimed had happened to him.

[27] The Applicant argues that the refusal to admit the new evidence unfairly insulated the RAD from the application of s 110 (6) of the *IRPA* and the requirement to afford him an oral hearing. He contends that had the RAD admitted all of the new evidence and conducted an independent assessment the credibility concerns that remained would have been addressed. In the alternative, the Applicant contends, if the new evidence gave rise to a serious issue with respect to credibility, the RAD member would have been obliged to hold an oral hearing.

[28] In my view, the RAD did not defer to the RPD's negative credibility findings. The RAD listened to the recording of the RPD hearing and conducted its own analysis. The fact that the RAD reached a similar conclusion as the RPD does not demonstrate deference or that the analysis was not independent. An oral hearing would only have been required under s 110 (3) and 110 (6) of the *IRPA* if there was new documentary evidence that raised a serious issue concerning the appellant's credibility, was central to the claim and, if accepted would justify allowing or rejecting the claim. Given the RAD's findings on the admissibility of the new evidence, the decision to dismiss the Applicant's request for an oral hearing was reasonable.

[29] Applying the reasonableness standard of review described above, I see no reason to interfere with the RAD decision.

[30] No questions of general importance were proposed, and none will be certified.

JUDGMENT IN IMM-7277-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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