Federal Court  Cour fédérale

Date: 20210129

Docket: IMM-2480-19

Citation: 2021 FC 99

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 29, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

MARIA TERESA ALVAREZ RIVERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The purpose of the *Refugee Protection Division Rules*, SOR/2012-256 (the RPD Rules) is to ensure an efficient and fair process. The rules governing the documents that can be filed with the Refugee Protection Division (RPD) aim to strike a balance between the right of procedural

fairness owed to refugee protection claimants, specifically the right to be heard, and the benefit of having an efficient and clear procedure for accepting evidence presented by the parties.

[2] In the present case, Maria Teresa Alvarez Rivera made a claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], fearing a criminal gang in El Salvador. At the hearing before the RPD, she submitted a psychologist's report that she had not filed within the time limit set by rule 34(3)(a) of the RPD Rules. The RPD member denied her request to file additional evidence without hearing her arguments on the admission of the document and without justifying this decision in light of the relevant factors, namely those set out in rule 36.

[3] I find that in refusing to give Ms. Alvarez Rivera an opportunity to present her point of view on the admissibility of the report, and in refusing the psychologist's report without considering the relevant factors, the member made an unfair and unreasonable decision.

[4] The application for judicial review is therefore allowed.

II. ISSUES & STANDARD OF REVIEW

[5] Ms. Alvarez Rivera raised several issues, but given my findings on the RPD's decision relating to rule 36, I consider that I am not bound to address her allegations concerning the merits of the refugee protection claim. Therefore, the decisive issues are:

A. What documents constitute the record before the Court?

B. Did the member err by refusing to accept the psychologist's report at the hearing, insofar as she

   (1) did not give Ms. Alvarez Rivera an opportunity to present her views on the admissibility of the psychologist's report, and

   (2) failed to take into account the relevant factors in such an analysis, namely those set out in rule 36?

[1] Question A relates to evidence before the Court and is not the subject of a review of an administrative decision. Therefore, no standard of review applies.

[2] As for question B, the parties mostly dealt with the two halves of the question together. Ms. Alvarez Rivera argues that the refusal of the report is a matter of procedural fairness, which must be reviewed by applying the correctness standard of review. The Minister contends that this is a question to which the standard of reasonableness applies. In my opinion, each party is in part right: question B(1) is a question of procedural fairness, while question B(2) is a question of the merits of the decision, which must be reviewed under the standard of reasonableness.

[3] The case law on the standard of review that applies to questions of the admissibility of documents submitted outside the time limit prescribed by rule 34 of the RPD Rules is not entirely clear. In this regard, I note that there is more extensive case law on rule 43, which deals with evidence submitted after the hearing, than on rule 36, which deals with the use of an

undisclosed document at the hearing: see, among others, *Nagulesan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1382; *Ahanin v Canada (Citizenship and Immigration)*, 2012 FC 180; *Shuaib v Canada (Citizenship and Immigration)*, 2013 FC 596; *Cox v Canada (Citizenship and Immigration)*, 2012 FC 1220; *Mannan v Canada (Citizenship and Immigration)*, 2015 FC 144; *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794. Since the factors applicable to the two rules are the same, it seems to me that the same standard of review should apply to determinations under both provisions: RPD Rules, ss 36, 43(3).

[4] In cases where the RPD did not even consider a request to file additional documents, this Court has clearly stated that this is a matter of procedural fairness: *Nagulesan* at paragraph 17; *Ahanin* at paragraph 37; *Shuaib* at paragraphs 3(2), 9–11. In these decisions, the Court noted that procedural fairness requires the RPD to rule on such a request. However, these decisions do not deal with the standard that applies to the review of the decision once made. Nevertheless, in *Cox*, where the RPD dealt with a request and refused the evidence, the Court concluded that "[t]he issue of whether post-hearing evidence is allowed has been deemed to be a question of procedural fairness", citing *Nagulesan* and *Ahanin*: *Cox* at paragraphs 33, 18, 26. Likewise, in *Mbirimujo*, the Court concluded with reference to *Nagulesan* that a decision to exclude late evidence raises the issue of procedural fairness: *Mbirimujo v Canada (Citizenship and Immigration)*, 2013 FC 553 at paragraphs 16–18.

[5] In *Behary*, Justice Strickland cited *Cox* but made a distinction between whether the RPD had *considered* the factors listed in rule 43(3) and the *result* of this consideration. She concluded that the first issue was one of procedural fairness. The second, on the other hand, raised the question of whether the RPD had taken "a decision that fell within the range of possible acceptable outcomes", which is the standard of reasonableness: *Behary* at paragraphs 6, 31; see also *Katsiashvili v Canada (Citizenship and Immigration)*, 2016 FC 622 at paragraphs 12, 39.

[6] In my opinion, a failure to consider factors relevant to discretionary decision-making goes to with the merits of that decision, not the process owed to the applicants, since it relates to the statutory constraints which prescribe the exercise of a discretionary power instead of the right to be heard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 23, 108; *Foster Farms LLC v Canada (International Trade Diversification)*, 2020 FC 656 at paragraph 102. The process leading to a decision to admit or refuse evidence, as well as the obligation to make such a decision, are matters of procedural fairness: *Nagulesan* at paragraph 17, *Shuaib* at paragraph 31; *Canada (Citizenship and Immigration) v Inarukundo*, 2015 FC 314 at paragraphs 3(b), 4, 10; *Farkas v Canada (Citizenship and Immigration)*, 2014 FC 542 at paragraphs 10–11. But once made, the correctness of the decision, including whether all relevant factors were taken into account, is subject to the standard of reasonableness. I come to this conclusion in light of *Vavilov* and despite the divergent conclusions in *Cox*, *Behary*, and *Mbirimujo*.

[7] I note by analogy that the merits of a Refugee Appeal Division (RAD) decision to refuse new documents are reviewed on a standard of reasonableness: *Canada (Citizenship and*

Immigration) v Singh, 2016 FCA 96 at paragraphs 29, 74; IRPA, section 110(4). It seems incongruous to me that the merits of an RPD decision to refuse documents based on statutory factors could be considered on a standard of correctness while the merits of an equivalent decision of the RAD would be considered on the standard of reasonableness. That said, the question of which standard applies would barely change the analysis of this issue if a decision maker has failed to justify their decision in light of the relevant factors set out in the rule. Whether it is considered an unfair decision or an unreasonable one, it cannot stand.

[8] Therefore, I find that question B(1) is a question procedural fairness, subject to the "fairness" standard of review similar to that of correctness, where the Court decides whether the procedure was fair in all circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 54.

[9] However, the reasonableness standard of review applies to question B(2). A reasonable decision is one that is justified, transparent, and intelligible from the point of view of the individuals to whom the decision applies, "based on an internally coherent and rational chain of analysis" read as a whole and in light of the administrative setting, the record before the decision maker and the parties' submissions: *Vavilov* at paragraphs 81, 85, 91, 94–96, 99, 127–28.

III. ANALYSIS

A. *Record before the Court*

[10] Ms. Alvarez Rivera attached to her affidavit as exhibits D and E the psychologist's observations and the report. The Minister alleges that these exhibits are inadmissible before this Court as they were not in the evidentiary record before the RPD. I find that exhibits D and E are admissible for the purpose of enabling the Court to decide the issue of procedural fairness and the reasonableness of refusing the documents.

[11] In an application for judicial review on the merits of the decision, the role of this Court is not one of substituting its own decision or of "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at paragraph 125; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 18. An application for judicial review is therefore not an opportunity for an applicant to present the merits of their application again. Consequently, with certain exceptions, the evidentiary record in an application for judicial review is limited to the evidentiary record available to the administrative tribunal: *Access Copyright*, above at paragraphs 19–20.

[12] One of those exceptions concerns questions of procedural fairness. The Court may admit evidence that brings attention to procedural defects that cannot be found in the evidentiary record of the administrative decision maker: *Access Copyright*, at paragraph 20(b). Here, to shed light on the alleged breach of procedural fairness, the nature of the evidence presented, that being a psychological report, is admissible as evidence.

[13] The psychologist's report is also relevant to my analysis of the reasonableness of the member's decision to refuse the request to file the document. The task of the reviewing court applying the standard of reasonableness is intimately linked to examining the evidence that was before the decision maker to determine whether the reasons for the decision as a whole were transparent, intelligible and justified: *Vavilov* at paragraph 15, 125–26. The report was before the member for her consideration of a request to file evidence under a rule 36, although it was not on the record before her with respect to the refugee protection claim. In addition, as we will see later, rule 36 of the RPD Rules lists the relevant factors for the RAD to consider when deciding whether to allow the use of an undisclosed document at the hearing. The Court would be unable to fulfill its task of determining whether the RPD's decision was reasonable if it could not refer to the document to which the decision related.

B. *Decision of RPD breached procedural fairness and was unreasonable*

(1) There was breach of procedural fairness

[14] Section 170 of the IRPA sets out the principles applicable to hearings held by the RPD. It requires flexible procedures regarding the admissibility of evidence and establishes a statutory obligation to ensure that parties have an opportunity to present evidence and make representations. The Federal Court of Appeal in *Thamotharem* cleared up the RPD's obligation to act fairly by stating that "[f]airness also requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it" [emphasis added]: *Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at paragraph 39.

[15] Although the refugee protection claimant should be granted an "adequate opportunity" to present evidence, this does not constitute an absolute right to present all the evidence that the applicant wishes to file at any time in the RPD process. Rule 34(3)(a) of the RPD Rules imposes a presumption that evidence is inadmissible if it is filed later than 10 days before the date fixed for the hearing before the RPD. Despite the prescribed time limit, rule 36 gives RPD members discretion to authorize the use of documents that were not provided in accordance with rule 34.

[16] The RPD held a hearing into Ms. Alvarez Rivera's refugee protection claim on November 19, 2018, and rejected that claim on December 10, 2018. At the start of the hearing, counsel for Ms. Alvarez Rivera attempted to have a report from a psychologist admitted even though it had not been provided 10 days before the hearing. The member explained that she would not decide on the question of the document's admissibility at that time and that they could come back to it:

> [TRANSLATION]
>
> **Counsel:** . . . And the report of the psychologist who gave it . . . I know that he gave it very late, that the letter was very late, but the fact is that Ms. Alvarez Rivera has just finished her therapy. And so, I was wondering if you could accept it since it is a sealed and closed envelope.
>
> **Member:** I will begin the hearing, Sir, and then we will be able to look at it maybe at the break or at the end if I need it, is that fine?
>
> **Counsel:** Thank you.
>
> **Member:** But this psychological report, was it not sent to the Board?
>
> **Counsel:** No, because it was too late.
>
> [Emphasis added.]

[17] The psychological report was not brought up again until the end of the hearing. The member advised that the hearing was over, and counsel for Ms. Alvarez Rivera raised the issue of the report. Without receiving other submissions, the member decided that she would not accept the report:

> [TRANSLATION]
>
> **Member:** Thank you, Counsel.
>
> **Counsel:** Thank you, Madam Member.
>
> **Member:** And the hearing is concluded.
>
> **Counsel:** Our colleague did not ask for the . . .
>
> **Member:** The psychologist's report? No. I think it's too late. I'm not going to accept it.
>
> [End of transcript.]

[18] These two passages of the transcript are the only ones in which the psychologist's report was mentioned during the hearing. It is obvious to me that the member did not grant Ms. Alvarez Rivera any opportunity to make any arguments about the admissibility of the psychologist's report, or the application of the factors relevant to its admission, before making her decision about it. I cannot accept that the brief introduction by counsel, that [TRANSLATION] "I know . . . that the letter was very late, but the fact is that Ms. Alvarez Rivera has just finished her therapy. And so . . .", constitutes their pleadings in this regard. The member indicated at the start of the hearing that the question of the admissibility of the report would be addressed at the break, at the end of the hearing, or whenever the member saw fit to address it. However, when Ms. Alvarez Rivera's counsel reminded her at the end of the hearing that she had not addressed the

admissibility of the report, the member did not hear representations on the matter, but simply said she refused to admit the report, as it had been filed late.

[19] Rule 36 of the RPD Rules clearly gives the RPD discretion to accept an undisclosed document at the hearing. This discretion exists even if a party's request does not comply with the *Notice to parties and counsel appearing before the Refugee Protection Division - late disclosure* published by the Immigration and Refugee Board of Canada, although this defect may be a relevant factor in determining the request. When a refugee protection claimant asks the RPD to exercise this discretion, the principles of procedural fairness require that he or she be given the opportunity to make submissions on the matter. The RPD did not give Ms. Alvarez Rivera such an opportunity, which constitutes a breach of procedural fairness.

[20] The Minister argues that Ms. Alvarez Rivera should have been more insistent before the RPD if she was of the opinion that filing the document was essential. He also notes that Ms. Alvarez Rivera could not bring an allegation of procedural fairness that she did not raise with the RPD. I accept that, in general, the reviewing court will not accept an allegation of breach of procedural fairness which could have been raised with the decision maker and that the applicant had not raised before the tribunal: *Kumara v Canada (Citizenship and Immigration)*, 2007 FC 448 at paragraph 26. However, in the present case, I find that Ms. Alvarez Rivera had no opportunity to raise an alleged breach of procedural fairness or to contest the member's decision not to allow the psychologist's report to be filed. Her decision was made at the last minute of the hearing without giving Ms. Alvarez Rivera, or her counsel, the chance to present their point of view in this regard. Although the member took a few days to reach her decision on the merits of

the refugee protection claim, her decision on the admissibility of the report was made at the end of the hearing.

[21] I note that Ms. Alvarez Rivera was unable to take advantage of an appeal to the RAD to either (i) file the report as new evidence, or (ii) raise an allegation of breach of procedural fairness before the RAD. Ms. Alvarez Rivera was prohibited from appealing to the RAD under paragraph 110(2)(d) of the IRPA: *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paragraph 17. The RAD dismissed her appeal on this basis.

(2) RPD's decision was unreasonable

[22] Furthermore, I find that the RPD's decision not to accept the psychologist's report was unreasonable.

[23] Rule 36 of the RPD Rules sets out the relevant factors that the member must consider when deciding whether or not to authorize the use of an undisclosed document at the hearing:

Use of undisclosed documents	**Utilisation d'un document non communiqué**
36 A party who does not provide a document in accordance with rule 34 must not use the document at the hearing unless allowed to do so by the Division. In deciding whether to allow its use, the Division must consider any relevant factors, including	**36** La partie qui ne transmet pas un document conformément à la règle 34 ne peut utiliser celui-ci à l'audience à moins d'une autorisation de la Section. Pour décider si elle autorise ou non l'utilisation du document à l'audience, la Section prend en considération tout élément pertinent, notamment :

(a) the document's relevance and probative value;	**a)** la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the hearing; and	**b)** toute nouvelle preuve que le document apporte à l'audience;
(c) whether the party, with reasonable effort, could have provided the document as required by rule 34.	**c)** la possibilité qu'aurait eue la partie, en faisant des efforts raisonnables, de transmettre le document aux termes de la règle 34.
[Emphasis added.]	[Je souligne.]

[24] Despite the presumption that documents filed with the RPD outside the 10-day period will not be accepted, rule 36 of the RPD Rules requires the RPD to decide whether, notwithstanding the time limit, the document should or should not be accepted.

[25] In the present case, nowhere did the member indicate that she took into consideration all relevant factors other than the delay in filing the document. At the end of the hearing, she simply said, [TRANSLATION] "No, I think it's too late. I'm not going to accept it".

[26] The Supreme Court reminds us that the reasonable exercise of a discretionary power "must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas": *Vavilov* at paragraph 108. The list of relevant factors under rule 36 suggests that all of these factors should be considered, not just a few: *Cox* at paragraph 26; *Mbirimujo* at paragraphs 22–23 (for decisions which treat this issue as one of procedural fairness, as we have seen); see also, by analogy with subsection 110(4) of the IRPA, *Ajaj v Canada (Citizenship and Immigration)*, 2015 FC 928 at paragraph 58.

[27] The member did not address any of the relevant factors under rule 36. She exercised her discretion without taking into account the constraints imposed by the rules, that is, in a manner that was non-transparent, non-intelligible and unjustified, and therefore unreasonable: *Vavilov* at paragraphs 15 and 108. I must emphasize that this conclusion is distinct from a conclusion that the member should have accepted the report: *Bilbili v Canada (Citizenship and Immigration)*, 2017 FC 1188 at paragraph 19.

[28] Finally, the Minister suggested that the psychologist's report, even if accepted, would not have alleviated the problems of lack of credibility at the heart of the RPD's decision. I cannot accept that proposition. A reviewing court must refrain from "reassessing the evidence considered by the decision maker" when conducting a judicial review analysis on a standard of reasonableness: *Vavilov* at paragraph 125. In the present case, I cannot establish that the RPD's decision on the refugee protection claim would necessarily have been the same had it accepted the report after an assessment of all the relevant factors.

IV. Conclusion

[29] The application for judicial review is therefore allowed, and the refugee protection claim is referred back to another member of the RPD for reconsideration. Neither party has proposed a question for certification. I agree that none arise in this case.

JUDGMENT in IMM-2480-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed, and the applicant's refugee protection claim is referred back to a differently constituted panel of the Refugee Protection Division for reconsideration.

"Nicholas McHaffie"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2480-19
STYLE OF CAUSE:	MARIA TERESA ALVAREZ RIVERA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARD ON SEPTEMBER 16, 2020, BY VIDEOCONFERENCE FROM OTTAWA, ONTARIO

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JANUARY 29, 2021

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