Federal Court Cour fédérale

Date: 20220923

Docket: IMM-9508-21

Citation: 2022 FC 1331

Ottawa, Ontario, September 23, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Kaleb ASHENAFI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kaleb Ashenafi, is a citizen of Eritrea presently residing in Canada. He seeks judicial review of the rejection of his application for a pre-removal risk assessment [PRRA] alleging that he faces risk of persecution and risk to his life from Eritrean authorities if he is returned to his home country.

[2] Having reviewed the parties' written material and considered their submissions, both written and oral, I am satisfied that the Applicant has not met his burden of demonstrating the procedural unfairness and lack of reasonableness he alleges regarding the rejection of his PRRA application. I thus dismiss the judicial review application and decline to certify the question proposed by the Applicant, for the reasons below.

II. Background

[3] The Applicant filed a claim for refugee protection upon his arrival in Canada that was found ineligible to be referred to the Refugee Protection Division [RPD], because he previously made a claim for refugee protection to the United States of America: paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. See Annex "A" for relevant legislative provisions.

[4] A removal order was issued against the Applicant who then filed the PRRA. A senior immigration officer [Officer] held a mandatory hearing, further to section 113.01 of the *IRPA*. A certified translator was present at the hearing.

[5] The Officer rejected the Applicant's PRRA application, finding that he had not established more than a mere possibility of persecution, and is not a person in need of protection, as described in sections 96 and 97 of the *IRPA*. Credibility was the determinative issue.

[6] When the Officer questioned the Applicant during the hearing about the discrepancy between his written narrative and oral testimony, the Applicant admitted that he provided false statements in order to bolster his case.

[7] Specifically, the Applicant describes in his written narrative having studied in Ethiopia and returning to Eritrea to retrieve identification the Applicant says was needed to write exams. As he was returning to Ethiopia, the Applicant alleges that the Eritrean military detained him for four months and beat him during his detention. The Applicant further asserts that after he escaped the Eritrean military, and made his way back to Ethiopia, the Ethiopian military captured him and brought him to a camp in the Tigray region.

[8] During the hearing, the Applicant provided a different account of the events. He stated that instead of capture by the Ethiopian military, he met farmers who advised him to take a bus back to the house where he was staying while he went to school in Ethiopia. The Officer was not satisfied with the Applicant's explanations for this discrepancy, finding initially that he provided incoherent answers. The Officer then found that,

> [a]fter the question was repeated and translated, the applicant stated that it was normal for individuals crossing the border from Eritrea to Ethiopia to be detained and put into Ethiopian government camps because the authorities would want to investigate. He stated that because this is what was considered the norm, he was advised to say this in his narrative because otherwise nobody would believe him.
>
> The applicant was then asked directly whether he was acknowledging that he was untruthful in his written submission. He stated that he did what he did to satisfy the judge, the reader or whoever would make the decisions.

[9] As a result, the Officer concluded that the Applicant was not credible, specifically regarding whether he would provide other false statements to strengthen his case. The Officer thus assigned little weight to the Applicant's written narrative and to the documents he submitted in support of his PRRA application (including a photo showing scars on his chest and arms allegedly sustained while he was detained and tortured by the Eritrean military, and multiple letters of support from individuals that did not have firsthand knowledge of any of the events detailed in their letters).

[10] Finally, after considering the general country condition documents submitted by the Applicant, the Officer acknowledged that Eritrea is experiencing adverse changes in its human right conditions. The Officer found, however, that the Applicant did not establish a linkage between those conditions and his personal circumstances.

III. Analysis

A. *Did the Officer breach procedural fairness by not providing a transcript or a recording of the mandatory PRRA hearing?*

[11] I am not persuaded that the lack of a transcript or a recording of the mandatory PRRA hearing resulted in procedural fairness, contrary to the Applicant's submissions.

[12] Questions of procedural fairness attract a correctness-like standard of review, through a sharply focussed lens on whether the process followed was fair and just; that is, did the applicant know the case they had to meet and did they have a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56. The duty

of procedural fairness, however, is variable, flexible and content-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77.

[13] I agree that "in the absence of a transcript or recording of the interview, it can be difficult for the Court to decipher which version of the facts is correct," and that "[r]ecordings – or transcripts – would go a long way to resolving the issue of conflicting versions of visa officer interviews": *Divya v Canada (Citizenship and Immigration)*, 2022 FC 620 [*Divya*] at paras 18, 20. Contrary to the situation in *Divya*, however, the Applicant's version of the PRRA hearing does not contradict the Officer's version. The Applicant admits that he provided an untruthful written statement, and only takes issue with the Officer's characterization of his testimony as incoherent.

[14] Further, in my view, this is not a case where it is impossible to ascertain accurately the content of the questioning and responses that transpired between the Officer and the Applicant during the hearing. I find that the Officer made lengthy and detailed notes. This is one of the ways this Court has indicated can meet the obligation for accuracy: *Zeon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1338 [*Zeon*] at para 14.

[15] Although the Officer initially found the Applicant's answers incoherent, the question asking the Applicant to explain the discrepancy between his written narrative and testimony was repeated and translated. The Decision provides, in my view, a precis of the Applicant's response which is described in the Officer's notes, reproduced in the certified tribunal record, as follows:

> Q: What happened after you crossed the [Ethiopian] border?

> - I found some farmers on the way, and I asked where can [*sic*] I take the bus to Addis Ababa.
>
> . . .
>
> Q: In your written statement, you stated that after you escaped the Eritrean camp and crossed the border back to Ethiopia, you were caught by the Ethiopian military and spent 10 days at their camp. Can you explain the discrepancy between your written testimony and your oral statement just now?
>
> <u>* Applicant gave non-coherent answer. Question was repeated a few times. Applicant asked for translation.</u>
>
> - It is normal that when individuals cross the border from Eritrea that they will be detained and put into camp because the government wants to investigate. This is the norm and I know this. I was told that I have to say this, if I don't then nobody will trust me.
>
> Q: So you were not being truthful in your written statement?
>
> - I put what I put because I thought that's what would satisfy the judge, the reader whoever. But the reality is what I just told you, that I was helped by the farmers.

[16] Unlike the situation in *Zeon*, I find the Officer's notes neither cursory nor ambiguous. Further, I am satisfied that the Officer did not include inappropriate comments in their notes, as argued by the Applicant. Rather, the Officer indicated, as explained in the Decision, that the Applicant initially gave a non-coherent answer, but after the question was repeated and translated, the Officer understood the Applicant's answer and noted that he admitted to being untruthful in his written statement, which affected his credibility in general. The Applicant does not dispute having made the admission.

B. *Is the Decision unreasonable?*

[17] The Applicant has not convinced me that the Decision is unreasonable.

[18] A reasonable decision is one based on an internally coherent and rational chain of analysis that is justified, transparent and intelligible in relation to the applicable factual and legal constraints; the party challenging a decision has the burden of showing that it is unreasonable: *Vavilov*, above at paras 85, 99-100.

[19] I find that it was open to the Officer to assign little weight to the Applicant's narrative, based on his evidence that he fabricated part of the narrative to strengthen his case, evidence that only came to light after the Officer questioned the Applicant about the discrepancy between his testimony and written narrative. In my view, the Decision provides a coherent and rational chain of analysis that permits the Court to understand the Officer's reasons for the weight given to the narrative.

[20] In addition, contrary to the Applicant's assertion, I find the Officer did not base the credibility finding on the incoherency of the answer that the Applicant provided to explain the discrepancy. Rather, the Officer only noted that the Applicant provided an incoherent answer before the question was repeated and translated for him.

[21] Further, I find that the Officer reasonably weighed the supporting documents provided by the Applicant, comprising a photo of injuries, support letters and country condition documents. Similarly, the reasons permit the Court to understand the basis on which the Officer assigned them little weight. In my view, the Applicant's written and oral submissions regarding the

Officer's treatment of the supporting documentation are tantamount to a request for the Court to reweigh the evidence considered by the Officer. This is not the role of the Court on judicial review: *Vavilov*, above at para 125.

IV. Conclusion

[22] For the above reasons, I am not persuaded that the Decision demonstrates a lack of procedural fairness or that it is unreasonable. I therefore dismiss this judicial review application.

V. Proposed Question for Certification

[23] As I explain below, I decline to certify the question the Applicant proposes.

[24] The Applicant submits the following question for the Court's consideration for possible certification, pursuant to paragraph 74(d) of the *IRPA*:

> When a Mandatory PRRA hearing is held pursuant to paragraph 113.01 of the *Immigration and Refugee Protection Act*, is it fair for the default procedure to include recording of the hearing?

[25] For this Court to certify a question, pursuant to subsection 18(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the question must be dispositive of the appeal and it must transcend the interests of the parties in that it contemplates issues of broad significance or general importance. The corollary of this threshold is that the question must have been raised and decided by the lower court: *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 16; *Canada (Minister of Citizenship and Immigration)*

v Zazai, 2004 FCA 89 at paras 11-12; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46.

[26] I am not persuaded, in the circumstances here, that the proposed question meets the applicable test. In my view, it would not be dispositive of an appeal. Further, although the Applicant argues the potential for prejudice in seeking judicial review where an applicant is unrepresented, I note that this was not the Applicant’s situation. The record reflects that this Applicant was represented by counsel at the PRRA hearing who provided clarifications and corrections during the questioning and posed clarifying questions to the Applicant at the end of the hearing. Although the Applicant has changed counsel since then, I reiterate that the Officer’s notes are contained in the certified tribunal record that was sent to the Court and the Applicant's counsel on May 16, 2022, while the Applicant’s Further Memorandum of Argument was filed two months later.

JUDGMENT in IMM-9508-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is dismissed.

2. The Court declines to certify the question proposed by the Applicant for certification.

"Janet M. Fuhrer"

Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act,* SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27**

Judicial Review	**Demande de contrôle judiciaire**
74 Judicial review is subject to the following provisions: … **(d)** subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	**74** Les règles suivantes s'appliquent à la demande de contrôle judiciaire : … **d)** sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.
Examination of Eligibility to Refer Claim Ineligibility **101 (1)** A claim is ineligible to be referred to the Refugee Protection Division if … **(c.1)** the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws; …	**Examen de la recevabilité par l'agent Irrecevabilité** **101 (1)** La demande est irrecevable dans les cas suivants : … **c.1)** confirmation, en conformité avec un accord ou une entente conclus par le Canada et un autre pays permettant l'échange de renseignements pour l'administration et le contrôle d'application des lois de ces pays en matière de citoyenneté et d'immigration, d'une demande d'asile antérieure faite par la personne à cet autre pays avant sa demande d'asile faite au Canada; …
Protection **Mandatory hearing** **113.01** Unless the application is allowed without a hearing, a hearing must, despite paragraph 113(b), be held in the case of an applicant for protection whose claim for refugee protection has been determined to be ineligible solely under paragraph 101(1)(c.1).	**Protection** **Audience obligatoire** **113.01** À moins que la demande de protection ne soit accueillie sans la tenue d'une audience, une audience est obligatoire, malgré l'alinéa 113b), dans le cas où le demandeur a fait une demande d'asile qui a

	été jugée irrecevable au seul titre de l'alinéa 101(1)c.1).

Federal Courts Citizenship, Immigration and Refugee Protection Rules **(SOR/93-22)**
Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés **(DORS/93-22)**

Disposition of Application for Judicial Review	**Jugement sur la demande de contrôle judiciaire**
18 (1) Before a judge renders judgment in respect of an application for judicial review, the judge shall provide the parties with an opportunity to request that he or she certify that a serious question of general importance, referred to in paragraph 22.2(d) of the Citizenship Act or paragraph 74(d) of the Immigration and Refugee Protection Act, as the case may be, is involved.	**18 (1)** Le juge, avant de rendre jugement sur la demande de contrôle judiciaire, donne aux parties la possibilité de lui demander de certifier que l'affaire soulève une question grave de portée générale, tel que le prévoit l'alinéa 22.2d) de la Loi sur la citoyenneté et l'alinéa 74d) de la Loi sur l'immigration et la protection des réfugiés.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9508-21
STYLE OF CAUSE:	Kaleb ASHENAFI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 9, 2022
JUDGMENT AND REASONS:	FUHRER J.
DATED:	SEPTEMBER 23, 2022

APPEARANCES:

Darcy Golden	FOR THE APPLICANT
Brett Nash	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Darcy Golden Immigration & Refugee Legal Clinic Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT