

Federal Court



Cour fédérale

**Date: 20230912**

**Docket: IMM-8246-21**

**Citation:2023 FC 1228**

**Ottawa, Ontario, September 12, 2023**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**MOHAMED SALAHELDIN MOHAMED ELHALWANY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Mohamed Salaheldin Mohamed Elhalwany, sought refugee protection in Canada based on his fear of persecution by Egyptian authorities because of his anti-government political opinion. Mr. Elhalwany alleges that he worked as a police officer in Egypt for approximately 18 years and, during that time, refused to follow orders that violated his

conscience. He claims that he was threatened and punitively transferred to dangerous regions as a result.

[2] The Refugee Protection Division [RPD] dismissed Mr. Elhalwany's claim. The RPD found serious reasons for considering that the claimant was complicit in crimes against humanity and that he was excluded from refugee protection pursuant to Article 1F(a) and section 98 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. The RPD was specifically concerned about Mr. Elhalwany's contribution to security operations in Suez and North Sinai during his service there as a police officer.

[3] Mr. Elhalwany appealed to the Refugee Appeal Division [RAD], where he sought to introduce new evidence. The RAD dismissed Mr. Elhalwany's appeal. Like the RPD, the RAD found serious reasons for considering that Mr. Elhalwany was complicit in crimes against humanity during his time as a police officer in Suez and North Sinai.

[4] The Applicant seeks judicial review of the RAD's decision. He argues that the RAD erred in failing to admit new evidence, denied him procedural fairness because the recording of his RPD hearing had poor audio quality, and unreasonably applied the test for complicity as set out in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

[5] I agree with the Applicant that the RAD erred in failing to admit the portions of his affidavit relating to his testimony at the RPD. This evidence was potentially relevant to evaluating whether the poor audio quality for the recording of one day of the RPD hearing

amounted to a breach of procedural fairness. It is unnecessary for me to consider Mr. Elhalwany's other arguments because the procedural fairness issue has to be re-evaluated in light of the potential relevance of Mr. Elhalwany's new evidence.

[6] Based on the reasons below, I grant the application for judicial review.

## II. Issue and Standard of Review

[7] The determinative issue concerns the RAD's decision to exclude Mr. Elhalwany's affidavit evidence about his testimony at the RPD. I have reviewed the RAD's analysis and determination on this issue on a reasonableness standard (*Singh v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 96 at paras 29, 74; *Mohamed v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1145 at para 9).

[8] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] described a reasonable decision as "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Administrative decision makers must ensure that their exercise of public power is "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

## III. Non-Admission of Affidavit Evidence

[9] New evidence can be filed at the RAD only where the evidence arose after the RPD rejected the claim, or where the evidence was not reasonably available or the claimant could not

have been reasonably expected to have filed the evidence prior to the rejection of the claim (s 110(4) of *IRPA*). The RAD found that the bulk of Mr. Elhalwany's affidavit did not meet the statutory requirements for the admission of new evidence at the RAD. The RAD's reasoning on this issue is limited to: "the balance of the Affidavit contains explanations and argument about testimony provided at the hearing and as such does not meet the requirements of s 110(4) of the *IRPA*."

[10] Mr. Elhalwany argued before the RAD that there was a breach of procedural fairness due to an incomplete record. Mr. Elhalwany's RPD hearing was held over two days. There was a transcript of the first day of the RPD hearing, but a transcript could not be produced for the second day of the hearing due to the poor quality of the audio recording. In his submissions filed to the RAD, Mr. Elhalwany argued that the RPD's credibility findings could not be upheld because of the incomplete record before the RAD. Here, Mr. Elhalwany referenced his affidavit, which was filed as new evidence at the RAD. In this affidavit, Mr. Elhalwany set out parts of his testimony that he felt the RAD failed to consider or misunderstood.

[11] Mr. Elhalwany raised for the first time at the RAD the allegation of a procedural fairness breach due to an incomplete record. The RAD does not explain how in these circumstances Mr. Elhalwany could have provided this evidence about his testimony earlier. The RAD fails to engage with the new evidence on the basis of the procedural fairness allegation made on appeal. This was unreasonable.

[12] The application for judicial review is allowed. Neither party raised a question of general importance and I agree none arises.

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed;
2. The matter is sent back to be redetermined by a different member at the RAD; and
3. No serious question of general importance has been certified.

"Lobat Sadrehashemi"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-8246-21

**STYLE OF CAUSE:** MOHAMED SALAHELDIN MOHAMED  
ELHALWANY v MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 13, 2023

**JUDGMENT AND REASONS:** SADREHASHEMI J.

**DATED:** SEPTEMBER 12, 2023

**APPEARANCES:**

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