Federal Court Cour fédérale

Date: 20231025

Docket: IMM-2726-22

Citation: 2023 FC 1422

Ottawa, Ontario, October 25, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

HAMIDA OMAR HASSAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Hamida Omar Hassan, seeks judicial review of a decision made by the Refugee Protection Division (RPD) on March 3, 2022, allowing the Minister's application under section 109 of the *Immigration and Refugee Protection A*ct, SC 2001, c 27 (*IRPA*) to vacate the Applicant's Convention refugee status. In making this determination, the RPD found that the

Applicant had misrepresented her true identity and that she is excluded from protection pursuant to Article 1E of the *Refugee Convention* and section 98 of *IRPA*.

[2] For the reasons that follow, I am allowing this application.

II. **Background**

[3] The Applicant is a citizen of Somalia. On August 19, 2005, the Applicant and her daughter were determined to be Convention refugees or persons in need of protection. In requesting protection, the Applicant stated she did not go by any other name, her location of embarkation was unknown, and she needed protection from a recent attack on herself and her family in rural Somalia. Her husband was determined to be in need of protection on February 19, 2007.

[4] On July 6, 2008, the Applicant's husband was stopped at Pearson International Airport, where he admitted to an officer that: (1) he had misrepresented his identity in Canada and he is a citizen of the Netherlands; (2) his wife had misrepresented his daughter's identity as being born in the Netherlands and she is a Dutch citizen, not a Somali citizen. (3) He also stated his wife had lived in the Netherlands under the name Bashir Ali Nadifo and had resident status in the Netherlands through him - as his spouse.

[5] On May 9, 2019 (nearly 11 years later), the Minister brought an application to vacate the Applicant's Convention refugee status as well as the statuses of her husband and daughter. By

this point, due to document retention practices, the Applicant's and her daughter's file had been destroyed.

[6] The Minister's application for vacation was heard on May 31, 2021, November 4, 2021, December 6, 2021, and January 13, 2022. Because the Applicant's husband and daughter had citizenship status in the Netherlands, they conceded the vacation applications.

[7] The Applicant conceded that she had withheld information regarding her stay in the Netherlands and that she had lived there under the alias Bashir Ali Nadifo. She testified, however, that her true name is Hamida Omar Hassan, the name she used when she made her refugee claim, and that Bashir Ali Nadifo was a false name that was found on a fraudulent passport she used to travel to the Netherlands, as she did not have a passport of her own.

[8] At the outset of the vacation hearing, counsel for the Applicant orally requested that the hearing be stayed due to abuse of process resulting from the Minister's delay, which resulted in destruction of her file. An oral interlocutory decision was issued by the panel, which found no abuse of process. This issue, which was rejected in the written decision, was raised a second time in written submissions following the hearing.

[9] At the hearing, Applicant's counsel tried to admit her marriage certificate as new evidence to rebut the Minister's allegation that she had misrepresented her identity. The vacation panel also orally decided not to admit this document into evidence.

[10] On March 8, 2022, the application was allowed by the RPD, rejecting the Applicant's claims for refugee protection and nullifying the decision that granted her refugee protection.

III. **Decision under Review**

[11] The RPD began by reviewing the evidence of the Minister and the oral testimony of the Applicant. The RPD determined that given the Applicant's daughter did not list the Netherlands as a country of citizenship on her refugee application, no claim for protection was made against the Netherlands. Therefore, there can be no sufficient untainted evidence considered at the time of the first determination that could justify refugee protection against the Netherlands. The RPD further determined that the Applicant, the Applicant's husband and their daughter's residency status in the Netherlands would have left them excluded from refugee protection under Article 1 E of the *Refugee Convention* had the panel of first instance been made aware of their Dutch status.

[12] The RPD determined that the Minister provided persuasive and uncontradicted evidence because the Applicant had made material misrepresentations to the panel of first instance; namely, that she falsified her true identity and that of her minor daughter. As such, the Applicant's identity significantly contradicted the personal history provided in the Applicant's Personal Information Form (PIF) narrative and her testimony, both at her initial hearing and at her vacation hearing.

[13] The RPD found that the Minister's counsel had established the three elements of subsection 109(1) as set out by the Federal Court in *Canada (Public Safety and Emergency Preparedness) v Gunasingam* [*Gunasingam*], 2008 FC 181 at paragraph 7. Namely:

(1) there has been a misrepresentation or withholding of material facts, being the particulars of the Applicant's original entry into Canada utilizing an alternate identity and her Netherlands citizenship);

(2) those facts relate to a relevant matter: not advancing a claim against all of the Applicant's countries of nationality and identity is fundamental in a refugee claim; and

(3) there is a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other: failing to advance a claim against all of one's countries of nationality will be fatal to the refugee claim.

[14] With regard to whether the destruction of the Applicant's original file amounts to the Minister's abuse of process, the RPD determined that it did not. The RPD found that the Applicant was given the opportunity to provide any other information that was not true, or true, in her PIF narrative or in her testimony. She replied there was none. The RPD noted that if there was any evidence that would negate the finding of misrepresentation, she could have voiced it at that time. Her response to most of the questions from the Minister's counsel was "I don't remember". Based on the Applicant's response, the RPD found that destruction of the original documents did not change the fact that she misrepresented herself regarding her identity.

[15] The RPD determined that the Applicant held valid Dutch residency at the time of making her claim and at the time of the positive decision, the panel of first instance would have found her excluded under Article 1E. Since their actual identities were undeclared, it makes sense that they provided no documentation, or reasonable explanation for an absence of documents, for identities they never admitted to. In addition, at the time she made a claim for protection in Canada the Applicant had status in the Netherlands until 2008. The RPD notes that if this had been declared to the original RPD panel she would have been excluded.

[16] The RPD agreed with the Minister that the Applicant, as a Dutch resident and spouse of a Dutch citizen, held rights and obligations similar to that of a Dutch national as envisioned by the *Refugee Convention*, *IRPA*, and Canadian jurisprudence. The RPD further noted that even if the Applicant has allowed her Dutch residency status to expire, the test for 1E exclusion set out in *Canada (Minister of Citizenship and Immigration) v Zeng*, 2010 FCA 118 at paragraph 19 [*Zeng*], makes it clear that the Applicant should still be found to be excluded. The RPD found that if the Applicant has lost her permanent residency in the Netherlands it was voluntary and that status could have been maintained with due diligence on her part. The RPD concluded that the Applicant did not provide good and sufficient reason for failing to maintain or renew her status in the Netherlands, and she is thus excluded from refugee protection in Canada.

[17] The RPD determined that the Applicant is excluded from refugee protection as per Article 1E of the *Refugee Convention* and Section 98 of the *IRPA*.

IV. **Issues and Standard of Review**

[18] The Applicant submits that the reasons provided for the Decision that the Applicant misrepresented her true identity are unreasonable.

[19] The Applicant further submits the RPD erred in finding she is excluded from refugee protection pursuant to Article 1E.

[20] The Applicant submits that the Decision not to stay the proceedings due to abuse of process stemming from the Minister’s delay in bringing the vacation application breached procedural fairness and constituted abuse of process.

[21] On the first two issues the parties agree, as do I, that the standard of review is reasonableness. The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. While this presumption is rebuttable, no exception to the presumption is present here.

[22] A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of

analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[23] The third issue is a procedural issue. The standard for this is whether the decision is fair in all the circumstances, which has been described as akin to correctness review. (See: *Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Association of Refugee Lawyers v Canada (Immigration, Citizenship and Refugees)*, 2020 FCA 196 at para 35. See also: *Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797, 20-28 [*Ganeswaran*].)

[24] The Applicant views the decision to be unreasonable and incorrect.

[25] The Respondent does not explicitly state a standard of review.

V. **Analysis**

[26] For the following reasons, I find the RPD unreasonably concluded that the Applicant had misrepresented her actual identity and that she is excluded from protection pursuant to Article 1E of the *Refugee Convention* and section 98 of *IRPA*.

[27] In *Coomaraswamy v Canada (Citizenship and Immigration)*, 2002 FCA 153 [*Coomaraswamy*], the Federal Court of Appeal stated at paragraph 17 that respondents in vacation proceedings may present new evidence at the vacation hearing in order to rebut the

Minister's allegation of misrepresentation. With reference to the *Immigration Act*, the predecessor of the *IRPA*, Justice Evans stated as follows:

> Of course, when attempting to establish for the purpose of subsection 69.2(2) that a claimant made misrepresentations at the determination hearing, the Minister may adduce evidence at the vacation hearing that was not before the Board when it decided the refugee claim. Similarly, a claimant may adduce new evidence at the vacation hearing in an attempt to persuade the Board that she did not make the misrepresentations alleged by the Minister.

[28] In *Wahab v Canada (Citizenship and Immigration)*, 2006 FC 1554 at paragraph 27, Madame Justice Gauthier, a member of this Court at the time, held that subsections 69.2(2) and 62.3(5) of the *Immigration Act* "are essentially the same as sections 109(1) and (2) in *IRPA* and so the Court is bound by these decisions."

[29] In order to rebut the Minister's allegation that she had misrepresented her identity, the Applicant presented her marriage certificate, which contained her photo and her real name, Hamida Omar Hassan. The RPD failed to accept that evidence by erroneously focusing its analysis on the requirements of subsection 109(2), which states: "The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection." As the Applicant presented her marriage certificate to rebut the Minister's allegation of misrepresentation pursuant to subsection 109(1), the rejection of the application in subsection 109(2) was not available to the RPD.

[30] In *Vavilov* at paragraph 122, it was held that a decision may be unreasonable because the decision maker "failed to explain or justify a departure from a binding precedent in which the

same provision had been interpreted.” Further, at paragraph 128, it was held that, “a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.” The RPD departed from the precedent set in *Coomaraswamy* and this error taints the entire decision because the RPD reached its conclusion without the benefit of the evidence that could refute the Minister’s case.

[31] As stated by Applicant’s counsel, with which I agree, one of the Minister’s core allegations was that the Applicant misrepresented her identity and the new evidence went to the heart of that issue. There was no way to justify the rejection of that evidence.

[32] Since the conclusion that the Applicant misrepresented her identity permeates the entire decision, this shows that the RPD failed to grapple with the main issue and, it calls into question whether the decision maker was actually alert and sensitive to the matter before it. Thereby, making the decision unreasonable.

[33] Further, the RPD unreasonably concluded that the Applicant would have been excluded pursuant to Article 1E of the *Refugee Convention* at her first hearing had she not withheld information about her stay in the Netherlands. I agree with the Applicant that it was not open to the RPD to conclude that the Minister had met his onus to establish a *prima facie* case for exclusion. This is because the Minister relied on two pieces of evidence to reach this conclusion, one being the visa application “TEMPORARY STATUS TO NL (VERBLIJFSDOCUMENT)” made by the Applicant in 2004 and held until 25APR08. The other piece of evidence being from

the website of the Dutch Immigration and Naturalisation Service (INS) regarding the rights and obligations of foreign spouses of Dutch citizens.

[34] In *Mai v Canada (Citizenship and Immigration)* 2010 FC 192 at paragraph 35 [*Mai*], this Court held that the Minister has the initial onus to show that the person concerned has a permanent status. However, I agree with the Applicant that it was unreasonable for the RPD to find that the Minister had met his onus to make out a *prima facie* case for exclusion based on a document described by a Canadian visa officer as being temporary. This document was insufficient to make out a *prima facie* case for exclusion.

[35] With regard to the second piece of evidence, INS, the correct temporal context for the assessment of exclusion is the time when the Applicant applied for refugee protection: *Parvanta v Canada (Citizenship and Immigration)*, 2006 FC 1146 [*Parvanta*] at para 13. The RPD erred by not considering what the Applicant's rights would have been in 2005, which would require an assessment of Dutch immigration law as it was in 2005. Instead, the RPD accepted the Minister's undated evidence as being descriptive of the rights of foreign spouses in 2005, despite there being no indication as to whether the current information was from 2021 or 2005. The RPD's failure to grapple with this submission leads to the question as to whether it was alert, alive and sensitive to the issues before it.

[36] In *Murcia Romero v Canada (Minister of Citizenship and Immigration)*, 2006 FC 506 at paragraph 13 [*Murcia Romero*] it was held that the Minister had not made out a *prima facie* case of exclusion in a case where a claimant's residence was no longer supported by her husband and

therefore she could no longer renew her residency. In this matter, the Applicant testified that she would have lost her status if her relationship with her husband were to fail. This was confirmed by the INS document, which states, "You and your partner must live together." The Applicant testified that she had wished to remain in Canada without her husband, that they had differences, and that she even refused to allow him to see their baby. This was further confirmed by the statements of her husband to CBSA in 2008, when he said they were "divorced" and described the Applicant as his "ex-wife" and that they were "having trouble".

[37] The RPD's failure to mention the conditions attached to the Applicant's status in the Netherlands is further evidence that the panel was not alert and sensitive to the matter before it.

[38] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paragraph 102 [*Blencoe*] set out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process:

1. Delay must be inordinate as determined in context, including the following non-exhaustive factors:
    a. the nature and purpose of the proceedings,
    b. the length and causes of the delay, and
    c. the complexity of the facts and issues in the case.
2. The delay must have directly caused significant prejudice, which is a question of fact.
3. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to

> an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute.

[39] Recently, in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29, at paragraph 102, the Supreme Court of Canada considered what remedies are available when an abuse of process is found:

> [102] When an abuse of process is found, various remedies are available. In rare cases, where going ahead with the proceeding results in more harm to the public interest than if the proceedings were halted, a permanent stay of proceedings will be justified. When this threshold is not met, other remedies exist, including reduction of sanction and a variation in any award of costs.

[40] In the present case, I agree with the Respondent that even if there has been some delay, the abuse of process argument fails because the Applicant does not meet the significant prejudice step of the test, as any inordinate delay is not manifestly unfair to the Applicant and does not bring the administration of justice into disrepute.

[41] Moreover, even if the Applicant were to establish an abuse of process, a stay, which is only one of other potential remedies, would not have been warranted in this case. To grant a stay, "…the court must be satisfied that, 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted'… Cases of this nature will be extremely rare": *Blencoe* at para 120.

[42] The Applicant's case does not fit this extremely rare category of cases.

VI. **Conclusion**

[43] For the reasons set out above, this application for judicial review is allowed.

[44] The RPD's response to the Applicant's abuse of process argument was correct based on their substantive findings. If the RPD's finding on the substantive grounds change when this matter is reheard on reconsideration, the abuse of process considerations may change.

[45] The Decision is set aside to be returned to a different panel of the RPD for reconsideration.

JUDGMENT IN IMM-2726-22

THIS COURT'S JUDGMENT is that:

1. The Decision is set aside to be returned to a different panel of the RPD for reconsideration.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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