

Date: 20080801

Docket: IMM-547-08

Citation: 2008 FC 914

Ottawa, Ontario, August 1st, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ABDUL-HAKIM ABD AZIZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of the decision of the Refugee Protection Division (RPD) wherein the applicant was determined not to be a “Convention refugee” nor a “person in need of protection”.

I. Facts

[2] The RPD found the applicant not to be credible in his claimed identity as a member of the Bajuni tribe from Chula, a small island in Somalia. The applicant claimed that he had fled Somalia

for Kenya with an uncle after his father was murdered in October 2003 and his mother died shortly thereafter. In August, 2005, the applicant left Kenya for Canada, travelling on a false Canadian passport procured for him by an uncle.

[3] The applicant provided no documentary evidence from Somalia and the RPD panel member gave little weight to the documents he obtained in Canada for reasons which will be discussed further. He then noted discrepancies between the applicant's testimony and the documentary evidence and found that, on the totality of the evidence, he was not persuaded that the applicant was a citizen of Somalia or that he had spent his youth in Chula. On the basis that he failed to establish his identity, the panel member could not find that the applicant was a Convention refugee or a person in need of protection.

II. Issues

[4] This application raises three issues:

- a. Did the RPD breach its duty of procedural fairness?
- b. Did the RPD ignore evidence?
- c. Did the RPD misapprehend evidence?

[5] The decision of the RPD is reviewable on a reasonableness standard, subject to the statutory regime of subsection 18.1(4) of the *Federal Courts Act*, S.C. 2002, c. 8. A breach of procedural fairness cannot be remedied and a decision found to have been made as a result of the unfair

procedure must be vacated. Any decision which is made without regard to the material before the tribunal must be considered unreasonable and should be set aside.

III. Analysis

Did the RPD breach its duty of procedural fairness?

[6] The RPD panel member gave little weight to the applicant's documentary evidence, including an affidavit from a childhood friend from Somalia who now lives in Calgary and a letter from a Somali agency in Toronto corroborating his identity. The member found the affidavit of Abdul Nassour to be defectively sworn, as the commissioner's signature was illegible and no stamp or other identification of the commissioner appeared on it. He gave little weight to the Somali agency's letter because it contained no specific information about the qualifications of the author to determine Mr. Aziz' heritage, how the determination was made or the language of the interview.

[7] The applicant argues that the RPD panel member breached his duty of fairness by questioning the credibility of Mr. Nassour's affidavit and finding it to be defectively sworn in his reasons when he had not given notice that the validity of the commissioner was at issue. The applicant notes that in *Vinski et al. v. Lack et al.* (1987), 61 O.R. (2d) 379, relied upon by the panel member in finding the affidavit defective due to the lack of stamp or typed signature, Master Sandler provided counsel with the opportunity to supply an affidavit with a legible signature. The RPD panel member in this instance never informed the applicant of the irregularity or provided him the opportunity to correct it.

[8] Likewise, the applicant alleges, the panel member did not notify him of his concerns regarding the letter from Midaynta, the Somali agency in Toronto. Had this been made known, the Refugee Protection Officer, the panel member or the applicant's counsel could have asked the questions which concerned the panel member and the applicant could have answered them under oath.

[9] The respondent counters that, in light of the incredible testimony of the applicant regarding Chula and the distinction between Bajuni and Somali ethnic groups, the RPD was within its jurisdiction and expertise to give the weight that it did to the documents. The panel member was under no obligation to point out evidence which he found unconvincing and the applicant and his counsel were equally able to identify and address the deficiencies. He also notes that raising concerns with the applicant would have served no purpose as he had previously given affidavit evidence regarding the interview which the panel member is presumed to have considered.

[10] Unfortunately, with regard to the affidavit of Mr. Nassor, it appears that the panel member focused on form rather than substance. The Court notes that a brief assessment of signatures suggests that the commissioner who took the oath of Mr. Nassor was probably the applicant's counsel. While counsel should be encouraged to file complete applications in conformity with the letter of the Court's procedure, the Court finds it unfair to the applicant for the panel member not to have brought his concerns with the irregularity to his attention before coming to the decision, in order to allow him to submit a properly commissioned oath.

[11] The respondent asks the Court, in the event that the failure of the RPD to provide notice of its concerns about the commissioning of the affidavit was erroneous, to find that this failure was not conclusive. The applicant responds that the decision on the validity of the affidavit goes to the heart of the issue and the essence of identity and that the suggestion that the RPD's conclusion would have remained the same is an exercise in speculation. This breach of natural justice requires a new hearing, regardless of whether the ultimate decision would have remained the same.

[12] The applicant is correct in his submissions on this point. It is trite law that a breach of procedural fairness must result in a quashing of the decision resulting from that unfair procedure and that a new hearing of the case must result. The affidavit was important to support the applicant on his identity. The affidavit should not have been discarded without providing counsel with an opportunity to supply an affidavit with a legible signature. The form here was less important than the content of the affidavit, and the noted deficiencies should have been brought to the attention of counsel for him to remedy.

[13] As for the letter from the Somali agency, the applicant would not have been able to address the member's concerns in testimony. It should be noted by counsel, in this instance and in the field of immigration law generally, that evidence purporting to establish the identity of a claimant should provide sufficient information about the author and the criteria on which that identity was determined in order to allow decision-makers and reviewing Courts to assess the reasonableness of the evidence and to assign it proper weight.

[14] The applicant also alleges that the panel member erred in ignoring evidence of his diligence in having a witness present for the hearing and in misapprehending evidence. The panel member concluded that the applicant was not diligent in having the witness Nassor present at his hearing. In order to reach this decision, he ignored evidence which showed that Mr. Nassor attended one aborted hearing, traveled to Toronto from his home in Calgary for a second aborted hearing and cancelled flights from Calgary to Toronto on at least one if not two subsequent occasions when hearings were adjourned. The applicant's diligence in arranging to have his witness present continued in the face of five separate adjournments of his hearing over the span of seventeen months.

[15] The respondent argues that the evidence regarding Mr. Nassor's previous attempts to be present at Mr. Aziz' hearings is not relevant to the impugned decision. The panel member's negative inference was not drawn from the lack of Mr. Nassor's physical presence in Toronto or testimony by other means, such as teleconference, but on the lack of diligence shown by the applicant in failing to follow up on the one telephone call he says he made to a friend, leaving a message for Mr. Nassor, five months before the hearing. The panel member clearly knew of the history of the case, including Mr. Nassor's previous presence and move to Calgary. It was within his jurisdiction to find the applicant's explanation inadequate or unsatisfactory in the face of his inaction.

[16] While it may be true that, taken out of context, one single telephone call to a potential witness five months prior to the hearing seems to be highly indicative of a lack of due diligence, in

the history of this case the Court disagrees with the panel member's negative finding. The panel member ignored that in spite of five adjournments over 17 months, none of them his responsibility, the applicant continued to arrange for his witness to be physically present at his hearing. The Court cannot see how it is reasonable to make a negative inference against a claimant for his inability to sustain such willingness to appear indefinitely. That finding under these circumstances is unreasonable. By itself, such a single point of error on a minor issue would not lead to the quashing of the decision; however, in combination with the procedural unfairness relating to the validity of Mr. Nassor's affidavit, it becomes more imperative to set aside the decision. In view of this conclusion, the Court does not see the necessity to address the two other issues.

[17] For the foregoing reasons, this application is allowed. No questions were proposed for certification and none will be certified.

JUDGMENT

FOR THE FOREGOING REASONS THE COURT allows the application and refers the matter back to a newly constituted panel for redetermination.

"Maurice E. Lagacé"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-547-08

STYLE OF CAUSE: ABDUL-HAKIM ABD AZIZ v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 16, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: August 1st, 2008

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