Federal Court  Cour fédérale

Date: 20190530

Docket: IMM-2366-18

Citation: 2019 FC 761

Ottawa, Ontario, May 30, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

MOHAMED ABDI SIYAAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Mohamed Abdi Siyaad, claims to be a citizen of Ethiopia. He sought refugee protection in Canada in June 2017. Following a two-day hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB], he was found to be a Convention refugee in a decision dated October 5, 2017.

[2] For some reason, this decision was not released to the applicant or to the Minister of Citizenship and Immigration (who had not participated in the hearing before the RPD) until January 16, 2018. In the meantime, the Minister had acquired information which, if correct, suggested that the applicant's refugee claim was based on material falsehoods and, further, that the applicant may be inadmissible to Canada under section 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for engaging in people smuggling.

[3] A report was prepared under section 44(1) of the *IRPA* by a Canada Border Services Agency [CBSA] officer in relation to the people smuggling allegation. The applicant was arrested and detained in custody in or about the second week of January 2018.

[4] Relying in part on this same information, the Minister appealed the decision of the RPD granting the applicant refugee protection.

[5] In a decision dated March 27, 2018, the Refugee Appeal Division [RAD] of the IRB allowed the Minister's appeal, set aside the determination of the RPD, and referred the matter back to the RPD for redetermination by a differently constituted panel. The RAD's decision was made without any participation by the applicant in the appeal.

[6] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA* on the basis that the RAD failed to comply with the requirements of procedural fairness.

[7] For the reasons that follow, I have concluded that this application must be allowed. In the particular circumstances of this case, it was incumbent upon the RAD to determine the applicant's intentions with respect to the Minister's appeal before making a decision on that appeal. It did not do so. As a result, the RAD's decision must be set aside and the matter returned to the RAD for redetermination.

II. BACKGROUND

A. *The Applicant's Refugee Claim*

[8] In his claim for refugee protection, the applicant stated that he was born in January 1989 in Kebri Daher in the Ogaden region of Ethiopia. This region is on the border between Ethiopia and Somalia. Both of the applicant's parents were ethnically Somali but his mother was a Somali citizen while his father was an Ethiopian citizen.

[9] The applicant sought refugee protection on the basis that he was at risk in Ethiopia because authorities there believed he was associated with the Ogaden National Liberation Front, a separatist rebel group fighting for independence in the Ogaden region. Among other things, the applicant claimed that he had been detained and tortured by authorities in Ethiopia between August and November 2007.

[10] The applicant stated that he fled to Kenya in November 2008 and then made his way to South Africa, where he sought asylum. In March 2013, the applicant left South Africa because of threats and harassment he was facing there and went to Brazil. In August 2013, he arrived in

the United States, where he made another asylum claim. That claim was refused and on September 10, 2014 the applicant was deported to Ethiopia.

[11] The applicant stated that upon returning to Ethiopia he was detained at the Kilinto prison in Addis Ababa, accused of having made false allegations against Ethiopia because he had claimed asylum in the United States. The applicant claimed that he was tortured and subjected to other mistreatment while in detention. He remained at the Kilinto prison until November 24, 2016, when he was able to escape after a fire broke out in the prison. Once again, he fled Ethiopia for Kenya. He claimed that, with the assistance of a smuggler in Nairobi, he travelled to Canada using a false Swedish passport in the name of Adnan. He no longer had this passport. The applicant stated that he travelled by air via Turkey, Argentina, and Colombia over the course of about a week before arriving in Canada on May 24, 2017. He submitted his application for refugee protection a short time later.

[12] As noted, the RPD found the claimant to be a Convention refugee. The RPD was satisfied that the applicant had established his identity and that he had a well-founded fear of persecution in Ethiopia on the basis of political opinion. Although the written decision of the RPD member is dated October 5, 2017, it was not released to the applicant and the Minister until January 16, 2018.

B. *The New Information*

[13] In early January 2018, the CBSA received information from the United States Department of Homeland Security [DHS] regarding the applicant. Specifically, the DHS was

alleging that the applicant is in fact a Colombian national of Somali descent. The DHS alleged that between August 2015 and May 2017, the applicant had served as the primary point of contact in a human smuggling operation for East African migrants entering Brazil and who were then transiting onwards to the United States. The information thus suggested that, prior to arriving in Canada, the applicant had actually been in Brazil working as a human smuggler, and not in Ethiopia facing persecution, as he had claimed.

[14] The DHS also advised CBSA that its investigators had identified the applicant's Facebook account. With information obtained from Facebook with a warrant, investigators "were able to track [the applicant's] timeline movement from Sao Paulo, Brazil, through Bolivia to Canada in May 2017."

[15] Further, the DHS had linked the applicant to a fraudulent Swedish passport in the name of Andnan Mahamed Digale. CBSA records indicated that this passport had been used on an Air Canada flight from Bogota to Toronto on May 10, 2017. It was then used to enter Canada at Pearson International Airport. This information suggested that the applicant had not entered Canada on May 24, 2017, as he had claimed.

C. *The Minister's Appeal*

[16] The Minister appealed the RPD's decision on two grounds. First, the Minister submitted that the RPD had erred in fact in failing to consider information in the National Documentation Package [NDP] for Ethiopia indicating that the fire at the Kilinto prison actually occurred on September 3, 2016, and not on November 24, 2016, as the applicant had claimed. (This was a

material fact because the applicant had claimed that he had escaped from the prison on November 24, 2016, after a fire broke out there.)

[17] The second alleged error was framed as follows in the Minister's written submissions to the RAD:

> The second error of fact grounded in this appeal is that the Minister's new evidence which [*sic*] shows that the respondent was in Brazil smuggling people across borders during the time he swore under oath he was imprisoned in Ethiopia. This evidence raises the possibility that the respondent is inadmissible to Canada for organized criminality for engaging in transnational crime and smuggling for profit in Brazil during his time there prior to coming to Canada and making a claim. The respondent has been reported and referred for organized criminality under section 44 of the IRPA. The respondent answered no when asked in his refugee intake documents whether he had been a member of an organization that is or was engaged in an activity that is part of a pattern of criminal activity [references omitted].

[18] The Minister had commenced his appeal to the RAD with a Notice of Appeal dated February 6, 2018. As discussed further below, the Notice of Appeal was served on the applicant personally on February 6, 2018, at the Maplehurst Correctional Centre, in Milton, Ontario, where he was detained. It was filed with the IRB on the same date.

[19] On February 21, 2018, the applicant was served personally with the Appellant's Record and the Appellant's Disclosure. The latter consisted of documents from the NDP the Minister was relying on along with the section 44(1) Report and supporting documentation from the DHS. By this point, the applicant had been moved from Maplehurst to the Central East Correctional Centre [CECC] in Lindsay, Ontario. The Appellant's Record and the Appellant's Disclosure were provided to the applicant by Nancy Donald, a CBSA Detention Support Clerk at the CECC.

Ms. Donald also gave the applicant a copy of a letter dated February 12, 2018, from the RAD to the applicant with the subject line "Notice of receipt of a Notice of Appeal from the Minister." This letter had been sent to the applicant at Maplehurst but it would appear that he did not receive it until he was at the CECC. The letter itself makes several references to an enclosed "Respondent's Kit." It is unclear whether the applicant received this "kit" but in any case it is not part of the record before me on this application.

[20] The February 12, 2018 letter informed the applicant that he "will have the right to respond" to the appeal "no later than" fifteen days from when he receives the Appellant's Record by filing a Notice of Intent to Respond and a Respondent's Record. Since the applicant received the Appellant's Record on February 21, 2018 (the same day as he first saw the February 12, 2018 letter), his responding materials were due no later than March 8, 2018.

[21] The February 12, 2018 letter does not mention that it is possible to request an extension of time to file responding materials (see Rule 12(4) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]). Nor does the letter say what could happen if the applicant failed to file his responding materials on time.

[22] On March 6, 2018, the RAD sent the applicant a copy of the record from the RPD proceeding at the CECC.

[23] The Minister did not request a hearing before the RAD and no hearing was held.

[24] The applicant did not file either a Notice of Intent to Respond or a Respondent's Record before the RAD decided the appeal.

D. *The Applicant's Circumstances*

[25] As noted above, in January 2018 the applicant was arrested and detained following the preparation of the report under section 44(1) of the *IRPA* in relation to the allegation of human smuggling. Prior to this, he had been at liberty in the community.

[26] The applicant was detained initially at Maplehurst. At some point between February 6, 2018 and February 21, 2018 (the exact date is not in evidence before me), the applicant was moved from Maplehurst to the CECC. The applicant remained in detention at the CECC throughout the time the Minister's appeal was pending.

[27] On his Basis of Claim form, the applicant stated that the only languages or dialects he spoke were Somali and some Amharic.

[28] The applicant's refugee claim was prepared with the assistance of a lawyer and a Somali interpreter. As well, the hearing before the RPD was conducted with the assistance of a Somali interpreter. The applicant was represented by the same lawyer at the RPD hearing.

[29] When he was given a copy of the Minister's Notice of Appeal on February 6, 2018, the applicant refused to sign the Statement of Service.

[30] In an affidavit filed in support of the present application for judicial review, the applicant states the following regarding the Notice of Appeal: "I refused to sign it because I did not understand it and wanted a lawyer to review it." The Statement of Service filed with the RAD has the following notation above the signature line: "Refused to sign – wants lawyer to read + sign." This notation was evidently made by Jacqlyn Taylor, a CBSA employee at Maplehurst.

[31] After receiving the Notice of Appeal, the applicant contacted the lawyer who had represented him before the RPD. She told him she was too busy to assist him.

[32] On February 3, 2018 the applicant had signed a Use of Representative form in favour of an immigration consultant for the purpose of a detention review scheduled for February 23, 2018. There is no dispute, however, that the applicant had not retained counsel for the purpose of responding to the Minister's appeal before the RAD rendered its decision. The applicant explains in his affidavit that his first lawyer was the only immigration lawyer he knew at the time and, because he was now in custody, he had "a great deal of difficulty reaching out and finding lawyers."

[33] In his affidavit, the applicant states that he has "limited" skills in English but he cannot understand legal materials.

[34] The applicant also states the following with respect to the documents filed by the Minister on the appeal to the RAD:

> I was given a large stack of papers from immigration, all written in English, of documents and legal arguments. I did my best to read

> the papers but I could not properly understand. I did not understand what was said about me. I did not know what I should do from prison. I did not know of other lawyers I could call. I was confused. Now that I have hired a lawyer, he has helped me understand the case against me. Until I hired a lawyer, I could not understand the legal process I was involved in.

E. *The RAD's Decision*

[35] On March 27, 2018 – that is, nineteen days after the applicant's response to the Minister's appeal was due – the RAD allowed the appeal, set aside the RPD's determination, and referred the matter back to the RPD for redetermination.

[36] In brief written reasons, the RAD member noted that the Minister had not requested a hearing. With respect to the information filed by the Minister in support of the appeal, the member stated that there was "no reason to doubt that these documents are credible and trustworthy." Further, the documents "are also very relevant to the Respondent's overall credibility, as well as the credibility of his allegations of persecution." Accordingly, the RAD "admitted the new documents and the Minister's related submissions."

[37] With respect to the merits of the refugee claim, the RAD member wrote as follows:

> Upon its own review of the record, the RAD has several concerns with the Respondent's credibility, including related to his identity and allegations of persecution. The issue of exclusion has also been raised with the new evidence. However, without the benefit of any oral evidence on these issues, the RAD is of the opinion that it cannot provide a final determination of this claim. Accordingly, the matter is referred back to the RPD for re-determination before a different panel member.

[38] The member does not say anything about the absence of a response to the appeal from the applicant.

III. ISSUE AND STANDARD OF REVIEW

[39] The determinative issue in this case is whether the RAD breached the requirements of procedural fairness.

[40] The parties submit, and I agree, that this issue is to be determined on a correctness standard of review. As a practical matter, what this means is that no deference is owed to the decision-maker on this issue. I must determine for myself whether the process followed by the RAD satisfied the level of fairness required in all of the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Co. v Canada (Attorney General)*, 2018 FCA 69 at paras 33-56; *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31).

IV. ANALYSIS

[41] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Supreme Court of Canada held (at para 22) that "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."

Further, the values underlying the duty of fairness "relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision" (at para 28).

[42] The common law duty of procedural fairness is "flexible and variable" (*Baker* at para 22). As is well-known after *Baker*, several factors must be considered in determining what is required in the specific context of a given case, including: (1) the nature of the decision being made; (2) the nature of the statutory scheme under which the decision is made; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the party challenging the decision; and (5) the procedures followed by the decision-maker itself and its institutional constraints (*Baker* at paras 21-28).

[43] Applying the *Baker* factors, there is no question that the RAD owes a high level of procedural fairness to parties affected by its decisions. There is also no question that, at least in theory, the process by which the RAD decides appeals (as set out in section 110 of the *IRPA* and in the *RAD Rules*) generally meets the requirements of procedural fairness. The central question in this application is whether these requirements were met in practice with respect to the Minister's appeal in the applicant's case. In my view, in a narrow but important respect, they were not.

[44] At the point at which the deadline for filing materials responding to the Minister's appeal had come and gone, the RAD (in the corporate sense) would have known the following:

- The applicant was the respondent on an appeal by the Minister.
- He had been served with the Notice of Appeal, the Appellant's Record, and a large number of supporting documents. He had also been provided with the letter dated February 12, 2018, explaining (in part) the appeal procedure. All of these documents were in English.
- The applicant had stated on his Basis of Claim form that he spoke only Somali and some Amharic.
- The applicant had been assisted by a Somali interpreter in preparing his refugee claim and at the hearing before the RPD.
- The applicant had been represented by a lawyer before the RPD.
- The applicant intended to obtain advice from a lawyer regarding the Minister's appeal.
- No one had gone on the record as counsel for the applicant before the RAD.
- The applicant was detained in custody.
- The applicant had not filed either a Notice of Intent to Respond or a Respondent's Record, nor had he communicated with the RAD in any other way.

[45] Presented with this constellation of circumstances, procedural fairness required the RAD to inquire of the applicant whether he intended to respond to the Minister's appeal before deciding that appeal. It did not do so.

[46] The applicant was not the one who had engaged the RAD by initiating the appeal. He was the respondent. But his rights and interests could be affected by the decision on the appeal in profound ways. It was the responsibility of the RAD to ensure that the appeal process unfolded fairly in the particular circumstances of this case.

[47] When the applicant had not filed anything by March 8, 2018, the RAD should not have simply presumed that he did not intend to do so. It should have recognized that there could be real barriers preventing the applicant (an unrepresented party) from responding to the appeal in a timely way. Rather than presuming that the applicant had nothing to say, the RAD should have asked him what his intentions were. There would have been no difficulty locating the applicant. An initial inquiry could easily have been made informally by a RAD Case Management Officer (with the assistance of Ms. Donald, if necessary). Depending on the response, the RAD might then have judged it appropriate to convene a conference under Rule 26 "in order to make the appeal fairer and more efficient." The RAD would also have learned whether it would be seized with a request for an extension of time to respond to the Minister's appeal. Such a request might or might not have succeeded on its merits but this is immaterial. What matters is that no one made any inquiries of the applicant whatsoever. The result is that a fundamentally important decision was made without any participation by the applicant.

[48] I recognize that Rule 13(a) of the *RAD Rules* provides in relation to appeals by the Minister that, unless a hearing is held, the RAD "may, without further notice to the parties, decide an appeal on the basis of the materials provided if a period of 15 days has passed since the day on which the Minister received the respondent's record, or the time limit for providing it set

out in subrule 10(6) has expired." For some reason, this possibility is not mentioned in the February 12, 2018 letter from the RAD to the applicant. Most importantly, however, this power must be exercised consistently with the requirements of procedural fairness. That did not happen in this case.

[49] We do not know why the RAD moved so expeditiously with the Minister's appeal. Perhaps it was as a result of the covering letter submitted with the Appellant's Record in which counsel for the Minister requested that this matter "be assigned as soon as possible given that the Respondent is currently detained on immigration hold." The Minister's counsel was right to be concerned about delay. So too (presumably) was the RAD. Regrettably, what the RAD failed to recognize was that the applicant's circumstances – particularly his custodial status – also called for greater care in ensuring that he actually had a fair opportunity to respond to the Minister's appeal before it was decided.

[50] The respondent submits that any prejudice that may have been caused to the applicant by how the RAD proceeded is cured by the fact that a new hearing before the RPD was ordered. Certainly matters would have been much worse if the RAD had gone ahead and determined that the applicant is not a Convention refugee under section 111(1)(b) of the *IRPA*. But even if the applicant is to be returned to the RPD, he has still lost the status originally recognized by that body. This is a significant consequence that the RAD may impose on him only if its proceeding was fair.

[51] Finally, the fatal mistake in this case might well have been avoided if there had been a hearing before the RAD. However, in view of the fact that this application can be determined on the basis set out above, it is neither necessary nor appropriate for me to address whether the Minister should have requested a hearing under section 110(6) of the *IRPA* or whether, in any event, the RAD should have ordered one.

V. CONCLUSION

[52] For these reasons, this application for judicial review must be allowed, the decision of the RAD dated March 27, 2018 is set aside, and the matter returned to the RAD for redetermination of the Minister's appeal by a different decision-maker.

[53] Neither party suggested a serious question of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-2366-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated March 27, 2018 is set aside.
3. The matter is remitted to the Refugee Appeal Division for redetermination of the Minister's appeal by a different decision-maker.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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