Federal Court  Cour fédérale

Date: 20191127

Docket: IMM-5837-18

Citation: 2019 FC 1516

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 27, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

WOLKY MARCELIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD], dated September 20, 2018, which found that the applicant is not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Refugee Appeal Division [RAD], in a

decision dated November 1, 2018, determined that it did not have jurisdiction to hear the appeal of the RPD's decision.

II. Facts

[2] The applicant is a citizen of Haiti and claims to be pursued by thugs paid by the father of his first spouse. He reportedly met his first spouse in 2011 and she quickly became pregnant within that first year. In his Basis of Claim [BOC] form signed on April 7, 2017, the applicant alleges that his father-in-law paid thugs to pursue him, because the applicant objected to his first spouse marrying someone else. In his second BOC form signed on August 3, 2018, the applicant alleges another reason why his father-in-law was after him: the applicant had continued to try and contact his first spouse, in spite of his father-in-law's objections. The applicant claims that the father-in-law objected to their relationship because the applicant was not sufficiently wealthy. He adds that he was the victim of several attacks by thugs from the Parti Haitien Tèt Kale [PHTK] sent by his father-in-law, despite the fact that he had moved to several different cities before leaving Haiti.

[3] In mid-October 2015, following the alleged incidents, the applicant left Haiti for Brazil, where he spent nine months. In December 2015, he obtained a foreigner identity card from Brazil, which is a temporary residence card.

[4] He left Brazil in July 2016 and travelled through several countries before reaching the United States. He arrived in the United States in September 2016, and applied for asylum in the U.S. on December 1, 2016, from a detention centre in Arizona.

[5] On March 27, 2017, prior to the hearing of his asylum claim in the United States, he crossed the border into Canada and claimed refugee protection.

III. RPD decision

[6] The RPD was of the view that the applicant had not credibly established that his first spouse's father had pursued him outside of Port-de-Paix. The RPD also did not believe his claims that he was attacked by thugs in Port-au-Prince in October 2015. Furthermore, the RPD found that the alleged fear was no longer current.

[7] The first inconsistency the RPD found in the applicant's testimony was with respect to the date on which he stopped seeing his first spouse. The RPD criticized the applicant for having answered that he had stopped seeing her as soon as she became pregnant, without being able to provide a specific date: [TRANSLATION] "he says towards the end of 2011 only to then say June or July 2011 before finally telling the panel that it was in February 2012".

[8] The second inconsistency found by the RPD was with regard to why he claimed his father-in-law was after him. The RPD criticized him for never having mentioned at the hearing that the reason for the father-in-law's animus towards him was [TRANSLATION] "because he objected to his girlfriend marrying someone else" when this was the reason he had provided in his first BOC form.

[9] Lastly, the RPD deemed the applicant's narrative unrealistic and failed to see why the frustrated father-in-law would have expended so much energy and so many resources to send

thugs from the PHTK to beat up the applicant in another city over a few calls. The RPD concluded that the medical note showed evidence that he had suffered injuries, but there is no evidence to suggest that he was beaten by thugs sent by the father-in-law. As a result, the RPD rejected the claim for refugee protection, given that the applicant had not established that he was a Convention refugee or a person in need of protection.

[10] It is the RPD decision that is the subject of this judicial review. It was initially filed out of time, but an extension of time and leave to appeal were granted at the same time.

IV. Issues

[11] Two issues arise from this matter:

1) Is there a reasonable apprehension of bias on the part of the RPD decision-maker?
2) Is the RPD's decision reasonable?

V. Analysis

A. *Procedural fairness and reasonable apprehension of bias*

[12] In his arguments, the applicant submits that the RPD's tone and comments were inappropriate, so as to belittle him, throw him off guard and create a hostile atmosphere that lasted throughout the entire hearing. He believes that while it was open to the RPD to require that he speak a little louder when testifying, it was not entitled to ask him to [TRANSLATION] "man up and speak louder". He further believes that the RPD decision-maker should not have threatened to interrupt the hearing until he spoke a bit louder. The applicant argues that such comments

were contemptuous, based on stereotypes and gave the impression that the decision in his case was a forgone conclusion.

[13] The applicant adds that the decision is invalid, given that there was a breach of procedural fairness. He cites the Supreme Court in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, in support of his argument.

[14] In reply to the respondent, the applicant points out that the Minister ignored the words used by the administrative decision-maker: [TRANSLATION] "It is not the interpreter's job to give your testimony, that is your job, and you have to speak up so that the Panel and the microphone and your counsel can hear you clearly".

[15] The respondent contends that any apprehension of bias must be raised at the earliest opportunity and that failing to do so amounts to waiving this right (*Varatharajah v Canada (Citizenship and Immigration)*, 2008 FC 746). The respondent argues that the applicant ought to have asked the RPD decision-maker to recuse himself.

[16] The respondent is of the view that the panel's reasons or interventions should be read as a whole rather than by isolating one word or sentence (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151). The respondent submits that the panel's repeated requests that the applicant speak up are not, in and of themselves, evidence of a biased attitude. Furthermore, the respondent adds that there is nothing in the RPD's decision to suggest that it made a negative credibility finding because the applicant was not speaking loudly enough.

[17] The respondent argues that an allegation of bias casts doubt on the integrity of the panel and that the only test to be applied is that of "an informed person, viewing the matter realistically and practically" (*Llana v Canada (Citizenship and Immigration)*, 2011 FC 1450 at para 16; *R. v. S. (R.D.)*, [1997] 3 SCR 484 at para 31; *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at p 394). The respondent adds that the grounds for the apprehension must be serious (*Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8), but that the applicant provided only impressions, not concrete evidence.

[18] The parties agree that a breach of procedural fairness invalidates an administrative decision. Given that the RPD exercises a quasi-legal function, the applicable test for determining whether a reasonable apprehension of bias exists is that of a reasonable and informed person (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25; *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623):

> [W]hat would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

[19] That said, the fact that some comments were inappropriate does not in itself show that the administrative decision-maker was biased. Is the applicant alleging that the decision-maker is biased against refugees? Is the applicant alleging that the decision-maker is biased against Haitians? Is the decision-maker biased against men who speak softly? The applicant is unclear.

[20] In addition, it remains open to an administrative decision-maker to draw a negative credibility inference as a result of a witness not speaking loudly enough. In Gilles Renaud's book, *L'Évaluation du témoignage : un juge se livre*, Montréal, Édition Yvon Blais, 2008, it is suggested that the voice, tone, and appearance of the witness, as well as bravado, expressing surprise, blushing, looks, hesitations, and facial or body tremors are some of the elements that are evaluated during *viva voce* testimony. In the absence of evidence of a disability or medical condition, the fact that a person is not speaking loudly enough may be taken into consideration by the decision-maker.

[21] To determine whether the decision-maker is biased, we need to ask whether a reasonable person would have an apprehension that the administrative decision-maker did not assess the testimony before him, but had an implicit prejudice against the person giving that testimony. Such prejudice could be against a man who does not speak loudly enough.

[22] In this case, the Court is satisfied that the RPD decision-maker was impartial, such that a reasonable person would have no apprehension of bias. The testimony reproduced in the Minister's certified record shows that the RPD decision-maker repeatedly asked applicant to speak up. What the RPD decision-maker said was clearly inappropriate, but it does not show bias. The RPD decision-maker wanted to hear in order to understand what was being said, but this is not sufficient to question his impartiality.

B. *Reasonableness of decision*

[23] The standard of review for decisions by specialized tribunals is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]). The task of a court is to verify whether there is justification, transparency and intelligibility within the decision-making process, as well as whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[24] In this case, the RPD's decision appears sufficiently justified and intelligible. The RPD is an expert in its field, and it is open to it to find the applicant's narrative to be implausible. Furthermore, the fact that the applicant changed the reason why his father-in-law was after him in different versions of his BOC form and the fact that he failed to confirm at the hearing all of the reasons he provided in the two different versions of his form seriously undermines his credibility.

VI. Conclusion

[25] For the reasons set out above, the Court finds that the RPD's decision is reasonable and thus dismisses the application for judicial review.

JUDGMENT in IMM-5837-18

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 11th day of December, 2019.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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