Federal Court  Cour fédérale

**Date: 20201119**

**Docket: IMM-7621-19**

**Citation: 2020 FC 1068**

[ENGLISH TRANSLATION, REVISED BY THE AUTHOR]

**Ottawa, Ontario, November 19, 2020**

**PRESENT: Mr. Justice Sébastien Grammond**

**BETWEEN:**

**MOULOUD AIT ELHOCINE**
**AMINA JASMINE BENABBES**
**KAIS ALLANE AIT ELHOCINE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Mr. Ait Elhocine and Ms. Benabbes, on their own behalf and on behalf of their minor son, are seeking judicial review of the dismissal of their claim for asylum. They submit they were denied procedural fairness because they were not represented by counsel and because the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] refused to admit an expert report regarding the recording of the hearing before the Refugee Protection Division

[RPD]. They also submit that the RAD's findings of fact with respect to country conditions are unreasonable.

[2] I am dismissing this application, as I conclude that the RAD did not breach procedural fairness and made reasonable findings.

## I. Background

[3] The applicants are citizens of Algeria. At the time of the alleged facts, Mr. Ait Elhocine was a senior executive of a major state-owned Algerian company. In January 2010, he and other executives were arrested in connection with financial crimes relating to this company. In February 2016, he was acquitted after a high-profile trial where he was defended by Ms. Benabbes, acting as his counsel.

[4] The applicants allege that the trial was in fact a political attack orchestrated by the Department of Intelligence and Security [DRS] against supporters of the then president. They fear that revelations made by Mr. Ait Elhocine during the trial could be perceived as a provocation by the secret service and that they might be subjected to mistreatment.

[5] In June 2017, the applicants left Algeria for Canada, where they claimed asylum. At the airport, the Canada Border Services Agency [CBSA] officer processing their claim was [TRANSLATION] "very complimentary" about the applicants' well-organized documentary evidence. She assured them that they would not need the assistance of counsel.

[6] The applicants chose to represent themselves. At the hearing before the RPD, they expressed confidence in their ability to represent themselves and stated that they did not want to avail themselves of legal aid because they did not want to [TRANSLATION] “be a burden on the government”.

[7] The RPD rejected their claim for asylum on the grounds that the applicants were not credible. The RPD identified inconsistencies, such as the fact that the applicants failed to claim asylum on their first visit to Canada, which took place after Mr. Ait Elhocine’s trial. Indeed, the applicants were in Canada for family reasons from June to August 2016. Mr. Ait Elhocine states in his Basis of Claim Form [BOC Form] that he did not leave Algeria until June 2017, so as to await the verdict of the trial, assemble a file of documents related to the case, avoid interfering with his son’s studies, and quietly leave the country under the guise of a summer vacation. The RPD noted that these conditions were already satisfied when they travelled to Canada in June 2016. Consequently, it drew a negative inference from their failure to claim asylum on their first visit to Canada.

[8] The RPD drew a second negative inference as to the applicants’ credibility as a result of omissions in Ms. Benabbes’ BOC Form. At the hearing, Ms. Benabbes stated that she was the victim of a motor vehicle collision and a burglary, both of which she believed were linked to her husband’s trial. However, in her BOC Form, Ms. Benabbes makes no mention of these events and instead describes hostility and rejection from their co-workers and neighbours, damage to their reputations and stress from the trial. When questioned about these significant omissions, Ms. Benabbes stated that she did not know who had committed the offences and had no evidence

of them, since the police did not prepare a report or act on the complaint. She believed that she could not base her claim on these incidents without documentary evidence. The RPD rejected this explanation, pointing out that the allegations of damage to reputation and hostility from relatives were also not corroborated. Consequently, the RPD gave little weight to the argument that the applicants chose not to mention the burglary and collision because of a lack of corroboration.

[9] Before the RAD, the applicants sought leave to introduce two new pieces of evidence, including a report analyzing the audio recordings of the hearing before the RPD. The applicants stated that the report identified gaps in the audio recording of the hearing. However, the applicants failed to indicate what information was missing from the recording and how it was relevant to the appeal. The RAD compared the recording with the hearing transcript and found no gaps suggesting that information had been omitted. Since the applicants failed to demonstrate how the record before the RAD was inadequate for it to properly dispose of the appeal, the RAD concluded that the recording was irrelevant and had no probative value. Consequently, the RAD refused to admit the new evidence, under subsection 29(4) of the *Refugee Appeal Division Rules* [the Rules].

[10] Moreover, the RAD agreed with the RPD's findings as to the appellants' lack of credibility. It therefore dismissed the applicants' appeal against the RPD's decision.

[11] The applicants are now seeking judicial review of the RAD's decision.

## II. Analysis

[12] From the outset, it would appear that the applicants have tried at every stage of the process to raise what are essentially minor irregularities in order to obtain a new hearing. The applicants' grounds to challenge the RAD's decision have little bearing on the merits of the case. Although the applicants endeavour to make their journey before the IRB appear to be grossly unfair, their claims do not withstand scrutiny.

### A. *Lack of Representation by Counsel*

[13] In their application for judicial review, Mr. Ait Elhocine and Ms. Benabbes allege two breaches of procedural fairness affecting the RAD's decision. The applicants' first argument relates to the lack of representation by counsel at the hearing before the RPD.

[14] In support of this claim, the applicants allege that the CBSA officer misled them when she told them that they would not need to retain counsel because of the quality of the file they had prepared. The onus was on the RPD to correct this error by advising them that it was in their interest to be represented by counsel. In addition, the applicants allege that the RPD held their claim to a higher standard by relying improperly on Ms. Benabbes's status as a lawyer.

[15] One must bear in mind that individuals are free to choose to represent themselves or to be represented by counsel. In principle, a court must respect this choice, subject to limits established by the case law to ensure procedural fairness where the particular situation of the applicant so requires (see *Nemeth v Canada (Minister of Citizenship and Immigration),* 2003 FCT 590

[*Nemeth*]). The lack of representation by counsel results in a breach of procedural fairness only if, given the circumstances, it deprives the applicant of the opportunity to "participate meaningfully" in the hearing (*Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423 at paragraph 6; *Nemeth*; *Li v Canada (Citizenship and Immigration)*, 2015 FC 927 at paragraph 37 [*Li*].

[16] There are circumstances in which an asylum claimant who has chosen self-representation is in fact unable to participate meaningfully in the hearing, resulting in an unfair decision. In my view, however, this is not the case here. The applicants were given a fair hearing in which they were able to participate meaningfully. In the end, their decision not to be represented by counsel did not affect the fairness of the hearing. For the reasons below, I reject the applicants' three arguments to the contrary.

[17] First, the applicants criticize the RPD member for failing to advise them to retain counsel. However, there is no indication that the applicants needed this advice to participate meaningfully in the hearing nor that they were unaware of their right to counsel. The member inquired about their need for an interpreter, confirmed that the applicants had not retained counsel and explained the process to them. By ensuring that the applicants understood the hearing process, the member met the procedural fairness requirement: *Li* at paragraph 37. It should also be noted that Mr. Ait Elhocine spontaneously stated during the hearing that their desire not to [TRANSLATION] "be a burden on the government" had guided their choice not to retain counsel. The applicants did not request an adjournment to retain counsel or otherwise express a desire to be represented.

Given this clearly expressed choice, the RPD did not have an obligation to urge the applicants to retain counsel.

[18] Second, the applicants allege that the CBSA officer [TRANSLATION] "misled" them with her comments about the quality of their documentation. They state that they [TRANSLATION] "feel they have been misled by the Canadian government" and that they have [TRANSLATION] "fallen into a trap". I find it difficult to see this situation as a case where the applicants were fooled, intentionally or unintentionally, by the officer. There is nothing to suggest that the officer's comments prompted the applicants' decision. In any event, Mr. Ait Elhocine made it clear that their decision not to be represented was based on other considerations.

[19] Third, the applicants allege that the RPD repeatedly and improperly raised Ms. Benabbes's legal background, holding the applicants to a higher standard. The member's conduct allegedly demonstrated a lack of sensitivity and compounded the lack of fairness experienced by the applicants due to their lack of representation.

[20] I note the repeated references to Ms. Benabbes's profession. The member commented that the file had no table of contents, making it difficult to find evidence quickly in the documentation, which the member described as [TRANSLATION] "voluminous". He also asked the applicants whether they were aware of the National Documentation Package while making this comment:

> [TRANSLATION]
>
> . . . especially as you are a lawyer, you will understand why I want to make sure that you are aware of it.

[21] I find it difficult to see how these comments would have imposed a higher standard on the applicants. It is true that Ms. Benabbes's status as a lawyer is mentioned a number of times, but mainly with regard to the organization of evidence. Presumably, the RPD member mentioned this to show that the applicants are highly educated professionals who are fully capable of understanding the process in which they are involved, which is not true of all asylum claimants. Thus, there is no evidence that the RPD required them to have a greater understanding of the applicable legal rules. Rather, the member was informing them of the need to organize their file more clearly and to review the evidence in the National Documentation Package.

[22] I also note that the RPD member provided the applicants with a second full day to present their claims and encouraged them to clarify the nexus between the evidence and their personal circumstances. Far from placing a higher burden on them, the RPD in fact gave the applicants every opportunity to present evidence and make their case.

[23] The preceding remarks distinguish the applicants' circumstances from those in *Castroman v Canada (Secretary of State)*, [1994] FCJ No 962 (TD) [*Castroman*], and *Nemeth*, to which the applicants refer in support of their application.

[24] *Castroman* deals with an exceptional situation where the claimant's counsel withdrew in the middle of the hearing, leaving the claimant unrepresented. The RPD then denied a request for an adjournment to enable the claimant to find new counsel. In this case, however, the applicants chose not to retain counsel and prepared themselves accordingly. Unlike in *Castroman*, the

absence of counsel at the hearing did not destabilize them and did not hinder the presentation of their arguments.

[25] The applicants rely on *Nemeth* to argue that there is a greater obligation to ensure procedural fairness when the applicants are self-represented. However, that case involved claimants who did not understand many fundamental aspects of the process, including the language used at the hearing: *Nemeth* at paragraphs 11, 15. In the case at hand, there is every indication that the applicants understood the issues, language and process. When their knowledge was lacking, the member even took care to inform them, in particular about the existence and application of the National Documentation Package.

[26] Ultimately, I find that the applicants were not denied the opportunity to present evidence and did not suffer any prejudice from the lack of legal representation. On reading the reasons of the RAD and RPD, it appears that the facts, and not the lack of representation, were the determining factor in dismissing the asylum claim.

B. *Rejection of Audio Recording Analysis*

[27] The second breach of procedural fairness invoked by the applicants is the RAD's refusal to admit the expert report regarding the recording of the hearing. The applicants allege that there are gaps in the recording of the hearing when they are discussing issues central to their claim. Had the RAD admitted this new evidence, it would have found a reasonable explanation for the omissions noted by the RPD, which would have affected the finding as to the credibility of the applicants.

[28] The IRB does not have an obligation to record refugee protection claim hearings: *Antunano Martinez v Canada (Citizenship and Immigration)*, 2019 FC 744 at paragraph 7 [*Antunano*]. As my colleague Justice John Norris pointed out in *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804:

> [31] . . . In cases where there is no statutory right to a recording, "courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice" (Canadian Union of Public Employees, Local 301 v Montréal (City), 1997 CanLII 386 (SCC), [1997] 1 SCR 793 at para 81). On the other hand, if the court cannot dispose of an application before it because of the absence of a transcript, this will violate the rules of natural justice.

[29] To establish that it is impossible for the RAD to properly determine their claim, the applicants must raise an issue that affects the outcome of the case that can only be determined on the basis of a record of what was said at the hearing: *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 at paragraph 34. In other words, the applicants must identify the information missing from the recording and explain how this is determinative in resolving an issue central to their claim.

[30] Where the applicants rely on gaps in the recording of the hearing, they must show a "serious possibility" that the gaps have denied them a means of appeal: *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at paragraph 81.

[31] However, the applicants have not specified how the alleged cuts raise a "serious possibility" that they might be denied a means of appeal. They allege that the gaps occur when they are discussing matters [TRANSLATION] "that are at the heart of their claim and their

credibility." However, before the RAD, the applicants failed to mention what was missing from the hearing transcripts: *Antunano* at paragraph 13. In support of their application for judicial review, the plaintiffs filed affidavits alleging that the missing information would explain why they did not mention the car accident in their BOC Form. The hearing before this Court did not establish what this information was, whether it had been omitted from the RAD's record or how it was determinative of an issue central to their claim for asylum. It is not for the Court to speculate on what might have been discussed at the hearing but rather for the applicants to explain how their right to procedural fairness was breached. Upon reading the RPD and RAD decisions, it would appear that Ms. Benabbes's explanations regarding the motor vehicle collision were considered and then rejected.

[32] Moreover, the applicants claim that the RAD assumed the role of an expert when it rejected the computer engineer's audio analysis on the basis of its own review of the recording. In this regard, the applicants seek to apply the test for admissibility of expert evidence set out in *R v Mohan*, [1994] 2 SCR 9 [*Mohan*], as applied in the administrative law context in *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at paragraph 45 [*Moffat*]. On reading the RAD decision, however, I note that the RAD rejected the expert evidence on grounds that were within the reach of a non-expert. It merely noted that the flow of questions and answers did not reveal any obvious inconsistencies or interruptions, contrary to the expert's claims. It compared the approximate duration of the gaps with the duration of the breaks recorded in the transcript. No particular expertise was required to make such findings. It is therefore not necessary to consider the *Mohan* criteria.

[33] Despite the applicants' allegations, I note that the RAD carefully reviewed the analysis of the recording of the hearing. Since the applicants did not state the nature of the omitted information, it was legitimate for the RAD to consider the analysis to be irrelevant and to reject it under subsection 29(4) of the Rules.

C. *Changed Conditions in Algeria*

[34] The applicants allege that the RAD's conclusions regarding the changed conditions in Algeria are hasty and incomplete. Having read the documentary evidence, the RAD concluded that there was no longer any prospective risk in Algeria for the applicants, in particular because the DRS had been dissolved.

[35] I have reviewed the documentary evidence, and I find it reasonable for the RAD to have reached this conclusion. The RAD noted that the DRS had been dissolved and replaced by three divisions reporting directly to the president. This is consistent with the evidence. The RAD's observations are faithful to the information in the National Documentation Package and do not embellish the country's situation for the purpose of rejecting the claim. Indeed, the RAD recognizes the possibility raised by the applicants that a [TRANSLATION] "clan war" could be reignited between the secret service and the president. However, it considers that the DRS's ability to act is greatly diminished, as is its motivation to persecute the applicants.

[36] Moreover, even if the RAD had reached a different conclusion regarding prospective risk, the claim for asylum faces an insurmountable obstacle, namely the absence of any challenge to the RAD's negative credibility finding. The RAD drew this finding based on the applicants'

failure to claim asylum during their stay in Canada in June 2016. Since this determinative finding remains undisputed, it must be presumed to be valid and alone constitutes sufficient basis for dismissing the application for judicial review: *Perez Perez v Canada (Citizenship and Immigration)*, 2013 FC 506 at paragraph 38.

D. *Question for Certification*

[37] At the hearing, counsel for the applicants asked me to certify the following question under paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

> [TRANSLATION]
>
> When determining the relevance of new expert evidence under subsection 29(4) of the RAD Rules, should a decision maker refer to the rules set out in Moffat v Canada (Citizenship and Immigration), 2019 FC 896, to see whether there are grounds for refusing the submission?

[38] I deny certification, since the applicants did not provide the five days' notice required by the *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* (November 5, 2018):

> . . . Where a party intends to propose a certified question, opposing counsel shall be notified at least five [5] days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question.

[39] Moreover, the proposed question does not meet the criteria for certification, which the Federal Court of Appeal set out in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674:

> [46] . . . The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. . . .

[40] For the reasons mentioned above, the issue of the test for the admission of new expert evidence by the RAD is not determinative of the outcome of the application for judicial review.

**JUDGMENT in IMM-7621-19**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.

2. No question is certified.

"Sébastien Grammond"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-7621-19 |
| **STYLE OF CAUSE:** | MOULOUD AIT ELHOCINE, AMINA JASMINE BENABBES, KAIS ALLANE AIT ELHOCINE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO, AND MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | NOVEMBER 2, 2020 |
| **JUDGMENT AND REASONS:** | GRAMMOND J. |
| **DATED:** | NOVEMBER 19, 2020 |

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