

Federal Court



Cour fédérale

Date: 20211221

Docket: IMM-6231-20

Citation: 2021 FC 1454

Ottawa, Ontario, December 21, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ABDULAZIZ ZIYAD KIDER

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Abdulaziz Ziyad Kider, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”) dated October 28, 2020, confirming the determination of the Refugee Protection Division (“RPD”) that the Applicant is neither a Convention refugee nor a person in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant fears persecution in Ethiopia because of his anti-government political views, his Gurage ethnicity, and his father's anti-government activities. The RAD dismissed the Applicant's claim because it found allegations central to the Applicant's claim were not credible.

[3] The Applicant submits that the RAD failed to observe the principles of natural justice by not giving the Applicant an opportunity to make submissions and present evidence on facts which were not disputed by the RPD, but which the RAD found to be not credibly established. The Applicant further submits that the RAD erred in its determination of the central allegations in the Applicant's claim, and erred in its credibility findings.

[4] For the reasons that follow, I find the RAD breached its duty of procedural fairness by failing to give the Applicant the opportunity to make further submissions on findings of fact that went beyond the findings of the RPD. I therefore allow this application for judicial review.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a 22-year-old citizen of Ethiopia of Gurage ethnicity.

[6] The Applicant claims that he participated in protests in August 2016 and December 2017, while studying at Mekelle University, but managed to avoid the mass arrests that took place. The Applicant states that he left university in June 2018 because of ethnic tensions, particularly

because non-Tigrean students such as himself faced harassment and discrimination from Tigrean students.

[7] In the summer of 2018, the Applicant and his father visited family in Welkite, where the Tigray People's Liberation Front attacked people belonging to the Gurage ethnic group. The Applicant states that he was among those who tried to defend the Gurage from looting and property damages. Because of his participation in this event, the Applicant was arrested and detained in a military camp from July 2-7, 2018. He was released with a warning not to participate in any future protests.

[8] The Applicant also claims that his father was detained for six weeks in November 2005 for his participation in political protests, and was later targeted and harassed for his perceived identity as a supporter of an outlawed opposition party.

[9] The Applicant came to Canada on a student visa in late 2018. Once in Canada, he made a refugee claim on the basis that he fears persecution due to his political opinion, ethnicity, as well as his father's anti-government activities.

B. *The RPD Decision*

[10] On January 2, 2020, the RPD determined that the Applicant was not a Convention refugee or a person in need of protection. The determinative issue for the RPD was credibility.

[11] The RPD noted that credibility concerns which were central to the Applicant's claim led the RPD "to doubt the veracity of all the claimant's allegations," finding that the Applicant had not provided sufficient credible or trustworthy evidence to establish the allegations that he is wanted by Ethiopian authorities.

[12] The RPD drew a negative inference with respect to the Applicant's overall credibility because of discrepancies between the Applicant's testimony and his Basis of Claim ("BOC"). For instance, at the RPD hearing, the Applicant stated that his father was detained with him from July 2-7, 2018, yet this was not mentioned in his BOC. The RPD was not satisfied with the Applicant's reasons for not mentioning his father in the BOC, and found this omission to be a significant element of his claim.

[13] Based on the inconsistencies between the Applicant's BOC and his testimony, the RPD found that the Applicant had not been beaten by the police or anyone else in Ethiopia, and that, on a balance of probabilities, the Applicant was not wanted by Ethiopian authorities following his arrest in July 2018, nor would he be in the future if he were to return to Ethiopia.

[14] The Applicant's claim included a statement from his friend confirming his presence at the August 16, 2016 protest, and a letter from his great-uncle confirming that the Applicant was involved in the protest in Welkite in 2018. The RPD did not dispute that the Applicant participated in the August 16, 2016 protest and accepted that he was detained in July 2018. However, since the Applicant was not arrested or detained until two years later in July 2018, the

RPD assigned little weight to the friend's statement to establish that the Applicant is wanted by Ethiopian authorities.

[15] The Applicant appealed the RPD decision to the RAD. No new evidence was provided to support the appeal.

C. *Decision Under Review*

[16] On October 28, 2020, the RAD dismissed the Applicant's appeal and confirmed the RPD's decision. The determinative ground for the dismissal of the appeal was credibility. The RAD found that there were numerous omissions and inconsistencies between the Applicant's BOC and his testimony at the RPD hearing. The RAD also doubted the veracity of the Applicant's allegations and agreed with the RPD that the Applicant is not, on balance of probabilities, wanted by Ethiopian authorities.

[17] The RAD considered the Applicant's submission that the RPD should still have found that even if he is not wanted by the authorities, the Applicant remains at risk in Ethiopia because the Ethiopian government has persecuted similarly situated persons. The RAD stated:

The RAD concludes, in its independent analysis and unlike the RPD, that all of the central allegations in the appellant's case, including his alleged participation in the August 2016 protest and his July 2018 arrest and detention, are not true, on a balance of probabilities. The RAD therefore finds that it has insufficient credible evidence upon which to find that the appellant is similarly situated to any persecuted person in Ethiopia.

[18] The RAD further found that no weight should be given to the letter from the great-uncle as proof of any of the central allegations, despite how the RPD decided to place positive weight on the letter as proof that something happened to the Applicant in Welkite in July 2018:

In its independent analysis, however, the RAD finds that the unreasonably explained omission of his father's alleged arrest and detention is sufficient to discredit the letter entirely.

III. **Issues and Standard of Review**

[19] The Applicant submits that this application for judicial review raises the following issues:

- Whether the RAD followed unfair procedure in arriving at the impugned decision;
- Whether the RAD's finding about the central allegation in the claim was erroneous;
- Whether the uncontradicted evidence establishes the Applicant's claim; and
- Whether the panel erred in assessing the credibility of the Applicant.

[20] I see the issues in this case as follows:

- A. *Whether the RAD breached procedural fairness.*
- B. *Whether the RAD's decision is reasonable.*

[21] The Respondent states that the issue is whether the decision of the RAD is reasonable and submits that the applicable standard of review is reasonableness. The Respondent submits that

while the Applicant frames the issue as one of fairness, the substance of their argument relates to the adequacy of the reasons – which is properly considered under substantive review.

[22] The Applicant submits that the issue of procedural fairness ought to be reviewed on the standard of correctness, and that the remaining issue ought to be reviewed on the standard of reasonableness. I agree: the first issue is to be reviewed on the standard of correctness, and the second on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“*Vavilov*”) at paras 10, 16-17).

[23] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[24] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

[25] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair, having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Analysis

A. *Whether the RAD breached procedural fairness*

[26] While the RPD made negative credibility inferences with respect to certain aspects of the Applicant's participation in the August 2016 protest and the Applicant's detention in July 2018, it nonetheless accepted that these incidents occurred. The RAD, however, conducted an independent analysis and found that, on a balance of probabilities, "all the central allegations in this case, including the appellant's alleged participation in the August 2016 protest and his alleged arrest and detention in July 2018, are not true."

[27] The Applicant concedes that his credibility was questioned by the RPD, yet he submits that the RAD should have provided him with a reasonable opportunity to make submissions with respect to the facts, which were rejected by the RAD, yet accepted by the RPD. The Applicant contends that the fact that he participated in the August 2016 protest and was detained in July 2018 were not live issues in the appeal before the RAD, and that the RAD committed a reviewable error by raising these issues in the appeal and failing to give him notice that the issues would be raised. The Applicant submits that it is unreasonable to expect him to make

submissions on appeal regarding issues and facts that were accepted by the RPD and thus not in dispute.

[28] The RAD addresses the issue of its independent assessment in its reasons:

While the RAD's independent assessment of the appellant's claim has arrived at a negative factual finding that is more extensive than the alleged facts rejected by the RPD, the RAD has arrived at that finding based on the same particular credibility issues that were identified and discussed by the RPD in its decision, and not based on any new credibility matters that the RAD perceived in the record that were not identified and relied upon by the RPD in arriving at its negative credibility conclusion. The RAD is therefore satisfied that the appellant has had notice of the issues motivating the RAD's decision.

[29] The Applicant relies on *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 ("*Ojarikre*") at paragraph 20 to submit:

[...] the RAD does not possess the jurisdiction to consider an issue that, although fully canvassed before the RPD, was not relied upon in its decision and therefore was not the subject matter of the Applicant's appeal.

[30] The Applicant states that the RPD denied his claim based on the determination that he is not wanted by Ethiopian authorities. The Applicant submits that although he addressed the RPD's credibility concerns in his appeal, the crux of his argument was based on the issue that led to the denial of his claim – notably the Ethiopian authorities' continued interest in him and the possibility of being persecuted. This argument was based on the evidence and facts that were

accepted by the RPD. As in the case of *Ojarikre*, the Applicant argues that the RAD erred by relying on an issue which was considered, but not relied on by the RPD.

[31] The Applicant also relies on this Court's decision in *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 ("*Ching*"), which applies the Supreme Court of Canada's decision in *R v Mian*, 2014 SCC 54 ("*Mian*") with regards to the scope of an appellate court's jurisdiction to raise new issues. The Supreme Court in *Mian* noted that when an appellate court raises a new issue, parties should generally be notified and given an opportunity to respond (*Ching* at para 70). Although *Mian* dealt with a criminal case, this Court in *Ching*, at paragraph 71, found that the principles should apply beyond the context of criminal appeals:

In my view, these principles should apply beyond the context of criminal appeals and, with the necessary modifications, to the context of appeals before the RAD. The RAD should first consider if the issue is "new" and if failing to raise the new issue would risk injustice. If the RAD pursues the new issue, it seems clear that procedural fairness requires that the party or parties affected be given notice and an opportunity to make submissions.

[32] The Applicant submits that the rest of the RAD's decision is coloured by its fact finding, which was itself procedurally unfair.

[33] The Respondent contends that a procedural fairness issue does not arise in this case, and that while the RAD did make new findings on some minor factual points, those new findings of fact did not require notice to the Applicant because they were not determinative and they formed part of the RAD's independent assessment.

[34] The Respondent submits that the RAD agreed with the RPD on the core, determinative findings: both tribunals found that the Applicant did not credibly establish that he faces a risk of persecution in Ethiopia; both tribunals determined that the Applicant is not wanted by the police, nor was he ever assaulted by the police, as reflected in his testimony; and both tribunals found that these admissions undermine the core of the Applicant's refugee claim.

[35] The Respondent states that this Court has noted that the RAD is not required to show deference to the RPD's finding of fact, and is entitled to conduct an independent assessment of the record before the RPD when addressing issues raised by the parties (*Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 ("Tan"), at para 40). In *Tan*, this Court found that a party should have an opportunity to respond to new issues and concerns that will have a bearing on a decision impacting them and it is generally not open to the RAD to raise an issue that was not raised by the parties or the RPD (*Tan* at para 32). However, this Court also noted:

The fact that the RAD views some of the evidence differently from the RPD is not a basis to challenge the RPD's decision on fairness grounds when no new issue has been raised (*Tan* at para 40).

[36] The Respondent submits that given the findings of the RPD, the Applicant had a duty to respond to the credibility determination on appeal. Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 states that an applicant must provide full and detailed submissions regarding the errors forming the grounds for appeal, and identify where those errors are found in the RPD's decision. The RAD must focus on the specific errors the applicant alleges were made by the RPD (*Dahal v Canada (Citizenship and Immigration)* 2017 FC 1102 at para 30), and "cannot be faulted on judicial review for not having considered or addressed arguments not

raised [by the applicant]” (*Cruz v Canada (Citizenship and Immigration)*, 2020 FC 22, at para 30).

[37] The Respondent further states that the RPD was clear in its assessment that it doubted the veracity of all aspects of the Applicant’s claim and that the Applicant should have thus already been “put on notice” that he would have to respond to these credibility findings on appeal to the RAD. The Respondent submits that the Applicant’s failure to provide new evidence to support his appeal or make new submissions to address the credibility issues was done at his own peril (*Ghuri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 34).

[38] While I accept that the RAD is not bound by the RPD’s findings, I cannot agree with the Respondent that the RAD’s new findings were only minor factual points that did not require notice to the Applicant. Since the thrust of the Applicant’s arguments before the RAD involved his fear of persecution in Ethiopia and whether the authorities were interested in him, I find that his participation in the August 2016 protest and his detention in July 2018 are central elements of the Applicant’s claim.

[39] In *Abiodun v Canada (Citizenship and Immigration)*, 2021 FC 642, this Court found that the RAD breached procedural fairness when it concluded that the applicants were not credible based on alleged inconsistencies between their testimony and BOC narrative without putting those inconsistencies to the applicants for a chance to respond. At paragraph 24, my colleague Justice McHaffie states:

I find it was unfair and unreasonable for the RAD to conclude it could make adverse credibility conclusions based on these asserted inconsistencies in the testimony without putting the purported inconsistencies to Ms. Abiodun.

[40] I agree with the Applicant's submission that procedural fairness requires the RAD to give an applicant notice that the RPD's findings of fact are a live issue in their appeal. I disagree with the Respondent's reasoning that the Applicant was put on notice that he would need to address the credibility of all aspects of his claim on appeal to the RAD. The Applicant's appeal to the RAD relied on the RPD's finding that it was undisputed that he participated in the protest in August 2016 and was detained in July 2018. The Applicant's appeal thus focused on the issue of whether there was a well-founded fear of persecution in Ethiopia, not on facts that were accepted by the RPD.

[41] In light of this breach of fairness, I find that the RAD's decision as a whole cannot stand.

[42] While it is unnecessary to address the Applicant's arguments with respect to the reasonableness of the decision under review, I find that there are issues with the RAD's decision that also render it unreasonable. For instance, while the RAD initially identified that the Applicant allegedly fears persecution at the hands of the Ethiopian government because of his opposition to the Ethiopian regime, his Gurage ethnicity, and his father's political activities, the RAD failed to consider the Applicant's claim in its entirety.

[43] The RAD failed to meaningfully address the Applicant's evidence concerning his Gurage ethnicity, political opinion, or his father's political profile, and how the government of Ethiopia

has treated individuals with the same profile as the Applicant. As it was rightly noted by the Applicant's counsel during the hearing, this leaves the Court to speculate whether the RAD would have arrived at a different conclusion had they considered the other grounds of persecution raised by the Applicant on appeal.

V. **Conclusion**

[44] I find that the RAD breached its duty of procedural fairness by going beyond the RPD's finding of facts and failing to provide the Applicant the opportunity to make further submissions. This application for judicial review is allowed.

[45] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6231-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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