Federal Court  Cour fédérale

Date: 20220623

Docket: IMM-1818-21

Citation: 2022 FC 947

Ottawa, Ontario, June 23, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ABEL OLIFANT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a decision by the Refugee Protection Division ("RPD"), who concluded that the Applicant was neither a Convention refugee nor a person in need or protection. The RPD concluded that the Applicant had no credible basis for his claim.

II. Background

[2] The Applicant is a South African national who arrived in Canada via the United States on February 22, 2019. He claimed refugee protection in Canada based on a fear of persecution at the hands of the African National Congress ("ANC") due his political opinion and affiliation with the Democratic Alliance ("DA") and Afri-Forum. He claims to have been a member of the ANC, who quit and joined the DA in 2016, eventually becoming an activist and joining the Afri-Forum.

[3] The Applicant is self-employed and claims that six men belonging to the ANC attacked him on June 16, 2016 when closing his shop. He asserts that two of them were arrested the next day but released the following day. The Applicant has not seen his attackers since.

[4] In the meantime, the Applicant applied for a temporary residency visa ("TRV") to Canada on August 31, 2016, but was refused due to misrepresentation stemming from falsified documents.

[5] The Applicant states that he mobilized individuals for demonstrations against the South African President on March 21, 2017. As a result, he alleges that he began receiving threats, and that in May 2018 his shop began being attacked by members of the ANC and Black First Land First ("BLF"). He states that he received a tip-off on June 28, 2018 that his shop was going to be attacked and left for safety before his shop was attacked by ANC members on June 29, 2018. He then moved his family to another province, Limpopo.

[6] At this point, the Applicant got in touch with a friend in Vietnam, as well as an ex-girlfriend living in the United States. He successfully applied for a visitor's visa to both countries. The Applicant himself travelled to Limpopo to be with his family on August 20, 2018. He states that he lived there peacefully until word got out regarding his association with Afri-Forum, at which time harassment caused his family to relocate to Hermanus on October 27, 2018.

[7] Then, on November 20, 2018, he states that a few unruly ANC supporters came to his new home looking for him and mistreated his wife. In response, the Applicant took his family to live with one of his aunts, in Northern Cape Province.

[8] Finally, the Applicant travelled to the USA and began living with his ex-girlfriend in Indianapolis on January 16, 2019. He states that he was attacked by her because he did not leave his wife and child for her.

[9] At this point, the Applicant travelled to Canada on February 22, 2019 and sought protection.

[10] His claim was heard on November 3, 2020 after several COVID-19 pandemic related delays. The hearing was attended in-person by Minister's Counsel due to credibility issues, and the Applicant was self-represented.

[11] The RPD made numerous adverse credibility findings against the Applicant, and found that various documents submitted in support of his claim were fraudulent.

III. Issue

[12] The issue is whether the RPD made a reviewable error on any of the statutory grounds listed in s. 18.1(4) of the *Federal Courts Act,* RSC 1985, c F-7.

IV. Standard of Review

[13] The standard of review for procedural fairness is, essentially, correctness, though this is an imprecise way to phrase it. As Justice Little succinctly summarized in *Garcia Diaz v Canada (Citizenship and Immigration),* 2021 FC 321:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond… In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).

V. Analysis

[14] I am of the view that the Applicant's procedural fairness was breached, and will grant this Application. Even though the merits of the Applicant's refugee case are weak, procedural

fairness is a critical factor of our legal system, particularly in matters affecting important interests such as those at stake in the instant case.

[15] It is most certainly not the case that every matter involving a self-represented litigant before the RPD, nor every case involving a no credible basis finding, nor every case with late disclosure, nor every case where RPD proceedings become adversarial, will breach procedural fairness. Rather, in this unique case, one with unusual circumstances fraught with hazard, the concatenation of all of these factors leads to a breach of procedural fairness.

[16] The right to a fair hearing is fundamental. However, I must be careful to prevent it from serving as a shield for an Applicant who has chosen to represent themselves and regrets that choice in light of the outcome. Though it falls outside of the immigration context – and thus differs in the nature of the interests at stake – *Wagg v Canada,* 2003 FCA 303 at paragraph 25 is instructive, as Pelletier JA wrote:

> Litigants who choose to represent themselves must accept the consequences of their choice. Thus, while the court will take into account the lack of experience and training of the litigant, that litigant must also realize that, implicit in the decision to act as his or her own counsel is the willingness to accept the consequences that may flow from such lack of experience or training.

[17] The issue of self-represented litigants in immigration proceedings is the subject of a great deal of jurisprudence. It is clear that the Board is not to act as counsel for the self-represented individual (*Dhaliwal v Canada (Citizenship and Immigration),* 2011 FC 201 [*Dhaliwal*]), nor is it the obligation of the Board to tell the claimant that he may ask for an adjournment of the hearing and it is not the obligation of the Board to "teach" the Applicant the law on a particular

matter involving his or her claim. The Board is there to hear submissions, decide issues of law and then make a decision in a fair and just manner (*Nguyen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1001 at paras 17-18). Further, the RPD does not have a duty to provide an unrepresented litigant an opportunity to provide evidence inquired about during a hearing (*Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 25).

[18] It is also clear that claimants before a tribunal such as the RPD have a right to represent themselves and that "they can be in no better position because they did not have a lawyer" (*Jacobs v Canada (MCI)*, 2007 FC 646 at para 7). However, the RPD has a positive duty to ensure that the Applicant understands both the nature of the proceedings and the salient aspects of the hearing to be conducted. Tribunals most certainly have a positive duty to ensure that self-represented individuals – as they do all parties – receive a fair hearing (*Dhaliwal*).

[19] With that being said, I am of the view that the Applicant's procedural fairness – his right to a fair hearing – was breached in the specific circumstances of the instant case. Given the seriousness of all of the circumstances, taken together, it was unfair for the RPD to not take at least some positive steps to ensure he understood what it meant if his claim was found to have no credible basis. A careful reading of the transcript reveals that the Board did not take any positive measures to introduce the seriousness of what was to occur or explain the Minister's Counsel would question him. Though the Board did ask if he had any questions about the process and determinative issues, it is in my view still the case that this was insufficient to ensure, he understand the nature of the hearing and its salient aspects given he was an unsophisticated Applicant representing himself. Indeed, both the fact that Minister's Delegate was present and

would be participating in the manner they did (turning the matter into a far more adversarial one and rightly so on these facts), the no credible basis aspect and the implications thereof, are not things that the Applicant ought necessarily to have known. It would not take much for the RPD to ensure that he understood this – a simple check-in of "do you understand what these specific aspects of the hearing mean" or informing him of them at the outset of the hearing would suffice – but the failure to do so was, in my view, procedurally unfair.

[20] As noted, these are very unusual circumstances, and are not meant to be indicative that this will even be the case in other cases bearing similarity. A concurrence of many oddities created this.

[21] This is also not an indication of the merits of the Applicant's claim. Rather, in my view, the RPD viewed this matter as such a "slam dunk" that they failed in their diligence, and as such, did not afford someone they would be rejecting anyways a fair hearing.

[22] This is procedurally unfair, and as such, I will be granting this application.

JUDGMENT IN IMM-1818-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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