Federal Court  Cour fédérale

Date: 20230411

Docket: IMM-1915-22

Citation: 2023 FC 506

Ottawa, Ontario, April 11, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

CHUKWUDI KINGSLEY KALU

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 filed February 16, 2022, from a Notification of Ineligible Refugee Claim dated January 7, 2021, brought pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Briefly, the Applicant made a refugee claim to the Refugee Protection Division [RPD] upon entering Canada in June 2019. He was later charged with fraud in the United States which led the Immigration Division [ID] to investigate whether he was inadmissible on grounds of serious criminality under paragraph 36(1)(c) of IRPA. A report making such a finding was referred to the ID for determination on April 30, 2020. The RPD suspended its hearing processes awaiting determination by the ID.

[3] Shortly thereafter, a second report dated May 5, 2020, was made and referred to the ID to determine whether the Applicant was inadmissible on grounds of organized criminality pursuant to paragraph 37(1)(a) of IRPA. The ID convoked a hearing, and concluded the Applicant was inadmissible due to organized criminality under paragraph 37(1)(a) of IRPA. That decision was made December 18, 2020.

[4] The decision of the ID dated December 20, 2021, included on the reverse a notice that, in the Applicant's circumstances, he had "the right pursuant to section 72 of the IRPA to file and application for judicial review in the Federal Court under section 18.1 of the *Federal Courts Act*." The Applicant did not apply for judicial review in respect of December 20, 2020 conclusion of the ID.

[5] On January 7, 2021, the Canada Border Services Agency [CBSA] sent a Notification of Ineligible Refugee Claim to the Applicant and the RPD informing both that his refugee claim was ineligible pursuant to paragraphs 104(1)(b) and 101(1)(f) of IRPA.

[6] The Notification of Ineligible Refugee Claim terminated the RPD's processes.

[7] The Applicant seeks judicial review of the Notification of Ineligible Refugee Claim on his allegation he was denied his right to counsel during the ID's admissibility hearing.

[8] This Application will be dismissed because the jurisprudence establishes the issuance of a Notification of Ineligible Refugee Claim under subsection 104(1) IRPA is not a discretionary, but rather the statutory consequence of the ID's finding the Applicant was inadmissible for organized criminality pursuant to paragraph 37(1)(a) of IRPA.

II. Background

[9] The Applicant is a citizen of Nigeria. He entered Canada from the United States on June 8, 2019, at which point he made a claim for refugee protection. On September 18, 2019, an arrest warrant was issued for him and associates of his in the United States. He, along with seven co-conspirators, were charged with several offences related to schemes targeting widows on the internet in order to defraud them of a total of six million dollars. According to the FBI and US Postal Inspection Service investigation, the Applicant received and deposited $480,000 USD from victims and other unexplained cash orders into his bank account.

[10] The alleged accomplices and co-participants in the United States were arrested or are wanted on US fraud related warrants. The Applicant entered to Canada upon learning of the arrests of the American participants.

[11] In April 2020, a report under subsection 44(1) IRPA found him inadmissible to Canada for serious foreign criminality. Consequently, an arrest warrant as well as a referral for an admissibility hearing under subsection 44(2) IRPA were issued. In May 2020, another referral for an admissibility hearing was issued, this time pertaining to the Applicant's inadmissibility under the more serious provisions of paragraph 37(1)(a) IRPA concerning organized criminality.

[12] The Applicant was arrested and detained on August 18, 2020. On August 21, 2020, his refugee claim was suspended pending the outcome of the admissibility hearing pursuant to section 103 IRPA. On August 26, 2020, the Applicant retained counsel in relation to detention review. It is unclear whether this counsel continued assisting the Applicant during the admissibility hearing.

[13] The Applicant through a third party affidavit alleges he was incarcerated and that he was not granted the right to be represented by counsel during the admissibility hearing convoked by the ID to consider his alleged organized criminality.

[14] The Applicant filed no evidence of his own in this or any other respect.

[15] The Applicant was found to be inadmissible under paragraph 37(1)(a) IRPA and a removal order was made against him on December 18, 2020.

[16] It is common ground the Applicant did not challenge the ID's decision.

[17] On January 7, 2021, a CBSA Officer sent the Applicant a Notification of Ineligible Refugee Claim informing him that the RPD would not decide his refugee claim because he was ineligible pursuant to paragraphs 104(1)(b) and 101(1)(f) IRPA.

[18] The Applicant's counsel submitted an application for judicial review of the Notification of Ineligible Refugee Claim dated February 16, 2022 and filed March 1, 2022.

[19] The Applicant's counsel submitted a Rule 9 letter requiring a copy of the Notification of Ineligible Refugee Claim dated January 7, 2021. The subject Notification of Ineligible Refugee Claim and Certified Tribunal Record [CTR] were provided.

[20] Because there was no application for judicial review of the December 20, 2018 decision of the ID, the record in that regard is incomplete. For example there is no material in the record concerning the Report and Referral related to serious criminality under paragraph 36(1)(c), nor is there the CTR or any material concerning what or who was or was not before the ID at its hearing and or leading to its December 18, 2020 decision.

III. Decision under review

[21] On January 7, 2021, the Officer sent the Applicant a Notification of Ineligible Refugee Claim pursuant to 104(1) and 104(2) of IRPA. It informed the Applicant and RPD he was determined not eligible to have your claim determined by the RPD pursuant to paragraph "104(1)(b) for - pour 104(1)(f)" of IRPA, and it informed the RPD that it "shall, upon receipt of

this notice, terminate any pending proceedings respecting the claim, pursuant to paragraph 104(2)(a)" of IRPA.

[22] The Notification of Ineligible Refugee Claim recites:

> You are a foreign national who is inadmissible on grounds of organized criminality for being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern.

IV. Issues

[23] The issue is whether the Notification of Ineligible Refugee Claim should be set aside as unreasonable.

V. Standard of Review

[24] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting

> reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

VI. Analysis

[25] The Applicant submits that the Decision was unreasonable because he was not able to consult with counsel at the time of the admissibility hearing.

[26] I am not persuaded of this core assertion.

[27] The Court has repeatedly held that the right to counsel in immigration cases is not absolute, however a right to a fair hearing is: *Aiyathurai v Canada (Citizenship and Immigration)*, 2018 FC 1278 at para 9 [*Aiyathurai*]; *Gabor v Canada (Citizenship and Immigration)*, 2022 FC 150 at para 40; *Ait Elhocine v Canada (Citizenship and Immigration)*, 2020 FC 1068 at para 15 [*Ait Elhocine*]. As the Court explains in *Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423 [*Austria*] at para 6, an applicant must be able to meaningfully participate in their hearing in order for it to be fair. This may result in a right to counsel:

> [6] As it is clear from the decision, which provides that state-funded legal aid is only constitutionally mandated in some cases, the right to counsel is not absolute. In immigration matters specifically, this Court has repeatedly held that the right to counsel is not absolute: *Mervilus v Canada(Minister of Citizenship and Immigration)*, 2004 FC 1206, [2004] F.C.J. No. 1460 (F.C.)(QL) at paras. 17-25 where Justice Sean Harrington reviews the law regarding the right to counsel. What is absolute, however, is the right to a fair hearing. To ensure that a hearing proceeds fairly, the applicant must be able to "participate meaningfully": *Canada (Minister of Citizenship and Immigration) v. Fast (T.D.)*, 2001 FCT 1269, [2002] 3 F.C. 373 (F.C.) at paras. 46-47.

[28] The only evidence pertaining to his allegation he was not represented is an affidavit signed by Cynthia Eleanya, who may be the Applicant's common-law partner. In her affidavit, she alleges the Applicant did not have access to counsel and therefore was not granted a fair hearing. Despite this allegation, the Applicant through counsel has not challenged the ID's inadmissibility decision flowing from the admissibility hearing.

[29] I note the Applicant did not file an affidavit of his own, although that would of course have met the best evidence rule. No explanation is provided for this evidentiary deficiency.

[30] I also note several very material errors in the affidavit of Ms. Eleanya. For example she says the Applicant was granted asylum in Canada. That is not simply untrue. She deposes the CBSA held an inadmissibility hearing, but it was not the CBSA it was the ID. I am not satisfied she accurately described the events relied upon in this proceeding.

[31] More importantly, because neither the ID decision nor the ID's CTR is before the Court, it is not possible to establish what if anything took place before the ID, nor who appeared on behalf of the Applicant if anyone.

[32] The ability of an Applicant to meaningfully engage in the hearing is a core concern in an enquiry of an unfair hearing: *Badran v Canada (Citizenship and Immigration),* 2022 FC 1292 at para 56; *Li v Canada (Citizenship and Immigration),* 2015 FC 927 at para 38; *Aiyathurai* at para 12; *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 at paragraph 26.

[33] But and with respect there is no evidence the Applicant asked for counsel, nor is there any evidence the ID played any role in not allowing the Applicant to have counsel before it. The steps, or lack there of, an applicant takes to obtain legal representation may also be a determinative factor when assessing the fairness of a hearing – but we know nothing of them: *Larrab v Canada (Citizenship and Immigration)*, 2021 FC 135 at para 18; *Tandi v Canada (Citizenship and Immigration)*, 2021 FC 1413 at paras 18-19.

[34] Likewise, steps an applicant takes to postpone or adjourn a hearing to retain counsel are also important factors – but again we know nothing in this connection: *Kikewa v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 40 at para 35; *Ait Elhocine* at para 17; *Castillo Avalos v Canada (Citizenship and Immigration)*, 2020 FC 383 at para 46; *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 274 at para 38; *Austria* at para 8. There is no evidence of any such requests made by the Applicant. This lack of evidence renders it impossible to establish that the Applicant was denied a fair hearing.

[35] If I properly understand the Applicant's argument, the Officer's action respecting the Notification of Ineligible Refugee Claim is unreasonable because the Officer failed to consider the fact that the Applicant was not represented during the admissibility hearing.

[36] This leads to another fundamental, and fatal flaw in the Applicant's argument which is that the Officer's action is not a discretionary one. It was purely administrative in nature, and as such is not amenable to judicial review, as explained below.

[37] The Court first determined that a CBSA officer does not exercise any discretion under subsection 104(1) IRPA when issuing a Notification of Ineligible Refugee Claim in *Tjiueza v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1247 [*Tjiueza*]. There Justice de Montigny (as he then was) arrived at the same conclusion as reached in in *Haqi v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1246 [*Haqi FC*] by Justice MacTavish (as she then was), which was upheld by the Federal Court of Appeal in *Haqi v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 256 [*Haqi FCA*].

[38] Most recently, Justice Roy applied these cases in *Ali v Canada (Citizenship and Immigration)*, 2018 FC 1187 [*Ali*].

[39] The scheme of IRPA is such that the Notification of Ineligible Refugee Claim is not discretionary. Once a proceeding before the RPD is suspended under paragraph 103(1)(a) IRPA because the ID is determining whether an applicant is inadmissible on the grounds of, amongst others, organized criminality, the ID must necessarily inform the RPD of its determination. Otherwise, the applicant's refugee claim would remain suspended indefinitely. It is only natural that once the reason for the suspension is resolved, that information must be communicated to the RPD so it may proceed or not accordingly.

[40] As Justice Roy explains in *Ali* at paragraph 111:

> [111] The scheme of the Act appears to be rather straight forward. The proceedings before the RPD in respect of a claim for refugee protection are suspended "on notice by an officer that (a) the matter has been referred to the Immigration Division to determine whether the claimant is inadmissible on grounds of security …" (para 103(1)(a) of the IRPA). It appears to be normal that there be another notice that the claim for refugee protection has become ineligible once the ID has made its **determination that the person seeking refugee status is inadmissible (para** 101(1)(f)). Pursuant to s. 42.1, the security matter (s. 34) may not constitute inadmissibility if Ministerial relief is granted. But, for the time being, the applicant is inadmissible. The law so operates.
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> [Emphasis added]

[41] The English version of subsection 104(1) uses the word "may", which may imply discretion. Although, as the House of Lords ruled in *Julius v Lord Bishop of Oxford*, [1880] 5 App Cas 214, the use of the word "may" is not determinative and the entire context of the

provision must be taken into account: in many circumstances, the word “may” may mean “shall” in the obligatory sense.

[42] In my view, the scheme of IRPA described above implies the CBSA officer “shall” issue a Notification of Ineligible Refugee Claim. This interpretation is also consistent with the French text, which uses the present tense indicating that the issuance a Notification of Ineligible Refugee Claim is an obligation imposed on CBSA officers. As Justice Roy ruled in *Ali* at paragraph 117:

> Nevertheless, not only is this Court not declining to follow the precedents in *Haqi* and *Tjiueza*, but the Court endorses fully the reasoning in the two cases. I wish to add, as did Mactavish J. in her final observations, that the use of the word “may” in the English version of s. 104 does not find its equivalent in the French version of the section. As the *Interpretation Act* (R.S.C., 1985, c. I-21) states at the French version of section 11, the use of the present tense (“indicatif présent”) expresses an imperative (“une obligation”). That corresponds to the language used in the French version of s. 104 of the *IRPA*, which is consistent with the scheme of the Act that calls for notices to the RPD for suspending its proceedings or for lifting the suspension. Merely relying on the word “may” will fall short. Instead, the construction of the scheme as performed in the two cases leads to only one conclusion.

[43] The Applicant has not provided any reason why the Court should depart from what I consider settled jurisprudence, nor has he tried to differentiate his case from *Haqi FCA*, which binds this Court. Thus, once the ID found the Applicant inadmissible on the grounds of organized criminality, the Officer was required by law to issue the Notification of Ineligible Refugee Claim.

[44] As the Federal Court of Appeal noted in *Haqi FCA* at paragraph 5, “[the] fact that it is a human actor, the officer, who takes notice of facts and communicates the legal consequence

imposed by the *Act* to the affected party and to the Refugee Protection Division does not make that person a decision-maker with discretion."

[45] In my opinion, the non-discretionary nature of the Notification of Ineligible Refugee Claim is dispositive of the application.

[46] This application is also an impermissible collateral attack on the ID's findings, in respect of which no justification is offered, which is a further reason why this application will be dismissed.

[47] In addition to the foregoing, the Respondent submitted because there is no possible *lis* between the parties, this application is moot under the *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 two-step mootness test. The Court respectfully declines to consider this additional submission.

VII. Conclusion

[48] Given the above, this application will be dismissed.

VIII. Certified Question

[49] Neither party proposed a question of general importance for certification, and none arises.

JUDGMENT in IMM-1915-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is not order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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