Federal Court  Cour fédérale

Date: 20231205

Docket: IMM-12518-22

Citation: 2023 FC 1638

Toronto, Ontario, December 5, 2023

PRESENT: Madam Justice Go

BETWEEN:

Abdullah Al POROSH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated November 18, 2022 [Decision], confirming the decision of the Refugee Protection Division [RPD] of January 15, 2021, and found the Applicant, Abdullah Al Porosh, is neither a Convention refugee nor a person in need of protection.

[2] The Applicant, a citizen of Bangladesh, alleges his life is in danger because of a land dispute between his family and the Gazi family, who is part of Bangladesh's ruling party. The Applicant alleges that his family inherited land from his grandfather, and the Gazi family forcefully took over the Applicant's inherited land in January 2009. One of the Applicant's two uncles filed an unsuccessful lawsuit in March 2009. A second lawsuit was launched in February 2018, after which the Gazi brothers threatened the Applicant's life, as he is the eldest son.

[3] The Applicant alleges that the ongoing dispute led one of his uncles to die from a heart attack. The Applicant's family reported the death to the police on January 28, 2019. On January 31, 2019, the police attended to the Applicant's home in search of him. The Applicant alleges his father learned from a lawyer that the Applicant was wanted for arrest under the Special Powers Act [SPA], and that he would not be released on bail. The Applicant fled to Canada on September 7, 2019 and made a refugee claim shortly thereafter.

[4] The Decision rested on a negative credibility finding. The RAD determined, among other things, that the arrest warrant the Applicant submitted into evidence was fraudulent.

[5] The Applicant seeks judicial review of the Decision. I grant the application as I find there was a breach of procedural fairness.

II. Issues and Standard of Review

[6] The Applicant raises the following issues:

a. The RAD breached the duty of procedural fairness by comparing the Applicant's warrant to an English translation of a sample arrest warrant, which was not available to the Applicant. The RAD also raised new credibility concerns regarding the arrest warrant without providing the Applicant an opportunity to respond.

b. The RAD misstated and ignored the evidence about obtaining the arrest warrant and its remaining credibility findings were unreasonable in light of the Applicant's explanation and psychological evidence.

[7] The parties agree that the presumptive standard of review for the Decision is a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[8] The Respondent further submits, and I agree, that for procedural fairness issues, the standard of review is akin to correctness, whereby the Court "is required to ask whether the procedure was fair having regard to all the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific Railway Company*] at 54 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[9] When a procedural fairness issue is raised, the Court should ask whether, taking into account the particular context and circumstances at issue, the process was fair and offered the applicant the right to be heard and a full, fair opportunity to know and respond to the case before them. No deference is owed to the decision-maker on issues of procedural fairness: *Canadian Pacific Railway Company* at para 56.

III. Analysis

[10] I will focus my analysis on the issue of procedural fairness as it is determinative of the application. My silence on the other issues raised by the Applicant should not be deemed as an endorsement of those findings.

[11] The RPD rejected the Applicant's claim primarily because of its determination that the arrest warrant submitted by the Applicant does not conform with the objective documentation in the National Documentation Package [NDP]. The RPD noted specifically that the words "High Court Criminal Process Form No. 12" should be written on the first page, whereas the Applicant's arrest warrant does not specify the form number, only stating "High Court Criminal Process No-." Second, the RPD noted that the NDP indicates that arrest warrants include a section pertaining to bail, but there is no such information in the Applicant's document.

[12] Before the RAD, the Applicant disputed the RPD's finding on the missing number "12." The Applicant argued that nowhere in the NDP is there a suggestion that the exact words "High Court Criminal Process Form No. 12" should appear on the arrest warrant's first page.

[13] The RAD disagreed and observed the arrest warrant the Applicant provided did not look like the sample arrest warrant, which the RAD found in Item 9.4 of the NDP from April 29, 2022. Item 9.4 is a Response to Information Request [RIR], dated November 18, 2016. Specifically, the RAD relied on an English translation of the sample arrest warrant in Item 9.4 to support its negative credibility finding.

[14] The RAD additionally found the arrest warrant did not include an authorizing signature from a judge and that it was not typical for arrest warrants to be issued under the SPA.

[15] Before this Court, the Applicant submits the RAD used the English translation to reject his claim and that this was a breach of procedural fairness because the English translation was not made available to the Applicant.

[16] The Applicant further submits jurisprudence holds that the duty of procedural fairness in refugee determinations must include the right to know the case and the opportunity to respond, especially where the decision-maker's concerns form a large part of the reasons for refusal. The Applicant cites *Chen v Canada (Minister of Citizenship and Immigration)* (TD), 2002 FCT 266 [*Chen*] and *Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342.

[17] The Applicant points out that while the RIR states that the sample arrest warrant's English translation is attached to it, only the non-English version of the sample arrest warrant is found. Therefore, the Applicant argues, it was not possible to know of the information the RAD relied on, rendering him unable to address the RAD's credibility concerns. The Applicant argues this breach was not saved by the RAD's other findings about the arrest warrant, which are contradicted by the evidence in the record. The English translation of Item 9.4 was included in the Certified Tribunal Record provided by the Tribunal as per the Court's production order.

[18] I have reviewed Item 9.4. As it now stands, the link to the attachment found in the online version of Item 9.4 does not contain an English translation of the sample warrant.

[19] The Respondent argues that whether the English translation was available is not a serious issue because while the English translation is not presently included in the NDP, there is no evidence that the English translation was also unavailable earlier. At the hearing, the Respondent asserted that "we know for sure" the English translation of the document was available at one point.

[20] I reject the Respondent's submissions, even though I agree with the Respondent that the evidence on this issue is somewhat unclear. The Applicant did not provide any affidavit, from himself, or from his former counsel who represented him at his RPD hearing and RAD appeal, whether or not they were able to access the English translation at the time.

[21] However, as noted above, Item 9.4 is a RIR dated November 18, 2016. The same RIR appears in subsequent versions of the NDP since the RPD hearing and RAD appeal. The reference to the English translation is found under the heading "Attachment" at the end of the document which states:

> Bangladesh. N.d. Law and Justice Division. Bangladesh Form No. 3905, High Court Criminal Process Form No.12: Arrest Warrant, Section of Criminal Proceedings. Translated by the Translation Bureau, Public Works and Government Services Canada. [Accessed 19 Sept. 2016]

[22] The hyperlink for the attachment is imbedded in the underlined portion of the above quoted statement and is linked only to a non-English language document. It is worth noting that while the second sentence of the statement suggests the document has been translated, there is no hyperlink imbedded in that sentence. The mere indication that the document has been translated into English, in my view, does not support the Respondent's bold assertion that the English

document must have been attached at one point to the NDP, especially in light of the absence of a hyperlink imbedded with that statement.

[23] Thus, contrary to what the Respondent asserted at the hearing, we do not know for sure if the English translation was ever available.

[24] I further agree with the Applicant that even if the translation was previously available, the fact it is currently unavailable renders the record incomplete: *Rezmuves v Canada (Citizenship and Immigration)*, 2015 FC 488 at paras 34-35, which supports the granting of judicial review. This is particularly so in this case as the RAD's determination that the arrest warrant was fraudulent was central to its finding of credibility.

[25] The Respondent also submits that given the RPD has already addressed this finding before, and the Applicant had the benefit of the RPD's reasons, the Applicant must have been aware of the sample the RAD relied on. Therefore, the Respondent submits the Applicant should be stopped from raising a procedural fairness argument. The Respondent cites *Tsigehana v Canada (Citizenship and Immigration)*, 2020 FC 426, at para 21.

[26] I am not persuaded. The RPD decision made no mention of any sample arrest warrant, but only pointed to the NDP as the source of the objective documentation it relied on. My review of the Applicant's submissions to the RAD from the RPD decision also show no indication that they were aware of the existence of an English version of a sample arrest warrant.

[27] As confirmed by this Court in *Chen*, at para 34: “Fairness requires that documents, reports, or opinions of which the applicant is not aware, nor deemed to be aware, must be disclosed.”

[28] In this case, I find that the Applicant cannot be deemed to be aware of the existence of the English translation of the sample arrest warrant, given it is not attached to Item 9.4, as it now stands, as well as the lack of an imbedded hyperlink to the sentence noting the English translation, and that the RPD did not refer to the sample arrest warrant in its decision.

[29] The RAD’s comparison of the English translation of the sample arrest warrant and that provided by the Applicant played a key role in the RAD’s negative credibility findings. As the English translation of the sample arrest warrant may not have been available to the Applicant at the time of his appeal to the RAD, I find the RAD’s reliance on this document without giving the Applicant an opportunity to respond constitutes a breach of procedural fairness.

[30] I also find the RAD breached procedural fairness by raising new concerns about the arrest warrant without providing the Applicant an opportunity to respond.

[31] Specifically, the RAD found the arrest warrant to be fraudulent in part because it did not include an authorizing signature from a judge. This finding was based on a footnote link in NDP Item 1.5 titled “EASO Country of Origin Information Report. Bangladesh: Country Overview.” The footnote in question is Bangladesh’s Code of Criminal Procedure, 1898 (Act No V of 1898) [Bangladesh Criminal Code], section 75, which reads:

> **Form of warrant of arrest**
>
> **75(1)** Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench, and shall bear the seal of the Court.
>
> **Continuance of warrant of arrest**
>
> **(2)** Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

[32] The Applicant notes that the RPD never raised concerns over the signature and that he was not notified of this new issue nor provided with an opportunity to respond. The Applicant further disputes the RAD's conclusion on the aforementioned provision. The Applicant argues that the Bangladesh Criminal Code does not suggest that there needs to be a signature from the "judge authorizing the warrant" and that the term "magistrate" – as it is written in the provision – does not mean judge, rather it means "an administrative official performing judicial functions."

[33] The Respondent takes issue with the Applicant's definition of "magistrate" and argues that the Applicant's suggestion for an alternative explanation does not render the Decision unreasonable.

[34] The Respondent also submits that the RAD need not give notice of new findings where they relate to previously raised issues, as the RPD had already raised concerns regarding the warrant's authenticity, the Applicant thus knew the case he had to meet, citing *Bebri v Canada (Citizenship and Immigration),* 2018 FC 726 [*Bebri*], at paras 16-18.

[35] I find *Bebri* distinguishable. Unlike *Bebri*, the issue with respect to the signature was never addressed by the RPD, nor was it raised by the Applicant in his own submission to the RAD: *Bebri* at para 16.

[36] As noted by this Court in *He v Canada (Citizenship and Immigration)*, 2019 FC 1316 at para 79, citing Justice Gascon in *Kwakwa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 600:

- the RAD cannot give further reasons based on its own review of the record, if the refugee claimant has not had the chance to address them: para 22;
- credibility conclusions not raised by the applicant on appeal of the RPD decision amounted to a "new question" on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions: para 25;
- when additional comments regarding the documents submitted by an applicant in support of [a critical element of their claim], were not raised or addressed specifically by the RPD, the applicant should at least have been given an opportunity to respond to those arguments and statements made by the RAD before the decision was issued: para 26.

[37] In this case, the RAD made additional comments on an issue regarding the arrest warrant which was a critical element to his claim and was not included in the Applicant's submission. The Applicant should have at least been given the opportunity to respond to these comments before the decision was issued. The RAD's failure to do so amounted to a breach of procedural fairness.

IV. Conclusion

[38] The application for judicial review is allowed.

[39] There is no question to certify.

JUDGMENT in IMM-12518-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12518-22
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