

Federal Court



Cour fédérale

**Date: 20190124**

**Docket: IMM-719-18**

**Citation: 2019 FC 97**

**Ottawa, Ontario, January 24, 2019**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**SHAMSAN MOFREH, REEM AL-SOUFI,  
LAYAN MOFREH, AND LEEN MOFREH**

**Applicants**

**and**

**MINISTER OF IMMIGRATION, REFUGEES  
AND CITIZENSHIP**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of the decision by a Member of the Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated January 10, 2018, which dismissed the Applicants' appeal of the decision of the Refugee Protection Division [the RPD], dated March 20, 2017, finding that the Applicants were neither Convention refugees nor

persons in need of protection within the meaning of sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicants, Shamsan Mofreh [the Male Applicant], his wife Reem Al-Soufi [the Female Applicant], and their children Layan Mofreh and Leen Mofreh, are citizens of Yemen.

[3] Until 2016, the Applicants resided in Saudi Arabia, where the Male Applicant was employed at a trading company.

[4] The Applicants left Saudi Arabia after the Male Applicant received a termination notice from his former employer. The Applicants claim that they fear returning to Yemen due to the Male Applicant's political activities.

[5] The Applicants flew from Saudi Arabia to the United States, and subsequently travelled to Canada. They claimed Canada's protection on or about September 6, 2016. The Applicants' Basis of Claim Form [the BOC Form] was received by the Immigration and Refugee Board on September 29, 2016.

[6] The Applicants appeared at a hearing before the RPD on November 10 and December 6, 2016, where both the Male Applicant and the Female Applicant were questioned.

[7] In a decision dated March 27, 2017, the RPD determined that the Applicants had not shown that they were Convention refugees or persons in need of protection within the meaning of sections 96 and 97(1) of the IRPA [the RPD Decision].

[8] One of the central components to the RPD Decision was a number of adverse credibility findings made against the Applicants on the basis of material omissions from their BOC Form.

I. Decision Under Review

[9] The Applicants appealed the RPD Decision to the RAD, alleging, among other things, that the RPD erred in making adverse credibility findings based on alleged omissions from their BOC Form. The Applicants intended to allege that the omissions occurred due to advice they received from their counsel before the RPD [RPD Counsel].

[10] The Applicants' counsel before the RAD [RAD Counsel] wrote to RPD Counsel in a letter dated May 12, 2017, to give RPD Counsel an opportunity to respond to these allegations. Attached to this letter was a notice signed by both the Male Applicant and the Female Applicant, dated May 1, 2017, authorizing RPD Counsel to release any information concerning their file to RAD Counsel.

[11] The Applicants received no response from RPD Counsel by the response date specified in their letter, so they included these allegations and the Declaration in their appeal record.

[12] The Applicants' primary argument before the RAD was that the RPD had erred because the omitted facts were mere elaborative details and not material omissions. The Applicants' alternative argument was that the omissions were not sufficient to ground a negative credibility finding because the Male Applicant had been advised by RPD Counsel not to include the level of detail that the RPD demanded. The Male Applicant swore a statutory declaration to this effect [the Declaration].

[13] The Applicants submitted two documents as new evidence before the RAD:

- A. The Declaration; and
- B. A re-translated version of a letter that was before the RPD, on the basis that the previous translation contained significant errors.

[14] The Applicants asked that an oral hearing be held on the basis of this new evidence.

[15] RPD Counsel subsequently retained his own counsel, who wrote a letter to the RAD, dated June 9, 2017, indicating that RPD Counsel intended to respond to the allegations and asking that the RAD hold the Applicants' appeal in abeyance until RPD Counsel could file and serve his application record. The RAD granted this request.

[16] RPD Counsel then filed an application for procedural relief, containing:

- A. A letter dated June 23, 2017, stating that neither RPD Counsel nor any staff from RPD Counsel's office had advised the Male Applicant to provide less detail, and that the omitted details were not known by anyone at RPD Counsel's office; and

- B. A supporting affidavit sworn by a staff member from RPD Counsel's office, and supporting documents.

[17] RAD Counsel wrote to the RAD in a letter dated July 4, 2017, advising that the Applicants withdrew their allegations against RPD Counsel.

[18] The RAD dismissed the appeal, and confirmed the RPD Decision, in a decision dated January 17, 2018 [the RAD Decision].

[19] The RAD allowed the new evidence to be admitted, but held that an oral hearing was not required.

[20] The RAD addressed the Applicants' primary argument regarding the omissions, and generally upheld the RPD's determination that the Applicants had made material omissions which warranted negative credibility findings. On two occasions, the RAD agreed with the Applicants that the omissions were mere elaborative details which did not warrant negative credibility findings.

[21] The RAD then addressed the Declaration, RPD Counsel's application, and the Applicants' withdrawal of their allegations against RPD Counsel. The RAD made a negative credibility finding on the basis that the Male Applicant had made false statements in the Declaration.

[22] The RAD moved on to consider other issues, before concluding that while they disagreed with two of the RPD's credibility findings relating to the omissions, they agreed that the Male Applicant was generally not a credible witness. As a result, the RAD upheld the RPD Decision.

## II. Issues

[23] The issues are:

- A. Did the RAD err by denying the Applicants an oral hearing?
- B. Did the Applicants waive solicitor-client privilege?
- C. Did the RAD err by making a negative credibility finding against the Applicants on the basis of the application by RPD Counsel?

## III. Standard of Review

[24] The reasonableness standard applies for issues of substantive review. The correctness standard applies to issues of procedural fairness (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93).

## IV. Analysis

- A. *Did the RAD err by denying the Applicants an oral hearing?*

[25] The Applicants argue that the RAD erred by denying their right to an oral hearing. They submit that once the RAD admitted the Declaration, an oral hearing was required to allow the

Applicants to explain issues related to the RPD's adverse credibility findings. Denial of an oral hearing rendered them unable to testify to the context of the completion of their BOC Form.

[26] A hearing is not granted simply because new evidence is admitted before the RAD (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 71). Rather, the new evidence must satisfy the three criteria set out in subsection 110(6) of the IRPA before a hearing may be held:

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

[27] The RAD explicitly considered these criteria at paragraphs 18-19 of the RAD Decision, and determined that an oral hearing was not required. The RAD noted that the Declaration related to an alternative argument that was subsequently withdrawn, and the re-translated letter related to issues that were not determinative of the appeal.

[28] Whether the Applicants are alleging a procedural fairness violation, reviewable on the correctness standard, or an issue of the RAD interpreting a provision of its home statute, reviewable on the reasonableness standard, I find that there is no reviewable error here - the RAD's analysis was both reasonable and correct.

[29] The RAD Decision is primarily based on the omissions from the BOC Form, the Male Applicant's "evolving, evasive and inconsistent testimony about key events", and the resulting adverse credibility findings. The RAD was correct in declining to conduct an oral hearing on the ground that the new evidence would not be determinative of the appeal.

B. *Did the Applicants waive solicitor-client privilege?*

[30] The Applicants allege that, while RAD Counsel requested that RPD Counsel comment on the Applicants' allegations, the Applicants never expressly waived solicitor-client privilege to allow RPD Counsel to comment before the RAD. The Applicants argue that, in the absence of an express waiver from each and every applicant, it was a violation of solicitor-client privilege for RPD Counsel to bring an application before the RAD.

[31] This argument fails for three reasons:

- i. As outlined by Justice Blanchard in *Canada (Citizenship and Immigration) v Mahjoub*, 2011 FC 887 at paragraph 10, where a litigant relies on legal advice as an element of his or her claim or defence, the privilege which would otherwise attach to that advice is lost. I find that by raising the conduct of their former counsel before the RAD, the Applicants impliedly waived any right to solicitor-client privilege;
- ii. The Applicants were copied on RPD Counsel's June 9, 2017 letter to the RAD, and were therefore fully aware of RPD Counsel's intention to respond to the Applicants' allegations. The Applicants made no objection at that point in time, and are precluded from doing so *de novo* before this Court;



iii. Before a party may plead incompetence, negligence or other conduct by their former legal counsel as a grounds for relief in an application for leave and for judicial review under the IRPA, current counsel must notify former counsel in writing and offer former counsel the opportunity to respond (*Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 at paras 17-18). No such notice was given in relation to this application.

C. *Did the RAD err by making a negative credibility finding against the Applicants on the basis of the application by RPD Counsel?*

[32] The Applicants argue that once the allegations against RPD Counsel were withdrawn, the RAD should have given little or no weight to the evidence associated with those allegations.

[33] I disagree. The RAD had before it a sworn declaration by the Applicants alleging misconduct of RPD Counsel, and an application by RPD Counsel containing, among other things, a sworn affidavit to the contrary. While the Applicants may have withdrawn their allegations, the evidence pertaining to the allegations remained before the RAD. The RAD was reasonable to consider the conflicting evidence, prefer the evidence of RPD Counsel, and make an adverse inference with respect to the Applicants' overall credibility.

[34] Moreover, a review of the RAD Decision reveals that the primary bases upon which the RAD concluded that the Male Applicant was not a credible witness were the omissions from the BOC Form and the Male Applicant's "evolving, evasive and inconsistent testimony about key events". The adverse credibility inference drawn on the basis of the conflicting sworn statements

was simply one additional factor that supported the RAD's conclusion that the Male Applicant was not a credible witness.

V. Conclusion

[35] The application is dismissed.

**JUDGMENT in IMM-719-18**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-719-18

**STYLE OF CAUSE:** SHAMSAN MOFREH ET AL v MINISTER OF  
IMMIGRATION, REFUGEE AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 22, 2019

**JUDGMENT AND REASONS:** MANSON J.

**DATED:** JANUARY 24, 2019

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