

Federal Court



Cour fédérale

**Date: 20190806**

**Docket: IMM-6417-18**

**Citation: 2019 FC 1038**

**Ottawa, Ontario, August 6, 2019**

**PRESENT: Mr. Justice Annis**

**BETWEEN:**

**OSMAN MOHAMMED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This application for judicial review, filed pursuant to section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 [the Act], seeks to set aside a decision dated October 29, 2018 [the Decision] of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board from an earlier Refugee Protection Division [RPD] decision denying the Applicant's claim for refugee protection.

[2] The Applicant, a citizen of Ghana, represented himself before the RPD because his lawyer allegedly failed to appear. The Applicant sought an adjournment, but this was rejected based on his answers to the RPD's questions, and his refugee claim refused on the grounds of credibility and state protection. He appealed to the RAD on the grounds of breach of his right to counsel and of a fair hearing, and attempted to adduce a personal affidavit and letter from Legal Aid.

[3] In upholding the RPD's decision, the RAD rejected the Applicant's argument of a breach of his right to counsel, and further upheld the numerous credibility findings made against him, as well as the finding that he failed to rebut the presumption of state protection. Furthermore, the new evidence was rejected because it either did not conform to section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, or the *Raza* factors. The new evidence was either answers which should have been given to the RPD during or after his hearing, or was inconsistent with the answers he gave to the RPD.

[4] The Applicant submitted that he had been denied a fair hearing because his counsel did not show up at the refugee hearing and his adjournment request was denied by the RPD. This argument, however, was abandoned at the hearing with the acknowledgment that no responsibility could be attributed to the lawyer for his absence. Accordingly, the remainder of the issues were subject to review on a reasonableness standard whereby the Court may only intervene if the Decision falls outside the "range of possible acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2000 SCC 9 at para 47).

[5] The Applicant further submitted that his adjournment request was unreasonably denied by the RPD without consideration of the factors described in the Federal Court of Appeal decision *Siloch v Canada (Minister of Employment and Immigration)* (1993), 10 Admin. LR (2d) 285, 151 NR 76 [*Siloch*]. On the subject, it stated as follows (no available pagination), with my emphasis:

It is well settled that in the absence of specific rules laid down by statute or regulation, administrative tribunals control their own proceedings and that adjournment of their proceedings is very much in their discretion, subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. (*Prasad v. Canada (M.E.I.)*, [1989] 1 S.C.R. 560 at 569, Sopinka J.)

In immigration matters, there is a specific rule laid down by the Immigration Regulations, which reads as follows:

35(1) The adjudicator presiding at an inquiry may adjourn the inquiry at any time if the adjournment will not impede or unreasonably delay the proceedings.

It is also well settled that in exercising his discretion to grant an adjournment under subsection 35(1) of the Regulations the Adjudicator must direct his attention to factors such as:

- a) whether the applicant has done everything in her power to be represented by counsel;
- b) the number of previous adjournments granted;
- c) the length of time for which the adjournment is being sought;
- d) the effect on the immigration system;
- e) would the adjournment needlessly delay, impede or paralyse the conduct of the inquiry;
- f) the fault or blame to be placed on the applicant for not being ready;
- g) were any previous adjournments granted on a peremptory basis;

h) any other relevant factors.

[6] It is to be noted that recently the Federal Court of Appeal in *Montana v Canada (National Revenue)*, 2017 FCA 194 at paragraph 8 rejected an argument that the factors in *Siloch* must be considered whenever a party requests an adjournment, it being a non-exhaustive list of the sorts of factors a judge deciding the case may find useful on the facts of the case.

[7] More significantly, however, the rules for Changing the Date of the Time of Proceeding have been radically revised since the decision in *Siloch* was rendered. The exercise of discretion has been severely limited, with strict timelines in place required to obtain an order changing the date or time of proceeding, as described at Rule 54 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules] as follows:

**Changing the Date or Time of a Proceeding**

**Application in writing**

54 (1) Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

**Time limit and content of application**

- (2) The application must
- (a) be made without delay;
  - (b) be received by the Division no later than three

**Changement de date ou d'heure d'une procédure**

**Demande par écrit**

54 (1) Sous réserve du paragraphe (5), la demande de changer la date ou l'heure d'une procédure est faite conformément à la règle 50, mais la partie n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.

**Délai et contenu de la demande**

- (2) La demande :
- a) est faite sans délai;
  - b) est reçue par la Section au plus tard trois jours ouvrables

working days before the date fixed for the proceeding, unless the application is made for medical reasons or other emergencies; and

(c) include at least three dates and times, which are no later than 10 working days after the date originally fixed for the proceeding, on which the party is available to start or continue the proceeding.

### **Oral application**

(3) If it is not possible for the party to make the application in accordance with paragraph (2)(b), the party must appear on the date fixed for the proceeding and make the application orally before the time fixed for the proceeding.

### **Factors**

(4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as

(a) the change is required to accommodate a vulnerable person; or

(b) an emergency or other development outside the party's control and the party has acted diligently.

avant la date fixée pour la procédure, à moins que la demande soit faite pour des raisons médicales ou d'autres urgences;

c) inclut au moins trois dates et heures, qui sont au plus tard dix jours ouvrables après la date initialement fixée pour la procédure, auxquelles la partie est disponible pour commencer ou poursuivre la procédure.

### **Demande faite oralement**

(3) S'il ne lui est pas possible de faire la demande conformément à l'alinéa (2)b), la partie se présente à la date fixée pour la procédure et fait sa demande oralement avant l'heure fixée pour la procédure.

### **Éléments à considérer**

(4) Sous réserve du paragraphe (5), la Section ne peut accueillir la demande, sauf en cas des circonstances exceptionnelles, notamment :

a) le changement est nécessaire pour accommoder une personne vulnérable;

b) dans le cas d'une urgence ou d'un autre développement hors du contrôle de la partie, lorsque celle-ci s'est conduite avec diligence.

[8] In his oral decision at the hearing, the RPD member indicated that the Applicant's explanations for the failure of his lawyer to appear were inconsistent, i.e.: "Your story keeps on changing and so I do not believe what you are saying about your efforts to retain a lawyer for today." In addition, the RPD member indicated that the Applicant had not followed the Rules for changing the date as described above in any respect, and that he had not been diligent in pursuing his claim by obtaining a lawyer from the first date until the date of the hearing. Finally, the RPD member pointed out the large number of refugee hearings that the Board was mandated to hear, in circumstances where the Applicant had not provided any good reason to cancel the hearing. In light of the foregoing findings, deference owed to the RPD member does not permit the Court to intervene in regard to the member's exercise of discretion in applying the Rules in refusing the adjournment.

[9] There were no other issues raised by the Applicant that bear on the outcome in light of abandoning the procedural fairness issue. Accordingly, the application is dismissed with no questions certified for appeal.

**JUDGMENT in IMM-6417-18**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No questions are certified for appeal.

“Peter Annis”

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Judge

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

**DOCKET:** IMM-6417-18

**STYLE OF CAUSE:** OSMAN MOHAMMED v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 8, 2019

**JUDGMENT AND REASONS:** ANNIS J.

**DATED:** AUGUST 6, 2019

**APPEARANCES:**

Xian Chen An FOR THE APPLICANT

Nicholas Dodokin FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Dov Maierovitz FOR THE APPLICANT  
Barrister & Solicitor  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario