

Federal Court



Cour fédérale

Date: 20201211

Docket: IMM-5304-19

Citation: 2020 FC 1148

Ottawa, Ontario, December 11, 2020

PRESENT: Madam Justice Pallotta

BETWEEN:

AHMED ABDALMOTLIB ABDALHAFIZ IBRAHIM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ahmed Abdalmotlib Abdalhafiz Ibrahim, seeks to set aside a decision of the Refugee Appeal Division (RAD), affirming the Refugee Protection Division's (RPD) determination that he is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Ibrahim is a Sudanese citizen and a member of one of the largest Nubian tribes in Northern Sudan—the Mahas. He fears persecution due to his ethnicity and his political activism and protests against the Sudanese government's mistreatment of Nubians.

[3] Mr. Ibrahim alleges that he left Sudan in March 2012 to work in Saudi Arabia as a servant for a Saudi Prince. In 2015, Mr. Ibrahim left Saudi Arabia to work for a Saudi Prince in the United States (U.S.), and alleges that he was abused and mistreated by his employer. Since he could not return to Saudi Arabia and feared being removed to Sudan, Mr. Ibrahim applied for asylum in the U.S. in May 2016. However, due to the fear of U.S. policies on immigrants and refugee claimants, Mr. Ibrahim did not wait for the outcome of his U.S. asylum claim; instead, he travelled to Canada in May 2017 and claimed refugee protection.

[4] The RPD rejected Mr. Ibrahim's refugee protection claim. Credibility was the determinative issue. The RPD found that Mr. Ibrahim was unable to justify a number of serious omissions and contradictions in his story, and concluded that Mr. Ibrahim failed to establish he was targeted by Sudanese authorities for political activism.

[5] On appeal to the RAD, Mr. Ibrahim sought to introduce new evidence and requested an oral hearing. The RAD admitted some of the evidence: a complaint to the Barreau du Québec (Barreau) against his former counsel, a June 12, 2018 affidavit explaining the inconsistencies in his documents and testimony, and a psychotherapist's report. However, the RAD refused to hold an oral hearing.

[6] On this application for judicial review, Mr. Ibrahim submits that the new evidence admitted on appeal established that his former counsel's incompetence, interpretation errors at the RPD hearing, and his vulnerabilities due to mental illness caused the RPD to wrongly doubt his credibility. He submits that the RAD's refusal to hold an oral hearing was unreasonable and that the RAD's decision should be set aside as a result. Also, Mr. Ibrahim argues that the new evidence demonstrated he should have been afforded procedural accommodations at the RPD hearing. By failing to assign appropriate weight to the newly admitted evidence, and by failing to properly assess how that evidence affected the RPD's adverse credibility findings, Mr. Ibrahim submits the RAD erred in concluding he was afforded procedural fairness and natural justice. Finally, Mr. Ibrahim also submits that, in view of the new evidence, the RAD's decision confirming the RPD's determination that he is not a Convention refugee or a person in need of protection was unreasonable.

[7] As Mr. Ibrahim has not established any reviewable error by the RAD, this application for judicial review is dismissed.

II. Issues and Standard of Review

[8] The issues on this application for judicial review are as follows:

1. Did the RAD err in refusing to hold an oral hearing?
2. Did the RAD err in finding that Mr. Ibrahim was not denied procedural fairness or natural justice before the RPD?
3. Did the RAD err by confirming the RPD's determination that Mr. Ibrahim is not a Convention refugee or a person in need of protection?

[9] With respect to the first issue, Mr. Ibrahim submits that the RAD's refusal to hold an oral hearing under subsection 110(6) of the *IRPA* should be reviewed on the reasonableness standard, and I agree. Reasonableness is the presumptive standard of review for administrative decisions, including the RAD's interpretation of its enabling statute: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at paras 23 and 29.

[10] Similarly, the reasonableness standard of review applies to the third issue.

[11] The second issue concerns the RAD's determination that Mr. Ibrahim was not denied procedural fairness or natural justice before the RPD. Mr. Ibrahim submits this issue is reviewable on the correctness standard. While I believe the second issue is reviewable on the reasonableness standard, my finding on the second issue does not turn on the appropriate standard of review because I am of the opinion that the RAD's determination was both reasonable and correct. Nonetheless, I will explain why I believe the second issue is reviewable on the reasonableness standard.

[12] Mr. Ibrahim does not allege a breach of natural justice or procedural fairness by the RAD. Rather, his appeal to the RAD raised issues of procedural fairness and natural justice before the RPD, and it is the RAD's determination of the procedural fairness and natural justice issues that Mr. Ibrahim asks this Court to judicially review.

[13] When a court reviews the merits of an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision is reasonableness: *Vavilov* at paras 23 and 25. The presumption is rebutted only when the legislature has indicated that a different standard should apply (by legislating the standard or by providing a right to appeal the tribunal’s decision to a court) or when the rule of law requires correctness review (i.e. for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies): *Vavilov* at paras 33 and 53. Neither exception is applicable to this case.

[14] Prior to *Vavilov*, a number of decisions of this Court and the Federal Court of Appeal found reasonableness to be the applicable standard in certain cases where the RAD’s decision engaged considerations of procedural fairness or natural justice: *Singh* at paras 23 and 29; *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 [*Abuzeid*] at para 12; *Brown v Canada (Citizenship and Immigration)* 2018 FC 1103 [*Brown*]; *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 31. For example in *Abuzeid*, Justice Gleeson wrote at paragraphs 11 to 12 (citations omitted):

In this case the Court is reviewing a finding of the RAD on the question of counsel competence, not dealing with the issue *de novo*. Ms. Abuzeid does not allege that the RAD acted unfairly or that there was a breach of fairness or natural justice in the proceedings before the RAD...

...The Court is being asked to review a decision of the RAD where the RAD, in the exercise of its jurisdiction and authority, concluded there was “insufficient evidence to find that counsel’s representation in regard to this claim was incompetent and as a result the claim was denied.” In my view, this determination was one of mixed fact and law and is to be reviewed against a standard of reasonableness.

[15] Similarly in *Brown*, Justice Norris found the reasonableness standard of review applied to the RAD's refusal to re-open an appeal based on a failure to observe a principle of natural justice, which is typically a question of mixed fact and law and reviewable on the reasonableness standard (*Brown* at paras 24-25).

[16] Other pre-*Vavilov* decisions of this Court have applied the correctness standard to the review of the RAD's determination on an alleged breach of procedural fairness, such as a finding that the RPD's conduct did not give rise to a reasonable apprehension of bias: *Eshetie v Canada (Citizenship and Immigration)*, 2019 FC 1036 at para 23; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 1061 at para 12.

[17] Pre-*Vavilov* jurisprudence must be considered in light of the revised framework for a standard of review analysis, and a clarification of the proper application of the reasonableness standard: *Vavilov* at para 143. A court seeking to determine what standard is appropriate in a case before it must look first to the reasons in *Vavilov*, in order to determine how the *Vavilov* framework applies to that case: *Vavilov* at para 143. Doing so leads me to conclude that the second issue on this application for judicial review should be reviewed on the reasonableness standard.

[18] According to the guidance on how to conduct reasonableness review, *Vavilov* states that the range of reasonable outcomes will vary depending on the context. The robust form of reasonableness review described in *Vavilov* recognizes that 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—including the common law and binding precedents that relate to the issue before the decision maker: *Vavilov* at para 90. Just as context may leave room for only a single reasonable interpretation of a statutory provision (*Vavilov* at paragraph 124), context may significantly constrain a question of procedural fairness and natural justice decided by the RAD, perhaps even leaving room for only a single reasonable outcome. However, such analysis is unnecessary because, even assuming there is only one reasonable outcome on the second issue, I find no error in the RAD's determination or the reasons supporting it.

III. Analysis

A. *Issue 1: Did the RAD err in refusing to hold an oral hearing?*

[19] On appeal to the RAD, Mr. Ibrahim sought to introduce new evidence to demonstrate that the RPD's negative credibility findings were flawed. The RAD admitted a complaint made to the Barreau against Mr. Ibrahim's former counsel, a June 12, 2018 affidavit explaining some of the omissions and contradictions in Mr. Ibrahim's documents and testimony, and a psychotherapist report.

[20] Mr. Ibrahim also requested an oral hearing before the RAD pursuant to subsection 110(6) of the *IRPA*. Generally, the RAD must proceed without an oral hearing: s. 110(3) of the *IRPA*. However, under s. 110(6) of the *IRPA*, it is open to the RAD to hold a hearing if the new evidence: (a) raises a serious issue with respect to an applicant's credibility; (b) is central to the refugee protection decision; and (c) if accepted, would justify allowing or rejecting the refugee protection claim (*Singh* at para 71). The RAD refused to hold an oral hearing on the basis that

the new evidence, if accepted, would not justify allowing or rejecting Mr. Ibrahim's refugee protection claim.

[21] Mr. Ibrahim submits this finding was unreasonable for two reasons.

[22] First, Mr. Ibrahim argues that the RAD merely stated a conclusion that the new evidence did not justify allowing or rejecting his refugee protection claim, without conducting any analysis. In my view, this argument is without merit. While the RAD did not repeat its analysis of the newly admitted evidence in its discussion of the request for an oral hearing, the RAD properly explained its analysis of the new evidence in its reasons.

[23] Second, Mr. Ibrahim argues the RAD failed to adequately consider the new evidence, failed to analyze the impact on his credibility, and unreasonably assigned little weight to the newly admitted documents. He asserts that the new evidence raised serious issues with the RPD's adverse credibility findings—the determinative issue before the RPD—and that on a proper assessment, the RAD should have found the new evidence satisfied the requirements of subsection 110(6).

[24] I do not accept that the RAD erred in its analysis of the new evidence, for the reasons discussed under the second issue, below. Also, I am not persuaded the new evidence would have justified allowing Mr. Ibrahim's refugee claim. The RPD concluded that Mr. Ibrahim was not credible due to serious omissions in his documents, and contradictory accounts of his political activities and his persecution in Sudan. During the RPD hearing, Mr. Ibrahim recounted events

that did not appear in his U.S. asylum application, the refugee claim form he completed upon entry into Canada, or his BOC narrative, which had been amended twice in the weeks before the hearing. The RPD gave Mr. Ibrahim an opportunity to explain the omissions, and did not accept his unreasonable explanations. The RPD found Mr. Ibrahim's testimony to be difficult, lacking in spontaneity, and marked by serious contradictions going to the heart of his refugee claim. These included contradictions about when Mr. Ibrahim and his family members were arrested for political activism, how long they were detained, when Mr. Ibrahim was expelled from school in retaliation for his activism, why Mr. Ibrahim left Sudan for Saudi Arabia, and whether he returned to Sudan after moving to Saudi Arabia. The RPD asked Mr. Ibrahim to explain the contradictions, but was not satisfied by the explanations. As a result, the RPD found Mr. Ibrahim was unable to justify a number of serious omissions and contradictions in his story, and concluded that Mr. Ibrahim had failed to establish that he was targeted by Sudanese authorities for political activism or that his fundamental rights were violated.

[25] The RAD conducted its own independent analysis of the record on appeal, listened to the recording of Mr. Ibrahim's testimony at the hearing, and found it was "absolutely impossible to find that the appellant's testimony before the RPD was coherent and plausible." Having reviewed the record, I find the RAD did not err in this conclusion. As stated above, the RAD may hold an oral hearing only if the three conditions under s. 110(6) are met. The newly admitted evidence on appeal did not make up for shortcomings in Mr. Ibrahim's oral testimony and documentary evidence before the RPD, and it was open for the RAD to conclude that the new evidence would not justify allowing or rejecting the refugee claim: *Singh* at para 71. Therefore, the RAD did not err by refusing to hold an oral hearing.

B. *Issue 2: Did the RAD err in finding that Mr. Ibrahim was not denied procedural fairness or natural justice before the RPD?*

(1) **Alleged incompetence of counsel**

[26] Mr. Ibrahim submits that he was denied procedural fairness before the RPD because his right to be heard was compromised due to his former counsel's incompetence. Mr. Ibrahim submits the RAD failed to properly consider or analyze the criticisms against his former counsel, and thus erred in concluding that there was no breach of procedural fairness before the RPD.

[27] According to Mr. Ibrahim, his complaint to the Barreau and his June 12, 2018 affidavit demonstrate that the RPD's adverse credibility findings arose as a result of his former counsel's incompetent representation. For instance, Mr. Ibrahim told his former counsel that there were mistakes in his U.S. asylum documents, but counsel advised that he must present the same claim in both countries. Mr. Ibrahim also disclosed issues with the interpretation during a break at the hearing, but counsel failed to act on the basis that it was "too late", since they were two hours into the hearing. Due to these issues, Mr. Ibrahim submits, the RPD erroneously came to a conclusion that he lacked credibility.

[28] Also, Mr. Ibrahim argues that the RAD failed to properly consider allegations of incompetence described in his June 12, 2018 affidavit, that were not included in his initial complaint to the Barreau. Mr. Ibrahim contends these additional allegations were "unrefuted" since the counsel's response filed with the RAD in 2019 consisted largely of a copy of his May 25, 2018 response to Mr. Ibrahim's complaint before the Barreau, which could not have addressed the allegations in Mr. Ibrahim's subsequent affidavit dated June 12, 2018.

[29] In order to establish a breach of procedural fairness resulting from incompetent representation, an applicant must meet the requirements of the following tripartite test (*Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16; *Abuzeid* at para 21):

1. The representative's alleged acts or omissions constituted incompetence;
2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and
3. The representative was given notice and a reasonable opportunity to respond.

[30] There is a high threshold for establishing incompetence of counsel. The party making the allegation of incompetence must show substantial prejudice flowing from the actions or inaction of the incompetent counsel and a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different: *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at para 9.

[31] I am not persuaded that the RAD erred by failing to properly consider or analyze the allegations against Mr. Ibrahim's former counsel, including those that were inaccurately characterized as "unrefuted". The RAD considered the allegations detailed in the Barreau complaint and in the June 12, 2018 affidavit. The RAD also considered the former counsel's response, and the Barreau's dismissal of Mr. Ibrahim's complaint. The RAD even accepted and considered Mr. Ibrahim's late reply, which criticized his former counsel for failing to respond to allegations in his June 12, 2018 affidavit—an argument that Mr. Ibrahim repeats before this Court. Having reviewed the documentary evidence, the RAD specifically noted that the former counsel categorically denied all of the allegations made against him, and concluded that the

counsel's response refuted several criticisms in Mr. Ibrahim's Barreau complaint, his June 12, 2018 affidavit, and his RAD memorandum.

[32] While the RAD's reasons do not specifically discuss the former counsel's allegedly faulty advice about maintaining the same narrative in the Canadian and U.S. refugee claim applications, there is no basis to conclude this allegation was overlooked, as the RAD properly considered the evidence in the record before the RPD and filed on appeal. Mr. Ibrahim's June 12, 2018 affidavit vaguely states that he explained to his former counsel there were mistakes in the U.S. asylum claim, but was advised that he could not change the narrative. Mr. Ibrahim's affidavit does not specify the mistakes that he identified to counsel or indicate when he did so. Before this Court, Mr. Ibrahim offers additional details and explanations for the first time, such as identifying the mistake to be the 17-day period of detention described in the U.S. asylum claim and in his initial BOC form; however, this amounts to an attempt to supplement the record, and it would be inappropriate to consider it on judicial review. In any event, Mr. Ibrahim amended his BOC narrative to change the period of detention from 17 to 7 days prior to the RPD hearing, and the period of detention was not the only inconsistency between Mr. Ibrahim's initial and amended BOC forms and his U.S. asylum form. Mr. Ibrahim has not established that the inconsistencies arose due to the incompetence of his former counsel.

[33] With respect to the former counsel's alleged failure to address interpretation issues, the RAD listened to the recording of the RPD hearing, and reasonably found that former counsel intervened several times to help Mr. Ibrahim provide more satisfactory answers to the RPD's questions and prevent him from undermining his credibility. Moreover, the RAD concluded that

the allegations of faulty interpretation were unsupported by the evidence. The RAD rejected Mr. Ibrahim's argument that his inaudible testimony prevented him from establishing any interpretation errors, and found that he had the opportunity to identify interpretation errors from the recorded testimony. The RAD did not err in concluding the evidence did not demonstrate interpretation issues at the RPD hearing.

[34] In summary, after reading the documents and carrying out its own analysis, the RAD concluded that Mr. Ibrahim did not establish his former lawyer acted incompetently. I have also considered Mr. Ibrahim's arguments in this application and I have reviewed the record. In my view, the RAD's conclusion was correct. Mr. Ibrahim did not demonstrate that his former lawyer acted incompetently, and he failed to meet the first part of the tripartite test.

(2) Psychotherapist's report

[35] Mr. Ibrahim submits the RAD incorrectly concluded that his behaviour during the hearing did not suggest he should be identified as a vulnerable person, and erred in failing to consider how his vulnerabilities compromised the ability to adequately explain his experiences. Mr. Ibrahim contends that the result before the RPD would likely have been different if he had been afforded appropriate accommodation.

[36] Mr. Ibrahim argues that the RAD did not properly consider the psychotherapist's report, which demonstrated that his mental health issues were the root cause of his confusion and inability to recall dates, names, and places that led to the RPD's adverse credibility findings, and that procedural accommodations likely would have affected the result. Mr. Ibrahim suggests he

was able to coherently relate the events of persecution in the less stressful environment of his psychotherapist's office, and with a competent interpreter, in a way that corroborated his account of past persecution and demonstrated his credibility.

[37] I am not persuaded that the RAD erred in its consideration of the psychotherapist's report. The RAD properly found that Mr. Ibrahim did not present a psychological report in support of his claim before the RPD, and in the subsequent report provided to the RAD, the psychotherapist did not opine that Mr. Ibrahim should have been afforded procedural accommodations at the RPD hearing. From a review of the report, it is apparent that the psychotherapist's recommendation for accommodation related to the possible oral hearing before the RAD, not the RPD hearing. Indeed, the psychotherapist had no basis for opining that mental health issues caused Mr. Ibrahim's confusion and inability to recall dates, names, and places before the RPD or that procedural accommodations likely would have affected the result. The report does not indicate that the psychotherapist read the transcript or listened to the audio recording from the RPD hearing. Furthermore, the report does not provide any opinions that would have assisted the RAD in reviewing the procedures that were followed by the RPD, such as information on the type of accommodation measures that might have assisted Mr. Ibrahim or how such measures would have assisted him then.

[38] The story told to the psychotherapist does not demonstrate that Mr. Ibrahim was able to credibly corroborate his account of persecution in a less stressful environment. In fact, the narrative provided to the psychotherapist introduces more inconsistencies. Mr. Ibrahim argues that the report explains why he returned to Sudan in 2014, despite leaving in 2012 due to serious

dangers to his life—the reason being his father’s deathly illness. However, Mr. Ibrahim did not mention his father’s deathly illness in any previous document or testimony. Furthermore, Mr. Ibrahim told the psychotherapist that his father became ill “on September 2014”, that Mr. Ibrahim visited Sudan after he received news that his father was deathly ill and he might not see him again, and that Mr. Ibrahim was “subsequently” arrested for 7 days due to his participation in youth demonstrations in his neighbourhood against the government. However, Mr. Ibrahim’s initial and amended BOC narratives indicate that Mr. Ibrahim returned to Sudan on August 1, 2014, and that he was arrested in Sudan on September 1, 2014. Both events are called into question if, as Mr. Ibrahim apparently told his psychotherapist, his father became ill “on September 2014” and Mr. Ibrahim returned to Sudan after he received news of this father’s illness.

[39] Therefore, I find no error in the RAD’s conclusion that Mr. Ibrahim did not establish the RPD’s decision would have been different if procedural accommodations had been formally adopted.

[40] Lastly, the RAD did not err in concluding that the hearing was conducted in a highly sensitive manner despite the lack of formal procedural accommodations. The RAD noted that Mr. Ibrahim did not identify what formal accommodations should have been adopted by the RPD. In the absence of any guidance, the RAD nevertheless listened to the hearing, considered the *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB [Guideline on Vulnerable Persons]*, and determined that both the RPD member and Mr. Ibrahim’s former counsel acted in a respectful and highly sensitive manner. The RAD found that

the questions put to Mr. Ibrahim took into account his difficulties in presenting testimony, and the RAD provided examples to illustrate the guidance offered by the RPD member and Mr. Ibrahim's former counsel to assist Mr. Ibrahim in explaining the discrepancies and issues in the evidence concerning: Mr. Ibrahim's associations and organizations, his father's persecution in Sudan, Mr. Ibrahim's reasons for returning to Sudan in 2014 despite possessing a residence permit in Saudi Arabia, differences between the narratives in the U.S. asylum claim and the Canadian refugee claim, and Mr. Ibrahim's failure to mention threats against his family since his departure from Sudan.

[41] In my view, the RAD correctly concluded that Mr. Ibrahim was not denied procedural fairness or natural justice before the RPD.

C. *Issue 3: Did the RAD err by confirming the RPD's determination that Mr. Ibrahim is not a Convention refugee or a person in need of protection?*

[42] Mr. Ibrahim submits that the RAD erred by confirming the RPD's determination that he is not a Convention refugee or a person in need of protection, despite admitting new evidence. For all of the reasons above, Mr. Ibrahim has not demonstrated that the RAD's decision to dismiss the appeal and confirm the RPD's determination was unreasonable. Based on its independent analysis of the record, the RAD did not err in concluding that it was "absolutely impossible to find that the appellant's testimony before the RPD was coherent and plausible."

IV. **Conclusion**

[43] I find that Mr. Ibrahim has not established any reviewable error by the RAD.

Accordingly, this application for judicial review is dismissed.

[44] Neither party raised a question for certification, and none arises.

JUDGMENT in IMM-5304-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5304-19

STYLE OF CAUSE: AHMED ABDALMOTLIB ABDALHAFIZ IBRAHIM v
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