Federal Court  Cour fédérale

Date: 20210106

Docket: IMM-6448-19

Citation: 2021 FC 15

Ottawa, Ontario, January 6, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ELENI SEYOUM HAILU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Eleni Seyoum Hailu, seeks judicial review of a decision of the Refugee Protection Division [RPD] granting the Respondent's application under section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] to vacate a previous decision allowing the Applicant's claim for refugee protection.

[2] The Applicant is a citizen of Ethiopia. She came to Canada on a work permit in March 2016. In January 2017, she filed for refugee protection alleging a fear of persecution based on her ethnicity as Oromo. The Applicant claims she participated in an anti-government demonstration in December 2015 in Ethiopia, at which she and other people were arrested, beaten and detained for three (3) days by the Ethiopian authorities. She was released after signing a document indicating she would appear if summoned. While in Canada, she was informed that she had received a police summons, and then later, a court judgment, for failing to appear as per the summons.

[3] In March 2017, a member of the RPD accepted her claim after determining that she met the definition of a Convention refugee pursuant to section 96 of the IRPA.

[4] A few months later, the Canada Border Services Agency [CBSA] commenced an investigation against the individual the Applicant had retained to represent her in her claim. During the investigation, the CBSA discovered that the police summons and court judgment were fabricated by the Applicant's representative and therefore, fraudulent.

[5] In October 2018, the Respondent sought to vacate the initial decision pursuant to section 109 of the IRPA.

[6] On September 30, 2019, a different member of the RPD [Vacate Member] granted the Respondent's application and vacated the decision allowing the Applicant's claim for refugee protection. Applying the test set out in *Canada (Public Safety and Emergency Preparedness) v*

Gunasingam, 2008 FC 181 at paragraphs 7 and 8 [*Gunasingam*], the Vacate Member agreed with the Respondent's submission that the summons and court judgment were fraudulent, that they were relevant to the Applicant's claim about government persecution and that the Applicant's positive decision was obtained as a result of the misrepresentation. The Vacate Member further determined that there was insufficient evidence left before the initial RPD member, once the fraudulent documents were removed, to uphold the positive decision. Relying on *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at paragraph 15, the Vacate Member rejected the Applicant's new evidence on the basis that allowing a claimant to submit additional evidence at the vacate hearing in an attempt to prove *de novo* that the claim is genuine would reward deception and remove incentive to tell the truth.

[7] Although framed differently by the Applicant, this application for judicial review raises two (2) issues: (1) whether the Vacate Member appropriately applied the test for vacation proceedings pursuant to section 109 of the IRPA; and (2) whether the Applicant was afforded procedural fairness at the vacate hearing given that the transcript from the initial RPD hearing was not available.

II. Analysis

A. *Standard of Review*

[8] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada held that reasonableness is the presumptive standard of review. This presumption can be rebutted in two (2) types of situations: (1) where Parliament has

explicitly prescribed the applicable standard of review or provided a statutory appeal mechanism; or (2) where the rule of law requires that the standard of correctness be applied. The rule of law exception covers constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 10, 16–17).

[9] Since none of these exceptions apply in this case and it is well established that the presumption of reasonableness review applies to a decision maker's interpretation of its enabling statute, I intend to review the first issue on a standard of reasonableness (*Vavilov* at para 25; *Bafakih v Canada (Citizenship and Immigration)*, 2020 FC 689 at paras 21-22).

[10] Where the standard of reasonableness applies, the Court shall examine "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask itself "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). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[11] With respect to the issue of procedural fairness, the Federal Court of Appeal clarified in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the role of this Court is to determine whether the proceedings were fair

in all the circumstances. In other words, “whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific* at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

B. *Section 109 of the IRPA*

[12] Subsection 109(1) of the IRPA enables the RPD to vacate a decision granting refugee protection if it finds that the decision was obtained as a result of misrepresenting or withholding material facts relating to a relevant matter. The burden of proof in this regard lies with the Minister (*Shahzad v Canada (Citizenship and Immigration)*, 2011 FC 905 at paras 23-24 [*Shahzad*]).

[13] Meanwhile, subsection 109(2) of the IRPA provides that the RPD may reject an application to vacate if it is satisfied that other sufficient evidence was considered at the time of the initial determination to justify refugee protection (*Shahzad* at paras 23-24). If the vacate application is allowed, the individual’s refugee protection is nullified pursuant to subsection 109(3) of the IRPA.

[14] The Vacate Member determined that the summons and court judgment relied upon by the Applicant were fraudulent. He relied on the statutory declaration of a CBSA officer involved in the investigation of the Applicant’s former representative and on the Applicant’s own admission that she had knowingly tendered the false documents at the initial hearing to substantiate her claim of persecution. The Vacate Member found that the Applicant’s statement in her Basis of

Claim form that the documents came from Ethiopia constituted a direct or indirect misrepresentation or withholding of material facts that occurred at the original hearing.

[15] The Vacate Member then considered whether the misrepresentations or omissions related to matters relevant to the Applicant's refugee claim. He concluded that they did. In his view, "the fraudulent documents were closely connected to the basis of the claim for protection, in that they were presented as proof that the Government of Ethiopia was persecuting the [Applicant] due to her ethnicity and/or her involvement in an anti-government protest that occurred in December of 2015".

[16] Finally, the Vacate Member considered whether there was a causal relationship between the misrepresentations or omissions and the favourable result. He found that there was. In his view, if the initial RPD member had been aware of the fraudulent nature of the documents and the Applicant's awareness of the fraud, he would have found that her general credibility was affected and required other corroborating evidence to substantiate the Applicant's statements that she attended an anti-government protest and that she is of Oromo ethnicity.

[17] Finding that all three (3) elements of the first prong of the test for vacation were met, the Vacate Member then turned to subsection 109(2) of the IRPA. He found that the taint of the fraudulent evidence was not limited to the summons and court judgment and that it extended to the balance of the Applicant's testimony about her participation in anti-government protests and her national identification card. The perpetrated fraud fatally affected the Applicant's general

credibility and thus, there was insufficient other credible and reliable evidence to justify refugee protection.

[18] The Applicant submits that the Vacate Member erred in finding that the two (2) false documents were central to her claim's success. She argues that although the initial RPD member had concerns about the documents, he nevertheless allowed the claim.

[19] I disagree.

[20] The fraudulent documents submitted by the Applicant were central to her claim. She had to demonstrate a personalized risk. She submitted the two (2) fraudulent documents as objective documentary proof to establish such risk. Her other evidence consisted of her testimony, an Ethiopian ID card and country documents.

[21] In his reasons, the initial RPD member described his questioning of the Applicant as being akin to a "dentist trying to pull a tooth out of a person who will not open their mouth". He also indicated that the details provided by the Applicant about the demonstration she claimed to have attended were ones that could be read in the newspaper and similar to the documents she provided. The initial RPD member was clearly suspicious about the truth and accuracy of the Applicant's testimony. He also had concerns about the police summons and the judgment. He had issues with how the document had come to Canada and noted that he only had photocopies of the documents. Relying on statements from the Applicant's representative that he had seen the originals, the RPD accepted the two (2) fraudulent documents.

[22] Upon review of the initial RPD member's decision, I am satisfied that the credibility issues arising from the Applicant's testimony were resolved in the Applicant's favour because her narrative was corroborated by the fraudulent summons and court judgment.

[23] The Applicant further submits that it was improper for the Vacate Member to ask himself what the initial RPD member would have done had he been apprised of the false documents and to use the tainted evidence to undermine her general credibility.

[24] This Court has found that where a refugee claimant has supplied a false document, the resulting damage to credibility can reasonably reflect on other aspects of the claimant's evidence. In the context of subsection 109(2) of the IRPA, the assessment of the credibility of the residual evidence lies with the RPD member determining the application to vacate (*Shahzad* at para 39; *Waraich v Canada (Citizenship and Immigration)*, 2010 FC 1257 at paras 35, 41-45; *Oukacine v Canada (Citizenship and Immigration)*, 2006 FC 1376 at para 32).

[25] In the Applicant's case, the Vacate Member reweighed the evidence presented to the initial RPD member in light of the misrepresentations. He determined that the fraud perpetrated with the Applicant's knowledge fatally affected her general credibility on matters central to her claim, including her alleged persecution. Without other credible evidence corroborating a personalized risk, it was reasonable for the Vacate Member to conclude there was insufficient evidence before the initial RPD member to justify a positive determination. The country condition documents alone did not justify the granting of refugee status (*Shahzad* at para 43; *Gunasingam* at para 18), nor did the Applicant's identification card confirming her identity and

ethnicity. They did not meet the test of establishing the existence of a subjective fear that is objectively well-founded.

[26] I disagree with the Applicant that the Vacate Member's approach to subsection 109(2) of the IRPA makes it impossible for applicants to overcome the misrepresentations. If the facts were different and the Applicant had presented further corroborative documentary evidence, then that further evidence could possibly have supported a positive conclusion regardless of the fraudulent documents. In this case, however, the only objective evidence establishing a personalized risk of persecution consisted of the two (2) fraudulent documents.

C. *Procedural Fairness and the Absence of a Transcript*

[27] The Applicant submits that she was entitled to a high degree of procedural fairness given the extremely serious consequences that flow from a vacate hearing. A complete record was required in order to make a full answer and defence. This record ought to have included the transcripts and the audio recording from the initial RPD hearing. Neither were available. This information was critical because it may have helped to establish how the initial RPD member came to his decision and that there was other sufficient evidence considered.

[28] The mere absence of a transcript or recording does not, in itself, amount to a breach of procedural fairness. A party's rights will only be infringed if the application cannot properly be disposed of (*Omar v Canada (Citizenship and Immigration)*, 2016 FC 602 at paras 29-30, 56; see also *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at para 83).

[29] It is unclear why the transcript or recording of the initial hearing was not available. However, I am satisfied the Vacate Member could fairly dispose of the application. The initial RPD member's decision is clear and straightforward. It is speculative to suggest that he based his decision on evidence not mentioned in the decision, which could be revealed by a transcript. The Applicant has not made a convincing case that she was prevented from being able to make a full answer and defence to the allegations levelled against her by the Respondent because of the lack of recording or transcript.

III. Conclusion

[30] When the decision is read as a whole, I am satisfied that the Vacate Member's decision meets the reasonableness standard set out in *Vavilov* and that the absence of a transcript or recording did not infringe the Applicant's rights to procedural fairness.

[31] Accordingly, the application for judicial review is dismissed.

[32] No questions of general importance were proposed for certification and I agree that none arise.

JUDGMENT in IMM-6448-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to name the Minister of Citizenship and Immigration as the proper Respondent; and

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ELENI SEYOUM HAILU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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