Federal Court  Cour fédérale

Date: 20111214

Docket: IMM-797-11

Citation: 2011 FC 1419

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 14, 2011

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Pritchard Ernst JEROME

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (panel), submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) by Pritchard Ernst Jerome (applicant). The panel found that the applicant was not a refugee or a person in need of protection and therefore rejected his refugee claim.

[2] The applicant is a citizen of Haiti. He arrived in Canada on October 23, 2007, with his uncle; they made their refugee claim under sections 96 and 97 of the Act on the ground that they feared for their lives. Their claim was heard on October 27, 2010, and the applicant was 15 years old at the time. Because the panel was unable to establish their identity, it rejected the claim orally, finding that the applicant and his uncle were not "Convention refugees" or "persons in need of protection" under the Act.

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[3] The panel specified in its decision that, according to the *Refugee Protection Division Rules*, SOR/2002-228 (Rules), it is required to consider the refugee claim based on the documents available the day of the hearing. Given that birth certificates are documents insufficient in themselves to establish the identity of a person, it stated that it was dissatisfied with the identity of the persons before it and rejected their claim without ruling on their fear of returning to Haiti.

[4] After this decision, the applicant submitted this application for judicial review on February 8, 2011, on the ground that, according to him, there were clearly problems during the hearing between his counsel and the Board member: the hearing was brief, the reasons were given orally and steps were taken by his counsel to ensure that she would no longer be required to appear before the Board member in the case, Youssoupha Diop, because she had filed two complaints against him.

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[5] The applicant and his uncle have separate records because the applicant now resides with his aunt. This application for judicial review therefore deals only with Pritchard Ernst Jerome's refugee claim and raises the following issues:

1. Did the panel err in law and did it base its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it?
2. Does the panel's conduct during the hearing raise a reasonable apprehension of bias?

[6] The standard of review applicable to the panel's findings of fact is reasonableness: a high degree of deference is owed to the panel because it is specialized and in the best position to assess the credibility of the applicant and thus assess the evidence (see, for example, *Kante v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 525 (T.D.) at paragraph 2; *Sinnathamby v. Canada (Minister of Citizenship and Immigration*), [2001] F.C.J. No. 742 (T.D.) at paragraph 14; *Encinas v. The Minister of Citizenship and Immigration*, 2006 FC 61 at paragraph 17).

[7] Reasonableness is assessed with respect to justification, transparency and intelligibility within the decision-making process (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47 (*Dunsmuir*)).

[8] The standard of review applicable to the panel's weighing of the applicant's proof of identity is therefore reasonableness: the question of whether the applicant provided sufficient documents to establish his identity is a question of fact (*Jin v. The Minister of Citizenship and Immigration*,

2006 FC 126 at paragraph 16 (*Jin*); *Saleem v. The Minister of Citizenship and Immigration*, 2008 FC 389 at paragraph 13 (*Saleem*)). The panel's decision to reject the applicant's refugee claim on the basis of insufficient evidence to establish his identity is related to its assessment of his credibility (*Jin* at paragraph 14 and *Saleem* at paragraph 14). This Court must therefore exercise great deference and should intervene only if the panel's decision was made based on erroneous findings of fact or without regard for the evidence in the record (*Singh v. The Minister of Citizenship and Immigration*, 2007 FC 62 at paragraph 11; *Jin* at paragraph 14).

[9] Conversely, the standard of review applicable to any question of law, procedural fairness or breach of the principles of natural justice is correctness (*Dunsmuir*).

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1. Did the panel err in law and did it base its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it?

[10] Even though it is true that there is a presumption of truthfulness for allegations made in the course of testimony (*Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 at paragraph 5), the panel, in my opinion, did not err by deciding that there was insufficient evidence to establish the applicant's identity. Its finding was reasonable given the record before it. The following errors emphasized by the applicant do not render the panel's decision unreasonable and do not warrant the intervention of this Court:

a. first, even if the panel's finding that the applicant was never asked to appear at the consulate in Haiti is erroneous, this error is not determinative;

b. second, the error made by the panel in saying that it had to render its decision based on the evidence available the day of the hearing, in disregard of the existence of the additional time available under section 37 of the Rules, is inconsequential because the applicant was never denied additional time.

[11] Therefore, despite these two errors, the decision nevertheless remains justified, transparent and intelligible (*Dunsmuir* at paragraph 47). In fact, the weighing of proof of identity is up to the panel and constitutes a determinative preliminary issue. The applicant simply failed to establish his identity with his testimony and the filing of a birth certificate (section 106 of the Act; *Jin* at paragraphs 13 and 15). It was reasonable for the panel to doubt the applicant's credibility considering that he had been in Canada since 2007 with his uncle and that they had taken no steps to obtain additional proof of identity. The panel gave the applicant the opportunity to explain why no steps had been taken over so many years. However, he failed to demonstrate valid justification. Furthermore, a document in the National Documentation Package on Haiti underlines the existence of fraud with respect to identity in Haiti, which also influenced the panel.

[12] It is also important to emphasize that, before the hearing and in accordance with Guideline 7 (concerning the preparation and conduct of a hearing in the RPD), the RPD's preliminary assessment of the record was communicated to the applicant (in February 2008) and identity was mentioned as an issue in it. The applicant therefore had to know that the proof with respect to his identity was problematic.

[13] Therefore, the panel, contrary to the applicant's allegations, did not simply disregard his testimony without valid reasons: it doubted the truthfulness of the evidence submitted for the reasons contained in its decision, including his lack of credibility. In fact, pursuant to section 106 of the Act, the panel was entitled to take into account the lack of identification documents in assessing the credibility of the applicant (*Saleem* at paragraph 27). For all of these reasons, I find the panel's decision reasonable on this issue and there is no error of law that warrants the intervention of this Court.

2. Does the panel's conduct during the hearing raise a reasonable apprehension of bias?

[14] Relying on the notion of bias as defined in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (*Wewaykum*) and *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 (*National Energy Board*), the applicant also raises a reasonable apprehension of bias based on the manner in which the panel conducted its hearing on October 27, 2010. The applicant alleges, in particular:

- that there was obvious tension between his counsel and the panel because his counsel had previously filed two complaints against the panel;
- that the panel had seemed to want to get rid of his claim quickly because the hearing had lasted only 30 minutes and the refugee claim itself was never considered;
- that, when the uncle had tried to answer the panel's questions, the panel cut him off; and
- that the panel gave its reasons orally after refusing to let the applicant and his uncle be questioned in turn.

[15] The respondent, even though in agreement with the definition and test applicable to assessing the reasonable apprehension of bias, relies on the principle that the applicant was required to raise his apprehension of bias at the hearing before the panel, if not earlier, given the complaints already filed by his counsel against the panel (*Zaroud v. Canada (Secretary of State)*, [1995] F.C.J.

No. 1326 (T.D.); *Chamo v. The Minister of Citizenship and Immigration*, 2005 FC 1219 (*Chamo*)). Furthermore, the respondent maintains that the panel was entitled to interrupt the applicant on the ground that energetic questioning is not prohibited (*Chamo* at paragraph 12; *Ithibu v. The Minister of Citizenship and Immigration*, 2001 FCT 288 (*Ithibu*); *Sanchez et al. v. The Minister of Citizenship and Immigration*, 2011 FC 68). The respondent also argues that the short duration of the hearing does not establish bias by the panel (*Blanco v. The Minister of Citizenship and Immigration*, 2010 FC 280). Finally, the respondent submits that, despite the prior problems between counsel for the applicant and the panel, the applicant failed to establish that the panel had breached its duty of impartiality.

[16] It is up to the applicant to submit concrete evidence demonstrating that "an informed person, viewing the matter realistically and practically — and having thought the matter through" would think that "it is more likely than not that [the panel], whether consciously or unconsciously, would not decide fairly" (*Wewaykum* at paragraph 60 and *Ithibu* at paragraph 41).

[17] In this case, I consider the fact that counsel for the applicant, the one who represented him before the panel and prepared the Applicant's Record before this Court, did not raise the issue of reasonable apprehension of bias before the panel, or even earlier, to be determinative. Counsel who replaced the previous counsel for the hearing before me admitted honestly that he could not explain why this was not done, referring instead to the other arguments.

[18] In *Chamo*, the Court is clear: "an argument of bias must be dismissed if it has not been raised at the first reasonable opportunity, namely at the hearing . . . . The failure to raise a reasonable

apprehension of bias at the earliest possibility forecloses the possibility [for the applicant] of raising such an argument subsequently before this Court" (at paragraph 9). The applicant's argument regarding a reasonable apprehension of bias therefore has no merit.

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[19] For the above-mentioned reasons, the application for judicial review is dismissed.

[20] I agree with counsel for the parties that no question for certification arises.

JUDGMENT

The application for judicial review is dismissed.

"Yvon Pinard"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-797-11
STYLE OF CAUSE:	Pritchard Ernst JEROME v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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