

Federal Court



Cour fédérale

Date: 20160616

Docket: IMM-5302-15

Citation: 2016 FC 674

Ottawa, Ontario, June 16, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

FIRAS SALEM MUNEF AJAJ

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Firas Salem Munef Ajaj is a citizen of Yemen. He sought refugee status in Canada based on an alleged fear of persecution due to his conversion from Islam to Christianity. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [Board] found that he was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Refugee Appeal

Division [RAD] of the Board dismissed his appeal of that decision. Justice Gascon allowed Mr. Ajaj's application for judicial review of the RAD's decision in July 2015.

[1] This application for judicial review concerns the redetermination of Mr. Ajaj's appeal, which the RAD again dismissed in a decision dated November 4, 2015. Mr. Ajaj says that the application should be allowed because the RAD denied him procedural fairness in three respects: (i) rendering its decision before he was able to retain legal counsel; (ii) declining to convene an oral hearing; and (iii) failing to assess a substantive ground of his claim for refugee protection.

[2] In the course of the hearing that took place in Toronto on May 26, 2016, counsel for the Minister, in his role as Officer of the Court, conceded that the RAD had committed a reviewable error by failing to convene an oral hearing pursuant to s 110(6) of the IRPA. I therefore allowed the application for judicial review with brief reasons to follow. These are the reasons.

II. Background

[3] The pertinent facts of this case may be found in Justice Gascon's previous decision (*Ajaj v Canada (Minister of Citizenship and Immigration)*, 2015 FC 928), and will not be canvassed at length here.

[4] Mr. Ajaj is a citizen of Yemen and of no other country. Prior to his arrival in Canada, he had lived his entire life in Saudi Arabia. However, he never became eligible for Saudi citizenship. He held temporary resident permits that were renewed every two years.

[5] Mr. Ajaj testified before the RPD that he decided to convert to Christianity after attending university. When he informed his family of his decision to abandon Islam, his father was furious. He threatened to kill Mr. Ajaj and report him to the religious police. Mr. Ajaj was forced to leave his home and go into hiding. He fled Saudi Arabia and arrived in Canada in November 2013.

[6] Mr. Ajaj claimed refugee protection in December 2013 on the ground that he would be persecuted in Yemen for converting to Christianity. While in Canada, he became a member of the St. Matthew the Apostle Oriole Anglican Church and was baptized in February 2014.

[7] The RPD rejected Mr. Ajaj's claim on the ground that he was not credible, given his inability to correctly answer basic questions about the Christian faith. This decision was upheld by the RAD.

[8] Following Justice Gascon's judgment granting the application for judicial review, the RAD provided Mr. Ajaj with an additional 20 days to make submissions with respect to the redetermination of his appeal. Mr. Ajaj informed the RAD that he would submit new evidence: Mr. Ajaj's mother had recently sent him a copy of an arrest warrant and a circular letter issued by the Yemeni authorities against him. Upon request, he subsequently provided the RAD with the original documents and their certified translations.

[9] The RAD dismissed Mr. Ajaj's appeal on November 4, 2015 without convening an oral hearing.

III. Decision under Review

[10] The RAD acknowledged its responsibility to conduct an independent assessment of the evidence, citing the applicable jurisprudence at the time of its decision (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799). The RAD nevertheless adopted the credibility findings of the RPD, holding that the RPD had engaged in a thoughtful and fair assessment of the genuineness of Mr. Ajaj's religious conversion.

[11] The RAD admitted the arrest warrant and circular letter issued by the Yemeni authorities as new evidence pursuant to s 110(4) of the IRPA, noting that they arose after the RPD's decision and contained information that was relevant to Mr. Ajaj's claim. However, the RAD found that both documents exhibited visible printing flaws and inconsistent markings. The RAD concluded as follows:

[47] Based on the concerns identified in both documents submitted by the Appellant, the RAD finds, on a balance of probabilities, the documents are fraudulent. The RAD further finds that this finding severely undermines the credibility of the Appellant in respect of his allegations of persecution in both Saudi Arabia and Yemen.

[12] The RAD agreed with the RPD that Mr. Ajaj's *sur place* claim must fail. The RAD held that Mr. Ajaj had not provided sufficient evidence to demonstrate that the Yemeni authorities were aware of his Christian activities in Canada. Furthermore, because it found that his conversion to Christianity was not genuine, the RAD concluded that he would not practise that faith if he returned to Yemen.

[13] The RAD held that the new evidence did not raise a serious issue of credibility capable of changing the outcome of the claim, because the evidence was neither credible nor reliable. The RAD therefore declined to convene an oral hearing pursuant to s 110(6) of the IRPA.

IV. Issue

[14] This application for judicial review may be decided on the basis of a single issue: whether the RAD erred by not convening an oral hearing pursuant to s 110(6) of the IRPA.

V. Analysis

[15] Mr. Ajaj argues that the right to an oral hearing is a question of procedural fairness, and is subject to review against the standard of correctness. He relies on this Court's application of the correctness standard to the analogous question of whether a pre-removal risk assessment officer must convoke an oral hearing under s 113(b) of the IRPA (see, *e.g.*, *Negrete Gudino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 283 at para 17).

[16] However, in the context of the RAD, this Court has found that s 110(6) of the IRPA imports a degree of discretion (see, *e.g.*, *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1028 at para 104 [*Siddiqui*]). Most recently, in *Ketchen v Canada (Minister of Citizenship and Immigration)*, 2016 FC 388 at para 19, Justice Diner held that the RAD's decision whether to hold an oral hearing involves the application of s 110(6) of the IRPA to the facts, and is therefore a question of mixed fact and law that attracts the reasonableness standard. This Court adopted the same approach in *Tchangoue v Canada (Minister of Citizenship*

and Immigration), 2016 FC 334 at para 12 and *Sanmugalingam v Canada (Minister of Citizenship and Immigration)*, 2016 FC 200 at para 36.

[17] I am satisfied that the applicable standard of review is reasonableness. However, nothing turns on this question. A breach of procedural fairness that results in an unfair hearing is both unreasonable and incorrect.

[18] An applicant's right to an oral hearing before the RAD is governed by s 110 of the IRPA and the common law duty of procedural fairness. Subsection 110(3) of the IRPA states that the RAD must generally proceed without a hearing. This is subject to the exception found in s 110(6), which provides that the RAD may hold an oral hearing where there is new evidence:

110(6) [...]

- (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.

110(6) [...]

- a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
- b) sont essentiels pour la prise de la décision relative à la demande d'asile;
- c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[19] In *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 71 [Singh], Justice de Montigny held that the RAD is not required to hold an oral hearing simply because it admits new evidence. The three criteria listed in s 110(6) must still be met. In *Singh*, the RPD had found several aspects of the refugee claimant's testimony to be deficient, including

the establishment of his identity. On appeal, the appellant sought to submit new evidence of a high school diploma to confirm his identity. In light of the various shortcomings identified by the RPD and RAD, Justice de Montigny held that it was “far from a given” that the new evidence would warrant allowing the applicant’s claim. Similarly, in *Siddiqui* at paragraphs 102-14, the RAD’s refusal to hold an oral hearing was considered reasonable because its decision was based on broader, unrelated adverse credibility findings which would not have been altered by new evidence that was relevant only to the applicant’s identity.

[20] This may be contrasted with this Court’s decision in *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684. In that case, Justice Hughes found that where the RAD makes new credibility findings, the parties must be given an opportunity to make submissions.

[21] The arrest warrant and circular letter that Mr. Ajaj submitted raised a new credibility issue that was unconnected to the RPD’s and RAD’s negative credibility findings regarding the genuineness of his conversion from Islam to Christianity. The new evidence was central to the decision regarding his *sur place* claim. If the documents had been accepted by the RAD as authentic, then they would substantiate Mr. Ajaj’s fear of persecution by the authorities in Yemen and his *sur place* claim could potentially succeed. For that reason, the criteria of s 110(6) of the IRPA were met, and the RAD erred in failing to convene an oral hearing.

[22] The application for judicial review must be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for re-determination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5302-15

STYLE OF CAUSE: FIRAS SALEM MUNEF AJAJ v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 26, 2016

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: JUNE 16, 2016

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