

Date: 20050422

Docket: IMM-6613-04

Citation: 2005 FC 549

[ENGLISH TRANSLATION]

Ottawa, Ontario, Friday, April 22, 2005

Present: The Honourable Justice François Lemieux

BETWEEN:

MOHAMED LEMINE OULD SALECK

Applicant

- and -

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mohamed Lemine Ould Saleck (the applicant), citizen of Mauritania, age 44, is contesting on several grounds the June 28, 2004, decision of the Refugee Protection Division (the panel or RPD), denying him the status of Convention refugee or person in need of protection.

[2] Among these grounds, the applicant cites: (1) bias of the panel; (2) breach of procedural fairness due to the multiple interventions of the presiding member; (3) abusive finding that he was not a credible witness; (4) the panel's use of information from its specialized knowledge without giving him the opportunity to make representations; and (5) erroneous analysis of the demonstration on May 30, 2003, in front of the Embassy of Mauritania in Ottawa, the basis of his claim that he was a refugee *sur place*.

[3] I need not address all of these grounds, since I am convinced that the panel made several errors in its analysis of the demonstration in Ottawa and that these errors alone justify setting aside the panel's decision.

[4] The panel writes the following about the demonstration in Ottawa:

[TRANSLATION] Alongside other individuals, the applicant participated in a demonstration in front of the Embassy of Mauritania in Ottawa between 12:00 and 1:00 p.m. on May 30, 2003. He then submitted a list of 13 people who participated in the demonstration. The panel told him that it remembers having heard in other cases that the 13 individuals are Mauritanian refugee claimants. This is clearly stated in this panel's decision and reasons in docket MA2-06526. In addition, the Board's database, "STAR", confirms that 12 of the 13 names have submitted applications for protection in Montréal. The panel cannot help but find this Ottawa demonstration suspicious. Firstly, because since his arrival in Canada in December 2002, this is the only public political activity in which the applicant has participated. Secondly, 12 of the 13 participants in the demonstration were claimants. Thirdly, according to the applicant, his only other public expression of his political opinions was the day he attended an "internal demonstration" in Kentucky, where a Mauritanian opponent was presented, when the applicant had been living in the United States since 1996. In an amendment to his PIF submitted on October 1, 2003, the applicant alleged that photos of the demonstration in Ottawa appeared on the Internet. However, as of the end of his hearing on May 7, 2004, he had not provided any evidence to that effect. He explained that the photos had been posted one week after the demonstration in Ottawa. This clearly does not explain why the photos, published on the Internet, were not submitted during the hearing. It was not until the final session granted to his counsel, the purpose of which was to hear the counsel's oral submissions, that the applicant presented copies of websites showing the photos of the demonstration in Ottawa. At the end of the hearing on May 7, 2004, the panel told him that it was unable to find the photos of the demonstration on the Internet. He responded that the photos are not kept *ad vitam*

aeternam. However, a glance at the fly-leaf shows that it was actually an email message containing the photos as attachments. There is a clear intent to deceive the panel. Consequently, the panel finds that the applicant is not a credible witness and that he did not discharge his burden of proving that the authorities in his country were aware of his participation in the Ottawa demonstration. [*Emphasis added*]

[5] After reading the panel's transcripts of the hearings held on September 19, 2003; February 24, 2004 and May 7 and 10, 2004, I find that the panel's decision violates paragraph 18.1(4)(d) of the *Federal Courts Act* and section 18 of the *Refugee Protection Division Rules (RPD Rules)* with regard to a panel's use of specialized knowledge. These provisions read as follows:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

...
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to

(a) make representations on the reliability and use of the information or opinion; and
(b) give evidence in support of their representations.

18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

...
d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; [*je souligne*]

18. Avant d'utiliser un renseignement ou une opinion qui est du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre — si celui-ci est présent à l'audience — et leur donne la possibilité de :
a) faire des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
b) fournir des éléments de preuve à l'appui de leurs observations. [*je souligne*]

[6] The context in which the demonstration took place is important. According to the applicant, the Mauritanian government apparently found out about his participation in the demonstration and suspected him of leading the attempted coup d'etat that occurred six days later. After the attempted coup d'etat, the Mauritanian authorities apparently questioned his family about his connection with the insurgents.

[7] Clearly, the panel had serious reservations about whether the photos of the demonstration had been posted on the Internet in such a way that they were accessible to the general public. (Panel's transcripts of the May 10, 2004, hearing, panel's record, at pages 344, 349, 353 and 354 and panel's transcripts of the May 7, 2004, hearing, panel's record, at pages 380, 381, 382, 383, 410 and 411.)

[8] At the start of the hearing on May 10, 2004, the panel informed counsel for the applicant (panel's record at page 344) that [TRANSLATION] "I personally searched for these photos myself on the Internet on . . . on Friday after the hearing and did not find them. . .", to which the counsel responded [TRANSLATION] "but it is clear that it is the website. It is clearly identified at the bottom that it was

taken from the internet.” This led the panel to respond,

[TRANSLATION] “Counsel, I . . . I think I can say without arrogance I know how to use a computer.”

[9] As stated, the panel used its specialized knowledge to conclude that the photos of the demonstration had never appeared on the Internet since [TRANSLATION] “a glance at the fly-leaf shows that it was actually an email message containing the photos as attachments.”

[10] In my view, the panel made three errors in its analysis on the question as to whether the Mauritanian authorities knew that the applicant had demonstrated in Ottawa against the regime on May 30, 2003.

[11] Firstly, section 18 of the *RPD Rules* provides that before using any information that is within its specialized knowledge, the Division must notify the claimant and give them a chance to make representations on the reliability and use of the information.

[12] The panel’s record clearly shows that the panel did not notify the applicant and his counsel that, based on its specialized

knowledge of computers, exhibit P-18 entitled “Yahoo ! France Groupes forum de la Diaspora pour une Mauritanie unie et prospère — Coalition pour le changement” message 2070/2550 dated June 5, 2003, with the subject [TRANSLATION] “Photos of the demonstration in Ottawa (30/05/03)”, was actually an email message containing the photos as attachments, which were therefore not accessible to the general public. The applicant and his counsel were not aware of this finding of the panel until they read the final judgment.

[13] The purpose of section 18 of the *RPD Rules* is to govern procedural fairness and the presentation of evidence. The panel was obligated to give the applicant a chance to demonstrate that its conclusion that the documents presented were email messages and not a copy of a web page accessible to the general public, based on its specialized knowledge of the Internet, was possibly incorrect. If confronted, the applicant or his counsel might have been able to demonstrate to the panel that Yahoo ! France Groupes had a discussion forum entitled “ForumDiaspora” on the Internet and that the attached photos were therefore accessible to the general public.

[14] Secondly, it is important to note that the document from Yahoo ! France Groupes was not the only evidence for this point.

The applicant had submitted into evidence a message entitled “MAURITANIE-NET archives - May 2003, Week 5” describing the demonstration in Ottawa and stating that [TRANSLATION] “the photos of the demonstration will be available in the coming days” (panel’s record, at page 129). The panel ignored this evidence showing that Mauritanie-Net was a website accessible to the general public and not an email service.

[15] Thirdly, and more fundamentally, the panel ignored the evidence demonstrating that the photos of the demonstration, whether or not they were posted on Yahoo ! France Groupes, were not the only photos identifying the applicant as an opponent of the regime. The applicant testified (panel’s record, at page 364) that [TRANSLATION] “. . . after the . . . coup d’etat, the attempted coup d’etat in Mauritania, our names were given to the Mauritania intelligence services with our photos. . .”. The photos were taken at the Embassy of Mauritania in Ottawa by people from the Embassy (panel’s record, at page 374). In response to a question asked by the presiding member, the applicant suggested two ways Mauritanian officers could have identified him. In the panel’s record, at page 410, he said [TRANSLATION] “I had these two possibilities, that is, that there was the possibility that it was on. . . from the Internet that

they got the photo, it was also possible that it was sent by the Embassy. I do not know what. . . their source was.”

[16] In my opinion, the panel was obligated to comment on this evidence and not simply ignore it. This evidence was the basis of his refugee *sur place* claim and of his fear of the Mauritanian authorities.

ORDER

THE COURT ORDERS that:

The application for judicial review be allowed. The panel's decision be set aside, and the applicant's claim be reviewed by a different panel. No questions to be certified were proposed.

“

François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6613-04

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M.C.I.

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REASONS FOR ORDER: Lemieux J.

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