Federal Court  Cour fédérale

Date: 20200116

Docket: IMM-2133-19

Citation: 2020 FC 61

Ottawa, Ontario, January 16, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

A.B., C.D., E.F., G.H.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Appeal Division ("RAD") (the "RAD Decision") to uphold the Refugee Protection Division's ("RPD") decision finding the Applicants are neither Convention refugees nor persons in need of protection. The Applicants' refugee claim was based on the threats from the Associate Applicant's brother in Iraq against the Principal Applicant for her pregnancy allegedly having resulted from adultery.

[2] On this application for judicial review, the Applicants submit the RAD Decision unreasonably excluded a piece of evidence that arose after the RPD decision: a transcript of a telephone call between the Associate Applicant and his sister in Iraq about the ongoing danger to the Applicants if they ever returned. The Applicants also submit the RAD erred in upholding the RPD decision despite its misapprehension of the time that passed between the Principal Applicant's departure from Iraq and the threats against her. The Applicants submit the RAD did not adequately consider the RPD's misapprehension in its own decision.

[3] The RAD Decision is unreasonable for the reasons below. This application for judicial review is allowed.

II. **Facts**

[4] A.B. (the "Principal Applicant") and her husband, C.D. ("the Associate Applicant") are citizens of Iraq. They have two children E.F. and G.H. (the "Minor Applicants"). E.F. is also a citizen of Iraq, and G.H. is a U.S. citizen. The Applicants are from the northern part of Iraqi Kurdistan. The Principal Applicant and the Associate Applicant have a Canadian-born child, who is not a party to this proceeding.

[5] The Principal Applicant and the Associate Applicant married in 2005, and had their son, E.F, in 2007. In 2014, the Associate Applicant left Iraq on a U.S. student visa to pursue his PhD program. In June 2014, a short time after the Associate Applicant had left Iraq, the Principal Applicant found out she was pregnant. When the Associate Applicant's family learned of the pregnancy, the Associate Applicant's brother, I.J., accused the Principal Applicant of infidelity

and bringing dishonour on the family. I.J., a high-ranking member of a local militia, made approximately eight threatening phone calls to the Principal Applicant over the next ten weeks. The Principal Applicant sought advice at a women's centre and threatened to call the police.

[6] On July 9, 2014, the Principal Applicant and her son, E.F., were granted visas to join the Associate Applicant in the U.S. On August 12, 2014, the Principal Applicant and her son left Iraq. In January 2015, the Principal Applicant and the Associate Applicant's daughter, G.H., was born. The Applicants remained in the U.S. until 2017, when U.S. authorities informed the Applicants that their visas were no longer valid because the Associate Applicant had lost his research funding and he would have to withdraw from the PhD program. Subsequently, the Applicants travelled to Canada and submitted refugee claims in October 2017.

[7] On April 27, 2018, the Applicants' refugee claim was heard by the RPD. Central to their claim was the fear of persecution from I.J., based on his threats and conduct towards the Principal Applicant. By decision dated May 1, 2018, the RPD found the Applicants were not Convention refugees or persons in need of protection. The RPD found the Applicants would not face a serious possibility of persecution if returned to Iraq.

[8] The Applicants appealed to the RAD. Pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA"*), the Applicants submitted the transcript of a telephone conversation from May 2018—which occurred after the RPD decision—between the Associate Applicant and his sister, who lived in the Applicants' region of origin and was in regular contact with I.J. By decision dated March 6, 2019, the RAD upheld the RPD's decision

and dismissed the appeal. The RAD refused to accept the new evidence that the Applicants sought to introduce. Contrary to the RPD's finding that four or five months had passed between I.J.'s learning of the pregnancy and the Principal Applicant's departure from Iraq, the RAD correctly noted that the time elapsed was only two months and eight days. Nevertheless, the RAD concluded that although I.J. had a "considerable period of time" to take concrete action against the Principal Applicant beyond the threatening phone calls, he did not do so.

[9] This is the underlying decision for this application for judicial review.

III. **Issues and Standard of Review**

[10] The issues on this application for judicial review are:

1. Was the RAD's rejection of the new evidence reasonable?
2. Did the RAD err in assessing the timeline error of the RPD?

[11] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard generally applied to the review of the RAD's consideration of RPD's findings, and the RAD's credibility findings, as in the case at bar: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII) at paras 30, 34-35; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 (CanLII) at para 30; *Walite v Canada (Minister of Citizenship and Immigration)*, 2017 FC 49 (CanLII) at para 30; *Deng v Canada (Minister of Citizenship and Immigration)*, 2016 FC 887 (CanLII) at paras 6-7.

[12] The applicable standard of review of the RAD Decision must be determined in accordance with the framework set out in *Vavilov*. As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100). In this case, the existing jurisprudence on the applicable standard of review is instructive. The reasonableness standard applies to the case at bar.

IV. **Relevant Provisions**

[13] Relevant provisions of section 110 of the *IRPA* read as follows:

Evidence that may be presented	**Éléments de preuve admissibles**
110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**110(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
[…]	[…]
Hearing	**Audience**
110(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**110(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject	**a)** soulèvent une question importante en ce qui

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.

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.

V. **Analysis**

A. *Admissibility of New Evidence*

[14] The Applicants submit the RAD made a credibility finding by refusing to admit the telephone transcript as new evidence. The Applicants submit the RAD's reasons for rejecting the new evidence formed credibility findings and demonstrated the RAD's disbelief of the Applicants' position that the transcript was genuine. The Applicants rely on *Zhuo v Canada (Citizenship and Immigration)*, 2015 FC 911 (CanLII) [*Zhuo*] and *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 (CanLII) [*Horvath*] for the proposition that the RAD is generally required to convene an oral hearing to make a valid credibility finding.

[15] The Respondent submits the RAD set out cogent reasons for rejecting the transcript of the purported telephone conversation for its lack of credibility. The RAD had noted several concerns: the Applicants did not provide the original source of phone call; there was no evidence to corroborate that the Associate Applicant was speaking to his sister; without the original recording showing the phone record, the RAD could not confirm that the Associate Applicant had called his sister; and the content of the conversation was vague and of low probative value. The Respondent submits the RAD "cannot admit evidence that is not credible" (See *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 (CanLII) [*Raza*]; *Canada (Citizenship*

and Immigration) v Singh, 2016 FCA 96 (CanLII) [*Singh*]). The Respondent further submits that there is no requirement for the RAD to hold an oral hearing to assess the credibility of the purported telephone conversation.

[16] In my view, the RAD reasonably rejected the new evidence. In *Singh*, the Court considered the scope of subsection 110(4) of the *IRPA*, and found the three conditions of admissibility set out in the provision are "inescapable and would leave no room for discretion on the part of the RAD," (*Singh* at para 35). The Court also found that the implicit criteria identified in Raza—credibility, relevance, newness, and materiality—subject to some adaptations, are also applicable in the context of subsection 110(4) (*Singh* at paras 38-49). Regarding the assessment of credibility on the admissibility of new evidence, the following excerpt is highly instructive (*Singh* at para 44):

> […] It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." It is true that paragraph 110(6)(a) also introduces the notion of credibility for the purposes of determining whether a hearing should be held. In that regard, however, it is not the credibility of the evidence itself that must be weighed, but whether otherwise credible evidence "raises a serious issue" with respect to the general credibility of the person who is the subject of the appeal. […]

[17] In view of the jurisprudence, the Applicants have advanced a misconstrued conception of the application of subsections 110(4) and 110(6) of the *IRPA*. The RAD is not required to hold an oral hearing to assess the credibility of new evidence—it is when otherwise credible and admitted evidence raises a serious issue with respect to the general credibility of the applicant

that the determination of an oral hearing becomes relevant. A "credibility finding" on the admissibility of new evidence is not equivalent to a credibility assessment on the Applicants.

[18] Contrary to the Applicants' submissions, neither decisions in *Zhou* or *Horvath* are helpful for the Applicants' arguments. The two decisions can be distinguished from the case at bar on the facts and issues. In *Zhou*, the RAD had admitted new evidence, and then used the admitted evidence to impugn the applicant's credibility (*Zhou* at para 2). Similarly in Horvath, the RAD had accepted new evidence that was directly contradictory to the RPD's findings, which went to the core of the applicants' credibility (*Horvath* at para 20). In the case at bar, the RAD rejected the new evidence.

[19] The RAD's rejection of the telephone transcript evidence was reasonable.

B. *Reasonableness of the RAD Decision*

[20] The Applicants submit the RAD erred in concluding that the RPD's erroneous understanding of the Principal Applicant's timeline in Iraq—in which she received threats from I.J.—did not "materially change the analysis". The Applicants submit that this timeline error was a key aspect in forming the RPD's frame of mind to assess the overall credibility of the Applicants, which informed the plausibility of the Applicants' claims, the genuineness of the Principal Applicant's fear, and an understanding of the Principal Applicant's pregnancy.

[21] I agree with the Applicants' position. A key concern raised by the RPD member in assessing the Applicants' credibility was that she was unsatisfied the Associate Applicant's

family or the brother, I.J., had acted on or may act on their disapproval of the marriage between the Principal Applicant and the Associate Applicant. However in this assessment, the RPD largely erred in its understanding of the timing of events, and had inappropriately relied on this erroneous context to find that the profile of the agent of persecution—and thus the Applicants' allegations—lacked credibility.

[22] The RPD noted that when I.J. learned of the Principal Applicant's pregnancy, he did not act beyond placing "annoying" phone calls, and although his threats via phone calls escalated when the Principal Applicant said she would go to the police, she "continued to live in Sulaymaniyah for several months before she joined her husband in the U.S. without seeing any of her in-laws," (my own emphasis added). The RPD also noted that within the context of "honour" crimes, the perpetrator would be more inclined to harming the target in a "stealthy fashion" when the public is not yet aware of the alleged acts of infidelity, i.e. before a pregnancy begins to show. The Applicants had argued that because the Principal Applicant's alleged "infidelity" was not known by others, I.J. would not want to publicly harm the Principal Applicant, but target her privately and in a "stealthy" manner.

[23] The RPD then concluded that if I.J. did wish to harm the Principal Applicant in a "stealthy fashion", he would have had the opportunity "during the four to five months that the [Principal Applicant] was still in Iraq, and was at her earlier and therefore less visible stage of her pregnancy." Since I.J. did not harm or attempt to harm the Principal Applicant during these four to five months, the RPD concluded it did not agree with the Applicants' characterization

that I.J. was interested in harming the Principal Applicant. Ultimately, the RPD did not find "the profile of the associate claimant's family" to be credible.

[24] In reviewing the RPD decision and forming its own assessment, the RAD noted that from the Applicant's documentary evidence, I.J. would be interested in harming the Principal Applicant before her pregnancy would begin to show, to prevent others from learning of the alleged dishonourable conduct. While the RAD recognized I.J. had only been aware of the Principal Applicant's pregnancy for about two months (contrary to the RPD's erroneous finding of four to five months), the RAD concluded this did not materially change the analysis, since I.J. and his family "continued to have a limited opportunity to keep the alleged dishonourable conduct from being known…before [the Principal Applicant] left for the U.S."

[25] From the RPD decision, it is evident that the RPD rejected the Applicants' credibility since the alleged risk of harm never materialized within the four to five months, in which the Principal Applicant's pregnancy would have begun to show. On an erroneous timeline framework, the RPD had concluded that I.J. was not interested in harming the Principal Applicant in a "stealthy" manner as the Applicants had alleged, since the Principal Applicant was left unharmed even until her pregnancy was visible to the public. This formed a crucial aspect of the RPD's adverse credibility findings against the Applicants. However, in its own assessment, the RAD continued to draw an illogical conclusion that a timeline of two months or four to five months makes no difference in the analysis. In my view, a correct understanding of the timeline is a significant detail. As noted earlier, conclusions on the plausibility of the Applicants' narrative and claim, and the truthfulness of the Principal Applicant's fear would

differ depending on the two timelines. Certainly, the credibility of the Applicants' claim would be lower if I.J. did not take any action to harm the Principal Applicant even until her pregnancy was very visible, since it would imply I.J. had no interest in harming the Principal Applicant before the news became public. However, a finding that I.J. did not yet take action to harm the Principal Applicant over two months, but still had a chance to (while the pregnancy was less visible or not showing), does not preclude the possibility that I.J. would still have a window to act upon his intentions to harm the Principal Applicant.

[26] The RAD Decision lacked an internally coherent and rational chain of analysis that is justified in relation to the facts and law (*Vavilov* at para 85).

VI. **Certified Question**

[27] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[28] The RAD erred in concluding that the RPD's erroneous timeline did not materially change the analysis. Thus, the RAD Decision is unreasonable. This application for judicial review is allowed.

JUDGMENT in IMM-2133-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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