Federal Court  Cour fédérale

Date: 20210303

Docket: IMM-7828-19

Citation: 2021 FC 199

Ottawa, Ontario, March 3, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

AHMAD QUIS BAREKZAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, which upheld the decision of the Refugee Protection Division [RPD]. The RAD determined the Applicants are not Convention refugees nor persons in need of protection pursuant to section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [Decision].

II. Facts

[2] The Applicant is a citizen of Afghanistan and states he fears persecution by the Taliban based on a newspaper article he wrote criticizing the Taliban.

[3] In his Basis of Claim the Applicant states he began assisting a small newspaper in Afghanistan [Newspaper] in and around April 2016. The Applicant's brother was a reporter with it.

[4] In and around October 2016, the Newspaper published an article written by the Applicant warning people to be aware of the Taliban's recruitment of youth into suicide missions by recruiting children under the pretext of Islamic education and then diverting them towards suicide missions [Article].

[5] One week after the Article was published, the Applicant says he received a phone call from someone who stated he had "written an article against the Taliban and the Islamic Emirate of Afghanistan and that [he] should cease doing so". The Applicant responded his mandate was to write and he wrote the truth. Soon after, the Applicant received another similar phone call.

[6] Another week later, the Applicant received a third phone call and the caller stated the Applicant had been warned twice but continued to work with the Newspaper and was therefore "sentenced to death".

[7] The Applicant changed his phone number but one week later, on November 7, 2016, received two text messages saying the Applicant could not escape by changing his number, he would not remain alive, he had written against the Islamic Emirates of Afghanistan, he was a spy for the infidels and he was calling for his own death. The Applicant says he was concerned they had his address so he slept at a friend's home and left for Kabul the next day. The Applicant already had a visa for India so he fled to India after staying in Kabul for one night.

[8] In June 2017, the Applicant returned to Afghanistan to collect documents to submit an application for a US visa. The Applicant says the purpose for getting the US visa was both to flee Afghanistan and to join his fiancée in the US.

[9] The Applicant said he did not know if the Taliban would pursue him and hoped he would be safe while collecting the documents. On October 15, 2017, a man knocked on his door and grabbed the Applicant. Another man holding what appeared to be an AK 47 was holding open the door of a black vehicle and a third person was in the driver's seat. The Applicant said he starting yelling for help and some neighbours came to help him and the three men left. The Applicant stayed at his friend's home that night, left for Kabul the next day and then travelled to India the next day.

[10] The Applicant's brother made two police reports for the Applicant while he was in India. He made the first report made after the calls and texts in November 2016. The second was made after the attempted kidnapping in October 2017. The brother said after the first report the police

said they could not provide security for every citizen and could not assist. The Applicant did not state what, if anything, the police said after the filing of the second report.

[11] The Applicant then travelled to the US. His relationship with his fiancée ended and he did not make an asylum claim in the US because he could not anticipate results under the Trump administration. The Applicant crossed into Canada where he has a friend and claimed refugee status. He was heard by the RPD in July, 2018.

[12] The RPD found the Applicant was not a Convention refugee or a person in need of protection. The determinative issue was the Applicant's credibility. The RPD did not believe the Applicant was a writer who submitted the Article to the Newspaper and had it published. The RPD found the Applicant's answers were generally consistent with written statements but some evidence lacked plausible and convincing detail and the letter of references were "bogus".

[13] The Applicant appealed the RPD decision to the RAD.

III. Decision under review

[14] The Applicant argued the RPD failed to consider all of the evidence and erroneously rejected the Applicant's claim based on credibility. In its Decision, the RAD dismissed the appeal and upheld the decision of the RPD. The RAD overturned some of the RPD's findings but agreed with the RPD's conclusion.

[15] The RAD accepted the general proposition of journalists and news outlets publishing articles notwithstanding reprisal they may face and country condition evidence showing Taliban and Islamic State using threats, intimidation and violent attacks against media companies and journalists.

[16] The RAD accepted the Applicant wrote an anti-Taliban Article that was published in the Newspaper.

[17] However, the RAD found it not plausible that the Applicant did not ask the Newspaper if it had been targeted by the Taliban.

[18] The RAD also found the totality of evidence did not support a finding that his subjective fear was credible and that he was actually threatened by the Taliban.

[19] The RAD further found the Applicant's decision to return to his family home in June 2017 was inconsistent with his testimony he feared the Taliban would find him there, and his explanation he thought the situation was calm was insufficient to address the inconsistency. The RAD found the Applicant's evidence of evading kidnap was implausible and ultimately found the "adverse credibility findings concern the allegation of targeted risk at the heart of the Appellant's claim, which means I do not need to conduct a separate section 97 risk analysis. Nor do I need to conduct a section 97 risk analysis based on a residual risk profile the Appellant does not possess." As a result, the RAD dismissed the appeal and confirmed the decision of the RPD.

IV. Issues

[20] The only issue is whether the Decision is reasonable.

V. Standard of Review

[21] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[22] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[23] The Supreme Court of Canada in *Vavilov*, at para 86 states "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies." The reviewing court must be satisfied the decision maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

VI. Analysis

[24] The basis of the RPD decision was the Applicant's lack of credibility which finding was based largely on two plausibility findings. The RAD struck several of the RPD's credibility findings, but nonetheless found the Applicant was not credible after conducting its own credibility analysis.

[25] The Applicant submits two RAD credibility findings were flawed and resulted in an unreasonable Decision, because the two findings and consequential subsidiary findings had to be set aside and ignored.

A. *Implausibility of discussion with Newspaper*

[26] The Applicant submits the RAD "appeared to agree" with the RPD's finding it was implausible the Applicant did not ask the Newspaper if it had received any threats as a result of his Article.

[27] The Applicant submits there was no evidence whether the Newspaper had or had not received threats. I agree. Therefore, the RAD's plausibility findings must be supported by the evidence before the panel including country condition evidence, rationality or common sense, and should only have been made in the clearest of cases: see *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653 [Blanchard J]:

> 21 Before proceeding to consider the credibility and plausibility findings of the CRDD, I think it useful to review the applicable standard of review for such findings.

22 The jurisprudence of this Court has clearly established that the CRDD has complete jurisdiction to determine the plausibility of testimony, so long as the inferences drawn are not so unreasonable as to warrant intervention, its findings are not open to judicial review. [See *Aguebor v. Canada (Minister of Employment & Immigration)* (1993), 160 N.R. 315 (Fed. C.A.), pp. 316-217 at para. 4.]

23 There is also authority that would see a Court intervene and set aside a plausibility finding where the reasons that are stated are not supported by the evidence before the panel. In *Yada v. Canada (Minister of Citizenship & Immigration)* (1998), 140 F.T.R. 264 (Fed. T.D.), Mr. Justice MacKay, at page 270 para. 25, wrote:

> Where the finding of a lack of credibility is based upon implausibilities identified by the panel, the court may intervene on judicial review and set aside the finding where the reasons that are stated are not supported by the evidence before the panel, and the court is in no worse position than the hearing panel to consider inferences and conclusions based on criteria external to the evidence such as rationality, or common sense.

24 Further, it is accepted that a tribunal rendering a decision based on a lack of plausibility must proceed with caution. I find it useful to reproduce the following passage from L. Waldman, Immigration Law and Practice, (Markham: Butterworths Canada Ltd. 1992) at page 8.10, paragraph § 8.22 which deals with plausibility findings and the impact of documentary evidence that may be before the tribunal:

> § 8.22 Plausibility findings should only be made in the clearest of cases - where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant. Plausibility findings should therefore be "nourished" by reference to the documentary evidence. Moreover, a tribunal rendering a decision based on lack of plausibility must proceed cautiously, especially when one considers that refugee claimants come from diverse cultures, so that actions which might appear implausible if

> judged by Canadian standards might be plausible when considered within the context of the claimant's background.

[28] Justice Muldoon in *Valtchev v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 776 [*Valtchev*] similarly held:

> 8 The tribunal adverts to the principle from *Maldonado v. Canada (Minister of Employment & Immigration)* (1979), [1980] 2 F.C. 302 (Fed. C.A.), at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the *Maldonado* principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.
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> 9 A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22].

[29] In *Tang v Canada (Citizenship and Immigration)*, 2019 FC 1478 I stated:

> [16] An allegation may be found implausible when it does not make sense in light of the evidence before the Board or is outside the realm of what reasonably could be expected. Otherwise, a plausibility determination may be nothing more than unfounded speculation. The Applicant relies on *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 per Gleason J, as she then was, at para 11 [*Zacarias*]:

> [11] An allegation may thus be found to be implausible when it does not make sense in light of the evidence before the Board or when (to borrow the language of Justice Muldoon in *Vatchev*) it is "outside the realm of what reasonably could be expected". In addition, this Court has held that the Board should provide "a reliable and verifiable evidentiary base against which the plausibility of the Applicants' evidence might be judged", otherwise a plausibility determination may be nothing more than "unfounded speculation" (*Gjelaj v Canada (Minister of Citizenship and Immigration*), 2010 FC 37 at para 4, [2010] FCJ No 31; see also *Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 694 at para 20, [2012] FCJ No 885 [Cao]).

[30] The Applicant submits, and I agree that the RAD's plausibility findings do not meet the established standard because in the first instance it was not necessary for the Applicant to ask if the Newspaper itself received threats. In addition the facts of this case are far from "the clearest of cases" that could justify a finding of implausibility and the RAD erred in finding so.

[31] While the Respondent submits the Applicant "misses the point", the fact is there was no evidence on whether or not the Newspaper received threats and or was targeted by the Taliban. This particular plausibility finding, in my respectful view, was crafted out of thin air, i.e., unsupported and speculative. Such finding was neither a common sense matter nor one based on rationality. It is unsustainable in the context of a reasonableness on judicial review inquiry because it does not conform with well-settled law on plausibility findings canvassed above. Findings made outside constraining legal parameters mark an unreasonable decision, and with respect, this is one such instance. This plausibility finding is therefore set aside and must be disregarded.

B. *Implausibility of attempted kidnapping*

[32] The RAD also found it was implausible the Taliban would have been deterred from kidnapping the Applicant on October 15, 2017 due to the presence of witnesses.

[33] In this regard, the Decision states:

> [47] I also find that the Appellant's account of having evaded kidnap by the Taliban is implausible both in light of his own evidence and the country conditions evidence. The RPD was "concerned by the reported ease with which the claimant evaded a squad of presumably armed militants on a kidnap mission" and opined that "[t]he presence of neighbours and onlookers is not something that has been noted to deter Taliban operations against its targets". The Appellant submits that the RPD's finding was made in error, as "[n]ot every assassination or kidnapping mission succeeds" and the Taliban's acts of terrorism were not "infallible".
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> [48] I have considered the account of the alleged Taliban kidnapping attempt in the Appellant's BOC narrative and his testimony about the alleged incident50 in light of the letter from the alleged witnesses to the kidnapping attempt.51 According to his BOC narrative it was "on about October 15 2017" that three men, one of who was "holding what looked like an AK 47", attempted to force the Appellant into a waiting black car.
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> [49] During the hearing the RPD asked the Appellant "how the Taliban kidnap squad" was "deterred by the appearance of some onlookers" given that they were armed and intent of "punishing an infidel." The Appellant testified that he was "lucky" and that "God helped [him]." According to the Appellant at least one of those who allegedly tried to kidnap him was armed with an automatic firearm. Absent evidence that any individuals or groups intervened to resist the kidnapping attempt, I find it implausible that the alleged kidnappers would have been deterred by the mere presence of observers.
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> [50] This is particularly the case given the numerous accounts in the country evidence of Afghan civilians being abducted by anti-government elements including the Taliban, and even killed shortly after being abducted or assassinated on the spot. For this reason I find that the Appellant's account of the alleged kidnapping

> is not credible, and that he was never the target of an attempted kidnapping by the Taliban.

[34] In my respectful view, this plausibility finding is unreasonable for three reasons.

[35] First, in essence, the RAD is speculating as to what is in the mind of the Taliban in question, or to put it another way, by asking what the reasonable Taliban would do in the circumstances. In my view *Venegas Beltran v Canada (Citizenship and Immigration)*, 2011 FC 1475 [per Rennie J, as he then was] is analogous: this Court found it unreasonable for the tribunal to speculate as to the actions of a "reasonable extortionist":

> [7] With respect to the plausibility findings, this case is an application of the principle expressed in *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653 where Mr. Justice Edmond Blanchard held that "there is… authority that would see a Court intervene and set aside a plausibility finding where the reasons that are stated are not supported by the evidence before the panel." More recently, as noted by Justice James O'Reilly in *Cao v Canada (Citizenship and Immigration)*, 2007 FC 819 at a para 7, the Court is often equally well situated as the Board in deciding whether a particular event or scenario or series of events might have occurred.
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> [8] Here, the Board speculated that a reasonable extortionist would have specified the sum of money demanded together with the means of payment, in the first phone call. The Board also found as implausible that the extortionists would make a call warning the applicant that he would be killed for having reported the threats to the police. This presumes much as to the *modus operandi* of the extortionist. The characterization of the events as described as implausible does not withstand the test of reasonableness.

[36] Secondly, this plausibility finding references and considers a letter originally filed by the Applicant with a request that it be treated as new evidence. However the RAD excluded the letter from the record. The RAD then compared this same letter to the Applicant's account of the

kidnapping. I am not persuaded the RAD should have supported an implausibility finding related to a document excluded from the record.

[37] Thirdly, the Court was taken to a number of country condition statements and evidence that contradict what the RAD held was implausible: see for example the National Documentation Package which provides examples of Taliban targets and incidents but does not explain the Taliban's *modus operandi* or whether they pursue every kidnapping attempt. The documentary evidence does not establish that the Taliban always kidnaps and executes its victims. Thus, this implausibility cannot stand and must be struck as failing to comply with constraining law.

[38] In my view, two other significant and residual findings by the RAD also fall when these two implausibility findings are removed: first, the Applicant's lack of sufficient residual profile merely as a journalist who had not written against the Taliban, and second the finding that he lacked subjective fear when he returned to Afghanistan to get his US documents – noting the fact the kidnap attempt took place *after* his return and that he left immediately after the failed kidnapping.

VII. Conclusion

[39] I am persuaded that without these two implausibility findings, and without the two other findings displaced as they were, judicial review must be granted. Otherwise, the findings below cannot safely support the refusal of his claim for refugee status because the credibility determinations of the RAD are not justified on the facts and constraining law before it. Because

the Decision is not supported by the record, it is neither transparent nor intelligible, and therefore judicial review must be granted and the Decision set aside.

VIII. Certified Question

[40] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7828-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision of the RAD is set aside, this matter is remanded to be reconsidered by a different decision-maker, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7828-19
STYLE OF CAUSE:	AHMAD QUIS BAREKZAI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON FEBRUARY 22, 2021 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 3, 2021

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