Federal Court  Cour fédérale

Date: 20210414

Docket: IMM-6878-19

Citation: 2021 FC 324

Ottawa, Ontario, April 14, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MUHAMMAD FAYSAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Muhammad Faysal, seeks judicial review of a decision of the Refugee Appeal Division ("RAD"), confirming the determination of the Refugee Protection Division ("RPD") that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of *Immigration and Refugee Protection Act*, SC 2001, c

27 ("*IRPA*"). The RAD dismissed the Applicant's claim for refugee protection because it found that the Applicant failed to establish his identity.

[2] The thrust of the Applicant's argument is that the RAD erred by refusing to admit the new evidence submitted by the Applicant upon appeal.

[3] In my view, the RAD unreasonably refused to admit the Applicant's new evidence, including his passport application receipt and birth information verification. With respect to the passport application, the RAD failed to consider the materiality of the potential arrival of the Applicant's passport and to justify its decision in light of the relevant country condition evidence. With respect to the birth information verification, the RAD unreasonably relied upon a lack of authenticity features and provided reasons that are not internally coherent. I therefore grant this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 22-year-old male and citizen of Bangladesh. The Applicant's parents were supporters of the Bangladesh Nationalist Party, the opposition party to the Awami League. On June 5, 2014, Awami League supporters killed the Applicant's father due to his political affiliations. The Applicant was then pressured to support the Awami League and was attacked when he refused to do so. The Applicant's mother moved the Applicant to a village in attempt to provide him with safety, but the Awami League supporters eventually found the Applicant and

attacked him again. Believing that the Applicant was no longer safe in Bangladesh, the Applicant's mother arranged for a smuggler to take him to the United States.

[5] On September 22, 2016, the Applicant left Bangladesh. After a lengthy journey, the Applicant entered the United States on December 26, 2016, where he was detained by immigration authorities for several months. On or about January 30, 2018, the Applicant entered Canada and made a claim for refugee protection.

[6] In a decision dated December 10, 2018, the RPD denied the Applicant's claim for refugee protection because it found that the Applicant failed to establish his identity. The Applicant subsequently appealed the RPD's decision to the RAD.

B. *Decision Under Review*

[7] In a decision dated October 9, 2019, the RAD confirmed the RPD's decision and dismissed the Applicant's appeal.

[8] The Applicant submitted the following new evidence to the RAD upon appeal:

1. an excerpt of the rules from the *Bangladesh Gazette* concerning the application procedure for obtaining a copy of one's birth certificate;

2. a receipt for a passport application that the Applicant submitted to the Bangladesh High Commission in Ottawa; and

3. the verification of the Applicant's birth information from the government of Bangladesh's website.

[9] The RAD refused to admit the Applicant's new evidence and accordingly dismissed his request for an oral hearing.

[10] On the merits of the Applicant's claim, the RAD confirmed the RPD's determination that the Applicant failed to establish his identity. As the Applicant did not possess a passport, his claim for refugee protection was based primarily upon the following documents: two birth certificates; two documents from a city councillor; death certificates for the Applicant's father; and documents from the Applicant's school. The RAD found that these documents did not establish the Applicant's identity.

[11] Noting the Applicant's obligation to provide sufficient and credible evidence to establish his identity under section 106 of *IRPA*, the RAD found that the Applicant's failure to establish his identity was sufficient to dismiss his claim for refugee protection.

III. **Issue and Standard of Review**

[12] The sole issue upon this application for judicial review is whether the RAD's decision is reasonable.

[13] Reasonableness is the applicable standard of review for both the RAD's admission of evidence under subsection 110(4) of *IRPA* and its decision to hold an oral hearing under

subsection 110(6), as both issues involve the RAD's interpretation and application of its home statute (*Ifogah v Canada (Citizenship and Immigration)*, 2020 FC 1139 at para 35, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"); *Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148 at para 9). I am therefore not persuaded by the Applicant's argument that the RAD's decision not to hold an oral hearing constitutes an issue of procedural fairness that is to be reviewed upon a correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35, and the cases cited therein).

[14] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at para 13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[15] Where a decision provides reasons, those reasons are the starting point for review (*Vavilov* at para 84). Reasons for a decision need not be perfect; as long as the reasons allow the reviewing court to understand why the decision-maker made its decision and permit it to determine whether the conclusion falls within the range of acceptable outcomes, the decision will normally be reasonable (*Beddows v Canada (Attorney General)*, 2020 FCA 166 at para 25, citing

Vavilov at para 91). Conversely, where a decision-maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will normally be unreasonable (*Vavilov* at para 98).

[16] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing or reassessing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Findings of credibility are accordingly provided "significant deference" upon review (*Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6, citing *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at para 21).

IV. **Analysis**

[17] Section 110 of *IRPA* governs appeals of RPD decisions to the RAD. Under subsection 110(3), the RAD generally "must proceed without a hearing, on the basis of the record of the proceedings of the [RPD]." Subsection 110(4) enumerates the circumstances in which a claimant may present evidence that was not before the RPD:

Evidence that may be presented	**Éléments de preuve admissibles**
(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	(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

could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[18] Once the RAD finds that new evidence meets the criteria under subsection 110(4) of *IRPA*, the RAD must then consider whether that evidence is credible, relevant, and material (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 38-49, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 ("*Raza*") at paras 13-15). These latter admission criteria are known as the "*Raza* factors."

[19] Under subsection 110(6) of *IRPA*, the RAD may hold an oral hearing if it admits new evidence that raises a serious issue with respect to the credibility of the claimant, and that is central and determinative:

Hearing	**Audience**
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	(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 of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[20] The Applicant submits the RAD unreasonably refused to admit: (1) the receipt for a passport application that the Applicant submitted to the Bangladesh High Commission in Ottawa; and (2) the verification of the Applicant's birth information from the government of Bangladesh's website. The Applicant does not argue that the RAD erred in refusing to admit the excerpts from the *Bangladesh Gazette*.

(1) Passport application receipt

[21] The RAD held that the passport application receipt met the statutory requirement under subsection 110(4) of *IRPA*, but determined that the evidence was inadmissible under the *Raza* factors. The RAD's reasons for this conclusion are two-fold: the Applicant failed to collect his passport before the collection date, and the application alone is not proof of the Applicant's identity. In particular, the RAD stated:

> I note that the document has February 17, 2019 as the date when the requested document could be collected. There is no indication that the Appellant has in fact collected the requested document. An application is not in and of itself proof the Appellant's [*sic*] identity.

[22] In refusing to admit the passport application receipt, the Applicant submits that it was unreasonable for the RAD to rely on the Applicant's failure to collect his passport. The Applicant notes that, as stated on the receipt, February 17, 2019 is a "tentative collection date" that is "subject to police verification." The Applicant further notes that according to Item 3.11 of the March 29, 2019 National Documentation Package ("NDP") for Bangladesh, the police verification process may take anywhere from six months to one year.

[23] I agree with the Respondent that the operative *Raza* factor in this issue is whether the passport application receipt was material. Indicative of this conclusion is the RAD's finding that the receipt is not alone proof of the Applicant's identity.

[24] Evidence is material if it could reasonably be expected to have affected the result of the RPD's decision (*Yurtsever v Canada (Citizenship and Immigration)*, 2020 FC 312 at para 15). The RAD must take a "generous approach" to the notion of materiality; if the RAD does not accept new evidence directly related to central elements of a refugee claim, it must properly explain the reasons for doing so (*Khan v Canada (Citizenship and Immigration)*, 2020 FC 438 at para 34).

[25] In my view, the RAD unreasonably determined that the passport application receipt was not material. The Applicant's passport, should he receive it, is the evidence with perhaps the greatest likelihood of affecting the RPD's determination that the Applicant failed to establish his identity. While I agree with the Respondent that the receipt is not material alone, I find that it is material in relation to the potential arrival of a passport — a possibility that is of the utmost

significance to the RPD's decision. For example, it would likely be reasonable for the RAD to conclude that the application is not material if it was established that the application would not result in the issuance of a passport, as the material component of the application would then be lost.

[26] In this case, the RAD failed to consider the material component that the receipt represents, instead faulting the Applicant for having not collected the passport. I agree with the Applicant that this approach is not justified in relation to the relevant country condition evidence (*Vavilov* at para 85).

[27] The Applicant's enrollment date for the passport application was January 11, 2019. Based on the NDP, the Applicant's passport may therefore not be verified until January 11, 2020. The RAD, however, issued its decision on October 9, 2019 — well within the six to twelve month verification process outlined in the NDP. While I am not persuaded with the Applicant's argument that the RAD was itself obligated to verify the application process (*Barre v Canada (Citizenship and Immigration)*, 2017 FC 1091 at para 20, and the cases cited therein), the RAD nonetheless had the ability to assess the application's results after it had run its expected course. I find that the RAD's failure to do so, in light of the passport's materiality, renders its decision unreasonable.

(2) Birth information verification

[28] The RAD held that the "original document" of the Applicant's birth information verification met the statutory requirements under subsection 110(4) of *IRPA*, but it nonetheless

determined that the evidence was inadmissible. The RAD's reasons for this conclusion are again two-fold: there is no indication of the source and authenticity of the document, and the Applicant did not provide a reasonable explanation for why the information contained in the document was not submitted to the RPD. In particular, the RAD stated:

> I note that there is no indication on the face of the document, such as a letterhead, logo, or signature, which provides the source and authenticity of this document. The information in this document could have been provided to the RPD prior to its decision. The Appellant has failed to provide any reasonable explanation as to why this information was not have been [*sic*] submitted prior to the RPD rendering its decision.

[29] With respect to the RAD's determination that the birth information verification lacked markers of authenticity, I find that the RAD's reasoning is not justified, transparent, and intelligible (*Vavilov* at para 99). I understand the RAD as concluding the evidence is not admissible under the *Raza* factors because it is not credible. However, the RAD fails to make any transparent findings to that effect — it does not even mention the word "credible" in its reasons.

[30] A lack of transparency aside, the RAD's determination is also not justified in relation to the relevant facts and law (*Vavilov* at para 85). I agree with the Applicant that *Denis v Canada (Citizenship and Immigration)*, 2018 FC 1182 ("*Denis*"), is analogous to the case at hand. In *Denis*, Justice Martineau held that the RAD unreasonably dismissed the claimants' identity documents for a lack of security features:

> [40] […] Documents issued by a foreign authority are presumed to be valid and in order to rebut this presumption, evidence to the contrary must be before the decision-maker. I find that such evidence was not before the RAD.
>
> [41] The RAD did not accept the Nigerian birth certificates as proof of the minor applicants' identities due to a lack of "verifiable security features," and its preference for the Minister's evidence. However, there was no evidence, or passage in the NDP, suggesting that security features of any specific kind are expected for Nigerian birth certificates. Moreover, neither decision provides any explanation as to why security features should be required nor what specific security features were expected. Without evidence that specific security features are required, "a lack of verifiable security features" is not a reasonable basis to rebut the presumption that a foreign-issued document is valid. While the RAD did not possess the original birth certificates, which were before the RPD, the record contained photocopies. It appears from these copies that each of the birth certificates was affixed with an official stamp. However, neither the RPD nor the RAD mentioned the stamp, which could very well be a security feature capable of identifying the issuing authority in Nigeria.
>
> [emphasis added, citations omitted]

[31] Likewise, in the case at hand, the RAD failed to explain why it expected the birth information verification to contain a letterhead, logo, or signature, and to rely on evidence to justify those expectations. As noted by the Applicant, Item 3.2 of the March 29, 2019 NDP for Bangladesh states that information for registering and obtaining a Bangladesh birth certificate can be found at a similar website address to the one listed on the birth information verification: br.lgd.gov.bd. The RAD, however, did not consider how the presence of this address might identify the authenticity of the document.

[32] In faulting the document for not containing such features, the RAD implicitly concludes that the document is fraudulent. Fraud is a serious finding that must be grounded in the evidence

(*Balyokwabwe v Canada (Citizenship and Immigration)*, 2020 FC 623 at para 45, citing *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 24). The RAD's finding in this case is not grounded upon any evidence, only its speculation that the birth information verification should contain certain features. I therefore find that the RAD's determination on this matter is unreasonable.

[33] In my view, the RAD's finding that the birth information verification could have been submitted prior to the RPD rendering its decision is also unreasonable. The RAD states at the outset of its reasons that the document meets the requirements under subsection 110(4) of *IRPA*, entailing that the birth information verification was not reasonably available to the Applicant before the RPD rendered its decision. However, the RAD then proceeds to find that the information in the document could have been provided to the RPD before its decision was issued, and it faults the Applicant for not doing so.

[34] It is unclear whether the RAD found that the entirety of the birth information verification is inadmissible under subsection 110(4) of *IRPA*, or whether only the information in the document is inadmissible. I find that both conclusions are unreasonable.

[35] The former conclusion is not internally coherent as it clearly contradicts the RAD's earlier finding that the evidence met the requirements under subsection 110(4) of *IRPA* (*Vavilov* at para 85). The latter conclusion is unreasonable as it splices the evidence in two by saying the document is itself admissible under the statutory requirements but the information it contains is not. Either the birth information verification is admissible under subsection 110(4) or it is

inadmissible; by not making a determination on the totality of the evidence, the RAD's decision is not justified, transparent, or intelligible (*Vavilov* at para 99).

V. **Conclusion**

[36] I find that the RAD's decision is unreasonable. I therefore grant this application for judicial review.The parties have not identified a question of general importance for certification. I agree that none arises.

JUDGMENT IN IMM-6878-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter returned for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6878-19
STYLE OF CAUSE:	MUHAMMAD FAYSAL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDECONFERENCE BETWEEN OTTAWA AND TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 24, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	APRIL 14, 2021

APPEARANCES:

Subodh Bharati	FOR THE APPLICANT
Charles Julian Jubenville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT