

Federal Court



Cour fédérale

**Date: 20210608**

**Docket: IMM-5955-20**

**Citation: 2021 FC 574**

**Vancouver, British Columbia, June 8, 2021**

**PRESENT: The Honourable Mr. Justice Bell**

**BETWEEN:**

**MUHAMMAD JAVED**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**(Delivered from the Bench at Vancouver, British Columbia, on June 7, 2021 and edited for syntax and grammar with added references to the relevant case law)**

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA], from the October 31, 2020 decision of the Refugee Appeal Division [RAD]. The RAD allowed the appeal from the Refugee Protection Division [RPD] which found Muhammad Javed to be a convention refugee pursuant to section

96 of the *IRPA*. The RAD referred the matter back to the RPD for re-determination pursuant to paragraph 111(1)(c).

[2] Although there is some discrepancy with respect to the exact birthdate of the Applicant, being either April 2 or February 4, there is no dispute that his birth year was 1965. He claims to have been born in the province of Khost, Afghanistan. He is married, and together with his wife, they have nine children. His spouse and children live in Afghanistan.

[3] Mr. Javed claims that when he was a teen, he, along with his family, fled to Pakistan in response to the Afghan civil war in 1978 and the Soviet invasion of Afghanistan in 1979. His family lived in Peshawar, Pakistan, along with more than 600,000 other Afghans, who were displaced persons. While permitted to live there, they were not permitted to obtain Pakistani citizenship.

[4] Mr. Javed claims that he was able to fraudulently obtain an authentic Pakistani passport in his own name by claiming he was the son of a Pakistani citizen. There is no dispute that he used his Pakistani passport to travel to several countries.

[5] Mr. Javed entered Canada from the United States on January 31, 2019. On that same day, he was arrested by the Royal Canadian Mounted Police and transported to the Pacific Highway port of entry, where he was released and referred to the Canada Border Services Agency Office in Vancouver, British Columbia. On or about March 21, 2019, Mr. Javed, without the assistance of counsel, completed a basis of claim form and filed for refugee protection.

[6] On April 17, 2019, the Minister of Public Safety and Emergency Preparedness intervened in his refugee claim. The claim was heard over two days, July 8, and July 31, 2019.

[7] In a decision dated September 19, 2019, the RPD accepted Mr. Javed's claim for refugee protection. The Minister appealed the decision to the RAD. The Minister claimed, *inter alia*, that the RPD erred in finding that Mr. Javed was not a citizen of Pakistan.

[8] In its decision, the RAD properly noted, following *Huruglica v Canada (Citizenship and Immigration)* 2017 FC 765, that the RAD applies a standard of correctness for questions of fact, mixed fact and law, and questions of law. It also correctly concluded that it may defer to the RPD in assessing credibility findings if it is of the view the RPD had a meaningful advantage in the circumstances. In the circumstances of this case, the RAD categorically concluded, "I find that the RPD did not have a meaningful advantage".

[9] Section (111)(1)(c) of the *IRPA*, which confers jurisdiction to the RAD to refer claims back the RPD for re-determination, is qualified by section 111(2) of the *IRPA* which reads as follows:

(2) the Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that:

(a) the decision of the Refugee Protection Division is wrong in law, in fact; and

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

**(b)** it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

**b)** qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

[10] I consider that to be a conjunctive test. Having concluded that the RPD did not have a meaningful advantage regarding findings of credibility, I am of the view it was not open to the RAD by operation of paragraph 111(2)(b), to refer the matter back to the RPD for re-determination.

[11] In the event I am wrong in that interpretation, I am satisfied the RAD decision in the circumstances does not meet the test of reasonableness as outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. *Vavilov* requires the reviewing court to 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” (para 99).

[12] In the circumstances of this case, the RAD referred generally to discrepancies that it felt the Applicant should have the opportunity to clear up before a different panel member of the RPD.

[13] The RAD refers generally to the discrepancies that the RPD member failed to consider such as his status in Pakistan, how he obtained his Pakistani passport, and the origins of the threats in Afghanistan. That said there is no specificity to the alleged discrepancies save one; namely, that which arises from the Applicant's statements that he received threats at his home in Pakistan, and later testified that threats came from individuals in motorcycles who came to a local mosque in Peshawar, Pakistan.

[14] I find that the general reference to discrepancies and that one specific reference to the situs of the threats do not, in the circumstances, a reasonable decision make. I am of the view that given the RPD's factual findings and the RAD's clear refusal to make different findings, despite its declaration that it was in as good a position as the RPD to make such findings, the decision by the RAD is neither justified, transparent nor intelligible.

[15] As a result, I would allow the application for judicial review and refer the matter back to a different panel of the Refugee Appeal Division for re-determination.

[16] I inquired of the parties as to whether either have a proposed question for certification and neither does. In the circumstances, no question is certified for consideration by the Federal Court of Appeal.

**JUDGMENT in IMM-5955-20**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed.

The matter is referred back to the Refugee Appeal Division for re-determination by a differently constituted panel.

"B. Richard Bell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5955-20

**STYLE OF CAUSE:** MUHAMMAD JAVED v MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** JUNE 7, 2021

**JUDGMENT AND REASONS:** BELL J.

**DATED:** JUNE 8, 2021

**APPEARANCES:**

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