

Federal Court



Cour fédérale

**Date: 20211103**

**Docket: IMM-4806-20**

**Citation: 2021 FC 1177**

**Ottawa, Ontario, November 3, 2021**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**OMER KHAN  
SUMMIYA X  
(AKA SUMMIYA BAKHSH)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board confirming the Refugee Protection Division's (RPD) determination that the applicants, Omer Khan and his wife Summiya Bakhsh, are neither Convention refugees nor persons in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Credibility was the

determinative issue. Specifically, the RAD (and the RPD) found that upon entering Canada, the applicants had identified “unknown criminals” as the agents of persecution in their port of entry (POE) interviews, but their basis of claim (BOC) narrative and supporting evidence indicated that the agents of persecution were members of their own extended families.

[2] The applicants submit the RAD’s credibility finding is unreasonable. They argue the RAD relied on a perceived inconsistency in the POE interview notes as the sole basis for refusing their refugee claim. The applicants allege that the fears they described at the POE interviews are not inconsistent with the rest of their evidence—rather, the POE interview notes are less detailed. They submit the RAD committed a reviewable error by relying exclusively on the POE interview notes to reject their refugee claim, and by failing to adequately address the applicants’ explanations about their statements made to border officers during the POE interviews.

[3] In addition, the applicants argue the RAD provided unintelligible reasons for rejecting their argument that the RPD had placed undue reliance on the POE interview notes and had failed to consider the corroborative evidence of their risk. The RAD used circular reasoning to find that such evidence supported the negative credibility finding, by proving a contradiction between the POE interview statements and the evidence submitted to the RPD.

[4] For the reasons below, the applicants have established that the RAD’s decision is unreasonable. This application for judicial review is allowed.

## II. Standard of Review

[5] The reasonableness of the RAD's decision is determined according to the guidance set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. Reasonableness is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

## III. Background

[6] The applicants are citizens of Pakistan who were living in Saudi Arabia based on Mr. Khan's work visa. When Mr. Khan's employment was terminated and he was unable to find new work, the applicants feared they would be returned to Pakistan. They secured visas to enter Canada, and claimed refugee protection.

[7] The applicants were interviewed twice by Canada Border Service Agency officers, first on the night they arrived in Canada and again three days later. After the second interview, the applicants' claim was referred to the RPD for determination.

[8] In their BOC narrative and in their testimony before the RPD, the applicants alleged that Mr. Khan had been drawn into a family feud over land involving a powerful faction of his

extended family. Mr. Khan alleged that he first learned of the feud on a visit to Pakistan in October 2015. He encouraged family members to report a murder to the police and in doing so, he believes he made himself a target. When Mr. Khan was next in Pakistan in December 2015, two unknown individuals approached him at a wedding, identified themselves as Ms. Bakhsh's cousins, and asked him personal questions. Later that night, he was followed in a car and he alleges shots were fired, hitting the car. Mr. Khan has not returned to Pakistan since the incident. In addition, Ms. Bakhsh alleged a longstanding conflict between her father and an uncle who does not approve of her family's marriages. Ms. Bakhsh refused to marry the man her uncle chose for her and fears both her uncle and the rejected fiancé if she were to return to Pakistan.

[9] The RPD dismissed the applicants' refugee claims, finding the applicants not credible because they had identified different agents of persecution at their POE interviews and failed to provide a reasonable explanation. The applicants appealed to the RAD, arguing that the RPD erred in making negative credibility findings based solely on omissions and discrepancies in the POE interview notes, rather than based on the totality of the evidence.

[10] The RAD dismissed the appeal, finding that the applicants "essentially changed the identity of their agent of persecution over the course of their refugee claim". The RAD found that: (i) in their POE interviews, the applicants stated they were being pursued by an unknown group of criminals; (ii) "on three separate occasions" in the POE interviews, Mr. Khan or Ms. Bakhsh referred to unknown criminals, and made no mention of a dispute that was internal to Mr. Khan's family or a fear of persecution by Ms. Bakhsh's uncle and the rejected fiancé; (iii) the contradictions between the POE interview statements and the rest of the applicants' evidence

were “major, material and central” contradictions that went to the heart of the applicants’ claim. The RAD rejected the applicants’ explanations that they were tired, stressed, had been waiting for a long time, Ms. Bakhsh was 8-months pregnant, and they did not have interpreters at the POE interviews.

[11] While the applicants had also challenged other findings of the RPD (about their intentions in coming to Canada and how many times Mr. Khan had been targeted in Pakistan), the RAD did not discuss them, finding that the contradictions noted above provided a sufficient basis to dismiss the appeal.

#### IV. Analysis

[12] The applicants submit the RAD’s analysis is unreasonable because the RAD over-relied on the POE interview notes when assessing their claims, and impugned their credibility solely because the POE interview notes lacked details: *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para 51 [*Cetinkaya*]. While the RAD’s credibility findings are entitled to deference, they are not immune from review and must accord with the guidance in the jurisprudence: *Guyen v Canada (Minister of Citizenship and Immigration)*, 2018 FC 38 at para 31 [*Guyen*]. The applicants rely on the principle that a decision maker must exercise caution when relying on POE notes alone to make credibility findings: *Guyen* at paras 39-42.

[13] The applicants submit the nature of POE interviews is an important consideration, in that (i) POE interviews are not part of a refugee claim itself, (ii) the POE assessment is about whether the refugee claim is eligible to proceed, (iii) POE interviews are meant to assess inadmissibility

or detention concerns; and (iv) the applicants did not sign the interview notes and Mr. Khan testified that the notes were not read back to him in their entirety. The applicants submit it was unreasonable for the RAD to reject their refugee claim on the basis that Mr. Khan did not mention during the short POE interviews that the perpetrators of violence were very distant relatives (the descendants of the brother of his great grandfather). The applicants state they had conveyed the substance of their claim by explaining that Mr. Khan's family was involved in a feud in Pakistan and he was targeted for this reason. They argue that the RAD failed to engage with important aspects of the applicants' explanations for their statements at the POE interviews, that they provided during the RPD hearing. In addition, the applicants submit the RAD's decision is unintelligible because instead of assessing whether their evidence of persecution could support a refugee claim, the RAD used circular reasoning to find that such evidence supported the negative credibility finding by proving a contradiction between this evidence and the POE interview statements.

[14] The respondent argues that the RAD's reasons must be understood in context. The RAD focused on the POE interview notes in response to the applicants' arguments in their memorandum on appeal. It is apparent from the record that the RPD had other concerns with the applicants' credibility, as well as the alleged basis for their fear of persecution. In dismissing the appeal, the RAD disagreed with the applicants' argument that the POE interview notes are not entirely trustworthy because they contain clear factual errors and the applicants had provided more details to border agents that were not recorded in the notes. The RAD found the notes to be generally reliable, and deserving of significant weight. The RAD observed, "when a fact is mentioned multiple times on different dates by both [applicants], I cannot infer that this was

simply an error on the part of the border agents.” The fact referred to is the pursuit by unknown criminals.

[15] According to the respondent, the RAD reasonably relied on a major contradiction (that the agents of persecution completely changed), not merely omitted details, and therefore *Cetinkaya* is distinguishable. Furthermore, the applicants do not deny the statements made in the POE interviews, but rather, they attempt to explain the statements by stating they were tired and did not have an interpreter, and it was open for the RAD to reject the explanations. The respondent submits the RAD’s credibility findings attract a high degree of deference and it is not the role of a reviewing court to reweigh or reassess the evidence.

[16] I agree with the applicants that the RAD erred in impugning their credibility on the sole ground that the applicants changed the identity of their agents of persecution over the course of their refugee claim. While the respondent is correct that the RAD’s reasons must be read in context (*Vavilov* at paras 91, 94), the RAD did not address issues with other credibility findings of the RPD, concluding that they were not determinative. The RAD did not rely on other concerns with the applicants’ credibility, or other concerns with the basis for their alleged fear of persecution. As a result, the reasonableness of the RAD’s decision hinges on whether the RAD’s reliance on statements in the POE interviews reasonably justify the finding that the applicants are not credible because they changed the identity of their agents of persecution over the course of their refugee claim.

[17] The RAD's statement that "on three separate occasions [the applicants] refer to unknown criminals and make no mention of the dispute being internal to their family" during the POE interviews is factually incorrect. At both of his POE interviews, Mr. Khan did mention an internal family dispute.

[18] The POE notes from Mr. Khan's first interview record the following exchange:

Q: Who or what are you afraid of in Pakistan?

A: Actually our family members were living in our hometown, [Dadu] City, Pakistan. Some of peoples group, criminals and powerful members had a fight with our family members and killed one of our members.

Q: Who are the family members?

A: My father's cousin's son. They are targeting their family. When I went to Pakistan in 2015. It was my second trip to Pakistan in beginning of 2015. They started targeting me.

...

Q: What happened after that first attack?

A: I went back to Pakistan for a friends wedding and they targeted me again. They tried to shoot me. I was in a car.

...

Q: What's the specific reason that they're targeting you?

A: I don't know.

Q: They don't give a reason, just attacking you?

A: I think they just want to involve me in anything.

Q: Involve you in what?

A: Their fights.

Q: What fights?



A: The fight from 2015.

Q: The fight between family members?

A: Yes.

[19] The POE notes from Mr. Khan's second interview record the following exchange:

Q: Who or what are you afraid of in Pakistan?

A: There is an unknown group of criminals, that tried to kill me when I was in Pakistan.

Q: Why are you afraid of these people?

A: They tried to kill me, back in 2014 in my home town, there was a fight between my family and these people. They killed one of my relative(s). My father's cousin's son.

Q: Do you know why they [were] fighting with your family?

A: Because I spend a lot of my life in Saudi Arabia, this was my second trip to Pakistan and they were targeting me because my family has a feud with this group. I left Dadu and went to Hyderabad and they followed me there. I then went into hiding from these people and went back to Saudi Arabia.

[20] At the RPD hearing, Mr. Khan was asked why he described the perpetrators as people's group, criminals and powerful members. He stated he was struggling to come up with the English equivalent of the Urdu word "wardera". The interpreter for the hearing also had difficulty finding an English equivalent to "wardera", stating that it loosely translates to people who control the land.

[21] The POE notes from Ms. Bakhsh's interview include the following exchange:

Q: Who or what are you afraid of in Pakistan?

A: There is an unknown group of criminals, that tried to kill my husband when he was in Pakistan. I am dependent on him and am also afraid.

Q: Why is he afraid of these people?

A: They tried to kill him, back in 2014 in his home town, there was a fight between his family and these people. They killed one of his relatives.

[22] Mr. Khan and Ms. Bakhsh referred to “unknown criminals” or an “unknown group of criminals” who shot at Mr. Khan following a wedding in 2015. At the RPD hearing, Mr. Khan remained unable to identify the men who shot at him after the wedding. When the RPD member asked whether he knew the names of the gunmen or where they lived, Mr. Khan replied “no”.

[23] At the RPD hearing, Ms. Bakhsh was asked why she did not mention her fear of persecution by her uncle and the man he chose for her to marry, and she provided the following explanations:

I first mentioned about my husband that there is one fear from the side of my husband and there is threat to me as well. They did not ask anything about me, they asked me again what is the threat to your husband.

...

So the way I understood the question they asked me that you are in fear from who, I first made the statement that I had fear from the side of my husband and I also have fear for myself, so they did not let me complete everything and they asked me the next question.

[24] The RAD stated, “[w]hile [Ms. Bakhsh] indicated at her hearing that the border officers redirected her to discuss the allegations against her husband, it is clear from the questions and answers in the Port of Entry notes that she had ample opportunity to discuss her fear”. The applicants argue the RAD’s statement that Ms. Bakhsh had “ample opportunity” is not clear from the POE questions and answers, which are very short and not verbatim, and the RAD does not adequately respond to Ms. Bakhsh’s explanation that she tried to add more detail, but it was not

recorded. I agree. Ms. Bakhsh was asked one substantive question about her fear at each interview, and in my view, the RAD's reasons are not sufficiently responsive to Ms. Bakhsh's explanations for the omission.

[25] As Justice Walker summarized in *Gaprindashvili v Canada (Minister of Citizenship and Immigration)*, 2019 FC 583 at paragraph 24 [*Gaprindashvili*], material omissions and inconsistencies among POE notes, BOC narratives, and oral testimony at an RPD hearing can properly form the basis of an adverse credibility finding where the omissions or inconsistencies are central to the claim. However, the tribunal must assess the nature of the omission or inconsistency and its impact on an applicant's refugee claim: *Gaprindashvili* at para 24. In this case, I find the RAD erred in that assessment. The RAD's characterization of the POE interview notes is inaccurate, and the RAD's perceived inconsistencies are not otherwise clear from the record. Also, the RAD failed to engage with important aspects of the explanations about their POE statements that the applicants gave in oral testimony at the RPD hearing.

[26] In my view, the RAD did not exercise the requisite degree of caution before rejecting the applicants' refugee claim on the sole basis of inconsistencies or omissions between their POE interviews and their later submissions, oral testimony, and documentary evidence: *Cetinkaya* at paras 50-51; *Guyen* at paras 31, 39-42; see also *Chikadze v Canada (Minister of Citizenship and Immigration)*, 2020 FC 306 at paras 21-22.

[27] In addition, I agree with the applicants that the RAD used circular reasoning to respond to their argument that the RPD was overly-focused on the POE interview notes and failed to

consider the totality of the evidence. The applicants had argued that the RPD's credibility findings were not based on the totality of the evidence, including oral testimony and corroborative documentation, and the RPD had not raised doubts about the veracity of that evidence. They urged the RAD to set aside the RPD's decision because their allegations of past persecution were not substantively addressed, as the RPD had focused on the POE interview notes to discount the entirety of their claim. In response, the RAD stated that while there were a number of support letters that discuss the family dispute and the incidents related to it, all of this evidence contradicted the applicants' POE interview statements that they are being pursued by unknown criminals, and "[i]t was precisely by looking at the totality of the evidence that the RPD came to the conclusions that it did." In my view, the RAD fails to engage with the applicants' arguments by resorting to circular reasoning. A decision maker should not reason in a way that begs the question at issue; it is impermissible to reach a conclusion based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion: *Li v Canada (Minister of Citizenship and Immigration)*, 2019 FC 307 at para 18.

[28] As the perceived contradiction was the sole basis for dismissing the applicants' refugee claim, and the basis for finding that the RPD had considered the totality of the evidence, the errors identified above render the RAD's decision unreasonable.

## V. **Conclusion**

[29] The applicants have established that the RAD's decision is unreasonable. The decision is set aside and the matter shall be referred back for redetermination.

[30] Neither party proposes a question for certification and there is no question to certify.

**JUDGMENT in IMM-4806-20**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is granted.
2. The RAD's decision is set aside and the matter shall be referred back for redetermination.
3. There is no question for certification.

"Christine M. Pallotta"

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Judge

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

**DOCKET:** IMM-4806-20

**STYLE OF CAUSE:** OMER KHAN, SUMMIYA X (AKA SUMMIYA BAKHSH) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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