

Federal Court



Cour fédérale

Date: 20211116

Docket: IMM-5934-20

Citation: 2021 FC 1246

Ottawa, Ontario, November 16, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

IMAD EL SAYED

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of a senior immigration officer [Officer] denying the Applicant's Pre-removal Risk Assessment Application [PRRA].

[2] For the reasons that follow, I am granting this application.

Background

[3] The Applicant, Imad El Sayad, is a Palestinian who was born and grew up in a Lebanese refugee camp. When he was 20 years old, he left Lebanon and went to Abu Dhabi where he worked from 1975 to 2018. When his employment in Abu Dhabi ended, so did his related immigration status. The Applicant then returned to Lebanon. He claims that in October 2018 he stopped two men, who were members of Hezbollah, from stealing money from the cash register of his brother's store where he was working. Shortly after this incident, he arrived at work to find bullet holes in the exterior walls of the store. Neighbours told him that members of Hezbollah were responsible for this. In mid-November 2018, while at the store, the Applicant was assaulted by members of Hezbollah and hit in the face, knocking out his dental implants. In June 2019, the Applicant's son's apartment in Beirut was burned down. The building security guard told his son that the perpetrators were members of Hezbollah.

[4] The Applicant claims that he feared for his life. He fled to the United States in January 2019 and attempted to submit a refugee claim at a point of entry into Canada but was found to be ineligible on the basis that he had failed to establish his identity – his year of birth differing between his identification documents. In February 2019, he entered Canada via an irregular border crossing. He was not permitted to make a refugee claim but was offered a PRRA. By a decision dated March 23, 2020, his PRRA was denied.

Decision under review

[5] Following a review of the background to the Applicant's claim, the Officer stated that "[t]he determinative issue at the hearing was credibility and further fact-finding. The applicant could not remember specific dates. For instance, he did not remember exact dates for any of the incidents with Hezbollah. Further, he states he went to the clinic two or three days after being assaulted".

[6] The Officer then briefly refers to affidavits from the Applicant's brother and a neighbour but afforded them little weight and found that they had low probative value, as did a photograph of the storefront. The Officer also assigns little weight to a medical report provided by the Applicant pertaining to the assault. The Officer refers to four identification documents provided by the Applicant which the Officer states contained conflicting information. The Officer then finds that "[a]lthough the applicant has not established his identity, after considering all the documents provided, I am convinced based on a balance of probabilities, the applicant is a Palestinian from Lebanon".

[7] As to forward-looking risk, the Officer afforded little weight to the affidavit of the Applicant's son concerning his apartment being burned down. The Officer also stated that considering that this was a significant incident and the only encounter with Hezbollah after the assault on the Applicant, it would be reasonable to expect the Applicant to speak about this incident at the PRRA hearing, without twice being prompted to do so by his counsel. The Officer

concluded that the Applicant had provided insufficient evidence to establish that he is, more likely than not, personally at risk from persons associated with Hezbollah.

[8] With respect to an internal flight alternative [IFA], the Officer found that there is little evidence that an agent of persecution is seeking the Applicant. The Officer also stated that there is little to suggest that the agent's seriousness and sphere of influence extends beyond the area around the refugee camp where the Applicant lived, or that they are able to track the Applicant. And "[a]ccordingly I find that both IFA prongs are met".

[9] Finally, the Officer addresses general country conditions, quoting from the UN High Commissioner for Refugees (UNHCR) February 2016 report on the situation of Palestinian refugee in Lebanon [UN Report]. The Officer concludes that their circumstances do not amount to persecution, that it is a situation that affects all Palestinian refugees residing in camps and, that the Applicant had failed to demonstrate how his personal situation would differ or his profile would make him more at risk.

Issue and standard of review

[10] The sole issue arising from this application for judicial review is whether the Officer's decision was reasonable. The parties submit, and I agree, that the standard of review is reasonableness (*Canada (MCI) v Vavilov*, 2019 SCC 65 at paras 23, 48 [*Vavilov*]). On judicial review, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks 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).

Analysis

Identity

[11] The Applicant submits that in reaching the conclusion that the Applicant had not established his identity the Officer ignored key identity documents, all of which support his testimony that he was born on March 17, 1955, and confirm that his Travel Document for Palestinian Refugees [Travel Document], issued by the Republic of Lebanon [Lebanon] (which document the Officer erroneously refers to as a Lebanese Passport), contains an error with respect to the Applicant’s year of birth. Thus, the Officer’s finding that the Applicant had not established his identity was unreasonable as was any implicit negative credibility finding concerning his identity.

[12] The Respondent submits that no reviewable error arises from the Officer’s identity analysis because identity was not a determinative factor in the PRRA refusal.

[13] In the decision, the Officer referred to four identity documents:

- the Travel Document, which gives the Applicant’s date of birth as 1961;
- Registration Statement, issued by the General Directorate of Political and Refugees Affairs for Lebanon on August 18, 2019, with the Applicant’s year of birth stated as 1955 and noting that a prior reference to his year of birth as being 1961 was in error.

- The Directorate's records indicate that he was born in Beirut in 1955 and that the Registration Statement corrects the error;
- Identity Card for Palestinian Refugees, No 688860 A, issued by the General Directorate of Political and Refugees Affairs for Lebanon, stating that the Applicant was born in 1955; and
 - UAE Driver's Licence indicating the Applicant's date of birth as 01-01-55 [AR 76].

[14] Documents not mentioned by the Officer include:

- Statutory Declaration of the Applicant filed in support of his PRRA in which he states that he was born on March 17, 1955;
- Birth Certificate, issued by Lebanon, indicating the Applicant's date of birth as March 17, 1955;
- Statement, issued by the General Directorate of Political and Refugees Affairs, confirming that the Identity Card No 688860 A belongs to the Applicant and that he was born in 1955; and
- United Nations Relief and Works Agency document concerning the Applicant's family indicating his month and year of birth as March 1955 ("0355").

[15] The Officer refers to explanations provided by the Applicant, presumably at the oral hearing, as to the discrepancy in his birth date in the Travel Document and the other documents issued by Lebanon, further, that the Applicant had indicated that the UAE was only concerned with his year of birth. However, the Officer offers no analysis of the documents or the explanations. The Officer simply concludes that the Applicant as not established his identity.

[16] In my view, this finding was unreasonable as it is not justified, transparent or intelligible. The bulk of the documents that were before the Officer support that the Applicant was born in 1955. The Officer does not address the correction contained in the Registration Statement or how it may effect the conflicting year of birth contained in the Travel Document. The Officer does not mention the Birth Certificate. It is also of note that most of the Applicant's documents include only his place and year of birth. This is consistent with the Applicant's explanation that the UAE used 01-01-1955 as his date of birth in his driver's licence as it only concerned with his year of birth.

[17] Further, the Applicant's name, place of birth and other information appears to be consistent in his identity documentation. The Officer does not explain why the inconsistency as to his year of birth is alone, and given the totality of the evidence, sufficient to support the Officer's finding that the Applicant had failed to establish his identity. The Officer also does not accept or reject the Applicant's explanations for the inconsistencies or make an explicit credibility finding in that regard. The Officer does not analyse the documents or suggest that they may be fraudulent. In short, the Officer provides no explanation to support the conclusion that the Applicant had failed to establish his identity and, in my view, the finding is not reasonable.

[18] It is also unclear from the decision what, exactly, the Officer drew from the finding. Generally speaking, if an applicant fails to establish their identity, this may be determinative of their claim such that no assessment on its merits is required. Or, a negative credibility inference may be drawn from the failure to establish identity. In this matter, the Officer does not say what, if anything, turns on the finding. The Applicant is left to wonder if a negative credibility

inference was drawn or if the issue of identity somehow taints the remainder of the Officer's reasoning. I would also observe that it is not apparent to me – where identity is found not to be established but a PRRA is granted – how this might impact the granting of refugee protection, but that question is not before me in this case as the Officer considered the application on its merits but did not grant the PRRA.

[19] While I agree with the Respondent that the Officer does not appear to have considered identity to have been determinative, it is problematic that the Officer does not explain the purpose or impact of the identity finding. Particularly in light of the Officer's credibility findings discussed below.

Credibility and corroborating documentation

[20] The Applicant submits that although the Officer stated that credibility was the determinative issue, the Officer did not explicitly make any credibility findings. Rather, the Officer made ambiguous statements which do not amount to an outright rejection of the claimant's evidence, but only “cast a nebulous cloud over its reliability”, contrary to *Hilo v Canada (Minister of Employment and Immigration) (1991)*, 15 Imm. L.R. (2d) 199 (FCA) at 200, per Heald JA which requires the Officer to explicitly state and sufficiently explain adverse credibility findings.

[21] The Respondent submits that after a hearing with the Applicant the Officer reasonably made specific adverse credibility findings. As well, in some instances, the Officer instead moved

immediately to an assessment of the weight to be afforded to evidence based on its low probative value (referencing *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067).

[22] I agree with the Applicant that, despite the Officer's statement that credibility was the determinative issue, the Office makes no express credibility findings, nor are any inferences identified as such or apparent.

[23] For example, the Officer refers to the affidavit of the Applicant's brother but finds that according to that document the Applicant's brother was not a witness to either of the incidents and that the brother states that he was inside the store when the Applicant was assaulted. Therefore "[i]t cannot be determined that he was an actual witness". The Officer then refers to the affidavit of a neighbour who stated that she witnessed the assault but does not mention Hezbollah. Only that it was an armed person with a military outfit getting out of a car (I note that while the Office refers to these as affidavits they appear to be supporting letters rather than sworn statements).

[24] The Officer then states that both affidavits provide vague references to the date of the assault, either November or mid-November. Further, they are both typed in the same font and format and are dated within two days of each other. The Officer states that the Applicant's brother is in Germany and the neighbour is in Lebanon but their affidavits have many similarities in format and that no identification documents were attached. The Officer states for those reasons, they "assign the documents little weight. They have low probative value as they do not establish the identity of the agent of persecution".

[25] The Applicant's brother's statement indicates that in mid-October 2018 he and the Applicant were in the store; he was upstairs when he heard shouting. He came down to see to people who were wearing military outfits running out of the store. The next day, before opening, some people came and shot at the store. The Applicant's brother states that witnesses stated that they were from Hezbollah based on their badges and clothes. In November, the Applicant's brother was inside the store when a military jeep carrying an armed person wearing a military outfit with a Hezbollah badge on it arrived. This person punched the Applicant, who was outside the store, in the teeth. He and the Applicant both ran out of the back door of the store and to the refugee camp.

[26] The Officer appears to dismiss this evidence largely because the Applicant's brother was not an eyewitness to the whole of each incident. But the Applicant's brother evidence was that he did actually see the tail end of the first incident and was present at the store when the assault occurred. Further, the Applicant's brother did provide relevant and material details that corroborate the Applicant's version of events.

[27] More significantly to this analysis, while the Officer also clearly suggests that the affidavits are fraudulent, the Officer makes no actual finding in that regard. Instead, the Officer assigns the affidavits little weight. However, if the Officer's finding was that the documents are fraudulent, then it is difficult to see why they would be afforded any weight at all. And, if they were fraudulent, it is unclear why the Officer would also assess them for probative value as to the identity of the agent of persecution.

[28] A similar circumstance was addressed in *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720 with respect to the treatment of a supporting letter. There Justice Norris states that:

[51] The letter purports to describe first-hand observations of events that are a key reason why Ms. Osikoya is claiming protection. If it is truthful, it corroborates Ms. Osikoya's claims in key respects. On its face, it could only have high probative value. The real issue is one of weight, and this turns on the letter's authenticity. The letter is either authentic or it is not. If it is not authentic, it should be given no weight and its contents can safely be disregarded. The problem with the RAD's assessment is that while it must have had concerns about the letter's authenticity, it does not reject the letter as inauthentic. Instead, the RAD accepts that it deserves some weight and has some probative value, only not enough to overcome other problems with the claim. But if the claim was corroborated in material respects by the letter, the other problems with the claim may be more apparent than real. The RAD needed to say a great deal more than it did to explain why the claim was rejected despite this corroborative evidence.

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[53] Justice Anne Mactavish has observed that “[i]f a decision-maker is not convinced of the authenticity of a document, then they should say so and give the document no weight whatsoever. Decision-makers should not cast aspersions on the authenticity of a document, and then endeavour to hedge their bets by giving the document ‘little weight’” (*Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20). Building on this, Justice Shirzad Ahmed stated recently: “Fact finders must have the courage to find facts. They cannot mask authenticity findings by simply deeming evidence to be of ‘little probative value’” (*Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27). Respectfully, I agree with my colleagues. The RAD's treatment of the letter from Ms. Osikoya's aunt demonstrates the incoherence that can result from equivocal findings of fact.

(See also *Marshall v Canada (Citizenship and Immigration)*, 2009 FC 622 at para 2; *Ogbebor v Canada (Citizenship and Immigration)*, 2021 FC 994 at paras 17-19; *Sitnikova v Canada (Citizenship and Immigration)*, 2017 FC 1082 at para 20.)

[29] There are similar concerns with the Officer's treatment of the letter from AMAN Charitable Association Medical Centre. The Officer states that the letterhead appears as a stretched image of the logo, the document appears to be a copy as it is black and white and there are creases showing. The Officer states that the document is typed, undated and does not have a signature, name or title of the medical person who treated the Applicant. Further, that the report states that the Applicant visited the Medical Centre "on 20/11/2018 many times" but the Applicant states that he only sought medical care once. For these reasons, the Officer assigns little weight to the document.

[30] Thus, the Officer clearly signals in their reasons that the authenticity of the report is suspect. But the Officer does not make a finding in that regard. Rather, after reciting their concerns, the Officer simply assigns little weight to the document.

[31] Again, if the Officer believed the report to be fraudulent, then the Officer should have said so and accordingly afforded the report no weight. It is unclear from the reasons why the Officer instead assigned the report little weight or if, or how, the documents otherwise undermined the Applicant's credibility.

[32] As to the Applicant's credibility, at the start of the Officer's reasons the Officer states that credibility is determinative and notes that the Applicant could not remember the exact dates for any of the incidents with Hezbollah. Further, that the Applicant he states he went to the clinic two or three days after being assaulted. While it is true that the Applicant does not provide exact dates, his evidence as to dates is consistent with the supporting documents provided by his

brother, neighbour, aunt and the medical report, including that these all indicate that the assault occurred in mid-November. The Officer does not address this and dismisses the supporting evidence without making a clear finding that it was fraudulent. The Officer also provides no reasons to explain why the Applicant's attendance at the medical clinic two or three days after he was assaulted negatively impacted his credibility.

[33] A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence is not reliable. The problem in this case is that the Officer appears to dismiss evidence as not credible, without actually ever making a credibility finding – explicitly or inferentially. Further, and contrary to the Respondent's submissions, the reasons do not suggest that the Officer assumed the evidence to be credible, but determined that it was insufficient to establish, on a balance of probabilities, the facts alleged. That is, that the Officer moved directly to an assessment the probative value and weight of the evidence.

[34] Finally, with respect to credibility, I note that the Officer, in the IFA analysis, concludes that there is little evidence to suggest that “an agent of persecution is seeking the applicant. There is also little to suggest that their seriousness and sphere of influence extends beyond the area around the camp he lived in, or that they are able to track the applicant”. Yet the Officer did not explicitly reject the Applicant's claim that his agents of persecution were Hezbollah militants. And, as the Applicant points out, while the Officer appears to reject the Applicant's evidence and his supporting documentation as not credible, in the conclusion of the reasons the Officer appears to accept the Applicant's claim that Hezbollah was his agent of persecution.

There the Officer states that “[i]ndividuals associated with Hezbollah have not made contact with the applicant since November 2018”, finding that the Applicant had not established a forward-looking risk. This aspect of the Officer’s reasons is incoherent.

[35] As the Applicant acknowledges, there may have been a sufficient basis upon which the Officer could reasonably have rejected the PRRA. However, the reasons provided by the Officer do not reflect this. I would add that that it is not the role of the Court – or the Respondent – to fashion its own reasons to buttress the decision of the Officer (*Vavilov* at para 96; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 at paras 26-28).

[36] Reviewing the reasons in whole, I agree with the Applicant that the Officer’s finding that credibility was the determinative issue is unreasonable in light of the Officer’s failure to actually make any clear credibility findings. Had the Officer properly assessed the evidence and made clear credibility findings the outcome may, or may not, have been the same. But because we cannot know what the outcome would have been, the matter must be remitted back for redetermination.

JUDGMENT IN IMM-5934-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted back to a different PRRA officer for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: NOVEMBER 16, 2021

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