

Federal Court



Cour fédérale

Date: 20220107

Docket: IMM-3835-20

Citation: 2022 FC 14

Toronto, Ontario, January 7, 2022

PRESENT: Madam Justice Go

BETWEEN:

ASFAND YAR AHMAD

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Asfand Yar Ahmad [Applicant] brought an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated July 30, 2020 [the Decision], in which the RAD dismissed the Applicant's appeal and confirmed the decision of the Refugee Protection Division [RPD] that the Applicant is not a Convention refugee or person in need of protection under the *Immigration and Refugee Protection Act*, SC

2001, c 27 [IRPA]. The Applicant submits that the RAD breached procedural fairness by raising new issues without giving him an opportunity to respond.

[2] The application is dismissed for the reasons set out below.

II. **Background**

A. *Factual Context*

[3] The Applicant is a citizen of Pakistan who arrived in Canada in 2012 on a study permit. He made a claim for refugee protection in May 2017 on the basis of fear of persecution by the Lashkar-e-Jhangvi [LEJ], an extremist group, the police, and his father's ex-business partner Farooq Malik [Farooq], all due to his conversion from the Sunni to the Shia Muslim sect in 2016.

[4] The Applicant claims his conversion was done by an Imam in Lahore, with his family attending in person while the Applicant joined by phone. The Applicant claims Farooq objected to his conversion and cancelled the engagement previously held between the Applicant and Farooq's daughter. Farooq also ended the business partnership with the Applicant's father and refused to pay back the money the latter had invested in a property they purchased together. The Applicant's father initiated a court case against Farooq. When the Applicant's father accused Farooq of fraud, Farooq allegedly threatened to kill the entire family.

[5] The Applicant states he then received a threatening letter from the LEJ demanding he revert to Sunni Islam or be killed. The Applicant claims his father went to a local police station

to report the threat, but the police did not take it seriously. The Applicant also alleges attacks on his father and brother by individuals identifying as LEJ members, which led to relocations of the family and further attempted reports to the police for protection to no avail.

[6] Fearing for his own safety after seeing his family go through these difficulties, the Applicant claimed refugee protection in 2017. At this time, his student status had lapsed.

B. *The RPD Decision*

[7] The RPD issued a negative decision dated November 27, 2018, finding credibility to be a determining factor. The RPD found numerous inconsistencies and omissions between the Applicant's testimony and statements in the Basis of Claim [BOC] form and the Port of Entry [POE] notes that were central to the claim but not adequately explained. The RPD found credibility concerns regarding such issues as: the Applicant's inability to recall any of the names of the mosques he had attended or the names of the Imams at these mosques, both in Canada and in Pakistan; the circumstances of the Applicant's conversion to the Shia sect; inconsistencies in the police reports and complaint letters containing different names for Farooq and an omission in the BOC narrative regarding his name; inconsistency and omission in testimony and BOC narrative and police report regarding the attacks on his father and brother by LEJ; and the Applicant's delay in making a refugee claim until after his student visa had expired and his application for restoration was refused.

C. *Decision under Review*

[8] The Applicant filed an appeal to the RAD, raising a number of grounds to challenge the RPD's findings. For the purpose of this review, the only relevant ground was the Applicant's submission that the RPD erred "by failing to consider and independently assess the corroborative evidence before making an overall credibility finding." The RAD conducted its own assessment of the evidence and decided to give these documents little weight. The RAD then concluded that the Applicant's allegations "are not credible and that he has not established a profile as a Shia Muslim on a balance of probabilities."

III. **Issues**

[9] The Applicant submits the RAD's findings on the credibility of the supporting documents are new issues and that the RAD violated the principles of natural justice by making these novel credibility findings without notice to the Applicant. The Respondent argues that no such notice was needed in this case. The only issue before me is whether the credibility findings made by the RAD constitute new issues and as such, whether the RAD should have given the Applicant an opportunity to respond.

IV. **Standard of Review**

[10] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*], at para 25. The RAD decision is to be reviewed on the standard of reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, at para 35.

[11] The issue of whether the RAD made additional credibility findings without sharing those concerns with the parties is one of procedural fairness, which is reviewable on a standard that is akin to correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*], at para 43; *Vavilov*, at para 23, *Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180, at para 17; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*], at para 19.

[12] The role of the reviewing court is to determine whether the process followed by the decision maker was fair, having regard to all the circumstances: *Khosa*, at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 54; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 313, at para 12; *Kwakwa*, at para 19.

V. Analysis

[13] The Applicant submits the RAD agreed with him that the RPD was delinquent in its assessment of the supporting documents and made no findings on these documents. Having made that finding, the Applicant submits the RAD then assessed the documentary evidence and made a number of new credibility findings, which were never made by the RPD. For instance, the RAD gave little weight to the following documents for reasons summarized as follow:

- the letter from LEJ “because it is not signed and there is no way to identify its author.”

- the affidavits of the Applicant's brother and father and the police complaints, because none of these documents were accompanied by identification to authenticate their signatures, and the affidavits are signed but not witnessed, sworn or notarized.
- the letter from the Imam who converted the Applicant because it was not authenticated with an accompanying identity document.

[14] In addition, the Applicant submits it was particularly egregious for the RAD to raise a new finding that the court document regarding the legal claim against Farooq "appears to be a fabrication" because it contains "grammatical errors and a typographical error in the name of the court in the title of the document" and because the file number cited the year 2017 but the document appears to have been filed in 2016. These issues were also not raised by the RPD.

[15] The Applicant cites *Laag v Canada (Citizenship and Immigration)*, 2019 FC 890, which in turn referred to *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684, at para 10, where Justice Hughes cautioned that "if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions."

[16] Relying on *Dalirani v Canada (Minister of Citizenship and Immigration)* 2020 FC 258 and *He v Canada (Citizenship and Immigration)*, 2019 FC 1316, at para 79, where Justice Elliott reproduced the principles from Justice Gascon's decision in *Kwakwa*, the Applicant submits the same should apply here.

[17] The Respondent counters that the RAD never agreed with the Applicant about the RPD not assessing the documents, as it only stated all the weighing was not reflected in the Decision. Moreover, the Respondent submits that none of the issues raised were new, as they dealt with the same credibility concerns on the documents that the RPD had already assessed. I disagree. The RPD decision was indeed silent regarding much of the documentary evidence.

[18] However, I agree with the Respondent that the important factor here is that the Applicant was the one who asked the RAD to assess his personal documents. It is in that context that I will consider whether the RAD's credibility findings constitute new issues.

[19] To start, I note that the Applicant devoted about 7 out of 26 paragraphs in his Memorandum of Argument to the RAD on the issue of assessment of documents. The Applicant submitted the RPD's "complete dismissal of the extensive array of personal documentary evidence provided in support of his claim" was unreasonable. He argued that the RPD "assigns no weight" to all the documents and "ignores the personal evidence before it", and thus "erred in failing to consider all the evidence before it before making a global credibility finding."

[20] The Applicant pointed specifically to the "various Affidavits and applications to the police and other authorities" as documents that the RPD has unreasonably ignored even though they "corroborate central elements of his claim."

[21] Significantly, the Applicant faulted the RPD for its failure to "make an explicit factual finding whether or not the supporting evidence is, in fact, fraudulent." Citing *Oranye v Minister*

of Citizenship and Immigration, 2018 FC 390, the Applicant submitted that the RPD erred by failing to make a clear finding as to “the authenticity/credibility of the personal documentary evidence” he provided, and “if the RPD found the evidence to be fraudulent, then it ought to have said so (with reasons) in clear and unmistakable terms.”

[22] In light of the above submission, I find that the RAD did not “take a frolic and venture into the record” unilaterally; it did so at the Applicant’s request.

[23] In *Kwakwa*, Justice Gascon defined a “new question” as “a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from”: *Kwakwa*, at para 25 [emphasis added].

[24] By raising arguments in his RAD appeal to criticize the RPD’s lack of credibility assessment of the documents, including an assessment as to whether the supporting documents are “fraudulent”, it is hard pressed for the Applicant to now claim that he is surprised by the RAD doing exactly what he has asked them to do.

[25] Putting it in another way, the credibility of these documents was so central to the Applicant’s grounds of appeal that the RAD’s findings with respect to these documents cannot be said to be “legally and factually distinct from the grounds of appeal raised” and therefore would not constitute a breach of procedural fairness: *Daodu v Canada (Citizenship and Immigration)*, 2021 FC 316, at para 24.

[26] Counsel for the Applicant expressed “frustrations” about being confronted with one set of reasons by the RPD to reject certain documentary evidence, and a completely different set of reasons by the RAD upon appeal for rejecting the same document. Counsel submits they are “always on the look out for different requirements by different RAD/RPD members” and that these reasons are often “arbitrary” and reflect members’ “personal standard.”

[27] While I am not unsympathetic to the predicament facing counsel, such concerns are addressed by this Court confirming that the RAD has an obligation to notify applicants when they raise new issues. Ultimately, the onus is on the Applicant to show that he is credible. As he had asked the RAD to assess the documents for their credibility and authenticity, he and his counsel ought to have been prepared to address all the pitfalls and inconsistencies within the documents as part of their appeal.

VI. **Certification**

[28] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[29] The application for judicial review is dismissed.

JUDGMENT in IMM-3835-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3835-20

STYLE OF CAUSE: ASFAND YAR AHMAD v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 30, 2021

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