

Federal Court



Cour fédérale

Date: 20220526

Docket: IMM-5274-21

Citation: 2022 FC 761

Ottawa, Ontario, May 26, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

SYED MUHAMMAD A JAFFRY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) dated July 15, 2021, finding that the Applicant was not a Convention refugee nor a person in need of protection.

[2] The Applicant argues there has been a breach of his right to procedural fairness because of the incompetence of his immigration consultant. The Applicant also argues the RAD failed to consider documentary evidence.

[3] For the reasons that follow, this judicial review is dismissed as there was no breach of procedural fairness and the decision of the RAD is reasonable.

I. Background

[4] The Applicant is a citizen of Pakistan. He alleges that on January 9, 2019, when he refused to sell land to Mr. Khan, he was accused of blasphemy and a First Information Report (FIR) was issued against him. He says he went into hiding, before fleeing to Canada via the United States.

[5] His refugee claim is based on his claim to be at risk of persecution by Mr. Khan and by the state as a result of the FIR.

[6] The Applicant was represented by an immigration consultant before the Refugee Protection Division (RPD) and RAD.

A. *RPD Decision*

[7] The RPD found the Applicant was not a Convention refugee or a person in need of protection. The RPD held the Applicant had not established that the FIR was issued against him,

as the Applicant testified his wife had provided him with a copy of the FIR, but he was unsure of how or when his wife obtained it.

[8] With respect to the authenticity of the FIR, the RPD noted as follows at paragraph 14:

According to the objective country documentation, once an FIR is registered, the police are bound to investigate the complaint unless they provide written reasons for not doing so. Furthermore, canceling a registered FIR is “extremely difficult and ultimately entirely at the discretion of the courts”. In consideration of this, and considering that the claimant has not established an ongoing pursuit by the police, and given the fact that fraudulent documentation (including police complaints and FIRs) is readily available in Pakistan, the panel assigned the FIR against the claimant no weight in regard to corroborating the claimant’s central allegations. The panel further finds that, on a balance of probabilities, the claimant has not established that an FIR was issued against him, nor that he is wanted by the police. In light of this [...] the panel finds that the claimant has also failed to establish a forward-facing risk as a result of blasphemy accusations [...]

[9] The RPD also considered that the Applicant’s wife and daughters have remained in Pakistan without incident. Although the Applicant claims that the police visited his home in Pakistan, he could not provide a date. As this was not referenced in his Basis of Claim (BOC) form or in his wife’s Affidavit, the RPD held the Applicant had not established that the police continue to look for him at his home.

[10] The RPD further considered the Applicant’s testimony that Mr. Khan never again contacted him after the alleged incident on January 9, 2019.

[11] The RPD noted several inconsistencies and omissions in the Applicant's testimony and supporting documents. The Affidavits provided by his friend and his wife did not indicate that the Applicant had been in hiding for over a month. Further, though the Affidavit provided by his wife indicated the police visited her home and informed her the FIR was issued against the Applicant, the Affidavit did not state she ever received a copy of the FIR, as alleged by the Applicant. Moreover, the RPD noted the events described in the Affidavits were self-reported by the Applicant.

[12] Finally, the RPD considered an affidavit of a witness to the January 9 incident. However, the affiant described the Applicant's injuries as including an injury to his hand, which the Applicant had failed to mention. The RPD, therefore, assigned little weight to these supporting documents.

B. *RAD Decision*

[13] The RAD agreed that the Applicant had not established that the FIR had been registered against him or that there was a forward-facing risk. The RAD highlighted the Applicant's lack of knowledge regarding how his wife received the FIR, the omission of subsequent police visits from his BOC, the lack of further contact from Mr. Khan, and the documentary evidence regarding fraudulent FIRs.

[14] The RAD also noted that the RPD made credibility findings that were not contested by the Applicant. The RAD found the RPD did not err in these findings.

II. Issues

[15] On this judicial review, the following issues arise:

- A. Was there a breach of the Applicant's right to procedural fairness due to incompetent counsel?
- B. Is the RAD's decision reasonable?

III. Standard of Review

[16] Issues of procedural fairness are assessed on a correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[17] Otherwise, the RAD decision is reviewed on the reasonableness standard. The Court asks whether the decision is justified, transparent, and intelligible (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

IV. Analysis

- A. *Was There a Breach of the Applicant's Right to Procedural Fairness due to Incompetent Counsel?*

[18] The Applicant argues that he had incompetent representation before both the RPD and the RAD. The Applicant points to the RAD's finding that "[t]he RPD made credibility findings that are not contested by the Appellant". The Applicant argues that the credibility findings were

not challenged because of the incompetence of his counsel. He also argues that his counsel failed to properly respond to the issues surrounding the FIR, the treatment of his wife's Affidavit, and his forward-facing risks on the grounds of blasphemy.

[19] As noted by Justice Diner in *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99, "incompetence of counsel will only constitute a breach of natural justice in 'extraordinary circumstances'" (at para 22).

[20] The Applicant must establish: (i) that the prior counsel's conduct constituted incompetence; (ii) but for the conduct, there is a reasonable probability that the result would have been different, and (iii) the representative was given notice and a reasonable opportunity to respond (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11).

[21] First, although the immigration consultant did not specifically challenge the credibility findings of the RPD at the RAD, the RAD nonetheless conducted an independent assessment of the evidence. Following which the RAD agreed with the RPD, stating "[a]fter my independent assessment, I find that the RPD did not err in these findings. They are correct and based on the evidence in the record."

[22] With respect to the issue of the FIR, the Applicant's representative did raise this on appeal, stating "the panel has clearly ignored the fact that there is a copy of the alleged FIR in the evidence available." Similarly, the representative challenged the RPD's assessment of forward-facing risk.

[23] Finally, the Applicant's representative generally challenged the dismissal of the affidavit evidence provided, and though the RAD held the Applicant had not provided full and detailed submissions, contrary to Rule 3(3)(g) of the *RAD Rules*, the RAD nonetheless reviewed the RPD's treatment of the affidavit evidence at paragraphs 18-24 of their decision.

[24] In summary, although the Applicant argues that he had incompetent counsel, he was not able to identify evidence that was not submitted by his counsel, nor can he point to documents that were not filed. Rather, the issues with the incompetence of the Applicant's counsel are made in relation to the failure of counsel to make arguments or submissions on certain issues. In light of the high bar to establish incompetent representation, these arguments do not meet that threshold.

[25] In the circumstances, I am not satisfied that the Applicant has demonstrated that he had incompetent representation nor has he established that but-for the alleged incompetence, the outcome of the RAD would have been different.

B. *Is the RAD's Decision Reasonable?*

[26] The Applicant argues the RAD erred in endorsing the RPD's conclusion that it would accord no weight to the FIR due, in part, to the prevalence of fraudulent documents in Pakistan. The Applicant relies on *Cheema v Canada (Minister of Citizenship and Immigration)*, 2004 FC 224, which held that "evidence of widespread forgery in a country is not, by itself, sufficient to reject foreign documents as forgeries" (at para 7).

[27] The FIR was central to the Applicant's claim. The RPD considered the objective documentary evidence that states that once the FIR is registered, police are bound to investigate.

However, a number of issues surrounding the FIR were identified, including:

- the Applicant was unsure as to how and when his wife obtained the FIR;
- there was no reference to police visits in his BOC, even though police are bound to investigate once the FIR is issued; and,
- the Applicant had no further contact with Mr. Khan after the initial incident.

[28] The RPD references the availability of fraudulent documents but does not dismiss the FIR on that basis. In fact, neither the RAD nor the RPD make a finding that the FIR was fraudulent. The RPD assigned "no weight" to the FIR as corroborating the Applicant's allegations, and concluded that the Applicant did not establish that the FIR was issued against him. The RAD made the same finding and concurred with the RPD's conclusion that the Applicant did not establish that the FIR had been issued against him. This conclusion was reached based upon a consideration of, and a weighing of, all of the evidence.

[29] Accordingly, the RAD did not discount the FIR solely on the basis of the prevalence of fraudulent documents in Pakistan. This is not like *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1219, where the RPD made the conclusion that the documents submitted was fraudulent for the sole reason of "easy accessibility of fraudulent documents in Pakistan" (at para 8).

[30] Here, the RAD (and the RPD) considered the FIR in the overall context of the Applicant's claim. The RAD was not satisfied that the Applicant had been sought out by Mr. Khan, who made the blasphemy claim which led to the FIR being issued. The Applicant's evidence was that he had no interactions with Mr. Khan beyond the incident when he refused to sell the land. Likewise, the RAD was not satisfied that the police in Pakistan were pursuing the Applicant, noting that the Applicant made no reference to police in his BOC, and also noting that police are bound to investigate once the FIR is issued.

[31] The RAD fully assessed and weighed the evidence and circumstances surrounding the FIR. This is not a situation where the RAD simply disregarded the evidence on the basis that it could be a fraudulent document. It was reasonable for the RAD to raise this as a concern, but the RAD, nonetheless, fully considered the FIR.

[32] It is not the role of this Court on judicial review to reweigh the evidence (*Vavilov* at para 125). As a result, this application for judicial review is dismissed.

JUDGMENT IN IMM-5274-21

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed; and,
2. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5274-21

STYLE OF CAUSE: SYED MUHAMMAD A JAFFRY v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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