

Federal Court



Cour fédérale

Date: 20230227

Docket: IMM-2193-22

Citation: 2023 FC 276

Ottawa, Ontario, February 27, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**Waqas KHIZAR
Faryal SARFRAZ
Yashfa NOOR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family from Pakistan - parents and their minor child. A second child who was born in Canada is not a party to this proceeding.

[2] The Applicants fear persecution by Lashkar-e-Jhangvi [LeJ] for their Shia Muslim beliefs, and in particular, the religious activities of the Principal Applicant, Waqas Khizar [PA]. The PA asserts he was threatened and pursued by the LeJ for organizing Majlis honouring his father who passed away in January 2016.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board of Canada [IRB] rejected their claim for credibility reasons. The Applicants appealed the RPD decision; the Minister intervened on the appeal only. Concluding that the RPD was correct in finding the Applicants are neither Convention refugees nor persons in need of protection, the Refugee Appeal Division [RAD] of the IRB dismissed the Applicants' appeal for similar reasons [Decision] and confirmed the RPD decision.

[4] The Applicants seek to have the Decision quashed, with the matter redetermined by a different panel. As I explain below, I find that the RAD made a material error in its assessment of new evidence it admitted, thus warranting the Court's intervention.

II. Issues and Standard of Review

[5] The Applicants raise three issues in their judicial review application:

- A. Whether the RAD erred in rejecting some of the Applicants' new evidence;
- B. Whether the RAD erred in deciding not to hold a hearing; and
- C. Whether the RAD's credibility findings were unreasonable.

[6] Because I find the third issue is determinative, I address only it in my analysis.

[7] There is no dispute that the presumptive review standard of reasonableness applies to the determinative issue here: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25. To avoid judicial intervention, the challenged decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (para 99). A decision may be unreasonable if the decision maker misapprehended the evidence before it (paras 125-126). The party challenging the decision has the onus of demonstrating that the decision is unreasonable (para 100).

III. Analysis

[8] Contrary to the Respondent's submission, the RAD's error can be characterized in my view as a fundamental misapprehension or failure to account for evidence before it, as opposed to a misstatement: *Vavilov*, above at para 126.

[9] Among the new pieces of evidence the Applicants submitted on their appeal of the RPD decision is the PA's affidavit. Although I do not disagree with the Respondent that it was open to the RAD to consider rejecting the PA's affidavit as impermissible bolstering of the record before the RPD, that is not what the RAD did, nor did it mention this possibility in its reasons. Instead, taking into account subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and finding the PA's affidavit contains sufficiently new and credible evidence for the purpose of admissibility, the RAD accepted it.

[10] The RAD independently assessed the evidence before the RPD and made its own independent credibility findings, taking into account the new evidence it admitted on the appeal.

As part of its assessment, the RAD considered the Applicants' evidence regarding the last event they assert caused them to leave Pakistan.

[11] According to the PA, he had organized a Majlis in January 2017 and another in January 2018, both times around the anniversary of his father's passing. In place of a Majlis in January 2019, the PA made a donation. The PA's amended Basis of Claim [BOC] narrative and his new affidavit admitted on appeal describe that he was preparing a Majlis in September 2019 for the holy month of Muharram. The PA further recounts that while returning by motorcycle from shopping for groceries for the Majlis, he was chased by masked men on motorcycles. He was able to escape but in the process, he fell off his motorcycle, hurting himself and damaging his nose.

[12] A hospital medical report from the same date as this incident indicates that the Applicant had injuries to his face and a fractured nose. After the PA's discharge from the hospital, the Applicants went into hiding and eventually left Pakistan in December 2019.

[13] The RAD held that there is sufficient evidence that there were two Majlis, one in January 2017 and one in January 2018 but there is insufficient evidence to find that the Applicant was organizing one in 2019. The RAD held that "it is unclear why the Principal Appellant would be planning for the Majlis in September 2019 when the next annual Majlis would be in January 2020." The RAD concluded that a "finding that the Majlis were held in January raises the question as to why the Principal Appellant would be preparing for one in September 2019."

These statements in turn raise a question with the Court as to whether the RAD properly read the PA's amended BOC narrative and affidavit admitted on appeal.

[14] While the RAD did not doubt the PA suffered injuries to his nose, and noted the medical report on file that mentioned the fractured nose, the RAD found the Applicants' corroborative evidence insufficient overall, however, to show that the PA sustained the injury escaping the LeJ. The RAD thus concluded that "[e]ven on a cumulative basis, this [corroborative] evidence does not address the flaws in the evidence," the flaws being a misapprehension about or failure to account for the PA's evidence that he was organizing a Majlis in September 2019 in conjunction with the holy month of Muharram.

[15] In my view, the 2019 incident involving the motorcycle chase was central to the Applicants' claims. I am persuaded that the RAD unreasonably discounted the incident because of its unjustified findings regarding the Majlis the PA described that he was organizing for September 2019, including his specific reason, that is to coincide with Muharram.

[16] Further, given that an applicant's credibility is a cumulative weighing exercise after all evidence is considered, the Court cannot know here, and it is speculative for the Respondent to conjecture, (1) how the RAD would have treated evidence regarding the reason for holding the Majlis in September, and (2) the how RAD would have factored that treatment into the global credibility assessment: *Marku v Canada (Citizenship and Immigration)*, 2021 FC 1096 at para 24.

IV. Conclusion

[17] For the above reasons, I am satisfied that the Applicants have met their onus. I find that the Decision is unreasonable, and I thus grant the Applicants' application. The Decision is set aside. A different RAD panel will redetermine the matter.

[18] Neither party proposed a question for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-2193-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial review application is granted.
2. The February 15, 2022 decision of the Refugee Appeal Division is set aside, with the matter remitted for redetermination by a different panel.
3. There is no question for certification.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2193-22

STYLE OF CAUSE: WAQAS KHIZAR, FARYAL SARFRAZ, YASHFA NOOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEO CONFERENCE

DATE OF HEARING: FEBRUARY 22, 2023

JUDGMENT AND REASONS: FUHRER J.

DATED: FEBRUARY 27, 2023

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