Federal Court  Cour fédérale

Date: 20230609

Docket: IMM-4697-22

Citation: 2023 FC 814

Ottawa, Ontario, June 9, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

ZEIN ZBIB
RENA YAGHI
CELENA ZBIB
ADAM ZBIB

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Zein Zbib, the Principal Applicant, his spouse Rena Yaghi, and their minor children, are citizens of Lebanon. They claim to fear for their lives at the hands of members of the Amal Movement on the basis that the Principal Applicant witnessed a colleague

being beaten at work and subsequently complained to his supervisor. The Applicants state that the owner of the company's bodyguards who beat the Principal Applicant's colleague have ties with the Amal Movement.

[2] The Applicants seek judicial review of a decision by the Refugee Appeal Division [RAD] dated April 22, 2022, dismissing the Applicant's appeal and confirming the decision of the Refugee Protection Division [RPD] to reject his claim for refugee protection, finding that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The determinative issue for both the RPD and the RAD was credibility. The RAD concluded that the accumulation of contradictions, omissions, and inconsistencies with respect to the Applicants' evidence about crucial elements of their claim supported a negative credibility finding.

[3] The Applicants submit that the RAD erred by refusing to admit a further report from the Principal Applicant's psychotherapist along with other new evidence. The Applicants further submit that the RAD's analysis of the Principal Applicant's credibility was flawed, unreasonable, and in breach of natural justice.

[4] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RAD's decision is unreasonable. For the reasons that follow, and despite the able submissions of counsel for the Applicants, this applicable for judicial review is dismissed.

II. Issues and Standard of Review

[5] The issues are as follows:

1. Did the RAD err by failing to admit the Applicants' new evidence?
2. Are the RAD's credibility findings unreasonable?

[6] The parties agree that the applicable standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85).

[7] It is the Applicants who bear the onus of demonstrating that the Officer's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[8] The focus must be on the decision actually made, including the justification offered for it, and not the conclusion the Court itself would have reached in the administrative decision maker's place. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

[9] During the hearing, the Applicants emphasized that where "the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes." (*Vavilov* at para 133).

[10] While the parties agreed that the applicable standard is reasonableness, I note one of the issues the Applicants raise, namely that the RAD did not afford the Applicants an opportunity to address a new issue, touches on procedural fairness. The standard applicable to issues of procedural fairness is whether, "having regard to all of the circumstances and focusing on the nature of the substantive rights involved and the consequences for the individual affected", the procedure followed by the decision-maker was fair: *Canadian Pacific Railway Company v Canada (Transportation Agency),* 2021 FCA 69 at paras 46-47. This standard involves no deference to the decision-maker.

III. Analysis

A. *The Applicants' New Evidence*

[11] Following the RPD's decision, the Applicants sought to submit further evidence on appeal. Included in the additional evidence was a letter from the Applicants' psychotherapist dated after the RPD decision and two days prior to the appeal being perfected [Second Psychotherapist's Letter]. This letter highlighted that the Principal Applicant was suffering from memory loss noting that he "missed several sessions because of his memory loss which was significant." Previously, a letter from the same psychotherapist dated October 30, 2021 had been submitted as part of the RPD record, but it had not mentioned memory loss on the part of the

Principal Applicant, although it had mentioned other emotional and mental health issues on his part [First Psychotherapist's Letter].

[12] As per the Applicants' written submissions to the RAD accompanying the new evidence, the Second Psychotherapist's Letter specifically attesting to the Principal Applicant's "memory problems associated with the trauma experienced by [him]" and stating that this "letter would not have been required had the Panel not made credibility findings based on immaterial inconsistencies."

[13] The RAD correctly cited subsection 110(4) of the IRPA as relevant and the criteria in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*].

[14] Subsection 110(4) states:

> Evidence that may be presented
>
> (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.
>
> Éléments de preuve admissibles
>
> (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[15] The Federal Court of Appeal in *Singh*, which the RAD relied upon, found that the explicit conditions referred to in subsection 110(4) must be satisfied along with the implied criteria identified in *Raza*, namely credibility, relevance and novelty (at paras 34, 35, 38, 44, 45 and 49).

[16] It is noteworthy that the objective behind subsection 110(4) and related provisions is "to require parties to put their best case forward before the RPD to prevent wasting valuable decision-making resources by thwarting claimants from rearguing the same issues before the RAD based on evidence that was available before the RPD rendered its decision." (*Mohamed v Canada (Citizenship and Immigration)*, 2019 FC 1537 at para 52).

[17] The RAD concluded that the Applicants were attempting to supplement the evidence that they had previously provided and that they could not use new evidence to complete a deficient record:

> [23] ….I find that the Appellants are attempting to supplement the evidence already presented to the RPD by the psychotherapist Randa Meshki in the form of her letter dated October 31, 2021. That letter says that the Appellants have been in therapy since May 8, 2021, and outlines the impact of the death threats on the Principal Appellant on "his capacity to concentrate, to sleep, on his self-esteem, his self-confident and his mental health." The new evidence about the Principal Appellant's mental health did not arise after the rejection of the claim, was reasonably available and the assessment of credibility is integral to every claim for protection. Section 110(4) is not to be used to complete a deficient record submitted before the RPD.

[18] The Applicants submit that the RAD erred by treating the test as conjunctive rather than disjunctive. Having considered the language used by the RAD, I disagree that the RAD required the Applicants to satisfy all three elements of the test. Rather, I read the RAD's statement as

finding that the Applicants did not satisfy any of the elements of the test. Furthermore, in paragraph 16, the RAD correctly states that it is “or” between each element of the test.

[19] The Applicants submit that the Second Psychotherapist’s Letter is critically important for the Principal Applicant’s credibility, because it permits the RAD to understand the impact of trauma on his ability to testify at the hearing. The Applicants plead that the RAD failed to grapple with the explanation that the Principal Applicant’s memory problems only became apparent for the first time at the RPD hearing, and thus the Applicants could not have reasonably been expected to present this evidence earlier.

[20] The Respondent states that no issues were raised concerning the Principal Applicant’s memory before the hearing, including in the First Psychotherapist’s Letter, and the RAD was correct to reject the Applicants’ attempts to solicit evidence to address the weaknesses in their case. The Respondent submits that this evidence cannot now be used to explain away inconsistencies in the Principal Applicant’s testimony.

[21] I am not persuaded the RAD erred by failing to grapple with the issue of the Principal Applicant’s memory issues becoming apparent for the first time at the hearing. Having reviewed the submissions to the RAD on this new evidence, this is not clearly stated and thus the RAD cannot be faulted for not grappling with it. Rather, the Applicants submitted to the RAD that this evidence would not have been necessary had the RPD not made credibility findings based on inconsistencies, which the Applicants considered immaterial. Indeed, such an explanation by the

Applicants serves to support the RAD's conclusion that the Applicants were seeking to supplement or buttress the evidence that they had presented to the RAD.

[22] Furthermore, the Second Psychotherapist's Letter referred to the Principal Applicant having a history of missing multiple sessions, and contained no indication as to when the memory problems first appeared (i.e., that they only appeared in the short time between the RPD hearing and perfecting the appeal). Accordingly, I am also not persuaded that the RAD erred in finding that this evidence was reasonably available beforehand.

[23] The Applicants submit that the Principal Applicant's mental health, and in particular his memory impairment issues, ought to have been considered when assessing discrepancies in the evidence. The Respondent replies that there is no explanation in the Second Psychotherapist's Letter as to why the memory issues were not captured in the First Psychotherapist's Letter, dated over two months earlier. The Respondent submits that the jurisprudence upon which the Applicants rely dealt with evidence that was presented to the RPD and not provided after the fact to explain away inconsistencies in the testimony and evidence from the hearing.

[24] I do not find the jurisprudence relied upon by the Applicants ultimately assists them in demonstrating that the RAD's decision is unreasonable. In *Sivaraja v Canada (Citizenship and Immigration)*, 2015 FC 732, the medical diagnosis from a doctor was not provided after the fact, unlike the present case. While in *Mafoumba v Canada (Citizenship and Immigration)*, 2021 FC 1325, Justice Roy dealt with a matter where the RAD dismissed new evidence, a psychotherapist's report. Justice Roy concluded that the "lack of reasons for declaring the new

evidence inadmissible is fatal in the case at hand" (at para 71). As such, I find the present matter to be distinguishable from *Mafoumba* in that RAD provided reasons and justified its decision to exclude the Second Psychotherapist's Letter.

[25] In addition, I note that the RAD did take the Principal Applicant's mental health into account when it considered the First Psychotherapist's Letter. The RAD ultimately concluded that the report could not serve as a cure-all for the deficiencies in the evidence, and found it did not explain away the inconsistencies and omissions in the Principal Applicant's testimony.

[26] Finally, the Applicants allege that the RAD erred in not admitting a photograph of an armed man outside the home of the Principal Applicant's parents. Contrary to the submissions of the Applicants, the RAD did not fail to engage with the evidence because it had found the Applicants not to be credible. I find that RAD engaged with the evidence and its analysis is reasonable given the credibility issues it had with the photograph, the letters that accompanied it, and the statements of the Principal Applicant in his affidavit.

B. *The RAD's Credibility Findings*

[27] As noted above, the determinative issue for both the RPD and the RAD was credibility. Credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29 [*Fageir*]; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35 [*Tran*]; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should

only be overturned “in the clearest of cases” (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12 [*Liang*]). Credibility determinations have been described as lying within “the heartland of the discretion of triers of fact […] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence” (*Fageir* at para 29; *Tran* at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22, citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[28] The Applicants submit that the RAD erred in its credibility analysis on multiple grounds. The Applicants highlight that the RAD’s credibility findings are cumulative, on the basis that the RAD concluded that “the accumulation of contradictions, omissions and inconsistencies regarding the Applicants’ evidence about crucial elements of their claim supports a negative conclusion about credibility.” As such, the Applicants submit that it is impossible to determine which error is determinative, thus the Court must send the matter back down should it find one error.

[29] The Respondent underscores that consistency is a hallmark of credibility in refugee claims, and that the RAD was entitled to weigh the evidence before it and consider the inconsistencies therein. The RAD’s credibility analysis is reasonable in the Respondent’s view.

[30] Having considered the transcript of the hearing, the record, the parties’ submissions, and the RAD’s decision, I conclude that the RAD’s analysis of the Applicants’ credibility, and in particular the credibility of the Principal Applicant, bears the required hallmarks of transparency, reasonableness and intelligibility. The Applicants have not succeeded in persuading me that the

RAD's credibility findings are unreasonable. Rather, the Applicants' credibility arguments are, in my view, an impermissible request to re-assess the evidence considered by the RAD (*Vavilov* at para 125). Moreover, as the Applicants' submissions pertain to the credibility determinations made by the RAD, these determinations are owed a high level of judicial deference (*Liang* at para 12).

[31] For a number of the RAD's findings raised by the Applicants, they reiterate that (i) a "medical diagnosis of memory impairment" ought to have been taken into account by the RAD when assessing the discrepancies in the Applicants' evidence; and (ii) contrary to the RAD's conclusion, the psychotherapist's report does offer a rationale for the omissions and inconsistencies. The Respondent submits that there was no evidence before the RAD that the Principal Applicant had difficulty recalling events, and in any event, it was open to the Principal Applicant to raise this and request accommodations.

[32] The Applicants do not succeed on these points. First, the RAD took the First Psychotherapist's Letter into account when assessing the Principal Applicant's omissions and inconsistencies, but concluded that the report and his psychological condition did not explain the omissions and inconsistencies. The RAD underscored that the jurisprudence of this Court "confirms that a psychotherapist's report cannot serve as a cure-all for any and all deficiencies in a claimant's testimony". The RAD also expressly considered the Applicants arguments on appeal that "difficulties organizing memories in chronological order is typical of individuals who have experienced trauma like the Principal Applicant". With respect to the chronology point, while the RAD agreed with the Applicants that errors in chronology alone would not lead to a general lack

of credibility, the RAD nevertheless found the inconsistency material and that it supported the negative credibility finding. As such, in my view, it cannot be said that the RAD did not take the Applicants' arguments on the Principal Applicant's mental state and the First Psychotherapist's Letter into account.

[33] Second, as discussed in detail in the previous section, there was no medical diagnosis in the present case. The Second Psychotherapist's Letter, drafted by a trained therapist and academic consultant, indicated the presence of memory loss on the basis that the Principal Applicant had missed several appointments despite being provided with reminders. The RAD, however, reasonably concluded that this letter was not admissible as new evidence.

[34] I turn now to a different point raised by the Applicants, namely that the RAD erred by advancing a new argument without providing the Applicants with an opportunity to address it. The Respondent submits that the point at issue was not new, in that it was not legally or factually distinct from the grounds of appeal raised by the Applicants.

[35] I do not share the Applicants' view. While the Applicants clearly disagree with the RAD's treatment of the evidence provided by the Principal Applicant, the RAD's findings as to the Principal Applicant's credibility based in part on the inconsistencies in his chronology of events is not a new argument or issue. Indeed, the RAD addressed the inconsistencies between the Basis of Claim form [BOC] and the Principal Applicant's testimony, in response to the Applicants' submission that such inconsistencies were not material and that the Principal Applicant had difficulties organizing his memories in a chronological fashion. The RPD in its

decision had highlighted a number of claims in the BOC and inconsistent testimony before concluding that it was reasonable to expect the Principal Applicant to provide consistent testimony about the chronology of events that resulted in his decision to flee from Lebanon. In their submissions on appeal, the Applicants stated that, contrary to the RPD decision, (i) the Principal Applicant provided thorough testimony that was consistent with the central allegations contained in the BOC in all matters central to the claim, and (ii) the inconsistencies noted by the RPD between the BOC and the testimony are not central to the claim. The Applicants' arguments on appeal touched upon both the chronology events and the alleged threats from the owner's bodyguards.

[36] In the context of addressing the Applicants' arguments on the inconsistencies in the chronology, in particular with respect to the timing of alleged visits by an armed man and by Mr. Aljamajem, the RAD also noted that the Principal Applicant's testimony about the chronology of events, with respect to the alleged threats from the owner's bodyguard, was inconsistent with the BOC but found that it was not determinative although it supported the negative credibility findings. It is this point on the owner's bodyguard that the Applicants object to for not having been put specifically to them for explanation.

[37] The Applicants rely on *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*], in which Justice Denis Gascon concluded that the RAD erred by identifying additional arguments and reasoning, without providing the applicant with the opportunity to respond to them (at para 26). In *Kwakwa*, Justice Gascon also found that "the RAD is entitled to make independent findings of credibility or plausibility against an applicant, without putting it

before the applicant and giving him or her the opportunity to make submissions, but this only holds for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant." (at para 24).

[38] I find the present matter differs from *Kwakwa*. This is not an issue that was unknown to the Applicants. Inconsistencies in the chronology of events as between the Principal Applicant's testimony and the BOC was not a new issue. Nor were the inconsistencies between the allegations in the BOC and the Principal Applicant's testimony about the alleged threats from the owner's bodyguard. Both of these issues were addressed by the Applicants in their submissions to the RAD. The fact that the RAD noted that there was an inconsistency between the BOC and the Principal Applicant's testimony as to the chronology of events relating to the alleged threats from the owner's bodyguard, in the context of a larger discussion on the issue of inconsistencies in the chronology of events, does not render the RAD's decision unreasonable nor does it constitute a breach of procedural fairness.

IV. Conclusion

[39] For the reasons set out above, I am of the view that the Applicants have failed to meet their burden of demonstrating that the RAD's decision is unreasonable or that the RAD breached procedural fairness. I therefore dismiss this application for judicial review.

[40] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-4697-22

THIS COURT'S JUDGMENT is that :

1. The Applicants' application for judicial review is dismissed; and

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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