

Federal Court



Cour fédérale

Date: 20230118

Docket: IMM-951-21

Citation: 2023 FC 74

Ottawa, Ontario, January 18, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KHISHIGJARGAL NIKOLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Khishigjargal Nikolai [Applicant] seeks judicial review of the Refugee Appeal Division's [RAD] January 5, 2021 decision wherein the RAD agreed with the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] [Decision].

[2] The Applicant has not met his burden of demonstrating that the RAD erred in arriving at its Decision. The application for judicial review is dismissed.

II. Background

[3] The Applicant is a 40-year-old citizen of Mongolia who claims persecution at the hands of criminals and corrupt police in Mongolia.

[4] In May 2017, following an initial visit by men interested in his recently opened business, several extortionists targeted the Applicant and demanded monthly payments of \$500 USD. The Applicant went to the police station and provided a police officer with the names and phone numbers of the extortionists.

[5] The following day, in retaliation for the police complaint, the extortionists assaulted the Applicant outside of his apartment in Ulaanbaatar and announced their planned return the next day to collect the payment. The Applicant's wife took him to the hospital to receive medical care. The Applicant did not report this incident to the police, as he suspected that the police advised the extortionists of his complaint. The Applicant made the monthly payment.

[6] The next week, the Applicant was summoned to the police station, where a police officer demanded payment in the amount of \$1000 USD. The Applicant could not afford this payment, causing him to relocate with his family to a rented apartment in another area of Ulaanbaatar. The Applicant hired an employee to run his business.

[7] Three weeks later, the extortionists found and assaulted the Applicant. The Applicant went to the hospital and the doctor called the police, but the Applicant did not make a complaint that day. Instead, the Applicant submitted a complaint against the police to the prosecutor's office. The Applicant began receiving threats from the police due to this complaint.

[8] The Applicant and his family relocated to Gachuurt, where they remained in hiding while applying for a Canadian visa. During this time, the Applicant learned that his business was vandalized and his employee had quit after being assaulted at work.

[9] In February 2018, the Applicant arrived in Canada.

[10] On July 10, 2019, the RPD refused the Applicant's claim for refugee protection. The RPD assessed the Applicant's claim under section 97 of *IRPA*, having found that it lacked a nexus to a Convention ground. The determinative issue before the RPD was credibility.

III. The Decision

[11] The RAD rejected the Applicant's appeal on the determinative issue of credibility. The RAD found that the Applicant's allegations were undermined by a series of insufficiently explained inconsistencies and omissions in his evidence.

[12] As a preliminary matter, the Applicant sought to have the following new evidence admitted:

- (a) A letter from the Applicant's wife;
- (b) A registration for the sale and a certificate of sale of the Applicant's apartment in Ulaanbaatar, both dated December 22, 2017 [Registration and Certificate of Sale];
- (c) A new translation of the Applicant's wife's letter that was before the RPD;
- (d) A letter from the interpreter who assisted with the interpretation of the Applicant's Basis of Claim [BOC] and refugee claim forms;
- (e) A letter from a psychologist; and
- (f) An annotated transcript of the RPD hearing, including corrections and submissions on the accuracy of the interpretation at the hearing.

[13] The RAD accepted the letter from the Applicant's wife, the letter from the interpreter, and the annotated hearing transcript, as they satisfied the requirements of subsection 110(4) of *IRPA* as well as the factors of credibility, relevance, and newness (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 38, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13-15 [*Raza*]). The RAD did not admit the remaining evidence.

[14] The RAD found that it was incorrect for the RPD to undermine the Applicant's credibility because of the following discrepancies or implausibilities: the Applicant was unable to remember his former apartment number, the Applicant omitted several addresses he allegedly relocated to from his Schedule A form, and the Applicant's family was not located in their hiding spot of one year after being previously found by the extortionists within three weeks.

[15] However, the RAD determined that the RPD was correct to find that the Applicant provided inconsistent testimony about the duration of his hiding in Gachuurt. While the Applicant's BOC narrative stated that he hid in Gachuurt for one month, he later testified that length of time was one year. The Applicant failed to adequately explain this inconsistency.

[16] The RAD also found that the RPD was correct to note the inconsistency in the police report and the Applicant's BOC narrative regarding whether the visit from the extortionists occurred one or two days after the initial visit from the men inquiring about the Applicant's business. The RAD acknowledged that this inconsistency could have been an innocent mistake, but did not accept the Applicant's explanation. The RAD found that this inconsistency reduced the reliability of the Applicant's police report and BOC narrative. However, given that the inconsistency was relatively trivial, it only formed a minor part of the RAD's overall credibility determination.

[17] Turning to the letter from the Applicant's wife, the RAD found that the RPD was correct in impugning the Applicant's credibility due to the inconsistency in the Applicant's wife's address. The RAD rejected the Applicant's explanation for why his wife had put their original

Ulaanbaatar address from her national identity card in her letter despite no longer living there. There was no evidence beyond the Applicant's own assertions that it was a cultural norm in Mongolia to list a previous government-registered address. The RAD also noted that the Applicant's apartment sale contract was simply an unsigned plain typed document without any security features. Accordingly, the RAD found that the inconsistency in the Applicant's wife's letter reduced the reliability of the Applicant's allegation that he sold his apartment in Ulaanbaatar and that his family remains in hiding in Mongolia.

[18] Fourth, the RAD found that the Applicant's evidence of the ongoing threats against him and his family was vague and inconsistent. The four letters from the Applicant's wife did not provide specific details about the threats. Further, there were discrepancies between the Applicant's testimony and the Applicant's wife's account.

[19] Lastly, the RAD determined that the Applicant's remaining documents did not overcome its credibility concerns. While the Applicant's rental agreement corroborated the Applicant's BOC narrative that he rented a cottage in Gachuurt for one month, it did not corroborate his testimony that he remained there for one year. The RAD also noted that the Applicant's letters of support did not contain first-hand knowledge of the incidents, and that both the letters and the medical documents did not contain any security features. Finally, the RAD found that the country condition evidence of political corruption was irrelevant to the Applicant's claim.

IV. Issues and Standard of Review

[20] After considering the submissions of counsel, I agree with the Applicant that the issues are:

1. Was the RAD's assessment of the new documents procedurally unfair and/or unreasonable?
2. Was the RAD's assessment of the Applicant's credibility unreasonable?

[21] Questions of procedural fairness are reviewable on the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Oleynik v Canada (AG)*, 2020 FCA 5 at para 39; *Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at para 12). This standard affords no deference to the underlying decision-maker (*Del Vecchio v Canada (AG)*, 2018 FCA 168 at para 4).

[22] The merits of the Decision are subject to a reasonableness review. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine outcome of the Decision and its underlying rational to assess “whether the decision, as a whole, bears the hallmarks of reasonableness—intelligibility, transparency, and justification—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at paras 87, 99). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

A. *Was the RAD's assessment of the new documents procedurally unfair and/or unreasonable?*

(1) Applicant's Position

[23] The RAD erred in refusing to admit the Registration and Certificate of Sale documents because they could have been obtained prior to the RPD's decision. This documentation was solely material to establishing the Applicant's move from the apartment. Accordingly, the Applicant could not have reasonably been expected to present this evidence to the RPD to address any credibility concerns. Further, the RAD found that this evidence introduced new credibility problems because it indicated that the sale of the apartment occurred long after the Applicant went into hiding in the countryside. The Applicant feared corrupt police officers, not the land registry office, and the documents did not identify where the Applicant was hiding. The documents went to key issues on the Applicant's appeal, and the RAD would not have reached the same conclusion had these documents been admitted.

[24] The RAD also breached procedural fairness in refusing to admit the corrected translation of the Applicant's wife's letter (*Mah v Canada (Citizenship and Immigration)*, 2013 FC 853 [*Mah*]).

(2) Respondent's Position

[25] The Applicant's argument that registering the sale of his property would not have raised the attention of his alleged persecutors is directly contradicted by his testimony. Namely, the Applicant testified that he would not even use banking services while hiding in the countryside

out of fear that he would be tracked by government agents. Further, as noted by the RAD, the Applicant could have reasonably provided the Registration and Certificate of Sale documentation to the RPD.

[26] The RAD reasonably rejected the new translation of the Applicant's wife's letter. The Applicant failed to advance any jurisprudence to support the notion that corrections to a previously translated document trump the *Raza* factors.

(3) Conclusion

[27] The RAD did not err in refusing to admit the Registration and Certificate of Sale documents or the Applicant's wife's translated letter for their failure to meet the requirements of section 110(4) of *IRPA* and the *Raza* factors.

[28] I agree with the Respondent that the RAD reasonably determined that the Applicant could have presented the Registration and Certificate of Sale documents to the RPD. This Court has noted that "[t]he process for refugee claims in the *IRPA* calls on applicants to file all relevant evidence before the RPD" (*Karim v Canada (Citizenship and Immigration)*, 2020 FC 566 at para 17). While the Applicant argues that the sale of the Applicant's apartment was not a key element of the Applicant's claim, I disagree. This documentation corroborated the fact that the Applicant moved from his apartment in Ulaanbaatar, a central element of his claim before the RPD. The Applicant could have reasonably provided this documentation to the RPD.

[29] Further, I agree with the Respondent that the RAD reasonably found that the Registration and Certificate of Sale documentation introduced new credibility issues, as they occurred after the Applicant alleged to have gone into hiding. While it is true that the Applicant's fear was not of state authorities generally, the Applicant's evidence was that he remained in hiding during this period and feared using banking services because he thought he would be tracked by his persecutors. The fact that the Applicant registered the sale of his property during this period contradicted his testimony in this regard.

[30] I also disagree with the Applicant that the RAD breached procedural fairness in refusing to admit the corrected translation of the Applicant's wife's letter. In my view, this is not a matter of procedural fairness. Further, the Applicant's reference to *Mah* is misplaced. *Mah* involved faulty translations at the RPD hearing, raising the issue of procedural fairness of the hearing itself (at para 9). In the present matter, the Applicant's corrected translation attempts to rectify deficiencies in his own evidence. The onus is on the Applicant to ensure that the English translation of his documents are accurate (*Gu v Canada (Citizenship and Immigration)*, 2017 FC 543 at para 29). As the Respondent notes, the Applicant has not advanced any jurisprudence to support his assertion that potential corrections to previously translated documents override the *Raza* factors.

B. *Was the RAD's assessment of the Applicant's credibility unreasonable?*

(1) Applicant's Position

[31] The RAD's finding of inconsistency concerning the length of time the Applicant remained in Gachuurt was without regard to the totality of the evidence. The Applicant stated in his BOC narrative that he remained in Gachuurt for one month, but did not explain where he moved after leaving Gachuurt. Accordingly, one could infer that the Applicant remained in Gachuurt until he fled Mongolia.

[32] Further, the RAD mischaracterized the evidence in drawing a negative inference from the Applicant's wife's letter, which listed their original Ulaanbaatar address. While the RAD described the wife's new evidence as a "letter", it was actually a sworn statement. The RAD failed to give proper appreciation to this. The Applicant's wife and children also remain in hiding; therefore, it is expected that they have not registered their new address.

[33] Third, the RAD's finding that the Applicant's wife's letters were vague and inconsistent was unreasonable, as it failed to consider that each of the letters were written for different purposes and in different contexts. The RAD seized on minor inconsistencies and omissions in the letters.

[34] Lastly, the RAD's treatment of the Applicant's remaining evidence, including the support letters, medical documents, and police reports, was unreasonable. Specifically, the RAD unreasonably gave little weight to the support letters because they did not contain security features, yet they were each signed and included a copy of the author's identity card.

[35] Given the RAD's conclusion that each of the identified issues was not determinative on their own, but that taken together they substantially undermined the credibility of the Applicant's allegations, the Decision must be set aside if the Court finds even some of the RAD's findings unreasonable.

(2) Respondent's Position

[36] The RAD reasonably found that the Applicant's evidence surrounding the whereabouts and timing of his hiding in Gachuurt was inconsistent. The Applicant's submissions are simply a reiteration of his argument that was considered and rejected by the RAD.

[37] The RAD reasonably found that the Applicant's wife's letter reduced the reliability of the Applicant's allegation that he sold his apartment in Ulaanbaatar and that his family remained in hiding. The Applicant's arguments do not engage with the RAD's evidentiary issues.

[38] Further, the Applicant fails to address the primary issues the RAD raised with the Applicant's wife's letters. Namely, the letters offered no specific details about dates, times, descriptions of those involved, how his wife came to know that people were looking for them, and how they avoided detection. The Applicant's arguments on this point are simply an attempt to rehabilitate his evidence.

[39] Lastly, the RAD reasonably considered the remainder of the Applicant's evidence. While the Applicant focused on the RAD's finding that the support letters contained no security features, the RAD also found that none of the authors had first-hand knowledge of the incidents.

The Applicant's argument asks this Court to reweigh the evidence. Similarly, the RAD reasonably found that the medical documents were simply plain forms without any security features, letterhead, or clinic contact information. The Applicant has not identified any specific issues with the RAD's assessment of this evidence.

(3) Conclusion

[40] In my view, the Applicant's submissions amount to a request for this Court to reweigh the evidence. I agree with the Respondent that the RAD reasonably drew a negative credibility inference from the inconsistencies between the Applicant's BOC narrative and testimony about the duration of his hiding in Gachuurt. There is no merit to the Applicant's argument that the absence of any statement in his BOC narrative about where he moved after leaving Gachuurt meant that he remained in Gachuurt. The Applicant explicitly stated that he stayed in Gachuurt for one month, but that it was no longer an option for him and his family to remain there.

[41] I also agree with the Respondent that the RAD reasonably found that the Applicant's wife's letter listing their original address reduced the reliability of the Applicant's allegations that he sold his property in Ulaanbaatar and that his family was in hiding. The suggestion that a new address has not been registered because the Applicant's wife and children remain in hiding is irrelevant to the RAD's point, namely that the use of their original address in the letter raised doubts that their residence was sold. While the Applicant explained that it was common practice in Mongolian culture for people to list their previous government-registered address, it was open for the RAD to find this explanation insufficient without further corroboration.

[42] As for his third argument, the Applicant submits that the RAD failed to consider the different purposes and contexts under which each of the Applicant's wife's letters were written in determining that the letters were vague and inconsistent. The RAD's primary issues with the letters concerned the lack of detail and inconsistencies in the wife's description of the events and ongoing threats. I see no error on the part of the RAD in making this finding.

[43] Lastly, I agree with the Applicant that it was unreasonable for the RAD to impugn the weight of the Applicant's support letters on the basis of their lack of security features. However, as the Respondent notes, the RAD also found that the support letters did not contain first-hand knowledge of the incidents. A review of the Decision indicates that the RAD engaged with the substance of the letters, and the RAD did not err in assigning them low weight.

[44] In light of the numerous credibility issues raised by the RAD, which are justified on the face of the record, I find the Decision reasonable. The Applicant has failed to identify any errors in the RAD's finding of inconsistencies and omissions in the evidence.

VI. Conclusion

[45] The application for judicial review is dismissed. The Applicant has not established that the RAD breached his right to procedural fairness or that the Decision was unreasonable.

[46] The parties did not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-951-21

THIS COURT'S JUDGMENT is that:

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

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-951-21

STYLE OF CAUSE: KHISHIGJARGAL NIKOLAI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 21, 2022

JUDGMENT AND REASONS: FAVEL J.

DATED: JANUARY 18, 2023

APPEARANCES:

James Lawson FOR THE APPLICANT

John Loncar FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yallen Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario