

Federal Court



Cour fédérale

Date: 20230621

Docket: IMM-5801-22

Citation: 2023 FC 872

Ottawa, Ontario, June 21, 2023

PRESENT: Madam Justice Walker

BETWEEN:

**KARANJIT SINGH
BALJEET KAUR**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Mr. Singh (Principal Applicant) and his spouse, are citizens of India. They request refugee protection in Canada due to their alleged fear of the followers of Baba Gurmeet Ram Rahim, the leader of the Dera Sacha Sauda organization, and the police.

[2] The Applicants seek the Court's review of a March 31, 2022 decision of the Refugee Protection Division (RPD) rejecting their refugee claim. The RPD found that the Applicants had

not credibly established the central allegations of their refugee claim and that the claim has no credible basis pursuant to subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[3] The determinative question in this application is whether the RPD breached the Applicants' right to procedural fairness in refusing to adjourn the hearing of their claim to permit them to obtain a psychological report to substantiate the Principal Applicant's possible impairment. The Applicants asked for an adjournment after the RPD noted during the hearing that the Principal Applicant appeared to be having difficulty testifying. The RPD refused the requested adjournment, instead granting the Applicants one week in which to submit any post-hearing disclosure.

[4] The Applicants submit that the RPD's decision to proceed with the hearing effectively bypassed the Principal Applicant's vulnerability and was unfair. The result, they argue, is an unreasonable decision based on negative credibility findings that should not have been made in the absence of expert evidence. The Applicants state that prior counsel's admitted failure to take prompt action either when the Principal Applicant's mental health issues first surfaced or at the beginning of the hearing does not overcome the RPD's procedural error.

I. Decision under review

[5] The Applicants did not make submissions or file a psychological report following the hearing. The RPD issued its decision at the expiry of the one-week period for post-hearing disclosure and addressed the circumstances of its refusal to adjourn at the outset of its decision:

1. During the course of the first hour of the hearing, the RPD observed that the Principal Applicant was having difficulty giving testimony (vague statements, delaying his responses, declining to answer, not finishing sentences). The panel raised these difficulties with counsel at which point counsel offered that the Principal Applicant was suffering from an impairment as she had observed the same difficulties when preparing him for the hearing.
2. The RPD asked if counsel believed the Principal Applicant was unable to appreciate the nature of the proceedings pursuant to Rule 20(1) of the *Refugee Protection Division Rules*, SOR/2012-256 (the Rules) and counsel responded that she did not. The panel agreed that the Principal Applicant appeared to understand he was attending the hearing to testify in support of his refugee claim.
3. Counsel suggested that accommodations could be made and the RPD stated they would question the Principal Applicant slowly. After meeting privately with her clients, counsel suggested that they could perhaps obtain an appointment with a professional within one month and requested an adjournment until a report could be generated after the appointment.
4. The RPD refused counsel's request, determining that there was insufficient evidence to justify either a change of date of the hearing (Rule 54) or an extended period for post-hearing documents (Rule 43).
5. The RPD emphasized that counsel stated they became aware of the Principal Applicant's difficulties prior to the hearing but did not alert the RPD at the earliest opportunity as required pursuant to section 7.3 of the Chairperson's Guideline 8 (*Procedures With Respect to Vulnerable Persons Appearing Before the IRB*). Despite having represented the Applicants since 2018, counsel made no application to identify the Principal Applicant as a vulnerable person (Guideline 8, section 7.4). In the panel's opinion, it was likely that evidence documenting any vulnerability could reasonably have been obtained between the commencement of the claim in 2018 and the date of the hearing in 2022.

II. Analysis

[6] The Applicants submit that the RPD ignored the cumulative effects of the Principal Applicant's odd testimony and took inadequate steps to accommodate his possible impairment. Although they concede that the panel was in the best position to assess the Principal Applicant's comprehension of the questions posed to him, they argue that the RPD did not have the expertise of a psychologist to fairly assess whether the hearing should continue.

[7] The role of the Court in reviewing allegations of breach of procedural fairness is to determine whether the procedure in question is fair having regard to all the circumstances (*Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56; *Pardo Quitian v Canada (Citizenship and Immigration)*, 2020 FC 846 at para 18).

[8] The parties agree on a number of important facts. First, the Applicants' counsel at the RPD hearing was aware of the Principal Applicant's apparent difficulties in providing evidence approximately ten (10) days before the hearing but took no action before or at the beginning of the hearing. Second, the RPD actively considered whether the Principal Applicant appreciated the nature of the hearing for purposes of Rule 20(1). Third, the panel also considered Guideline 8 and offered to accommodate the Principal Applicant by asking questions slowly to ensure he had time to understand what he was being asked.

[9] In light of these agreed facts and for the following reasons, I find that the RPD's treatment of the Principal Applicant's testimony and counsel's late request for an adjournment was fair in the circumstances. The Applicants downplay their counsel's responsibility for compliance with the Rules and Guideline but offer no persuasive reason why the RPD ought to have agreed to a mid-hearing request for an indeterminate adjournment.

[10] First, it is clear that the RPD carefully assessed the Principal Applicant's ability to understand the purpose of the hearing as required pursuant to Rule 20(1). The panel took the initiative in raising the issue of impairment and received counsel's assurance that the Principal

Applicant understood the reason for the hearing. Only after the RPD interrupted its questioning did counsel mention the challenges she had encountered in preparing her client for the hearing.

[11] Second, the RPD also assessed the content and progression of the Principal Applicant's testimony. The panel described the testimony as "vague, laboured, and evasive" and stated that the lack of coherence in the testimony was likely strategic rather than the result of a psychological or physical impairment:

[29] On a balance of probabilities, I find that the male claimant's manner of testimony was a conscious choice, and a decision to evade responding to clearly-posed questions or to answer in vagaries has a negative impact on his credibility as a witness.

[12] Third, the Applicants rely on Guideline 8 and the RPD's obligation to ensure a fair proceeding but do not address the requirements of the Guideline other than in general terms. The starting point for an analysis of the Guideline is Section 2.1. The section defines vulnerable persons as individuals whose ability to present their case is severely impaired beyond those circumstances that affect many claimants. Counsel in the present case did not suggest the Principal Applicant suffered from a severe impairment, nor was there evidence of such an impairment before the panel. Counsel suggested only that a psychological report might illuminate the situation.

[13] Section 7.3 of Guideline 8 provides that counsel for a claimant is best placed to bring any vulnerability to the attention of the IRB and is expected to do so as soon as possible. Here, no steps were taken by counsel either before or at the hearing to raise the possibility of impairment. Similarly, counsel took no action after the hearing to indicate to the RPD that any action was

underway to obtain an expert assessment. I acknowledge that it was unlikely the Applicants could obtain and submit written psychological report within one week of the hearing. However, it was open to them to provide evidence during that period of their efforts to obtain an appointment and the time within which a report could be obtained. Further, section 7.4 of the Guideline requires counsel who wishes that a claimant be identified as a vulnerable person to make an application under the Rules, specifying the nature of the vulnerability, the type of procedural accommodations sought and the rationale for the particular accommodations. Again, no application was made.

[14] Fourth, although counsel in this application argues that the Applicants requested only a short one-month adjournment, this is not the case. The RPD described counsel's suggested adjournment as follows: "counsel suggested that [she] could perhaps obtain an appointment with a professional within one month, offering to reschedule the hearing until a report generated after such an appointment".

[15] Fifth and in the absence of evidence of a particular condition or issue, the RPD offered to accommodate the Principal Applicant's laboured testimony. The panel offered to ask questions more slowly for him and, as noted a number times in the decision, it did so with varying degrees of success.

[16] Sixth and finally, the jurisprudence on which the Applicants rely does not assist their argument. In *Pilashvili v Canada (Citizenship and Immigration)*, 2022 FC 706, the Court found that the RAD erred by failing to consider a medical diagnosis of memory impairment that could

have explained the omissions and inconsistencies identified in the applicant's evidence (at paras 20-21). Similarly, the Court found that the decision maker in another recent case unfairly addressed the medical evidence before it concerning the applicant's deteriorating mental health (*Aduwo v Canada (Citizenship and Immigration)*, 2022 FC 899 at para 18). The difference in this case is the absence of medical or psychological evidence for the RPD to consider.

[17] In summary, I find that the RPD acted fairly in refusing the Applicants' request for an adjournment of uncertain duration to address an issue that could and should have been addressed in advance. The obligation in this regard was their own. The RPD provided detailed reasons in support of its decision to proceed and took steps to accommodate the Principal Applicant's apparent difficulty in testifying. The panel considered both Rule 20(1) and Guideline 8 to assess whether they could continue the hearing and received counsel's assurance that the Principal Applicant understood the nature of the hearing. There was no evidence of severe impairment and the RPD fairly concluded that it could proceed with the hearing.

[18] I note briefly the Applicants' statement in their written memorandum of July 20, 2022 that they were attempting to obtain a psychological assessment for the Principal Applicant and may request the admission of any report received as new evidence in this application. They then indicated at the hearing on May 10, 2023 that they had obtained a report but had not filed a motion for its admission due to the Court's rules prohibiting the introduction of evidence that was not before a decision maker. While it is accurate to state that the evidentiary record on an application for judicial review is generally restricted to the record before the decision-maker, there are recognized exceptions to the general rule, including the admission of evidence that

addresses procedural fairness issues (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). The Applicants have not sought the introduction of any report in support of their argument of procedural unfairness with the result that there remains no evidence of severe impairment of the Principal Applicant's ability to testify.

[19] The Applicants also contest the RPD's adverse credibility findings and its determination that their claim has no credible basis. However, their submissions largely return to their position that the RPD should not have continued the hearing and that any findings it made based on the Principal Applicant's testimony are suspect.

[20] I do not agree with the Applicants and find that the RPD committed no reviewable error in its assessment of the Applicants' testimony and evidence. It is well-established that the RPD's credibility determinations are to be given significant deference as the RPD is best placed to make such determinations (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 42). In my view, it was open to the RPD in this case to characterize the Principal Applicant's testimony as deliberately evasive. The panel explained in some detail the new and evolving allegations and inconsistencies that developed through the Principal Applicant's testimony and its attempts to obtain clarity through the repetition and rewording of questions. The RPD noted that the Principal Applicant's ability to respond to questions appeared to vary in a strategic manner. At some points, he gave imprecise answers or declined to answer but at others was able to respond clearly. These findings, coupled with the issues identified by the panel in the third party statements the Applicants filed as corroboration, were explained clearly

and logically. The RPD's reasons justify its refusal of the Applicants' claim and its determination that the claim has no credible basis.

[21] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-5801-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5801-22

STYLE OF CAUSE: KARANJIT SINGH, BALJEET KAUR v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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JUDGMENT AND REASONS: WALKER J.

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