

Federal Court



Cour fédérale

Date: 20230804

Docket: IMM-9163-21

Citation: 2023 FC 1074

Ottawa, Ontario, August 4, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

GURVINDER SINGH RANDHAWA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Gurvinder Singh Randhawa, seeks judicial review of a decision of the Refugee Appeal Division [RAD] confirming a decision of the Refugee Protection Division [RPD] that he is not a Convention refugee or a person in need of protection, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA].

[2] The Applicant submits that the RAD denied him procedural fairness when it made credibility findings without giving him the opportunity to respond to the concerns; he also argues that the decision is unreasonable because the credibility findings made by the RAD cannot be sustained.

[3] For the reasons set out below, this application for judicial review will be dismissed. There was no denial of procedural fairness, and the RAD's credibility analysis is reasonable because it is grounded in the evidence and clearly explained.

I. Background

[4] The Applicant is a citizen of India. He first came to Canada on a study permit in 2017, but returned to India in June 2019, in order to seek medical treatment. He returned to Canada in September 2019 and made a refugee claim, saying that he feared persecution because he was unable to pay back a loan he had obtained to pay for his studies in Canada.

[5] The Applicant says he fears that a man named Anupam Sharma (hereafter referred to simply as Sharma) will harm him for two reasons: (i) because the Applicant and his family had not repaid the loan they obtained from Sharma in order to support his study abroad; and (ii) because the Applicant prepared and ate beef in 2017, while he was still in India and Sharma is a Hindu fundamentalist who is strongly opposed to any action that causes harm to cows.

[6] The RPD denied the Applicant's claim because it found his evidence not credible. The RPD pointed to differences between the Applicant's account of events leading to his claim for

protection in his Basis of Claim (BOC) narrative, port of entry (POE) interview with the Canada Border Service Agency (CBSA) on September 18, 2019 and a follow-up POE interview on November 25, 2019. The RPD also noted that the Applicant lived safely in India between June and September 2019.

[7] The Applicant appealed to the RAD, arguing that the RPD had erred in finding that he does not face a risk to his life because he has eaten beef, and also in failing to account for his exhaustion and nervousness at the POE interview, which explains the discrepancies in his various narratives. The RAD dismissed the Applicant's appeal.

[8] The RAD rejected new evidence the Applicant sought to file on appeal, finding that it did not meet the admissibility requirements set out in subsection 110(4) of *IRPA*. The Applicant does not challenge that finding.

[9] The RAD rejected the appeal, finding that the Applicant's evidence lacked credibility because his narrative evolved regarding core elements of his claim, he provided inconsistent evidence about the identity of the alleged agent of harm, and the corroborating documentary evidence did not support his claim that he was at risk because he had prepared and eaten beef.

[10] The RAD also found that the Applicant had failed to establish that he is at risk because he failed to repay his debt. The RAD accepted that the Applicant and his father had a dispute with Sharma about the loan agreement, but found that it had resulted in a court case in India. The court hearing in that case occurred three days before the RPD hearing, and the Applicant said he

had communicated with his father the day before the RPD hearing. However, when asked about the result of the court hearing in India, the Applicant said he did not know because he had not asked his father about it. Given that the financial dispute was one of two key elements at the core of the Applicant's refugee claim, the RPD found this undermined his credibility, and the RAD agreed with that assessment.

[11] Based on these findings, the RAD dismissed the Applicant's appeal. The Applicant seeks judicial review of the RAD's decision.

II. Issues and Standard of Review

[12] There are two issues that arise in this matter: whether the Applicant was denied procedural fairness because the RAD raised a new issue without giving him notice or an opportunity to respond; and whether the RAD's credibility findings are unreasonable.

[13] Procedural fairness is to be assessed using an approach that is similar to correctness review, although technically no standard of review is being applied: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54. A reviewing court is to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed." (*Canadian Pacific* at para 54). "(T)he ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond." (*Canadian Pacific* at para 56).

[14] The review of the RAD's specific credibility findings is to be done on a standard of reasonableness, in accordance with the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[15] In summary, under the *Vavilov* framework, a reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). An administrative decision-maker's exercise of public power must be “justified, intelligible and transparent” (*Vavilov* at para 95). The onus is on the Applicant to demonstrate flaws in the decision that are “sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100). It is only in exceptional circumstances that a reviewing court will interfere with the assessment and evaluation of the evidence by the administrative decision-maker (*Vavilov* at para 125).

III. Analysis

A. *The Applicant was not denied procedural fairness*

[16] The Applicant's procedural fairness claim is based on two inter-related arguments. First, he says that the RAD should have given him notice that it was going to undertake a comprehensive assessment of his credibility, or it should have held an oral hearing. He submits that the RPD had indicated to his counsel that it was mainly concerned with whether he had an internal flight alternative (IFA) in India, and thus his counsel did not ask him any questions to address credibility issues. The Applicant argues that he was treated unfairly because the RAD relied on the transcript of the RPD hearing in assessing his credibility, but that hearing was not

focused on credibility and therefore he was not able to answer the concerns that served to call his credibility into question.

[17] Second, the Applicant submits that the RAD raised a new issue when it made credibility findings that went beyond the RPD's findings, and therefore he was entitled to receive notice of the specific concerns and an opportunity to address them. He relies on several decisions of this Court on the issue of when a credibility finding by the RAD will amount to a new issue. In particular, the Applicant cites *Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063 [Bouchra], and *He v Canada (Citizenship and Immigration)*, 2019 FC 1316, which stand for the proposition that in some circumstances new credibility findings by the RAD can amount to a new issue on which the RAD is obliged to give the claimant notice and an opportunity to address the concerns.

[18] In this case, the Applicant points to the RAD's finding that he was not at risk because he had prepared and eaten beef. He says that this is a new issue because the RPD decision focused on his claim of risk because he was unable to pay back the loan. The Applicant contends that the RAD failed to apply the jurisprudence of this Court on when a new issue arises that requires that notice be provided, and thus the RAD denied him procedural fairness.

[19] The Respondent takes issue with both aspects of the Applicant's claim relating to procedural fairness. On the question of whether the Applicant was misdirected by the RPD, the Respondent submits that the Applicant was represented by counsel, and the RPD stated on several occasions that "all issues remain on the table". Although the RPD did direct counsel's

attention to the IFA issue, the Respondent argues that the issue of credibility was identified at the outset of the hearing and the RPD never indicated that it was satisfied that its questions on this aspect of the matter had been addressed. Instead, the RPD invited counsel to ask questions on any issue; its only restriction was that counsel was not to repeat questions that had already been asked.

[20] In addition, the Respondent submits that the RAD did not raise a new issue, but rather it largely focused on the same questions that had been raised by the RPD.

[21] I am not persuaded that the RAD denied the Applicant procedural fairness. On the Applicant's argument that he had been misdirected by the RPD, I am unable to agree. The RPD hearing was not solely focused on the IFA issue; it identified credibility as an issue at the outset of the hearing. Furthermore, the RPD repeatedly advised the Applicant's counsel that all issues were on the table, and that counsel should feel free to ask questions and make final submissions on all of the issues. The fact that counsel did not do so does not give rise to any irregularity in the RPD hearing, and the RAD was therefore not required to somehow overcome any deficiency in the earlier proceeding.

[22] Second, the RAD did not raise a new issue when it addressed the credibility issues, because these issues had been discussed in the RPD decision and they flow directly from the Applicant's documents and testimony. He was fully aware of the nature and scope of the narrative he advanced at different points in the proceeding, and the RAD was under no obligation to signal its concerns to him or to provide an opportunity for the Applicant to address the specific

questions. The RPD hearing transcript and the RPD's decision simply do not support the Applicant's claim that it was only focused on the risks he said he faced from the lender. His claim to be at risk because he had prepared and eaten beef is discussed at length in the RPD's decision, which is appropriate given the importance of this aspect of the claim as set out in the Applicant's testimony.

[23] In the case-law relied on by the Applicant, the Court has confronted the difficult question of determining when a credibility finding by the RAD goes beyond the scope of the findings made by the RPD such that it amounts to a "new issue". In *Bouchra*, Justice Roy quotes from a leading decision on this point, *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] (at para 29):

[T]here is a fine (and sometimes blurred) line between situations where the RAD raises and deals with a 'new question' and those where it simply makes reference to an additional piece of evidence to support an already existing conclusion of the RPD on a factual assessment or a credibility issue.

[24] In *Kwakwa*, Justice Gascon held that a "'new question' is a question which constitutes a new ground of reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from." Thus a new issue is not merely an elaboration on findings made by the previous decision-maker, but rather an entirely new basis for a finding made on appeal. The underlying idea is that it is unfair for the RAD to make such findings without notice to the appellant, in the same way that the RPD is required to give a claimant notice of the issues that will determine the case.

[25] In my view, the RAD did not cross that fine (or blurred) line in this case. The risk faced by the Applicant because he had prepared and eaten beef, and also because some people believed he had actually killed a cow, was a significant feature of the narrative presented in the Applicant's testimony before the RPD. It is mentioned on many occasions in the RPD decision, and then discussed again in the Applicant's submissions on appeal to the RAD. The Applicant was fully aware that the credibility of this aspect of his claim was in issue from the very beginning, and the RAD was not obliged to give him notice of it or an opportunity to address the concerns.

[26] Finally on this point, the concerns arose directly from the Applicant's documents and testimony before the RPD. The Applicant's counsel was aware of all this, and had an opportunity to question him on it, or to seek time to file supplementary evidence or submissions after the hearing. The Applicant's counsel did not question him on these points, and did not seek to file any further evidence or submissions. In view of this, the RAD was fully entitled to consider both aspects of the Applicant's refugee claim, and to assess them against the evidence and arguments submitted. That is precisely what the RAD did here, and the Applicant was not taken by surprise or denied an opportunity to make submissions on these points.

[27] In view of the reasons set out above, I reject the Applicant's claim that the RAD denied him procedural fairness.

B. *The RAD's credibility assessment was reasonable*

[28] The Applicant submits that the RAD's credibility finding was not reasonable, because it gave undue emphasis to changes in some elements of his narrative without taking into account the context or his explanations. He cites three examples of such findings by the RAD.

[29] The first unreasonable finding, according to the Applicant, relates to the discrepancies between the POE notes and his subsequent testimony regarding the risk he faced because he had eaten beef. He acknowledges that he did not mention this in the interviews with the border officials recorded in the POE notes, but says that he was nervous and tired after a long journey. The Applicant points to decisions of this Court where such explanations, and the fact that the POE notes are not part of the refugee determination process, have been found to require that decision-makers exercise sufficient caution in assessing the impact of POE notes on a claimant's credibility. He argues that this was not done here.

[30] Second, the Applicant argues that the RAD engaged in an unreasonable and microscopic analysis when it examined his Basis of Claim form and found that his failure to specifically name Sharma as the agent of harm regarding the eating of beef hurt his credibility. He had testified that he is a simple person who thought that it was sufficient to include the main points of his narrative, and he thought that it did include Sharma's name. The Applicant says that the RAD was overzealous in its efforts to find ways to question his credibility.

[31] On this point, the Applicant observes that the RAD found that it “defies logic” that Sharma would fund his education if he wanted to harm the Applicant because he ate beef. He argues that the RAD failed to notice the timeline set out in the evidence: the loan agreement was made in May; the beef incident occurred in June, and he came to Canada in September. The Applicant submits there is nothing illogical in this sequence of events.

[32] Finally, the Applicant contends that the RAD engaged in unwarranted and unreasonable speculation when it questioned why he had not asked his father about the outcome of the court case in India. He says his testimony was clear: he did not ask his father about this because the case was still ongoing, he was not sure the hearing had proceeded because of COVID-19 restrictions, and he had been fully occupied preparing for the RPD hearing. There was no basis in the evidence to infer any other reason or rationale, and the RAD engaged in pure speculation when it drew a negative inference from his failure to inquire about how the Indian court had dealt with the claim.

[33] I am not persuaded by the Applicant’s arguments on this issue. The RAD engaged in a careful and thorough examination of the evidence, and its credibility findings are based on the documentary evidence and testimony. The onus was on the Applicant to establish his claim, and the RAD’s finding that he failed to do so was reasonable.

[34] The Applicant implicitly acknowledges that there are gaps and inconsistencies in the POE notes, but claims that these are due to the circumstances of the initial interview. The problem with this explanation is that the notes reflect two separate interviews, the first of which occurred

on September 18, 2019 and the second of which occurred on November 25, 2019. While some of the deficiencies in the first interview may have been explained by the fact that the Applicant was tired after a long journey and nervous when he encountered border officials, this rationale cannot explain the issues regarding the second interview.

[35] The RAD appropriately considered the circumstances of the first interview and specifically acknowledged that it had to exercise caution in drawing an adverse credibility finding from POE interviews. However, the RAD also appropriately noted the Applicant's claim that he feared persecution because he had eaten beef was the issue that caused his flight from India, and thus the Applicant's failure to mention it was a serious concern. The RAD noted the inconsistencies between the POE notes, the Applicant's BOC form and his testimony, and found these differences undermined his credibility. This was a reasonable finding based on the evidence.

[36] It is important that the gaps and inconsistencies in the Applicant's various versions of his narrative relate to core elements of his claim. In the first POE interview, the Applicant did not mention that he feared persecution because he had prepared and eaten beef; he based his initial refugee claim only on his fear of harm because he could not repay the loan. He also failed to mention Sharma as the agent of harm. In the second interview, he mentioned that he obtained the loan from Sharma, and added that he also fears religious persecution because he was involved in eating cow meat and was accused of killing a cow. He did not mention any threats or risks from Sharma relating to that aspect of his claim, although as the RAD observed, he mentioned Sharma's name in the earlier portion of his narrative.

[37] In his Basis of Claim form, the Applicant's narrative focused on the risks he faced because he had eaten cow meat and was accused of killing a cow. He mentions the loan from Sharma but does not indicate that Sharma is a Hindu fundamentalist who threatened him because he had eaten cow meat. Instead, he simply refers to "a man" who came to their house to inform his father that he had eaten cow meat.

[38] These examples, among others, were relied on by the RAD as the basis for its finding that the Applicant lacked credibility. The failure to mention Sharma by name, and then later to refer to him in relation to only one part of the claim, stands in sharp contrast to the Applicant's testimony before the RPD. It was reasonable for the RAD to refer to this and to consider it as a negative factor in assessing the Applicant's credibility.

[39] Finally, in relation to the court case in India between the Applicant's father and Sharma, the RAD reasonably found that the Applicant's lack of curiosity about the outcome was a negative factor in assessing his credibility. The loan was the original basis for his claim and remained a central element throughout the process. The fact that there was litigation underway and that the Indian court heard the matter a few days prior to the RPD hearing gave rise to a reasonable line of questioning. This, combined with the evidence of the Applicant that he had spoken to his father the day before the RPD hearing but had failed to inquire about the status or outcome of the matter, was a relevant consideration in assessing the Applicant's credibility.

[40] On this point, the Applicant is asking the Court to attribute different weight to this evidence in the overall mix of factors relevant to his credibility. That is not the role of a reviewing court.

[41] For all of the reasons set out above, I find that there was no breach of procedural fairness and the RAD's credibility assessment was reasonable. The application for judicial review will therefore be dismissed. There is no question of general importance for certification.

JUDGMENT in IMM-9163-21

THIS COURT'S JUDGMENT is that:

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

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

Docket: IMM-9163-21
STYLE OF CAUSE: GURVINDER SINGH RANDHAWA V THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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