

Federal Court



Cour fédérale

**Date: 20231016**

**Docket: IMM-6285-22**

**Citation: 2023 FC 1377**

**Ottawa, Ontario, October 16, 2023**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**QAMAR JAVEED**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, Qamar Javeed, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”) dated June 13, 2022, confirming the determination of the Refugee Protection Division (“RPD”) that the Applicant is neither a Convention refugee nor a person in need of protection, pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”).

[2] The RAD upheld the RPD's refusal of the refugee claim on the basis that the Applicant lacks credibility in establishing central elements of his claim.

[3] The Applicant submits that the RAD failed to adequately consider the evidence, rendering the decision unreasonable, and that the RAD's proceedings breached procedural fairness due to the incompetence of his previous counsel.

[4] For the reasons that follow, I find that the RAD's decision is reasonable. This application for judicial review is dismissed.

## **II. Facts**

### **A. *The Applicant***

[5] The Applicant is a 47-year-old citizen of Pakistan. He identifies as Shia Muslim.

[6] Intermittently between 2002 and 2019, the Applicant resided in Kuwait on a work visa. The Applicant's wife and four children resided in Pakistan and the Applicant would travel back to Pakistan to visit them on his time off from work.

[7] While in Pakistan, the Applicant alleges that he generously supported his local Shia community, the Imam Bargah, financially. He claims that on one of his return trips to Pakistan, he proposed a renovation plan for the Imam Bargah that included a children's section, and made a large donation to the project. The Applicant alleges that this caused an influx of donations, his

name being announced in a speech by the Imam, and his appointment as the construction manager for the children's section. This allegedly caused the Applicant to become well known in the local Shia community.

[8] The Applicant claims that shortly thereafter, he received a threatening phone call from a man named Hafiz Bilal. On November 12, 2016, the Applicant was allegedly assaulted and threatened by members of Sipah-e-Sahaba ("SSP"), a Sunni extremist group. The Applicant claims that he reported the assault to the police the following day. On November 15, 2016, he allegedly fled Pakistan and returned to Kuwait, where he remained until 2019.

[9] In May 2019, the Applicant applied for a temporary resident visa to come to Canada, fearing that his Kuwaiti work visa would be terminated. This application was refused in June 2019. The Applicant returned to Pakistan in July 2019 to visit his ailing father. During this trip, the SSP continued to threaten him, culminating in an attack on his family home on September 19, 2019.

[10] The Applicant allegedly fled to Islamabad, where he hid from the SSP and applied for a visa for the United States ("US"). On November 24, 2019, he left Pakistan and travelled to Kuwait. On December 8, 2019, the Applicant travelled to the US and crossed the border into Canada the following day. The Applicant made a refugee claim in Canada upon arrival.

B. *RPD Decision*

[11] In a decision dated January 10, 2022, the RPD found that the Applicant's claim lacks credibility. The RPD admitted post-hearing evidence relating to the Applicant's allegation that he has continued to make donations to the Imam Bargah in Pakistan.

[12] The RPD drew negative credibility findings from inconsistencies and omissions in the Applicant's evidence with respect to the alleged events in November 2016. The Applicant's Basis of Claim ("BOC") narrative alleged that he was threatened via phone call two days after he was appointed as manager of the new children section of the Imam Bargah, from an individual named Hafiz Bilal, but the Applicant later testified that he also received other calls. The RPD further noted that the Applicant's First Information Report ("FIR") dated November 13, 2016, mentions receiving a threatening letter from Hafiz Bilal, but his BOC narrative and initial testimony make no reference to such a letter.

[13] The RPD found that the BOC form does not mention any FIR being issued in November 2016; that he testified to receiving two threatening letters from the SSP in 2019 while his BOC form only mentions one letter; that there are significant discrepancies between the Applicant's BOC narrative and his testimony regarding the nature of the alleged assault by four members of the SSP on November 12, 2016; and that the BOC form does not mention any bystanders intervening to help him during the alleged attack, despite his testimony to that effect.

[14] The RPD noted that the Applicant repeatedly attributed these inconsistencies and omissions in the evidence to the “middle-person/agent” who worked with his previous counsel, who allegedly assured the Applicant that everything the Applicant told him would be written down in his BOC narrative. The Applicant testified that he now understood that this middle-person did not include many details about his narrative in the BOC form. The RPD also noted the Applicant’s testimony that issues with his memory were also responsible for inconsistencies and omissions in his evidence, but found that he provided medical evidence of limited probative value to establish such claims.

[15] The RPD also drew negative credibility findings from inconsistencies in the Applicant’s evidence surrounding his location between November 17, 2016, and February 3, 2017. The Applicant’s BOC form stated that he fled Pakistan in November 2016 and did not return until July 2019, while the stamps in his expired passport indicate that he was in Pakistan between November 17, 2016, and February 3, 2017, which he confirmed in his testimony before the RPD. The Applicant even provided a rationale for why he returned there, with details of what he was doing there, at the hearing. However, the Applicant’s explanation again evolved when he later testified that the stamps in his passport are falsified by the agent.

[16] The RPD considered additional evidence proffered by the Applicant in advance of the panel’s second sitting, to demonstrate that he was actually in Kuwait during the period in question. This evidence was a letter by the Federal Investigation Agency (“FIA”) of Pakistan attesting to the Applicant’s location from November 2016 to July 2019, medical records related to appointments in Kuwait in 2016 and 2017, a certificate of employment dated December 2016,

a legal agreement entered into from Kuwait during the period in question, an affidavit sworn by the Applicant's friend, and an affidavit sworn by the Applicant's wife.

[17] The RPD found that the credibility of the FIA letter was undermined by the objective evidence and by discrepancies in the Applicant's testimony, and that the letter is likely fraudulent. The RPD found that the medical documentation was insufficient to establish that the Applicant was in Kuwait during the period in question; that the certificate of employment does not establish the Applicant's location; that the legal agreement is of no probative value in establishing the Applicant's whereabouts; and that the affidavits sworn by the Applicant's friend and wife did not overcome the numerous other credibility concerns and did not establish that the Applicant returned to Kuwait during the period in question. For these reasons, the RPD found that the numerous negative credibility findings went to the core of the Applicant's claim and therefore, the claim lacked credibility.

[18] Despite finding that the Applicant lacked credibility with respect to his claim that he faces persecution at the hands of the SSP, the RPD considered whether the Applicant has a residual profile sufficient to establish a claim pursuant to sections 96 and 97 of the *IRPA*. The RPD referenced the National Documentation Package ("NDP"), which indicates sectarian violence facing Shia Muslims in Pakistan, instances where individual Shia activists are targeted, and circumstances where an individual Shia Muslim will face a heightened risk. However, the RPD found that on the basis of the Applicant's own evidence and testimony, the Applicant did not establish that he is a Shia Muslim who would face a heightened risk of persecution from Sunni extremists such as the SSP in Pakistan.

C. *Decision under Review*

[19] In a decision dated June 13, 2022, the RAD dismissed the Applicant's appeal and found that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *IRPA*.

[20] The RAD accepted a medical note by the Applicant's psychiatrist as new evidence on appeal, finding that it met the requirements for new evidence under subsection 110(6) of the *IRPA*, and to be sufficiently new, relevant, and credible. The RAD rejected the Applicant's submission that this new evidence provides an explanation as to why the Applicant did not present certain central information before the RPD. The RAD found that the medical note does not explain the credibility concerns noted by the RPD.

[21] The RAD found that the inconsistencies in the Applicant's evidence regarding the number of threatening phone calls he received concern a material matter and that this warranted a negative credibility finding. On appeal, the Applicant submitted that the complete list of events he detailed to his former counsel were not included in his BOC narrative. The RAD found that despite making allegations of incompetence against his former counsel, the Applicant did not follow any of the procedures outlined in the Practice Notice for Allegations Against Former Counsel set out by the Immigration and Refugee Board.

[22] Regarding the inconsistency between the Applicant's testimony and BOC narrative about the alleged threatening letter he received from Hafiz Bilal, and the Applicant's evolving

testimony that he also received letters and threatening calls from a man named Adil Malik, the Applicant submitted that the RPD failed to consider that these two individuals are both members of the SSP and work together. The RAD found that the FIR explicitly indicates that Hafiz Bilal sent a threatening letter to the Applicant, and that the Applicant's assertions that the two individuals work together are speculative and unsupported by the evidence.

[23] The RAD acknowledged the RPD's finding that the issuance of a FIR is distinct from registering a complaint in the daily diary of the police station, which the Applicant's BOC narrative claims he did, despite the FIR included as evidence. The RAD agreed with the RPD's finding and noted the Applicant's testimony that the police was unwilling to register his FIR after the November 2016 incident.

[24] The RAD noted the Applicant's inconsistent evidence regarding the nature of the alleged attack against him in November 2016. The RAD found that this discrepancy amounted to more than an elaboration of details and that the two accounts of what allegedly occurred in November 2016 are distinct from one another.

[25] The RAD also agreed with the RPD in its finding that, on the basis of the Applicant's inconsistent evidence and varying testimony, he was not in Kuwait during the time period between November 17, 2016, and February 3, 2017. The RAD noted that the Applicant first provided an account of a trip to Pakistan during this time, before later recanting this response and alleged that the stamps on his passport were fraudulent. The RAD found that the Applicant did not provide medical documentation that would explain this "vastly inconsistent" evidence and



that the Applicant's supporting documentation does not establish that he did not travel to Pakistan from November 2016 to February 2017.

[26] With regards to the RPD's finding that the Applicant failed to establish that he has a residual profile such that he would be at risk of persecution on the basis of his Shia identity, the Applicant submitted that he continues to make donations to the Imam Bargah, that the situation for Shia Muslims in Pakistan has not improved, and there is an increase in sectarian violence targeting Shia Muslims. The RAD acknowledged the objective evidence demonstrating such violence against Shia Muslims, but found that the Applicant's evidence on appeal is the same as that before the RPD, and that the RPD correctly found that the Applicant provided insufficient evidence to establish that he, as an individual Shia Muslim, would face a heightened risk.

[27] For these reasons, the RAD dismissed the Applicant's appeal and upheld the RPD's finding that the Applicant's claim lacks credibility.

### **III. Issues and Standard of Review**

[28] This application for judicial review raises the following issues:

- A. *Whether the RAD's decision is reasonable.*
- B. *Whether there was a breach of procedural fairness.*

[29] The parties agree that the first issue is to be reviewed on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). I agree.

[30] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (“*Canadian Pacific Railway Company*”) at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[31] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[32] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent

exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100).

[33] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

#### **IV. Analysis**

[34] The Applicant submits that the RAD’s decision is both unreasonable and breaches procedural fairness. I disagree. I do not find that the Applicant has raised a reviewable error or has pointed to a breach of procedural fairness that warrants this Court’s intervention.

##### *A. Reasonableness*

[35] The Applicant’s submissions with respect to the reasonableness of the RAD’s decision are limited and largely unsupported with references to the decision. The Applicant submits that the RAD failed to properly address and independently evaluate all the evidence in the record, particularly the Applicant’s medical report submitted as new evidence on appeal, and that the RAD “did not go far enough” in addressing each alleged error in the RPD’s decision as raised by the Applicant on appeal.

[36] The Respondent maintains that the RAD's decision is reasonable, and that the Applicant's limited arguments fail to demonstrate any reviewable error with the decision. The Respondent characterizes these submissions as "bald assertions" that do not give rise an arguable issue of law.

[37] I agree with the Respondent. This Court cannot intervene on reasonableness review in an evidentiary vacuum or on the basis of unsupported assertions. Rather, the Court must look to the reasons to determine whether the decision as a whole is reasonable and, in so doing, whether it is justified in relation to the factual and legal constraints bearing upon it (*Vavilov* at para 99). I find that the RAD's reasons reflect an independent and thorough assessment of the Applicant's evidence and testimony before the RPD, to arrive at the reasonable conclusion that the Applicant's claim lacks credibility. I agree with the Respondent that the Applicant has not raised a reviewable error in the RAD's decision.

B. *Procedural Fairness*

[38] At the outset, I note that the Applicant's submissions regarding the alleged procedural unfairness flowing from counsel incompetence primarily address proceedings before the RPD. This application for judicial review is focused on proceedings before the RAD and whether the RAD's decision breaches procedural fairness. I will therefore not be addressing the allegations with respect to the alleged incompetence of his counsel at, or prior to, the RPD proceedings.

[39] The tripartite test to demonstrate that incompetent representation resulted in a breach of procedural fairness is outlined by this Court in *Guadron v Canada (Citizenship and*

*Immigration*), 2014 FC 1092 (“*Guadron*”). The Applicant must establish: 1) that the representative’s alleged acts or omissions constituted incompetence; 2) that there was a miscarriage of justice in that, but for the alleged conduct, there is a reasonable probability that the result of the hearing would have been different; and 3) that the representative be given notice and a reasonable opportunity to respond (*Guadron* at para 11, citing *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25 and *Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25). This Court in *Guadron* also states the following:

[17] I reiterate that, in IRPA proceedings, the incompetence of counsel will only constitute a breach of natural justice in “extraordinary circumstances”, and such incompetence or negligence must be sufficiently specific and clearly supported by the evidence: *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36. The onus is on the Applicant to prove every element of the test for negligent representation, including rebutting the presumption that the representative acted competently and that a miscarriage of justice resulted: *R v GDB*, 2000 SCC 22 at para 27.

[40] The Applicant submits that the proceedings before the RAD were tainted by the incompetence of his former counsel such that the RAD’s decision breaches the duty of procedural fairness owed to the Applicant. He claims that Masood Ahmad Bhalli (Mr. “Bhalli”) claimed to be an “agent” for an immigration lawyer, John Savaglio (Mr. “Savaglio”). He claims that he never met Mr. Savaglio and all correspondence and dealings regarding his claim were through Mr. Bhalli, to whom he recounted his narrative in Punjabi. The Applicant submits that he trusted that everything he recounted to Mr. Bhalli would be included in his BOC narrative.

[41] The Applicant claims that when his numerous requests to meet with Mr. Savaglio were denied, he retained another lawyer, Shah Rukh Zahaib Abbas (Mr. “Abbas”), who represented the Applicant before the RPD and the RAD. The Applicant alleges that he informed Mr. Abbas of the deficiencies in his BOC narrative, particularly that an agent had prepared a fake Pakistani passport with fake stamps, and that Mr. Savaglio had not included central details about the alleged attack against him. Mr. Abbas allegedly failed to advise the Applicant that he could amend his BOC narrative to include this information.

[42] The Applicant submits that during his representations on behalf of the Applicant on appeal before the RAD, Mr. Abbas incompetently failed to argue that the omissions in the Applicant’s narrative were the result of Mr. Savaglio’s incompetence. The Applicant also contends that Mr. Abbas never instructed the Applicant to undergo a mental health assessment.

[43] In compliance with the Court’s Protocol for Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases (the “Protocol”), the Applicant notified Mr. Abbas about his allegations. In a letter dated August 2, 2022, Mr. Abbas responded to these allegations of incompetence against him. Mr. Abbas stated that over the course of the more than 10 meetings he had with the Applicant about his case, the Applicant never communicated any concerns about his BOC narrative or the need to amend it, and consistently affirmed that the BOC narrative was complete, true, and correct.

[44] The Respondent submits that the Applicant’s allegations are unsupported and he has not satisfied the tripartite test outlined in *Guadron*. The Respondent submits that Mr. Abbas’s

response to the Applicant's allegations confirms that he was never informed of details or information missing from the BOC narrative, and that the Applicant had many opportunities to raise such an issue, but failed to do so. The Respondent further submits that the Applicant's allegations regarding the nature of Mr. Abbas's incompetence differ from his prior testimony before the RPD, in which the Applicant confirmed that his BOC narrative was complete, true and correct. The Respondent notes that only now is the Applicant alleging that his BOC narrative is incomplete and that the failure to include certain details is the fault of Mr. Abbas, despite previously asserting that the issues identified in his medical report were the reason for the omissions and inconsistencies in his evidence.

[45] The Respondent submits that the Applicant's allegation regarding Mr. Abbas's failure to instruct him to undergo a mental health assessment was not included in the notice letter provided to Mr. Abbas and, therefore, does not comply with the Court's Protocol. The Respondent further submits that, in any event, this allegation is unsupported.

[46] I agree with the Respondent and find that the Applicant has not provided sufficient evidence to establish that all three elements of *Guadron* test are made out. The Applicant's allegations of incompetence against his former counsel are mostly unsupported assertions, without evidence demonstrating the alleged negligence. The Applicant does not provide any support for his assertion that he informed Mr. Abbas of omissions in his BOC narrative, that Mr. Abbas failed to act on this knowledge, or that he instructed Mr. Abbas to raise the issue of Mr. Savaglio's incompetence before the RAD.

[47] Noting this Court’s guidance that allegations of incompetence of counsel will only amount to a breach of procedural fairness and natural justice in “exceptional circumstances,” and that such allegations “must be sufficiently specific and clearly supported by the evidence,” the Applicant has not provided any evidence to support his assertions of incompetence against Mr. Abbas (*Guadron* at para 17). I take particular note of the fact that the Applicant confirmed that his BOC narrative was complete, true, and correct before the RPD. This differs significantly from his testimony, and current allegation, that his BOC narrative was missing central details and he raised this issue with Mr. Abbas. This means the Applicant knew about the omissions in his BOC narrative during the proceedings before the RPD, but still attested to the truth and correctness of this narrative. As the RAD notes in its reasons, the Applicant also attributed certain omissions in his BOC narrative to the mental health issues detailed in the medical note, which was provided as new evidence on appeal.

[48] This Court cannot make a serious finding of incompetence of counsel rising to the level of a breach of procedural fairness and natural justice on the basis of evolving and evasive evidence. For these reasons, I find that the Applicant has not fulfilled the test outlined in *Guadron* and, therefore, has failed to establish a breach of procedural fairness.

## **V. Conclusion**

[49] This application for judicial review is dismissed. The RAD’s decision is both reasonable and procedurally fair. No questions for certification were raised, and I agree that none arise.



**JUDGMENT in IMM-6285-22**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6285-22

**STYLE OF CAUSE:** QAMAR JAVEED v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 27, 2023

**JUDGMENT AND REASONS:** AHMED J.

**DATED:** OCTOBER 16, 2023

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