Federal Court  Cour fédérale

Date: 20240109

Docket: IMM-12337-22

Citation: 2024 FC 28

Ottawa, Ontario, January 9, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

MITESHKUMAR ARUNBHAI PATEL
BHAIRAVI RAJENDRAPRASAD PANDYA
SHLOK JAYMINKUMAR VAIDYA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA], the Applicants, Miteshkumar Arunbhai Patel, his wife, Bhairavi Rajendraprasad Pandya and the female Applicant's minor son, Shlok Jayminkumar Vaidya [the "Applicants"], are seeking a Judicial Review of the rejection of their refugee claim by the *Refugee Protection Division* ["RPD"] of the *Immigration and Refugee Board of Canada* ["IRB"].

[2] Because the RPD member had also made a finding of No Credible Basis ["NCB"] under section 107(2) of IRPA, the Applicants lost their right of appeal to the *Refugee Appeal Division* ["RAD"] and applied for a judicial review directly.

[3] The adult Applicants first came to Canada in 2017 and began proceedings to obtain temporary status that would help them remain in Canada permanently. Following a rejected student visa application, they applied for refugee protection on October 11, 2019. The minor Applicant came to Canada in December 2019 and claimed refugee status in January 2020. The RPD heard the claims jointly.

[4] The Applicants' basis of claim is in the record, but a brief summary for the purpose of this application is as follows: The adult Applicants love story triggered the wrath of the female claimant's well-connected ex-husband. All Applicants allege that they fear the Indian authorities because the ex-husband had unleashed the police on them by accusing the male Applicant of supporting Muslim militants. At various times, the adult Applicants were arrested, assaulted, and in the case of female Applicant, sexually assaulted and then freed after the police was bribed.

II. Decision

[5] I grant the Applicants' judicial review application because I find the decision made by the RPD to be unreasonable.

III. The Issues and Standard of Review

[6] I summarize the issues articulated by the Applicants as follows:

i) Was the RPD's decision reasonable?

ii) Did the RPD demonstrate a reasonable apprehension of bias that in turn resulted in a breach of procedural fairness?

[7] The standard of review applicable to refugee determination decisions is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at para 23 [*Vavilov*]; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1645 at para 13; *Shah v Canada (Citizenship and Immigration)*, 2022 FC 1741 at para 15). 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). The reviewing court must ensure that the decision is justifiable, intelligible, and transparent (*Vavilov* at para 95). Justifiable and transparent decisions account for central issues and concerns raised in the parties' submissions to the decision maker (*Vavilov* at para 127).

[8] 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 at paras 37-56 [*Canadian Pacific Railway Company*]; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). 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 CanLII 699 (SCC), [1999] 2 SCR 817 at paragraphs 21-28 [*Baker*] (*Canadian Pacific Railway Company* at para 54).

[9] Regarding questions of procedural fairness, as Mr. Justice Regimbald recently wrote in *(Nguyen v Canada (Citizenship and Immigration)*, 2023 FC 1617 at para. 11:

> the reviewing court must be satisfied of the fairness of the procedure with regard to the circumstances (Singh v Canada (Citizenship and Immigration), 2023 FC 215 at para 6; Do v Canada (Citizenship and Immigration), 2022 FC 927 at para 4; Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 at para 54 [Canadian Pacific Railway]). In Canadian Pacific Railway, the Federal Court of Appeal noted that trying to "shoehorn the question of procedural fairness into a standard of review analysis is… an unprofitable exercise" (at para 55). Instead, the Court must ask itself whether the party was given a right to be heard and the opportunity to know the case against them, and that "[p]rocedural fairness is not sacrificed on the altar of deference" (Canadian Pacific Railway at para 56).

[10] A reasonable apprehension of bias results in a breach of procedural fairness, so the standard of review is the same.

IV. Analysis

A. *Legal Framework: Credibility Findings*

[11] There is generally a great degree of deference given to the credibility findings of an expert administrative tribunal such as the RPD. Generally, this Court will not interfere with a decision if the evidence before the Board, taken as a whole would support its negative assessment of credibility, if its findings were reasonable in light of the evidence, and if reasonable inferences were drawn from that evidence (T*sigehana v Canada (Citizenship and Immigration)*, 2020 FC 426, at paras 33-35.)

[12] Where the necessary preconditions are satisfied based on the facts, subsection 107(2) of IRPA does not grant any discretion to decision makers as it "shall state" in its reasons for the decision that the claim has no credible basis (NCB) *Yared Belay v* Canada (Citizenship and Immigration), 2016 FC 1387 at para. 16.

B. *Legal Framework for Reasonable Apprehension of Bias*

[13] The test for a reasonable apprehension of bias is undisputed and was first articulated by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369, at p. 394 and subsequently endorsed and clarified in further cases including in *Wewaykum Indian Band v Canada*, [2003] 2 S.C.R. 259, at para 60; *C.U.P.E. v Ontario (Minister of Labour)*, [2003] 1 SCR 539, at para 199; *Miglin v Miglin*, [2003] 1 SCR 303, at para 26; *Baker*, at para 46; *R. v S. (R.D.)*, [1997] 3 SCR 484, at para 11, per Major J., at para 31, per L'Heureux-Dubé and McLachlin JJ., at para 111, per Cory J.; *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267, at para 45; *R. v Lippé*, [1991] 2 SCR 114, at p. 143; *Valente v The Queen*, [1985] 2 SCR 673, at p. 684:

> . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Ci-tation omitted.]

[14] The threshold is high as there is a strong presumption of judicial (or quasi-judicial) impartiality.

Issue 1: Was the RPD decision unreasonable?

[15] In this case, the RPD member went after individual pieces of evidence one by one and with little regard for whether or how they might fit into the Applicants' refugee claim. In short, the member's analysis took place piece by piece and divorced from any theory of case supporting or rejecting the Applicants' refugee claim under the requirements of sections 96 or 97(1) of IRPA. At times, the process became microscopic and the logic circular, which ultimately broke a rational chain of reasoning and resulted in a decision that lacked intelligibility.

[16] A key reason for impeaching the Applicants' credibility for the RPD member was the discrepancy with facts in the female Applicant's Study Permit (SP) application, which was made in Canada prior to claiming refugee status. After a painstakingly long but unhelpful analysis of her SP application in paragraphs 27 to 40 of the RPD's decision (which was ultimately unsuccessful and did not result in the issuance of the visa), the RPD finally disbelieved the employment history of the female Applicant (at para. 39 of her reason). From that, it concluded that since her husband had applied for an open work permit alongside the wife's study permit, he too was culpable: "I consider it more likely than not that he was fully aware of and jointly took part in these misrepresentations" (at para. 39). This was when the wife's employment in India had been irrelevant to any of the allegations related to the family's refugee claim.

[17] The Applicants had not disclosed any arrests in India because it was extra-judicial and undocumented. It was open to the RPD to find this explanation to be unreasonable. This would have made it reasonable to disbelieve the arrests, but the RPD used this omission to conclude that the SP application were likely fraudulent, that the omission of the arrests on the SP applications was a material misrepresentation for which the visa officer was prevented to engage in a full examination (at para. 43), and the husband who applied for a work permit on the force of his wife's SP application was complicit. The member mirrored the language of s. 40(1)(b) IRPA to demonstrate the need to be punitive. Not only does the IRPA contemplate an exemption for misrepresentation for refugee claimants, the member's overzealous approach to the evidence and the overreach on her conclusions takes away from a chain of reasoning relevant to the underlying refugee case.

[18] Another example of unclear reasoning was the RPD's rejection of the son's experience with sexual assault. With a different analysis that the Court could follow, this might have been a reasonable finding. However, the way that the RPD tried to connect unrelated facts to further undermine the Applicants' credibility makes it difficult to follow the chain of reasoning. In addition to the omission in the female Applicant's testimony about the sexual assault, at paragraph 72, the member linked a third party's awareness of the female Applicant's effort to obtain a SP to that person's willingness to help the Applicants. Then, the RPD found it problematic that the helpful person who would know about the son's experience with sexual abuse but not provide the Applicants with corroboration. The RPD attempted to link the third party's awareness of availability of funds for SP to the rejection of the allegation of the son's sexual assault because that person did not provide a statement about the assault, and the female Applicant had not substantiate facts that the same third party knew about the son (at para 75). Following the chain of reasoning is simply too difficult to be intelligible.

[19] Another example with a breakdown in the chain of reasoning was how the member dealt with supporting affidavits over 12 paragraphs (paras 53 to 65). The member's rejection was based on perceived discrepancy of microscopic issues, such as on the Applicants not knowing whether the affiants knew English or if the affidavits were translated to them. The RPD took issue with how and why the affidavits might have been produced, or why the same notary who prepared them used similar language for the same facts. Affidavits were produced as corroboration, and it was certainly open to the member to find them to not amount to sufficient credible evidence to be given any weight.

[20] However, the RPD did not stop at rejecting the affidavits. The RPD got into a circular reasoning that since it had rejected the Applicants' credibility and the affidavits, that the affidavits were probably prepared at the request of the Applicants to bolster their claim, which further undermined their credibility. So, not only were the affidavits rejected as corroboration, their rejection was used to speculate on why and how they were prepared, and this was circled back (in a literal and figurative sense) to further undermine the Applicants' credibility.

[21] Another example of lack of intelligibility is the laboured process of understanding why the medical certificates were rejected. While a logical chain of reasoning could render their rejection reasonable, this is not what happened in this case. Some of the RPD findings were based on perceived contradictions that were hard to follow. For example, the RPD took issue with how the documents were obtained because at some point the male Applicant had stated that he obtained them and at another, he said he contacted the hospital to prepare them but asked his father to pick them up. One can see how the member should have expected equal levels of details. However, more problematically, the RPD found the Medical Certificate's reference to "seeing internal and external bruising" and confirmation of sexual abuse contradictory to allegations of severe beating or sexual assault. It is hard to understand where the contradiction lies here. Based on these perceived problems with the documents, at paragraph 52 the member concluded that the medical certificates were fraudulent, and used this conclusion to further support her finding that the Applicants' credibility was further damaged. The RPD's reason was tantamount to, "I do not believe you, therefore I do not believe anything that explains why I might be wrong" *Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at para 12. This is a hallmark of unreasonable decision-making.

[22] Another example of the RPD member being unreasonably closed to any opportunity to change her mind was when she asked for why there were no court documents pertaining to the male claimant's case (at paras. 94 to 98). He stated that he had provided those to his refugee counsel, one who was not his current counsel. The member mentioned that his former counsel was suspended from practice but disallowed the submission of post-hearing documents because the claim was pending for over three years, they knew of their case for two months and were alerted of a need to retain new counsel. Ultimately, the member rejected the male Applicant's explanation for what she considered to be a "key evidentiary" omission and saw the absence of legal documents before her as evidence of a lie about providing the document to former counsel.

[23] At the hearing, the Respondent's counsel agreed that the RPD had chosen to focus her attention on the individual pieces of evidence. However, I disagree with the Respondent that this was a diligent manner by which the member demonstrated that there was nothing left upon which a positive decision could be based. This is in part because the member engaged in a circular logic, microscopic analysis, and treated all evidence as equal, irrespective of their relevance and materiality. All these contributed to a decision that as a as a **whole is not reasonable**.

[24] Putting it differently, likening the situation to puzzle pieces, individual credibility findings represent fragments of evidence. Each piece might be accurate on its own, but without assembling and examining the complete puzzle, the overall picture – the comprehensive credibility assessment – may fail to reflect the true nature of the case. It underscores the necessity of a holistic approach to ensure the integrity and accuracy of the decision-making process. Without it, the chain of reasoning is lost and the reasons are no longer intelligible.

[25] At the judicial review hearing, the Respondent also conceded that the RPD had based some of its finding on peripheral facts. However, they argued that the RPD could not be faulted for being rigorous. I agree that the RPD has a duty to be thorough and rigorous. However, when the rigor is not rationally connected to evidence relevant to the underlying refugee case, it is simply microscopic and the Court's intervention is required (*Paulo v Canada (Citizenship and Immigration)*, 2020 FC 990, at para 60).

[26] What makes the decision further unreasonable is the RPD's finding of NCB. This Court has noted in several cases that a "no credible basis" determination cannot be based on "a summary of insufficiency and weighing of evidence pros and cons" (*Mohamed v Canada (Minister of Citizenship and Immigration*), 2017 FC 598 at para 31; *Mahdi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 218 at para 10; *Boztas v Canada (Citizenship and Immigration)*, 2016 FC 139 at paras 11-12).

[27] In fact, RPD engaged in extensive "insufficiency and weighing of evidence pros and cons" in this case. The RPD provided a 31 page decisions with 119 paragraphs of attempted rational to weigh the various evidence. This took place evidence by evidence, and as counsel had submitted during the RPD hearing, without regard to the big picture of their refugee claim. The extensive weighing, often on a microscopic level and circular, led the member to conclude that there was no credible or trustworthy evidence on which they could have determined that the Applicants were Convention Refugees. This conclusion was based on an overall unreasonable analysis and cannot stand.

[28] This Court has returned and can return the finding of "no credible basis" to the RPD for redetermination by a different member if it finds that the decision is otherwise reasonable (see

for example *Omar v Canada (Minister of Citizenship and Immigration)*, 2017 FC 20 at paras 20-22; *Hadi v Canada (Minister of Citizenship and Immigration)*, 2018 FC 590 at para 55). However, in this case, the "no credible basis" determination is intertwined into the entire reasoning that is deemed to be unreasonable and cannot be separated from the decision. The NCB finding, which curtails the right to appeal or an automatic statutory stay of removal, were largely based on the perceived significance of peripheral facts or circular reasoning. In these circumstances, the appropriate remedy is to send the whole matter back for redetermination (*Adeshina v Canada (Citizenship and Immigration)*, 2022 FC 1559).

C. ***Issue 2: Did the RPD demonstrate a reasonable apprehension of bias?***

[29] Since I have already found the decision to be unreasonable, there is no need to analyse the potential bias argument

Conclusion

[30] The Application for Judicial Review is granted because the RPD's reasons are unreasonable.

[31] There is no question to be certified.

JUDGMENT IN IMM-12337-22

THIS COURT'S JUDGMENT is that

1. The application for Judicial Review is granted. The case is returned to RPD to be decided by a different decision-maker.

2. There is no question for certification.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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