Federal Court  Cour fédérale

Date: 20240122

Docket: IMM-4069-22

Citation: 2024 FC 99

Ottawa, Ontario, January 22, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Hasib NOORISTANI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Hasib Nooristani, is a citizen of Afghanistan and a former officer of the Afghan National Army [ANA], following in the footsteps of his grandfather and father who served in the military before him. He seeks refugee protection in Canada based on fear of the Taliban, because of alleged threats he received related to combat activities.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejected his claim after a five-day hearing. The RPD found that there were serious reasons for considering that the Applicant had committed a war crime and was complicit in war crimes committed by the ANA. Thus, the Applicant was excluded from protection by reason of section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], incorporating by reference Article 1F(a) of the Refugee Convention as defined in section 2 of the *IRPA*. See Annex "A" for relevant provisions.

[3] The Refugee Appeal Division [RAD] of the IRB dismissed the appeal [Decision], confirming the RPD's finding that the Applicant is excluded from refugee protection. Specifically, the RAD found that there were serious reasons for considering that the Applicant voluntarily made a significant and knowing contribution to the torture of conflict-related detainees, pursuant to the test developed by the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*].

[4] The Applicant seeks judicial review of the Decision, arguing that the RAD breached procedural fairness and erred in finding that the Applicant was complicit in acts of torture committed by other members of the ANA.

[5] Questions of procedural fairness attract a correctness like standard of review: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. The focus of the reviewing court is whether the process was fair and just in the circumstances:

Chaudhry v Canada (Citizenship and Immigration), 2019 FC 520 at para 24; *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at para 9.

[6] A reasonable decision is one that exhibits the hallmarks of justification, transparency and intelligibility, and is justified in the context of the applicable factual and legal constraints: *Vavilov*, above at para 99. The Applicant has the burden of establishing the decision was unreasonable: *Vavilov*, above at para 100.

[7] I am persuaded that the RAD breached procedural fairness by making new credibility findings. Because procedural fairness is the determinative issue, I decline to address the reasonableness of the Decision. In these reasons, I deal first with the preliminary issue of the admissibility of the further affidavit submitted by the Applicant in support of his judicial review application, and then I address the procedural fairness issue.

II. Analysis

A. *The Applicant's Further Affidavit is admissible*

[8] Contrary to the Respondent's submissions, I find the Applicant's further affidavit of Ahmad Fahim Baloutch dated January 30, 2023 [Further Affidavit] is material when viewed in context.

[9] I do not disagree with the Respondent's argument that it is inappropriate for the Court to intervene where an issue was not raised before the RAD. Here, the Further Affidavit raises a

translation issue that the Applicant did not raise before the RAD: *Caleb v Canada (Citizenship and Immigration)*, 2018 FC 384 at para 37.

[10] That said, I am persuaded that the Further Affidavit is admissible on the basis that it is relevant to an issue of natural justice, which is one of the three "recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review": *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20.

[11] The affiant is an accredited Dari-English interpreter for the IRB and the Ministry of the Attorney General. The Applicant produced the Further Affidavit to challenge a particular translation during the RPD hearing—specifically the Applicant's response to the Minister's question regarding mistreatment or torture of Taliban who were detained by the Applicant's unit. The transcript for the February 20, 2019 hearing states "I had full information" (the translation at the time), while the affiant states that the correct translation is "I was sure about my unit because I had control over my unit."

[12] The full exchange is reproduced below:

> MINISTER'S COUNSEL: During the time that the -- the short period of time, like, the 24 to 48 hours' period of time when they were detained in your division, were the Talibans ever mistreated or tortured during that period of time?
>
> CLAIMANT: Never.
>
> MINISTER'S COUNSEL: How can you be sure of that?
>
> CLAIMANT: Because -- I -- I knew that because I -- I know -- I had full information. I knew that nobody was tortured.

[13] While the Respondent concedes the mistranslation, the Respondent argues that it was not significantly material. I disagree and will address the import of the translation in connection with the breach of procedural fairness analysis below.

B. *The Decision was procedurally unfair*

[14] As I explain next, I am not persuaded by the Respondent's argument to the effect that the Applicant's credibility was not a new issue before the RAD, and thus the RAD was not required to give the Applicant notice and to provide him with an opportunity to make submissions about the issue.

[15] Generally, the RAD may decide an appeal on the basis of the materials provided without additional notice to the parties. The RAD may not decide an appeal on a new ground, however, without providing the parties an opportunity to make submissions. Put another way, the RAD cannot "take a frolic and venture into the record to make further substantive findings" without first notifying the parties: *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637 at para 75, citing *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10.

[16] Procedural unfairness thus may arise when the RAD raises a new question to support the correctness of a decision and the parties are not advised, i.e. the RAD relies on a ground or reasoning which was not raised by an applicant as a ground of appeal: *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] at para 25.

[17] According to this Court's jurisprudence, "a consensus emerges that there is a breach of the duty of procedural fairness where new credibility issues not raised in the RPD decision are brought up by the RAD" and the applicant is not provided an opportunity to make submissions: *Dalirani v Canada (Citizenship and Immigration)*, 2020 FC 258 [*Dalirani*] at para 28. This is especially true where the stakes are high, as is the case for all refugee applicants: *Dalirani*, above at para 31, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22.

[18] This Court has recognized that stakes may be even higher in proceedings under Article 1F(a), as they could result in a refugee claimant being labelled a "war criminal": *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 104 at para 35.

[19] In the matter before me, the parties dispute whether the credibility issues that the RAD canvassed constitute "new" issues, thus requiring the RAD to provide notice.

[20] The Respondent asserts that credibility was not a "new" issue because the RAD assessed credibility in the context of the knowledge component of the three-pronged *Ezokola* test for exclusion analyzed at first instance by the RPD. I disagree.

[21] The Respondent argues that the RPD's "knowledge" analysis is unclear, as confirmed by the RAD in the Decision, which is the reason why credibility was in issue. Pursuant to the contribution-based exclusion test in *Ezokola*, the Minister must establish that there are serious reasons for considering (a lower threshold than a balance of probabilities) that the Applicant's

contribution to the crimes against humanity or criminal purpose of the ANA were: (1) voluntary; (2) knowing; and (3) significant. In other words, the Respondent submits that the Applicant was aware that the Minister's intervention would address these three issues.

[22] The RAD agreed with the Applicant that the RPD made substantial errors, including:

- Failing to consider whether the acts committed by the ANA constituted war crimes and to identify the crimes to which the Applicant allegedly contributed;
- Failing to make clear findings on the question of the Applicant's knowledge (regarding the issue of whether the claimant made a voluntary, knowing, and significant contribution to the crimes or criminal purpose of the impugned organization—here, the ANA—per *Ezokola*, above at para 8);
- Finding that the Applicant was a member of the Afghan "special forces"; and
- Applying the improper standard of "complicity by association."

[23] The RAD also agreed that procedural fairness was breached by the Minister's failure to disclose a document from Canada's military attaché in Pakistan concerning the Applicant's military service.

[24] After determining that the torture of conflict-related detainees constituted a war crime pursuant to Article 8(2)(a)(ii) of the *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9, July 17, 1998, the RAD next addressed the issue of the Applicant's knowledge. The RAD proceeded to make a core credibility determination that turned on the perceived testimony regarding whether the Applicant had "full information" of whether detained Taliban fighters were subjected to torture.

[25] In particular, the RAD was of the view that the Applicant "was categorical in saying that he had 'full information' that there was no torture occurring." The RAD assessed the Applicant's testimony and documentary evidence against his imputed full knowledge and concluded: "I do not accept that someone who proclaims having full information was unaware that [torture of detainees] was occurring with some regularity."

[26] Noting that the ANA's use of torture was the specific act pinpointed by the RAD, but not the RPD, as constituting a war crime, I find that the RAD's related credibility determination results in a procedural fairness breach. In my view, "the Applicant obviously could not make submissions on an issue that [he] was not aware of and which [he] only learned about upon receipt of the RAD's decision": *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at para 22. I find that, at the very least, this is new reasoning of the sort contemplated by cases like *Kwakwa* and *Dalirani* in respect of which the parties should have been given notice and an opportunity to make further submissions, even if it would not change the outcome: *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 76.

[27] Contrary to the Respondent's submissions, I am not persuaded the RAD's findings were linked to the parties' submissions or the RPD's determinations. I thus find the present situation before me distinguishable from what confronted the Court in *Lemma v Canada (Citizenship and Immigration)*, 2022 FC 770, resulting in the conclusion at paragraph 23 in particular.

[28] As noted above, the duty of procedural fairness is heightened in exclusion cases. I find that the RAD was obligated, in the circumstances, to provide the parties with the opportunity to be heard on its new findings based on its venture into the record.

III. Conclusion

[29] For the above reasons, I grant the Applicant's judicial review application. The April 6, 2022 Decision of the RAD will be set aside and the matter will be remitted to the RAD for redetermination by a different panel, which will take into account the translation of that portion of the February 20, 2019 hearing in issue in this judicial review, as evidenced by the Further Affidavit, by permitting the Applicant to file the same or substantially the same affidavit. If the Applicant's credibility in the context of his knowledge remains a live issue for the redetermination panel, or if there are any other new issues considered by the panel, the parties must be given notice and an opportunity to make further submissions before the panel makes its new determination.

[30] Neither party proposed a serious question of general importance for certification. I agree that the outcome here is very fact-specific, thus not warranting the certification of a question for appeal.

JUDGMENT in IMM-4069-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The April 6, 2022 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada is set aside, and the matter will be remitted to the RAD for redetermination by a different panel, which will take into account the translation of that portion of the February 20, 2019 hearing in issue in this judicial review, as evidenced by the affidavit of Ahmad Fahim Baloutch dated January 30, 2023, by permitting the Applicant to file the same or substantially the same affidavit.
3. If the Applicant's credibility in the context of his knowledge remains a live issue for the redetermination panel, or if there are any other new issues considered by the panel, the parties must be given notice and an opportunity to make further submissions before the panel makes its new determination.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

Definitions **2 (1)** The definitions in this subsection apply in this Act. … ***Refugee Convention*** means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule. (***Convention sur les réfugiés***) …	**Définitions** **2 (1)** Les définitions qui suivent s'appliquent à la présente loi. … ***Convention sur les réfugiés*** La Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, dont les sections E et F de l'article premier sont reproduites en annexe et le protocole afférent signé à New York le 31 janvier 1967. (***Refugee Convention***) …
Exclusion — Refugee Convention **98** A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**Exclusion par application de la Convention sur les réfugiés** **98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
SCHEDULE (Subsection 2(1)) Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees **E** This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. **F** The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**ANNEXE** (paragraphe 2(1)) Sections E et F de l'article premier de la Convention des Nations Unies relative au statut des réfugiés **E** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays. **F** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	**a)** Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	**b)** Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.	**c)** Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

***Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9, July 17, 1998.**
***Statut de Rome de la Cour pénale internationale*, UN Doc A/CONF.183/9, 17 juillet 1998.**

Jurisdiction, Admissibility and Applicable Law	**Compétence, Recevabilité et Droit Applicable**
Article 8	**Article 8**
War crimes	**Crimes de Guerre**
2. For the purpose of this Statute, "war crimes" means:	**2.** Aux fins du Statut, on entend par « crimes de guerre » :
(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:	**a)** Les infractions graves aux Conventions de Genève du 12 août 1949, à savoir l'un quelconque des actes ci-après lorsqu'ils visent des personnes ou des biens protégés par les dispositions des Conventions de Genève :
…	…
(ii) Torture or inhuman treatment, including biological experiments;	**ii)** La torture ou les traitements inhumains, y compris les expériences biologiques;
…	…

FEDERAL COURT

SOLICITORS OF RECORD

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