Federal Court  Cour fédérale

Date: 20240409

Docket: IMM-183-23

Citation: 2024 FC 559

Ottawa, Ontario, April 9, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

XIAOFU WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Xiaofu Wang, seeks judicial review of the decision of the Refugee Appeal Division ("RAD") dated December 19, 2022, finding the Applicant to be excluded from protection under Article 1(E) of the *Convention Relating to the Status of Refugees* ("Convention"), pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the decision is unreasonable and rendered in a manner that breached procedural fairness.

[3] For the following reasons, I find that the RAD's decision is reasonable and accords with procedural fairness. This application for judicial review is dismissed.

II. **Analysis**

A. *Background*

[4] On December 29, 2019, the Applicant entered Canada with a Temporary Resident Visa ("TRV"). He made a claim for refugee protection and the Minister intervened before the RPD, alleging that the Applicant was a permanent resident of Spain.

[5] In a decision dated February 8, 2022, the RPD found that the Applicant was not excluded from refugee protection under Article 1(E) and allowed his claim. The RPD found that the "only evidence" of the Applicant's permanent residence in Spain was his fraudulent TRV application, which was insufficient to ground an exclusion finding.

[6] In a decision dated December 19, 2022, the RAD allowed the appeal of the RPD decision.

[7] The RAD found that the Applicant had not provided the Respondent with the post-hearing evidence of an additional passport and concluded that this breached procedural fairness.

[8] The RAD acknowledged evidence of the Applicant's residence in Spain, including documents indicating he had resided in Madrid and a Spanish permanent residence card issued on October 28, 2018. The RAD further found that the Applicant had not explained how he continued to work and travel in the Schengen area without valid visas.

[9] Examining his second passport, the RAD found that there were no work permits or visas except for the Canadian TRV, but that there were a number of exit and entry stamps from countries in the EU. The RAD found that the Applicant would have been required to have a residence permit of an EU country to travel throughout the Schengen area between 2017-2019. The RAD had no reason to doubt the authenticity of these documents and concluded that the Applicant held permanent residence in Spain.

[10] The Respondent had therefore established a *prima facie* case that the Applicant was excluded under Article 1(E), which the Applicant failed to rebut, and the RAD excluded the Applicant from protection under section 98 of the *IRPA* and found that he was neither a Convention refugee nor person in need of protection.

B. *Issues and Standards of Review*

[11] The issues in this application are whether the RAD's decision is reasonable and made in accordance with procedural fairness.

[12] Both parties agree that the merits of the decision is to be reviewed on the reasonableness standard. I agree (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

("*Vavilov*") at paras 16-17). The issue of procedural fairness is to be reviewed on the standard of correctness (*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). I find that this conclusion accords with the Supreme Court of Canada's decision in *Vavilov* (at paras 16-17).

[13] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). 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 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). 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).

[14] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). 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 peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

[15] 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).

C. *Procedural fairness was not breached.*

[16] The Applicant submits that the RAD breached procedural fairness by failing to provide the Applicant with the opportunity to make submissions on the issue of exclusion.

[17] The Respondent maintains that the RAD had authority to hear appeals of RPD decisions and substitute the RPD decision for its own.

[18] I agree with the Respondent. The issue of exclusion under Article 1(E) was not a "new issue" on appeal at the RAD, not being "a new ground or 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" (*Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 25). The Minister explicitly stated in their appeal submissions that "the RPD erred in reaching its conclusion that Article 1(E) did not apply," raising concerns *inter alia* about the Applicant's ability to travel throughout the Schengen area without any valid Schengen visas or permits. The RAD is empowered to set aside the RPD's decision and substitute its own (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 44, citing *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 ("*Huruglica*") at para 103; *IRPA*, s

111(1)). The RAD may refer the matter for determination at the RPD only when it cannot confirm the decision or set it aside and make a new decision without hearing the oral evidence presented to the RPD (*Huruglica* at para 103). I do not see why the RAD would have needed to hear oral evidence presented to the RPD. The evidentiary issue was one of objective documentation; namely, the Applicant's passports and travel history. There has been no breach of procedural fairness.

D. *The decision is reasonable*

[19] The Applicant submits that the RAD unreasonably found that he had permanent residence in Spain, failing to address the RPD's finding that he was able to travel to the Schengen area on his Maltese work permit and failing to address the fact the Applicant consented to the Respondent investigating his status in Spain.

[20] The Respondent submits that the RAD reasonably concluded that the Applicant would have had a residence permit to enter EU countries between 2017-2019 after the expiration of his last work permit in 2016, and that the RAD did not have to refer the Applicant's authorization to permit the Respondent to investigate the Applicant's status in Spain.

[21] I agree. The RPD found that the Applicant's passport confirmed that he lived and worked in Malta from 2008 to 2019, thus being able to travel in the Schengen area. The RAD disagreed, finding that the Applicant's last Maltese visa was valid until February 23, 2016, with there being no additional visas to further allow the Applicant to travel and work in the Schengen area. In my view, the decision demonstrates that the RAD conducted an independent assessment

of the record and substituted a decision for that of the RPD's, as the RAD was entitled to so do (*Huruglica* at para 103). The Applicant has not established that the RAD's decision is unreasonable (*Vavilov* at para 100).

[22] Furthermore, the RAD did not err by not mentioning the Applicant's written authorization for the Respondent to investigate his status in Spain. It is presumed that the RAD "considered all the evidence before it and is not required to refer to each piece of evidence" (*Wang v Canada (Citizenship and Immigration)*, 2022 FC 546 at para 23, citing *Ruszo v Canada (Citizenship and Immigration)*, 2018 FC 943 at para 34). The Applicant has not displaced this presumption.

III. **Conclusion**

[23] This application for judicial review is dismissed. The RAD's decision is reasonable and rendered in a manner that was procedurally fair. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-183-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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