Federal Court Cour fédérale

Date: 20240610

Docket:IMM-1500-23

Citation: 2024 FC 883

Ottawa, Ontario, June 10, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

SATHANANTHAKUMAR SELLAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA], the Applicant, Sathananthakumar Sellan [the “Applicant”], is seeking a judicial review of the rejection of his refugee protection appeal by the Refugee Appeal Division [“RAD”] of the Immigration and Refugee Board of Canada [“IRB”]. The judicial review is granted for the following reasons.

I. Overview

[2] The Applicant alleges to be a citizen of Sri Lanka. His claim at the Refugee Protection Division [“RPD”] was denied because the member was not satisfied that he had established his identity. The RAD dismissed his appeal and confirmed the decision that the Applicant had failed to establish his identity and that his credibility, as it related to the question of identity, had been seriously undermined.

[3] Identity in refugee determination is a threshold issue, meaning that it is a crucial legal question that must be satisfied before other legal considerations can be examined.

II. Issues and Standard of Review

[4] The parties submit, and I agree with them, that the standard of review in this case is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 [*Vavilov*]).

[5] 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).

[6] One of the issues raised by the Applicant is based on the RAD member’s failure to hold an oral hearing under s. 110(6) of IRPA, and whether this amounted to a breach of procedural

fairness. The Applicant argues that a new document the RAD admitted under s. 110(4) of IRPA, namely a copy of the identity page of his passport, is a relevant document to the credibility of the only determinative issue, namely identity. He argues that questions on its circumstances would justify allowing or rejecting the refugee protection claim, and that in depriving him of the opportunity to explain, the member reached a decision in breach of procedural fairness.

[7] The Respondent's arguments relied on *Mbouna v Canada (MCI),* 2022 FC 941 [*Mbouna*] to state that the standard of review in assessing the RAD's decision to not hold an oral hearing pursuant to subsection 110(6) of IRPA is reasonableness. I follow with the authority of this Court in *Mbouna* and review the decision on the standard of reasonableness.

III. Legal Framework

[8] Section 106 of IRPA and RPD Rule 11 are the relevant legal references for identity:

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Credibility	**Crédibilité**
106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	**106** La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[9] Rule 11 puts the onus on the refugee claimant to provide sufficient credible evidence to establish their identity and that if they do not have them, to provide a reasonable explanation.

Claimants must establish the material facts of their claim, including on the question of identity, on the balance of probabilities:

Refugee Protection Division Rules, SOR/2012-256

Documents	**Documents**
11 The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.	**11** Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

[10] This Court has also consistently held that identity is the cornerstone of the Canadian immigration regime (*Bah v Canada (Citizenship and Immigration)*, 2016 FC 373, at para 7; see also *Canada (Minister of Citizenship and Immigration) v Singh*, 2004 FC 1634, at para 38; *Canada (Citizenship and Immigration) v X*, 2010 FC 1095, 375 FTR 204, at para 23). As Justice LeBlanc stated in *Canada (PSEP) v Gebreworld*, 2018 FC 374, at para 21: "this is the case because a number of important factors in implementing this regime, such as admissibility in Canada, evaluating the need for protection, assessing the risk to public safety in Canada or the propensity to accept or reject the controls required by the Act, depend upon it."

IV. Analysis

A. *Was it reasonable for the RAD to not hold an oral hearing?*

[11] Subsection 110(3) of the IRPA requires that the RAD proceed without an oral hearing, save for certain circumstances. Subsection 110(6) of the IRPA provides that the RAD may convene an oral hearing where new evidence (a) raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) is central to the decision with

respect to the refugee protection claim; and (c) if accepted, would justify allowing or rejecting the refugee protection claim. The decision to hold an oral hearing is thus based on the RAD's assessment of whether the criteria set out in subsection 110(6) of the IRPA have been satisfied and, if so, whether the RAD should exercise its discretion to hold an oral hearing (*Mbouna* at para 12 and *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296 at para 44).

[12] There is no question that the RPD had rejected the claim on identity alone, and that a new national passport would raise a serious issue with respect to that sole determinative issue. In addition, the RAD found that it was genuine and capable of contradicting a finding of fact by the RPD. However, the member found that "given my reasons set out below", the passport would not amount to evidence that would justify allowing or rejecting the claim. This was because the Applicant must have provided his National Identity Card ("NIC") to obtain the passport, which the RAD found to not be credible. Because the NIC document was not a credible basis for obtaining the passport, the passport was therefore fraudulently obtained.

[13] It is clear that in this case, the circumstances of the issuance of the passport was unclear and not limited to the credibility its issurance or simply of the NIC. Rather, it is relevant to the credibility of the Applicant about identity as the sole determinative issue, a threshold issue that stopped the RPD and the RAD to examine the merits of the claim *Gedara v Canada (Citizenship and Immigration),* 2021 FC 1023 (CanLII), at para 48. It is therefore central with respect to the only element that the Applicant needed to prove to get a chance to have the merit of his case assessed.

[14] For reasons that I will elaborate, I find that the member's dealing with the NIC was unreasonable. However, even if it were reasonable to reject the NIC, the member must have

analysed the credibility of the Applicant in the context of the key new document admitted, a passport. An oral hearing would have allowed the member to do this.

[15] The documentary evidence demonstrates that the NIC was one of many documents needed to apply for a passport. Even though in many cases a passport is the only available identity document, the member rejected it solely on rejecting the NIC. This is when the documentary evidence before the member pointed to contrary evidence: the need for a number of other documents to obtain the passport in addition to fingerprints. Not only did the member not deal with contrary evidence on the key issue, she did not see a need to hold a hearing to assess the Applicant's credibility with respect to all of these. In light of the contrary evidence on the material credibility issue, the RAD finding of the passport being fraudulently obtained is based on the member's assumption that rejecting the NIC would not leave sufficient credible evidence for a genuine and properly obtained evidence. The member had the opportunity to test the assumption, which would have shed further light on the Applicant's credibility, and chose not to.

[16] For greater clarity, the documentary evidence before the member shows in LKA200299, that to obtain a passport, one needs to submit significantly more documents than one's NIC, including birth certificate and marriage certificate (the credibility of which was accepted by the RAD, but the member found not to outweigh the issues with the NIC), among others. The same document states that the applicants are fingerprinted.

[17] Without engaging with any of this and solely basing the rejection of the passport and the Qatari visa in it on the rejection of the NIC, the member engaged in a circular reasoning: one that equated the member's assumption (that the NCI was fraudulent) with her ultimate conclusion (that identity was not established and could not be established on any basis).

[18] It is in this context that compelling the Applicant to a hearing would have offered the RAD member with the opportunity to inquire into his credibility as it related to his identity and to test the complete circumstances of obtaining the passport. Basing a decision on an assumption and not the totality of the evidence is the break in the chain of reasoning that renders the conclusion arbitrary. For this reason, finding that the passport was probably fraudulently obtained without an oral hearing was unreasonable.

[19] While this is sufficient to send back the decision for consideration by a different RAD member, I think it is important to elaborate on the unreasonableness of the RAD's key finding on the rejection of the NIC. This is not to be interpreted as evidence of finding the rest of the RAD's findings, including on the rejection of the other new evidence, to be necessarily reasonable or unreasonable. The new RAD member must re-engage with all the issues.

B. *Was it reasonable for the RAD to conclude that the Applicant had not established his identity?*

[20] The RAD's reason to conclude that the Applicant had not established his identity was largely based on the rejection of his NIC document. For this, the RAD relied on the following factors:

- The preliminary CBSA analysis that triggered referring the document for further analysis to CBSA's Document Laboratory had concluded that the document was most likely altered. The preliminary conclusion was based on bubbles under the plastic laminate, the disturbance of the paper fibres on the back of the document and issues with the ultraviolet features;

- The RAD member compared the document to her reading of a document in the National Documentation Package and found that a genuine document needed a purple number, which was missing on the document in question.

[21] Both the RPD and the RAD based their conclusion in part on the documentary evidence on NICs, and that NICs issued before January 1, 2016, contain this feature. However, the documentary evidence also speak to the different iteration or modifications to the card, including on a change from handwritten to print, or different information in different parts of the country as well as the some changes at different times:

> In 1978, type-written cards began to be issued (Sri Lanka n.d.i). In 2005, colour photographs replaced the black and white photos (Sri Lanka n.d.i). In 2014, the manual paper system was replaced with printing of identity cards and, also starting in 2014, all identity cards were issued in Sinhala and Tamil (Sri Lanka n.d.i). A sample from the Department for the Registration of Persons of the computer-printed NIC is attached to this Response (Under 3.3 of LKA200299).

[22] The Applicant argues that it is unclear from the documentary evidence as to when the purple number was added, and that the member assumed that all cards issued before 2016, regardless of the timeline, contain it. I agree that this was based on the member's unsupported assumption that all cards issued before January 1, 2016, no matter how ancient, should have contained the evidence. This was particularly unreasonable when there was evidence to various modifications at different times before the member, and the preliminary CBSA report was silent on a difference between the document and a prototype of one issued in the relevant timeline.

[23] I am mindful of the fact that as an expert tribunal, the RAD is entitled to make findings and accord weight to different evidence. However, it is not open to any decision-maker to ignore the totality of the evidence and base its conclusion on unsupported evidence.

[24] As the Applicant pointed out, the CBSA document was a preliminary examination. On its first page, it states that "it is for guidance purpose only and it is not a formal report", and that a formal report by a document analysis expert would be issued at a later date. At the RPD hearing, there was some discussion about the state of the formal report, and the Minister Counsel indicated that they had not obtained it and could not speak to its timing. While the RPD reasons speak to this context, the RAD dealt with this finding conclusively and in the context of the Applicant's answers to the RPD questions.

[25] The RPD asked the Applicant to speculate as to why a purple number, which was a security feature, was missing from his card. The RPD transcript shows that the Applicant responded to this invitation to speculate by saying how it was handled by individuals at checkpoints in wet conditions and also how it was generally handled over a long period. This explanation was rejected by the RPD and upheld by the RAD.

[26] The problem with the RAD's analysis is not about reweighing the evidence. Rather, the RPD, and then the RAD, found the Applicant not to be credible because of his responses to the invitation to speculate on the absence of security features on documents, something that he could not have reasonably expected to know. He speculated that it must have been erased because it was found in wet conditions, and when asked further questions, he said that he did not know why it did not contain the security feature. Both the RPD and the RAD equated this with potential

problems with testimony on direct evidence, something that the Applicant should have known based on direct experience.

[27] The only part of the evidence related to the Applicant's direct experience was his evidence on the card's repeated handling in wet circumstances. Nowhere did the RAD analyse this in the context of whether it affected the weight to the CBSA's preliminary report on the reasons for its conclusion, namely the bubbles in the laminate or the disturbance of the paper fibers on the back of the document suggesting data erasure. This also further shows how the RAD did not distinguish evidence in response to an invitation to speculate with evidence based on direct experience, which led to an unreasonable and erroneous analysis.

[28] The Respondent relied on *Anto v Canada (MCI),* 2017 FC 125 [*Anto*] to argue that it was open to the RAD to reject the Applicant's testimony on documents. However, in *Anto*, the Applicant's evidence was on their direct knowledge, such as how they had obtained the evidence, and not on speculation.

[29] I am guided by the comments of Justice Lafrenière on questions of identity and the RAD's expertise: "Questions of identity of a claimant are within the RAD's expertise and the Court should give it significant deference. The Court will only interfere if the decision under review lacks justification, transparency or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law" (*Kagere v Canada (Citizenship and Immigration),* 2019 FC 910, at para 11). However, on the facts of this case, the Applicant had his entire documents rejected based on one underlying document and without engaging with an independent analysis of the other factors needed for the other documents or wanting to inquire about those factors. The member's failure to distinguish

between her assumptions with the conclusion resulted in a circular reasoning lacking in transparency.

V. Conclusion

[30] For the foregoing reasons, I conclude that the RAD's decision does not meet the standard of reasonableness set out in *Vavilov*. This application for judicial review is therefore granted.

[31] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT IN IMM-1500-23

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is granted. This matter is referred to the RAD to be decided by a differently constituted panel.

2. There is no question to be certified.

"Negar Azmudeh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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