Federal Court Cour fédérale

Date: 20240627

Docket: IMM-6506-22

Citation: 2024 FC 996

Ottawa, Ontario, June 27, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SURINDER PAL SINGH AHLUWALIA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Respondent and his family members, citizens of India, applied for refugee protection reporting that they feared persecution at the hands of individuals with whom the Respondent had business dealings.

[2] The Refugee Protection Division [RPD] rejected the claims. The RPD found the Respondent not to be credible and that he was to be excluded from refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and article 1F(b) of the United Nations' *Convention Relating to the Status of Refugees,* Can TS 1969 No 6 on the basis that there are serious reasons to believe he committed a serious non-political crime in India. The RPD also refused the claims of the Respondent's family members, finding they had a viable internal flight alternative [IFA].

[3] The claimants appealed to the Refugee Appeal Division [RAD].

[4] Relying on fresh evidence demonstrating the Respondent had been acquitted of the alleged crimes in India, the RAD found the Respondent not to be excluded from refugee protection. The RAD further found the Respondent's failure to appear for outstanding civil proceedings in India placed him at risk of an indeterminate period of arrest or detention in India and that the country condition evidence indicated torture or mistreatment by police is a problem in that country. The RAD further concluded it was likely that the Respondent's presence in India would become known to local police at any location in India, that the presumption of state protection had been rebutted and that the Respondent was a person in need of protection pursuant to paragraph 97(1)(b) of the IRPA.

[5] In a separate Notice of Decision, the RAD set aside the RPD's finding that the Respondent's family members had a viable IFA in India, and found that they were Convention refugees under section 96 of the IRPA.

[6] The Minister brings this Application for Judicial Review arguing that the RAD decision is unreasonable. The Minister does not seek to review the RAD's decision as it relates to the Respondent's family members.

[7] The Application is dismissed; my reasons follow.

II. Issues and Standard of Review

[8] The Minister raises the following issues:

A. Was the RAD's decision not to conduct an oral hearing unreasonable?

B. Did the RAD fail to justify the approach taken to credibility in light of the RPD's negative findings?

C. Did the RAD unreasonably consider and analyse the evidence relating to fraud?

D. Was the RAD's assessment of risk speculative?

E. Were the RAD's state protection and IFA analyses unreasonable?

[9] It is not disputed that the RAD's decision is to be reviewed against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 100, 102 [*Vavilov*]). In conducting a reasonableness review, a reviewing court is to determine whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility (*Vavilov* at paras 12-13, 75, 85 and 99).

III. Analysis

A. *Oral hearing*

[10] On appeal, the RAD admitted new evidence that (1) demonstrated the Respondent had been acquitted of charges alleging assault with a weapon and other associated offences in India, and (2) relating to medications prescribed to the Respondent.

[11] New evidence demonstrating that the Respondent had been prescribed a specific medication after the RPD decision was admitted on the basis that it was relevant to the state of the Respondent's mental health and could in turn, be a relevant factor in determining credibility.

[12] Having admitted new evidence, the RAD then considered whether to conduct an oral hearing as requested by the Respondent.

[13] The RAD's decision not to conduct an oral hearing is set out in a brief paragraph that concludes the new evidence does not raise a serious issue with respect to the credibility of the Respondent.

[14] The Minister, relying on *Bukul v Canada (Citizenship and Immigration),* 2022 FC 118 at para 24 [*Bukul*], argues that the RAD's mere statement of a conclusion renders the decision unreasonable. The Minister argues the RAD appears to have ignored the Respondent's submission that the new evidence was critical to his claim. The Minister also notes the RAD expressly states that the credibility of the new evidence and the Respondent "has been addressed

throughout these reasons." This, the Minister argues, suggests the new evidence was viewed by the RAD as relevant to credibility, was central to the claim, and should therefore have weighed in favour of conducting an oral hearing.

[15] Subsection 110(3) of the IRPA states that the RAD must proceed without a hearing and on the basis of the record of the proceeding of the RPD, except where new evidence is admitted pursuant to IRPA s 110(4). In that circumstance, the RAD "may hold a hearing" if the evidence (a) raises a serious issue with respect to credibility, (b) is central to the decision with respect to the refugee claims, and (c) if accepted, would justify allowing or rejecting the refugee claim, pursuant to s 110(6) of the IRPA.

[16] In reviewing a decision, the Court is required to consider the decision <u>as a whole</u> in determining if the indicia of reasonableness have been satisfied – transparency, intelligibility and justification (*Vavilov* at paras 15, 85 and 99). A reviewing court is not to consider portions of the impugned decision in isolation.

[17] In my view, the Minister's reliance on *Bukul* is misplaced. The RAD does not merely set out its conclusion in respect of an oral hearing; it also signals that credibility is addressed throughout the reasons (see for example paragraphs 66-75, 110 and 118 of the RAD decision). The RAD then grapples with the issue of credibility and concludes the Respondent is credible, at least in respect to those matters relevant to the issues before the RAD. The RAD explains its credibility conclusions and why those conclusions differ from those reached by the RPD. All of this distinguishes the RAD's analysis in this instance from *Bukul*.

[18] Having found the Respondent to be credible, it was not unreasonable for the RAD to conclude, as it did, that the new evidence did not raise a serious issue with respect to credibility that would require an oral hearing. There is nothing to suggest the RAD ignored the request for an oral hearing.

B. *Credibility*

[19] The Minister submits that, contrary to the teachings of the Federal Court of Appeal in *Huruglica v Canada (Citizenship and Immigration),* 2016 FCA 93 at para 70 [*Huruglica*], the RAD failed to properly consider whether the RPD was in a more advantageous position to evaluate credibility in finding the RPD had no particular advantage in assessing the credibility of the oral testimony. The Minister submits that, because the RAD reviewed only a portion of the audio recording, the principle that the RAD may be in an equally advantageous position to assess credibility is of limited application here. Reading the transcript and listening to portions of the RPD hearing recording is not, the Minister argues, the same as hearing the entirety of the testimony. The RAD also failed explain why the RPD's credibility findings did not attract deference.

[20] Although the RAD reviews RPD decisions on a standard of correctness, there are circumstances where the RAD must ask itself, after engaging in an independent assessment of the evidence, whether the RPD was in a more advantageous position (*Huruglica* at paras 70-74). However, and as stated in *Rozas Del Solar v Canada (Citizenship and Immigration*), 2018 FC 1145, the mere fact that the matter was heard in an oral hearing is not sufficient to justify deference:

> [105] The RAD majority clearly had concerns about its inability to truly review, on a correctness standard, findings based on the RPD's proximity to a witness, and elements that could not be translated into the record. What was not reasonable for the RAD majority, however, was to give no guidance on how this factor should be considered under the categories they discuss. Matters simply relating to oral testimony cannot suffice as a reason for deference. Rather, the relevant factors must relate to oral testimony and be incapable of being captured in the record before the RAD. Only then could it be said that the RPD had a meaningful advantage over the RAD.
>
> [106] Instead of explaining this divide, and analyzing when having heard oral testimony confers a meaningful advantage, the RAD majority seems to reason that having heard oral testimony in and of itself confers a meaningful advantage. In the end, this begs the question of when the RPD enjoyed a meaningful advantage, because that tribunal always hears oral testimony. In other words, the RPD always has a general advantage. The key question is, therefore, when that advantage becomes particular or specific to the oral testimony. Only then would it become a meaningful advantage, such that deference to the RPD is owed.
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> [Emphasis added.]

[21] The RAD is not required to defer to the RPD. Instead, the jurisprudence demonstrates that RAD deference to the RPD is exceptional.

[22] In this instance, the RAD had before it the full transcript of proceedings before the RPD and the complete RPD record, both of which the RAD did review. The RAD also had before it the audio recordings of the RPD hearings. That the RAD acknowledged it listened to only portions of the audio recording does not create a presumption that the RPD had a meaningful advantage in assessing credibility.

[23] In addition, there had been a significant change in the underlying circumstances. The Respondent had been acquitted of charges in India, and the acquittal decision, which was before the RAD, contained information relating to the police investigation and evidence in respect of the criminal charges that was not before the RPD.

[24] The RAD did not err by failing to justify its approach to credibility.

C. *Fraud*

[25] The Minister argues the RAD erred in considering the evidence of fraud. The Minister submits that, although the RAD appropriately considered the decision of the Supreme Court of Canada in *R v Théroux*, 1993 CanLII 134 (SCC), the RAD did not properly engage with the evidence of the Respondent’s conduct in assessing his intent.

[26] In advancing this argument, the Minister argues the RAD’s exclusive reliance on the Respondent’s subjective belief that his behavior was innocent in assessing the *mens rea* element of the offence was an error in that the RAD failed to consider the evidence disclosing a pattern of conduct.

[27] The RAD analyzed each individual claim of fraud and concluded that the Minister had not provided sufficient evidence to establish that the elements of the crime of fraud were present. The RAD justified its conclusions in each instance. The Minister acknowledges the RAD correctly instructed itself in respect of the decision in *R v Théroux* and has not identified any specific error on the part of the RAD. Essentially, the Minister again takes issue with and

disagrees with the RAD's credibility findings; however, mere disagreement does not establish a reviewable error.

[28] I also note the RAD concluded the evidence failed to establish both the *actus reus* and the *mens rea* elements of the offence of fraud. The Minister does not appear to take issue with the RAD's *actus reus* finding.

D. *Speculative risk assessment*

[29] The RAD found the Respondent to be at risk of cruel and unusual treatment if he were to return to India due to outstanding warrants for his arrest related to civil proceedings. The Minister argues the RAD erred in considering risk by conflating the probability of arrest upon return to India with the possibility of mistreatment in detention. Further, the Minister argues the RAD's conclusion that the Respondent would face an indefinite detention is unclear and incoherent. The possibility of indefinite detention is inconsistent with the record, the Respondent's prior detention experience in India, his lack of prior convictions and the discretionary bail provisions in Indian law. The RAD's risk findings are speculative and not based on evidence.

[30] Although I am sympathetic to the Minister's position on this issue, it is not the role of the Court on judicial review to substitute its view for that of the decision maker. The RAD engaged with the country condition evidence. The RAD also acknowledged the circumstances of the Respondent including his prior experiences with police and detention in India. Having done so, it was open to the RAD to interpret and determine what evidence it preferred.

[31] While the Minister argues the RAD conflated risk of arrest with risk of mistreatment in detention, I see nothing in the RAD's reasons to support this submission. The RAD made specific findings relating to the Respondent's risk of arrest upon return and separately addressed the risk of mistreatment while detained.

E. *State protection and IFA analyses*

[32] For substantially the same reasons that I have found the RAD's risk assessment to be reasonable (see paragraphs 30 and 31 above), I am also of the opinion that there is no basis to interfere with the RAD's analysis and findings on the issues of state protection and IFA.

IV. Conclusion

[33] For the above reasons, the Application is dismissed. The Parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-6506-22

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6506-22
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v SURINDER PAL SINGH AHLUWALIA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 20, 2023
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JUNE 27, 2024

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