Federal Court  Cour fédérale

Date: 20240627

Docket: IMM-9068-22

Citation: 2024 FC 1000

Toronto, Ontario, June 27, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

KARRAR MOHAMMED FLAYYIH FLAYYIH
LAYLA MOHAMMED FLAYYIH FLAYYIH
AND OTHER

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of decisions of an officer [the Officer] of Immigration, Refugees and Citizenship Canada [IRCC], dated July 29, 2022 [Decisions], refusing their applications for permanent residence visas as members of the Convention Refugee Abroad Class or the Humanitarian Protected Persons Abroad Class (encompassing the

Country of Asylum Class), pursuant to the Immigration and Refugee Protection Regulations, SOR/2002-227 [*IRPR*], made under the Immigration and Refugee Protection Act, SC 2001, c 27 [*IRPA*].

[2] The Applicants sought judicial review of these functionally identical Decisions in two separately filed but related applications for judicial review. On November 24, 2022, this Court ordered that the two applications be consolidated and heard together in the within matter.

[3] As explained in greater detail below, this application is allowed, because the reasonableness of the Decisions is undermined by the Officer having impugned the Applicants' credibility based on an impermissible implausibility analysis.

II. Background

[4] The Applicants are the Principal Applicant, her brother [Brother], and her six-year-old son [Minor Applicant], all citizens of Iraq. They are currently living in Lebanon.

[5] The Applicants claim that the Principal Applicant's husband and the father of the Minor Applicant [Husband] was murdered in Iraq in May 2017. On May 16, 2017, the Husband went to meet someone about a call he had received about a construction job, but he never returned home. The Principal Applicant was contacted by the police the next day and identified her Husband's body.

[6] The Principal Applicant claims that, after her Husband was murdered, she received a letter that threatened her, her Brother, the Minor Applicant, and her other brother. After receiving the threatening letter, the Applicants relocated to their family home, where they alleged they continued to receive threatening phone calls. The Applicants claim that in April 2019 they received another threatening letter at their family home, following which they decided to leave Iraq.

[7] The Applicants fled Iraq in April 2019 and registered as refugees with the United Nations High Commissioner for Refugees. The Principal Applicant's sister lives in Canada, and in September 2019, the Applicants applied for permanent residence in Canada through a sponsorship program. On December 9, 2021, the Principal Applicant and her Brother were interviewed together by the Officer in Beirut.

III. Decisions under Review

[8] The Decisions were communicated to the Applicants in effectively identical letters dated July 29, 2022. The letters stated that, based on inconsistent statements throughout their interview, the Applicants' permanent resident visa applications were refused because they failed to establish that they were a member of any of the classes under consideration. The letters stated that, besides making generic assertions about threats made to the Applicants after the Husband had been killed because he and the Brother worked for a foreign company that the Applicants were not able to name or identify, the Applicants were unable to identify which group or persons in Iraq would constitute a threat to them and why. The letters stated the Officer had credibility concerns based on those inconsistencies and was therefore not satisfied that the Applicants

possessed a well-founded fear of return to Iraq based upon their race, religion, nationality, membership in a particular social group, or political opinion. The Officer also found the Applicants did not meet the requirements of the country of asylum class.

[9] The Officer's Global Case Management System [GCMS] notes, which form part of the reasons for the Decisions, are functionally the same for both Applicants, and include the following extract:

> The applicants were interviewed on 2021/11/09 with the assistance of an Arabic speaking interpreter. The applicants indicated that they understood and spoke Arabic and had no issues with the interpretation.
>
> Xrefs Siblings G000291160 (Widow with 1 minor child)/ G000291188 (Brother- [Brother]) –they indicated their basis of claim was the same and they agreed to be Interviewed together
>
> My concerns in the interview centered on an inability for both applicants' to articulate a well-founded fear of persecution with a nexus to a convention ground in their country of nationality, Iraq.
>
> Both PAs relocated to Lebanon in 2019 with another sibling who is now missing (they don't know where he is), after the husband of G000291160 ([Principal Applicant]) was killed in 2017 by unknown people for unknown reasons, and applicants claim to have received threats in the following years by what they think are the same people who killed the [Principal Applicant's] husband, which is the reason they left Iraq. They stated that [Principal Applicant's] husband was killed because he was working for a foreign company and considered a traitor, to note [Brother] declared that he was also working for the same company.
>
> I noted that PAs were not able to name the company, or even where the company was from, and they were also unable to establish who might have killed [Principal Applicant's] husband and is now threatening them. Both applicants confirmed that neither them or their family members ever worked for companies associated with the coalition or the US government after the 2003 invasion of Iraq, which is usually the main indicator of this type of persecution (people working for foreign companies)

I noted that the applicant's remained in Iraq after 2017, moved back to their village which is in the south of Iraq in an area populated in majority by Shias, and that they are also Muslim Shia (No ethnic/Nationality nor Religious grounds)

I noted that applicants declared that they have no issues with the government of Iraq, or the various non-state actors such as the Shia Militias that are prevalent in the South of Iraq, where they are from (Political grounds).

I noted that their entire extended family remains in Iraq and has not faced threats or persecutions, as per the declaration of applicants, only [Principal Applicant] and her two brothers had to flee, which is peculiar as generally in these situations the entire extended family might be at risk of retaliation (social group grounds)

I expressed the concern to the applicants that they had not established a WFF of persecution based on convention grounds: They are Muslim Shias and their hometown is in a region dominated by Muslim Shias, neither they or their family have ever been involved with coalition forces following the 2003 invasion (a clear factor of political persecution in Iraq), they have never had any political or personal issues with the government or the various Militia present in Iraq. In addition, their extended family lives in Iraq and has no issues. Finally, I find it implausible that they would be threatened and persecuted for working for a foreign company and yet be unable to identify the company or even the origin of the company (country?)

In response, applicants repeated the same narrative, that they have a WFF of persecution because of threats linked to their previous association with an unnamed foreign company coming from a country they can't identify, which I interpret as a WFF of persecution based on "imputed political opinions"

My concerns remain because, although PAs have raised persecution concerns based on imputed political opinions ("being traitors because [Brother] and [Principal Applicant's] husband worked for foreign company), they cannot name the company or its origin, or identify who their potential aggressors are, they declared having no qualms with the government or with any know militias, and their extended family remains in Iraq and has never faced any issues.

Overall, because of the above noted inconsistencies, I did not find the applicant's to be credible, nor was there any indication or

> articulation of a credible well-founded fear in Iraq, based on convention grounds.
>
> Furthermore, I find applicants have not continuously and personally been affected by civil war, armed conflict, or mass violations of human rights, R147 is not applicable here.
>
> On the whole, upon review of the file and the interview in its entirety, I do not find the applicant's to be credible and therefore cannot be satisfied they are admissible to Canada.
> Further, due to a lack of credibility, as well as the inability to articulate a well-founded fear of persecution, on balance, the applicant's do not meet the requirements under the program under which they applied for the reasons argued herein. I have further considered the Asylum Class, but there is insufficient evidence that these individuals have and continue to be personally and seriously affected by armed conflict, civil war, or mass violations of human rights. For these reasons I have refused this application.
>
> Refusal letter to follow.

IV. Issues and Standard of Review

[10] The Applicants' submissions raise several arguments that require the Court to determine whether the Decisions are reasonable. As is implicit in that articulation, the Court's review of the Decision is subject to the reasonableness standard (Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 23 [Vavilov]).

[11] The Applicants also argue that the Officer breached procedural fairness by failing to provide the Applicants adequate opportunity to respond to the Officer's concerns. The procedural fairness issue is subject to judicial scrutiny to ensure that a fair and just process was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (Canadian Pacific Railway Company v Canada (Transportation Agency), 2021 FCA 69 at paras 46-47).

[12] The Respondent also raises the following two preliminary issues:

A. Whether the Applicants' Further Memorandum of Argument improperly seeks to rely on the Applicants' initial Memorandum of Argument and their Reply Memorandum of Argument; and

B. Whether the Applicants improperly seek to rely on new evidence that was not before the Officer.

V. Analysis

A. *Preliminary Issue: Applicants' Further Memorandum*

[13] The Respondents submit that the Applicants' Further Memorandum of Argument [Applicants' Further] is improper, because it fails to accord with Justice Heneghan's Order granting leave, which provided that the Applicants' further memorandum of argument, if any, shall replace the Applicants' memorandum of argument filed pursuant to Rule 10 and reply memorandum (if any) filed pursuant to Rule 13.

[14] In support of this position, the Respondent notes that the Applicants' Further states that the Applicants rely on their initial memorandum and reply memorandum. The Respondent argues that the Applicants are thereby relying on an additional 10+ pages of argument that is no longer properly before the Court, without having sought leave of the Court to file a factum that is longer than that permitted by the Rules.

[15] In response, the Applicants' solicitor asserts that he has not previously been confronted with an argument that it is improper for a further memorandum, filed by an applicant in an application for judicial review of an immigration decision, to also note in the further memorandum the Applicant's reliance on the earlier filings. He disputes that this approach is improper and asks the Court to continue take into account the facts outlined in the Applicants' initial memorandum.

[16] I agree with the Respondent's position. Justice Heneghan's Order granting leave clearly states that, if the Applicants file a further memorandum of argument, it shall replace the Applicants' initial memorandum of argument and reply memorandum. As the Respondent correctly asserts, filing a further memorandum that is inconsistent with the requirements of the leave order, by seeking to incorporate or rely upon the earlier filings, results in the following:

A. The Court is compelled to review additional material in preparation for the hearing of the judicial review; and

B. The party filing this material benefits from more pages of argument than are permitted by the Rules.

[17] I also agree with the Respondent's position that the appropriate remedy in the case at hand is for the Court to disregard the references in the Applicants' Further to their earlier filings and to disregard the referenced pleadings in those earlier filings. I have taken that approach in adjudicating this application. However, I note that, as the facts underlying this application are available from other components of the record before the Court, the Applicants' inability to rely

on the facts as pleaded in their initial memorandum and in their reply has been immaterial to the outcome of this matter.

B. *Preliminary Issue: New Evidence*

[18] Subject to the exceptions recognized in the jurisprudence, the evidentiary record before a court on judicial review is restricted to that which was before the tribunal (Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 [Access Copyright] at para 19). However, as will be further canvassed below, there are exceptions to this general rule (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh Nation*] at para 97.

[19] The Applicant has included in their Application Record the following articles with which the Respondent takes issue as representing new evidence:

A. Nick Schwellenbach, Lagan Sebert, "The struggle to police foreign subcontractors in Iraq and Afghanistan", August 29, 2010;

B. CNN, "Contractors reap $138 B from Iraq war", March 19, 2013; and

C. Orie Swed and Thomas Crosbie, Royal Danish Defence College, "Who are the private contractors in Iraq and Afghanistan?", March 17, 2019.

[20] The Applicants submit that the new evidence fits within exceptions recognized in *Tsleil-Waututh Nation* for background information or evidence to establish the complete absence of

evidence before the administrative decision-maker concerning a particular subject. In connection with these exceptions, *Sharma v. Canada (Attorney General)*, 2018 FCA 48 at para 8, explains that new evidence may be admitted where:

> (1) it provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits (2) it highlights the complete absence of evidence before the administrative decision-maker on a particular finding […]

[21] I am not convinced that these exceptions apply to the evidence that the Applicants wish the Court to take into account. As the Respondent submits, the invocation of exceptions to the general rule described in Access Copyright does not allow for the introduction of fresh evidence relevant to the merits of the matter decided by the administrative decision-maker (Bernard v Canada (Canada Revenue Agency), 2015 FCA 263, at para 22).

[22] I have also considered the Applicants' reliance on Saifee v Canada (Citizenship and Immigration), 2010 FC 589 [*Saifee*] at paras 27-28, where the Court rejected the respondent's effort to expunge a United States Department of State [DOS] human rights report from the applicant's record. The Court explained that, in the case of a refugee claim determination, it must be assumed that the generally available country conditions were before the decision-maker. As such, by including the DOS country condition document, the Applicant was not adding to the record but rather was setting out the facts that were available to the officer when making the decision.

[23] In the case at hand, the new evidence in the Applicant's record includes a Country Information Report on Iraq, published by the Australian Department of Foreign Affairs and Trade

on October 17, 2020 [DFAT Report]. In keeping with the principle explained in *Saifee*, the Respondent does not object to the inclusion of this report, as it forms part of the National Documentation Package for Iraq [NDP]. However, the Respondent contrasts the DFAT Report with the pieces of disputed country condition documentation to which it objects. These are media articles that do not form part of the NDP.

[24] I agree with the Respondent's position. As it is reasonable to expect the Officer to be familiar with the NDP, it is appropriate to treat documentation from the NDP as part of the record available to the Officer when the Decision was made. However, the Officer cannot reasonably be expected to have identified every media article and other publication that could potentially be considered a piece of country condition evidence. If the Applicants wanted such evidence to be considered, they had an opportunity and an obligation to submit that evidence to the Officer in advance of the Decision.

[25] I find that the reasoning in *Saifee* does not assist the Applicants. As such, I will not take the disputed evidence into account in assessing the reasonableness of the Decision.

C. *Reasonableness of the Decision*

[26] While the Applicants raise several arguments challenging the reasonableness of the Decision, my conclusion that this judicial review should be allowed turns on their arguments surrounding a plausibility analysis that significantly contributed to the Officer's finding that the Applicants' claims were not credible.

[27] It is common ground between the parties that the Officer did not find the Applicants credible in advancing their claim that they had been threatened, and were therefore at risk in Iraq, as a result of the Husband and the Brother having worked for a foreign company in Iraq. While there were other bases for the Officer's adverse credibility finding, it is clear from the Decision that this finding was significantly influenced by the inability of either the Principal Applicant or the Brother to identify their employer company or its national origin. The Officer found it implausible that they would be threatened and persecuted for working for a foreign company and yet be unable to identify it or its origin.

[28] It is trite law that implausibility findings should be made only in the clearest of cases, *i.e.*, only if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant (see, e.g., *Gebreslasie v Canada (Citizenship and Immigration)*, 2021 FC 566 at paragraph 12, relying on *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 9, and *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 9).

[29] I agree with the Applicants' position that, on the facts of the case at hand, the Officer's implausibility analysis falls afoul of these principles. As the Applicants emphasize, it was the Principal Applicant's Husband, not the Principal Applicant herself, who was allegedly employed as a construction worker with the foreign company. Her Brother was also employed with the company, but he was a teenager at the time and his evidence was that it was the Husband who arranged the work. I cannot conclude that this is one of the clearest of cases where it is outside

the realm of what could reasonably be expected that, in the circumstances described by the Applicants, the Principal Applicant and the then teenage Brother would not know the identity of the employer or its country of origin.

[30] In my view, this implausibility finding is comparable to that which was found unreasonable in *Rubaye v Canada (Citizenship and Immigration)*, 2020 FC 665 at paragraph 26, where Justice Mosley held that the applicant's inability to identify the name of a particular American engineering, procurement, construction firm did not seem incongruous with his being an Iraqi national doing only part-time work at a US base. The Court described this as the type of unjustified reasoning that decision-makers are cautioned against in *Vavilov*.

[31] This is also not a situation where this aspect of the Officer's analysis is sustainable because it was conducted with the support of country condition evidence. Indeed, the Applicants emphasize the explanation in the DFAT Report that in-country sources report that Iraqis who work with the international community face threats and take substantial measures to mitigate their risks, including by concealing their employment from their families and communities. The Applicants submit that this evidence is consistent with the Principal Applicant not knowing details of her Husband's employment.

[32] I accept the Respondent's argument surrounding the DFAT Report that, while it references Iraqis working with the international community generally, it focuses on those employed as translators or with Western militaries or embassies. However, it remains the case that this evidence does not support the Officer's implausibility analysis and, if anything, it serves to undermine it.

[33] For these reasons, I find that the Decision is unreasonable and will allow this application for judicial review and return the matter to another decision-maker for redetermination. As such, it is unnecessary for the Court to consider the Applicants' other arguments.

[34] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-9068-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decisions are set aside, and these matters are returned to a different decision-maker for redetermination.

2. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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