Federal Court  Cour fédérale

Date: 20151218

Docket: IMM-2504-15

Citation: 2015 FC 1396

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Madame Justice Gagné

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

AFSHIN NOROUZI
MINA KARIMI

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] The Minister of Public Safety and Emergency Preparedness [MPSEP] is seeking judicial review of the Refugee Protection Division [RPD] decision to not withdraw the refugee status granted in 2002 from the respondents, a couple who are Iranian citizens. Since that date, the

MPSEP has discovered that the respondents obtained their refugee status through misrepresentations, by failing to declare that before arriving in Canada, the respondent Afshin Norouzi lived in Japan for many years where he was convicted of a criminal offence and served a prison term.

[2] Based on section 109 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA], the MPSEP therefore asked the RPD to vacate the decision that allowed the respondents' refugee claim on the ground that it was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. The RPD dismissed the application, finding there was sufficient other evidence considered during the first determination to justify refugee protection.

[3] It is of note that the respondent Mina Karimi was neither present nor represented during the hearing before the Court. The applicant does not know where she is and counsel for the respondent Norouzi was unable to answer the Court's questions about her. However, because the MPSEP's application for judicial review was duly served at the last address she provided, a judgment by default shall be issued against her.

[4] For the following reasons, the MPSEP's application for judicial review is allowed.

II. Facts

Facts alleged in support of the refugee claim

[5] The respondents arrived in Canada on July 17, 2001, from the United States and filed their refugee claim. During their interview with an immigration officer, Mr. Norouzi declared, among other things, the following:

- he did not have a criminal record;
- he had never committed a crime;
- he was never the subject of a removal order from any country;
- he arrived in the United States on July 16, 2001, via Mexico; and
- to enter the United States, he had used a false passport that had cost him US$12,000.

[6] In his Personal Information Form [PIF], submitted August 13, 2001, Mr. Norouzi repeated that he had never committed a criminal offence or been convicted of any crime. He also stated that he never lived or travelled outside Iran except for the trip that brought him to Canada in 2001.

[7] As for the heart of their narrative, the respondents allege that they left their country further to threats received from the family of Laila Shahsavand, Mr. Norouzi's ex-wife. In May 1999, Mr. Norouzi began a romantic relationship with Ms. Shahsavand and they had sexual relations outside of marriage, contrary to the customary and religious rules of Iran. In April 2000, Ms. Shahsavand informed him that she was pregnant and they had to enter into a temporary

marriage ("*sigheh*") so the child would be "legitimate." Mr. Norouzi agreed and paid a bribe so the marriage would be backdated by three months. A few months later, Mr. Norouzi realized Ms. Shahsavand was not pregnant and he ended the relationship in July 2000.

[8] A few months after that, Mr. Norouzi met the respondent Karimi, who is a doctor, and they began a romantic relationship. Ms. Shahsavand heard about this relationship and began to harass Mr. Norouzi, accusing him of having taken her virginity. Mr. Norouzi asked Ms. Karimi to perform surgery to restore Ms. Shahsavand's hymen to avoid a family stigma. Ms. Karimi agreed and performed the surgery in January 2001; it seems that this surgery was illegal because Ms. Shahsavand did not have her parents' consent.

[9] In April 2001, Farhad, Ms. Shahsavand's brother, went to Mr. Norouzi's place of business and threatened to have him imprisoned for fraud if he did not marry his sister. That same week, Farhad went to the respondent Karimi's medical clinic to blackmail her. From April to June 2001, the respondents received phone calls from Ms. Shahsavand's family, who threatened and blackmailed them.

[10] On June 12, 2001, Farhad went to see Mr. Norouzi and gave him an ultimatum: marry his sister or pay his family 10 million *toomans*. Knowing that Farhad is a member of the "*Sepah*" and has strong ties with the Iranian government, the respondents feared for their lives and decided to leave Iran.

[11] In a short decision rendered April 4, 2002, the RPD granted the respondents refugee status.

Facts after the initial RPD decision

[12] On April 24, 2003, the Canada Border Services agency [CBSA] was informed by the Service de police de la Communauté urbaine de Montréal [Montreal Urban Community Police Service] that a person had gone to the police station to lay an information about the respondent. The information indicated that before coming to Canada, Mr. Norouzi lived in Japan for 11 or 12 years and he had invented a story in order to obtain refugee status in Canada. The following is an excerpt from Constable Éric Bournival's email summarizing the information received:

> [TRANSLATION]
> The woman told me that she learned that Mr. Norouzi (of Iranian origin) had lied to Immigration during his immigration application. She had information from [redacted] and statements Mr. Norouzi made in her presence. She said that Mr. Norouzi allegedly told immigration he was being pursued and in danger in Iran because his former spouse, a doctor, performed abortions there (where is it prohibited) and it was discovered. However, according to [redacted] it is not true that the couple was in danger because nobody knew they were performing abortions. This story was completely invented and prepared for the application to immigrate to Canada. Moreover, it seems that Mr. Norouzi spent 11-12 years in Japan, and then spent a short time in Iran to get his ex-spouse Mina KARIMI (the doctor) before coming to Canada and submitting his Immigration application. He allegedly concealed his presence in Japan from Immigration Canada. [Redacted] also said that shortly after arriving in Canada with his ex-spouse Karimi, well, she allegedly tried to commit suicide. The same thing happened with [redacted] who apparently thought of suicide less than 3-4 weeks after [redacted] Mr. Norouzi. She finds this very strange. [Redacted] also said that Mr. Norouzi always had large sums of money in his possession. She said that one time, when police officers went to the couple's home, there was $10,000 on the table. She also said that Mr. Norouzi supposedly worked in restaurants. Then she said that Mr. Norouzi was afraid of the police

> and often says not to repeat anything he says to them. She also said that he was allegedly conducting secret business with the Japanese government, but she did not know more. Then, she said he does not like Canada and says he just wants to get his Canadian citizenship and will leave Canada afterwards. She said that Mr. Norouzi is currently in Vancouver for a few days. She said Mr. Norouzi has a friend named Timur. She finds all this very strange and wanted to let Immigration Canada know, but since her French and English are not very good, she preferred to go to the police station to disclose this information.

[13] During the hearing, the respondent objected to the production of this email. He argued that it cannot be relied on considering all the information that has been redacted.

[14] At any rate, Mr. Norouzi became a permanent resident of Canada on September 18, 2003. As for Ms. Karimi, she did not appear to obtain her permanent residence in February 2004 and has not contacted the Citizenship and Immigration Canada office since then.

[15] In February 2008, the Canadian Embassy in Japan received a document from the Mito regional tribunal, which indicates that Mr. Norouzi, alias Mario Costas, was found guilty on October 9, 1997, of violating the Japanese stimulants control act and had served a prison sentence of one year and eight months.

[16] A few months later, the Royal Canadian Mounted Police sent the CBSA the results of an Interpol search. It indicates that Mr. Norouzi has a criminal record in Japan for two offences, one for violating the immigration act in 1993 and another for violating the stimulants control act in 1997.

[17] In September 2008, CIC received a detailed anonymous letter about Mr. Norouzi. It states that he is from a poor background and he and his two uncles went to work in Japan around 1990. It mentions the prison sentence Mr. Norouzi served in Japan and that he was subsequently deported to Iran. With false documents, Mr. Norouzi allegedly returned to Japan and stayed there for around one year and then returned to Iran where he obtained a US visa. It was through the United States that he allegedly came to Canada in 2001. It also alleges that Mr. Norouzi was intercepted in Germany while trying to travel to Romania with a false Italian passport.

[18] The respondent challenged the admissibility of this letter during the hearings before the RPD and before the Court. Moreover, he alleges that since it was an anonymous information, there is no guarantee that the information it contains is true.

[19] The CBSA took steps to verify the facts alleged in this letter. It received confirmation from the German authorities that Mr. Norouzi was arrested in Hamburg in 2007 while using a counterfeit Italian passport to travel to Romania.

[20] The CBSA also obtained a copy of three emails Mr. Norouzi allegedly sent in 2008, in which he states that: (i) he lived in Japan for several years in the 1990s, (ii) he decided to come to live in Canada in 2001, and (iii) he has criminal records in Japan and Germany. The respondent also challenges the admissibility of these emails on the ground that they could very well have been written by someone other than himself and they could have been from an email account that was not his.

[21] The respondent Norouzi chose not to attend the hearing of the MPSEP application before the RPD, but he made the following admissions through his counsel:

- Before coming to Canada, respondent Norouzi stayed for many months, many years even, in Japan;
- He has a criminal record, having been arrested in Japan and in Germany;
- He travelled many times to Iran, even after having obtained refugee status in 2002.

[22] Moreover, the RPD had in its possession Mr. Norouzi's Iranian passport, issued in Tehran on February 17, 2001, and renewed in Ottawa on February 18, 2005, which shows his entries and exits from Iran for part of the period during which the facts in support of his refugee claim allegedly occurred:

- Exit from Iran on March 1, 2001 (to Thailand) and return March 16, 2001;
- Exit from Iran on April 29, 2001 (to Turkey) and return May 12, 2001;
- Exit from Iran on July 4, 2001 (to the United States) and return November 23, 2003;
- Exit from Iran on April 15, 2004 (to Canada) and return on an unknown date;
- Exit from Iran on October 29, 2004 (to Thailand) and return February 6, 2005;
- Other trips to Iran and Turkey in 2005 and 2006, and return to Canada.

[23] On December 29, 2010, the MPSEP submitted his application to vacate the decision granting the respondents' refugee status. Many requests for postponement were granted through

the years, such that the hearing of this application before the RPD did not take place until February 24, 2015.

III. Decision under review

[24] The RPD first notes that Ms. Karimi was not represented and that Mr. Norouzi's absence was recommended by his counsel. Then, the RPD addressed the objection to the evidence and found the exhibits submitted by the MPSEP admissible, including (i) Éric Bournival's email; (ii) the anonymous letter received September 19, 2008, and (iii) Mr. Norouzi's three emails. The RPD added that it "reserves the right to grant probative value to this evidence as it sees fit."

[25] The RPD then announced that it would conduct a two-part analysis: first, it would assess the application of subsection 109(1) of the IRPA, and then it would proceed with an analysis under subsection 109(2). Under subsection 109(1), the RPD must determine whether the decision to grant refugee status was obtained as a result of "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." If so, and under subsection 109(2), the RPD may still reject the application to vacate "if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection."

[26] For the first component, the RPD noted the admissions the respondent made and concluded that he made misrepresentations on a relevant matter regarding his refugee claim. The respondent neglected to mention, in his refugee claim, that he had stayed in Japan many times in the 1990s and that he has a criminal record in that country. The RPD concluded that these facts constituted relevant factors that should have been considered during the 2002 hearing before the

RPD. According to the RPD, the respondent's admissions are sufficient to dispose of the first component of its analysis.

[27] As for the second component of the analysis, however, the RPD found that there is sufficient evidence from the first determination to maintain the RPD decision of 2002. According to the RPD, Mr. Norouzi's omissions or lies involve events that took place before May 1999, when the respondents' narrative in support of the refugee claim begins. There is no evidence that their narrative is false or tainted. The RPD therefore dismissed the MPSEP's application to vacate.

IV. Issue and standard of review

[28] This application for judicial review raises a single question: did the RPD err by finding that there was sufficient evidence from the first determination to uphold the RPD decision to grant the respondents refugee status?

[29] The applicable standard of review for this question is reasonableness (*Al-Maari v Canada (Citizenship and Immigration)*, 2013 FC 1037 at para 8; *Shahzad v Canada (Citizenship and Immigration)*, 2011 FC 905 at paras 22 and 24). The analysis the RPD conducts pursuant to subsection 109(2) of the IRPA is under its discretionary power, and the Court owes its findings considerable deference (*Waraich v Canada (Citizenship and Immigration)*, 2010 FC 1257 at paras 18-20; *Canada (Citizenship and Immigration) v Chery*, 2008 FC 1001 at para 23).

V. Analysis

Did the RPD err by finding that there was sufficient evidence from the first determination to uphold the RPD decision to grant the respondents refugee status?

[30] In an application to vacate a decision granting refugee status, the burden of proof is on the Minister. He must convince the RPD that on a balance of probabilities, the decision is the result of direct or indirect misrepresentation or withholding material facts (*Németh v Canada (Justice)*, 2010 SCC 56 at paras 109-110). Second, the RPD must assess whether, despite the misrepresentations, there is sufficient evidence to justify granting refugee status.

[31] In this case, although the RPD correctly states the first component of the test at paragraph 23 of its reasons, the analysis in the subsequent paragraphs clearly shows that the only issue the RPD addressed is the relevance of the facts that were misrepresented. It finds that the facts were relevant to the initial analysis and that they would have raised concerns in the decision-maker's mind. However, it did not analyze the causal link between the respondents' misrepresentations and the RPD decision to grant them refugee status, as required under subsection 109(1) of the IRPA. It also did not identify the facts alleged in support of the refugee claim that would have been tainted by the respondents' misrepresentations.

[32] In doing so, the RPD immediately skips to the second component of the test stated in subsection 109(2) of the IRPA, and finds that the respondents' narrative is intact. It only conducted a simple temporal review and concluded that there was no evidence that the respondents were not in Iran from May 1999 to June 2001.

[33] The respondent argues that the RPD could not, in the second component of the test, "reassess evidence that was not tainted by the misrepresentations in light of the evidence adduced by the Minister at the vacation hearing as proof of the claimant's misrepresentations at the determination hearing" (*Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at para 26).

[34] However, the problem here is that the RPD did not identify the initial evidence that could have been tainted by the respondents' misrepresentations.

[35] In this respect, the RPD committed a number of errors that require the Court's intervention.

[36] First, at paragraph 30 of its reasons, the RPD finds that "nothing in the evidence presented by the Minister indicates that the male respondent was not in Iran between May 1999 and June 2001." However, this is not true. The stamps in the respondent's only passport submitted to evidence show that he was not in Iran for four weeks during the period in question. Mr. Norouzi was in Thailand from March 1 to March 16, 2001, and was in Turkey from April 29 to May 12, 2001. In support of his refugee claim, Mr. Norouzi alleged that he was threatened by Ms. Shahsavand's brother in April 2001. However, the new evidence shows that he later returned to Turkey, stayed for 10 days and obtained a visa for the United States there before returning to Iran. Not only did the RPD neglect to analyze the impact of the new evidence on the respondent's narrative, but it plainly ignored this evidence. This material error in itself justifies the Court's

intervention (*Sherwani v Canada (Minister of Citizenship and Immigration)*, 2005 FC 37 at para 17).

[37] Second, although the RPD allowed the new evidence submitted by the applicant and it indicated at paragraph 21 of its reasons that it reserved the right to grant probative value to it as it saw fit, it did not conduct this analysis nor did it review this evidence anywhere in its decision. The fact the letter received in September 2008 was anonymous might have had a negative impact on its probative value; however, this letter is very detailed and many of the facts in the letter are corroborated by reliable sources: the long stays in Japan, the fact he has a criminal record in Japan, the fact he was intercepted by the German authorities with a false Italian passport, etc. The RPD had to determine whether the fact that important elements from this letter were corroborated had any impact on the reliability of the other elements in the letter.

[38] Before moving on to the second component of the test, the RPD had to analyze all of the new evidence, determine which of the respondent's initial allegations were tainted and set them aside before beginning the second component of the test. It did not do so.

[39] Third, if the MPSEP had been informed of the respondent's criminal record during the analysis of the refugee claim, he could have raised a ground for exclusion under article 1F(*b*) of the *1951 Convention Relating to the Status of Refugees* (*Frias v Canada (Citizenship and Immigration)*, 2014 FC 753 at paras 7 et seq).

[40] In *Canada (Citizenship and Immigration) v Wahab*, 2006 FC 1554 at para 29, this court reviewed the case law on applications to vacate and stated that "[t]he RPD only needs to proceed to the s. 109(2) analysis (step two) if it is satisfied that a claimant is not excluded under section 98 of IRPA." It is true that this argument was raised by the applicant for the first time during the hearing of the application for judicial review and that the MPSEP did not submit evidence of equivalency between the offence the respondent committed in Japan and a known offence in Canadian law (*Iliev v Canada (Minister of Citizenship and Immigration)*, 2005 FC 395 at para 6); however, the RPD nonetheless proceeded to the second component of the test without addressing the issue of exclusion and in a sense avoided the first component analysis.

[41] The RPD decision does not fall within a range of reasonable outcomes that can be justified in light of the facts and the law.

VI. Conclusion

[42] This application for judicial review is allowed. There is no question of general importance to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is allowed;
2. The decision rendered on April 24, 2015, by the Refugee Protection Division of the Immigration and Refugee Board of Canada is set aside and the matter is referred back to another member for redetermination;
3. No question of general importance is certified.

"Jocelyne Gagné"
Judge

Certified true translation
Elizabeth Tan, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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