

Federal Court



Cour fédérale

Date: 20180320

Docket: IMM-3954-17

Citation: 2018 FC 315

Ottawa, Ontario, March 20, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

**ANMAR HUSSEIN MOHAMMED AL-HAFIDH
ZAINAB ANMAR HUSSEIN AL-HAFIDH
INAAM YOUSIF ABBAS AL-NUAIMI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by the Applicants pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision made by the Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated August 18, 2017, determining that the Applicants are neither Convention refugees nor persons in need of

protection for the purposes of section 96 and 97(1) of *IRPA* [the Decision]. The Refugee Protection Division [RPD] came to the same conclusion; the RAD dismissed the Applicants' appeal from the RPD.

II. Facts

[2] The Applicants, citizens of Iraq, are a husband [the Principal Applicant], his wife and their adult daughter. The Applicants entered Canada on April 10, 2016 and made refugee claims on May 20, 2016.

[3] The facts that led to the Applicants entering Canada and making claims for refugee status are:

- The Principal Applicant alleges that he worked for the Iraqi Ministry of Tourism until 2007;
- According to the Principal Applicant, in 2008, he became a manager and auditor at the Iraqi presidency office, which involved taking inventory of the assets of the presidency office. The Principal Applicant alleges that influential members of the Iraqi government had co-opted government property as their own and saw his investigation as a challenge to their possession. The Principal Applicant also states that certain members of the government resisted his requests for documentation and began threatening him in early 2012;
- In 2012, the Principal Applicant claims to have sought to leave his post, but his requests to resign were denied. According to the Principal Applicant, the police informed him that they could not protect him;

- The Principal Applicant alleges he retired from the Iraqi presidency office in 2013, because he turned 63 years old, the mandatory retirement age in Iraq. The Principal Applicant also claims that he while he was “officially retired” in 2013; he continued working at the presidency office to finish some outstanding tasks before he would be released. According to the Principal Applicant, he continued working at the presidency office until he fled to Canada in April 2016;
- In 2013, the Principal Applicant travelled to the U.A.E.;
- In March 2015, the Principal Applicant and his wife applied for visas to Canada to visit one of their other children. The Principal Applicant stated that he was retired on his application. The Principal Applicant’s application was unsuccessful;
- In April 2015, the Principal Applicant’s wife obtained a visa to Canada;
- In June 2015, the Principal Applicant again unsuccessfully applied for a visa to Canada. Once again, the Principal Applicant stated he was retired and listed one prior employer – a hotel in Baghdad;
- From June - July 2015, the Principal Applicant’s wife was in Canada. She returned to Iraq on July 30, 2015 and remained there until April 2016, despite holding a valid Canadian visa;
- The Principal Applicant alleges that in August 2015, someone tried to assassinate him by placing a bomb in his car. According to the Principal Applicant, he was not in the car at the time, but the explosion injured his driver;
- In September 2015, the Principal Applicant again applied for a Canadian visa. In this application, he listed himself as retired and again stated that he worked at a hotel in Baghdad as manager of accounts until his retirement;

- In October 2015, the Principal Applicant obtained a visa to Canada while travelling in the U.A.E.;
- On October 29, 2015, the Principal Applicant returned to Iraq from the U.A.E.;
- In December 2015, the adult daughter obtained a visa to Canada while travelling in the U.A.E.;
- In January 2016, the adult daughter returned to Iraq from the U.A.E.;
- On April 7, 2016, the Applicants left Iraq, for Canada, via Turkey;
- On April 10, 2016, the Applicants arrived in Canada; and
- On May 20, 2016, the Applicants made inland refugee claims.

[4] According to the Principal Applicant, he and his family are at risk in Iraq because of his work at the Iraqi presidency office, where he exposed corruption against high-ranking officials. The Principal Applicant and his wife also claim fear of persecution based of their mixed sect (Shi'a and Sunni) marriage.

[5] In a decision dated February 10, 2017, the RPD concluded that the Principal Applicant did not provide credible evidence that he worked for the presidency office. Therefore, the RPD rejected the Applicants' claim, and found that the Applicants are neither Convention refugees nor persons in need of protection.

[6] The Applicants appealed to the RAD, which dismissed their appeal.

III. Issues before the RAD

[7] The RAD rejected all of the Applicants' proposed new evidence. Since the new evidence was not admitted, the RAD rejected the Applicants' request for an oral hearing. Admissibility of the Applicants' proposed new evidence was not an issue before the Court on this application.

[8] The RAD framed the following issues:

- (a) Whether the RPD erred in its assessment of the Applicants' visa applications?
- (b) Whether the RPD erred in finding a lack of subjective fear?
- (c) Whether the RPD erred in rejecting the Applicants' supporting documents?
- (d) Whether the Applicants are at risk of persecution in Iraq?

A. *Whether the RPD erred in its assessment of the Applicants' visa applications?*

[9] The RPD found that the Applicants failed to provide credible evidence that the Principal Applicant worked at the presidency office, which is the reason they fear persecution in Iraq. The RPD made this finding for a number of reasons: (1) there were inconsistencies in the Principal Applicant's previous visa applications in which he stated he retired in 2013; (2) the Principal Applicant's explanation that he was "retired because he applied for retirement and was eligible to retire, but was unable to stop working"; (3) that he "did not know" why his visa applications from 2015 state he was the manager of accounts at a Baghdad hotel before his retirement; and (4) that he did not include his true employment history because he was worried that it would be verified by officials, tipping off the presidency office that he intended to leave the country.

[10] The RAD found the RPD's finding was based on the evidence and the result of a comprehensible reasoning process because the RPD was in an advantageous position and its

finding deserved deference. The RAD agreed with the RPD; there was an inconsistency and omission and the Principal Applicant was given the opportunity to explain. It was up to the RPD to find the Principal Applicant's evolving and unsatisfactory.

[11] The RAD held that the Principal Applicant's submissions that he was both "officially retired" and "continued working" at the presidency office were inconsistent. The RAD expected that if the Principal Applicant was "officially retired" he would not continue working at the presidency office until 2016. The RAD took issue with the Principal Applicant's failure to include his employment at the presidency office on his visa applications. The RAD also took issue with the Principal Applicant's explanation of the inconsistency on his visa applications, and found that he did not provide his answer initially and was hesitant and evasive when providing his final answer about why he included the employment at the Baghdad hotel.

[12] The RAD rejected the Applicants' submission that the RPD breached procedural fairness by not putting to them that the presidency office would know that the Principal Applicant was visiting his daughter in Canada. The RAD found that the RPD clearly put this matter to the Applicants and in response; the Principal Applicant was again evasive and did not directly answer the question.

[13] The RAD also considered the Principal Applicant's argument that the RPD should have put to him that his frequent trips to the U.A.E. undermined his explanation that he could not leave Iraq without being at further risk. The RAD agreed with the Principal Applicant, but found this finding was of no consequence to the overall outcome.

B. *Whether the RPD erred in finding a lack of subjective fear?*

[14] The RPD found that the Applicants' actions, including that they re-availed themselves to Iraq several times after receiving their Canadian visas indicated a lack of subjective fear.

[15] The Applicants argued that the RPD erred in this subjective fear assessment because they had reasonably explained that they returned to Iraq because that they could not leave the two other children in Iraq if they were not safe. The RAD rejected the Applicants' argument and reasons for re-availing themselves to Iraq and accepted the RPD's finding. In the RAD's view, arrangements could have been made for the remaining children, who were 26 and 29 years old. The RAD found that even if certain arrangements needed to be made, the wife and adult daughter need not have returned to Iraq. This, in the RAD's view, undermined the Applicants' argument that they all needed to leave Iraq together, and by extension, "undermines the credibility of their allegations that the whole family was threatened and that the [Principal Applicant] was the subject of an assassination attempt in August 2015."

C. *Whether the RPD erred in rejecting the Applicants' supporting documents?*

[16] The RPD concluded that the Principal Applicant never worked at the presidency office. That allegation was central to the Applicants' claim of persecution. The RAD considered the evidence and concluded that the Applicants failed to provide any supporting documentation to show that the Principal Applicant worked at the presidency office *after* 2014. I emphasize this finding because it is pivotal to the Applicants' request for judicial review. That said, the latest correspondence document in the record from the presidency office is dated February 2014 and the Applicant told the CBSA that he last worked at the presidency office in April 2014.

[17] Moreover, the RAD found there was no supporting documentation that his car, which was allegedly provided by the presidency office, was bombed. The RAD also found there was no supporting evidence that the driver allegedly hired by the presidency office was injured.

[18] The RPD noted a number of issues with the Applicants' supporting documentation, concluding that they were insufficient to establish that the Principal Applicant held the position he alleges. Such issues include unclear crests and letterheads, and that training certificates and pictures do not establish employment at the presidency office and could have been related to employment at a government-run hotel. The RPD found that cards that referred specifically to his work at the presidency office were not in original form and appeared less genuine because text was cut off and laminates were poorly applied.

[19] The RAD accepted the Applicants' argument that the RPD failed to properly consider the correspondence from the presidency office and that the RPD did not identify which security features it would expect on certain letters or on what basis it believed such letters would have certain security features. The RAD accepted the Applicants' explanations that because the letters are photocopies, letterheads and crests are of poorer quality.

[20] However, the RAD found that even if it accepted all of the Principal Applicant's supporting documents from the presidency office, the documents were not sufficient to overcome the above-mentioned credibility concerns and establish the Applicants' allegations. The RAD stated:

[34] The RAD accepts the [Applicants'] argument that the RPD failed to properly consider the correspondence from the presidency office, the RPD did not identify what security features it would expect on such letters, or on what basis it believed such letters would have security features. Moreover, the RAD accepts the

[Applicants'] explanation that because the letters are photocopies, this reasonably explains why the letterheads and crests are of poorer quality than the text of the letters. Regardless, even if the RAD accepts the [Applicants'] argument and all of his supporting documents from the presidency office, the [Applicants'] supporting documents are not sufficient to overcome the above-mentioned credibility concerns and establish their allegations.

[Emphasis added.]

D. *Whether the Applicants are at risk of persecution in Iraq?*

[21] The RPD rejected the Applicants' argument that they are at risk because the Principal Applicant is Shi'a and his wife is Sunni because the Applicants raised this issue near the end of their hearing, omitted this allegation as a concern in their Basis of Claim forms, and because their frequent returns to Iraq indicated that this is not a credible risk for them. The RAD found that the RPD did not err in making this finding; this issue is not before the Court.

IV. Issues

[22] In my view, this case raises the following issues:

- (a) Did the RAD breach the duty of procedural fairness by failing to put new credibility concerns to the Applicants in order to provide them an opportunity to respond?
- (b) Is the RAD decision otherwise unreasonable?

V. Standard of Review

[23] The first issue is a matter of procedural fairness in that it concerns an alleged failure to provide an opportunity to respond. It is reviewable on the standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir v New Brunswick*,

2008 SCC 9 [*Dunsmuir*] at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[24] As to the second issue, the Supreme Court of Canada held, in *Dunsmuir* at para 62 that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined that reasonableness is the standard of review applicable to a decision-maker's failure to address an issue that must be addressed per *Ameeri v Canada (Citizenship and Immigration)*, 2013 FC 373[*Ameeri*] per Gleason J, as she was then, at para 20:

[21] Thus, the Board's failure to consider the risks facing Mr. Ameeri and Maryam in Bahrain as a result of their ethnicity is a reviewable error which must result in the decision being set aside as a decision is unreasonable if it fails to address an issue that must be addressed (see e.g. *Cunningham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 636 at para 19).

[25] Reasonableness is the standard of review applicable to this issue.

[26] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision

falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[27] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole:

Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[28] *Sanmugalingam v Canada (Citizenship and Immigration)*, 2016 FC 200 per Kane J outlines the law in connection with how the RAD should approach credibility findings on appeal from an RPD decision:

[34] With respect to questions of credibility, although there are some nuances, the jurisprudence has established that the RAD may defer to the RPD because the RPD has heard the witnesses directly, has had an opportunity to probe their testimony or has had some advantage not enjoyed by the RAD (see for example, *Huruglica* at para 55; *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at para 39, [2014] FCJ No 1116 (QL); *Nahal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1208 at para 25, [2014] FCJ No 1254 (QL)). However, the Court has also noted that such deference should follow from an independent assessment of the evidence, given that the RAD is performing an appellate function (see for example, *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 31, [2015] FCJ No 156 (QL) [*Khachatourian*]; *Balde v Canada (Minister of Citizenship and Immigration)*, 2015 FC 624 at para 23, [2015] FCJ No 641 (QL)).

[29] Finally, this Court reviews decisions of the RAD on a standard of reasonableness:

Canada (Citizenship and Immigration) v Huruglica, 2016 FCA 93 at para 35.

VI. Analysis

Issue 1: Did the RAD breach the duty of procedural fairness by failing to put new credibility concerns to the Applicants in order to provide them an opportunity to respond?

[30] The Applicants submit the RAD breached the duty of procedural fairness by failing to put to them its credibility concerns in order to give them an opportunity to respond; specifically, the Applicants allege that the RAD found that the Principal Applicant worked at the presidency office but retired in 2014.

[31] It is important to note the Applicant alleges that the RAD found that the Principal Applicant worked at the presidency office up until 2014. In the Applicants' view, this was a pivotal finding that undermined the Principal Applicant's allegations of risk related to the 2015 assassination attempt. The Applicants say this was implicit in the RAD's reasons.

[32] The Respondent disagrees. The Minister argues that the RAD's decision reveals that the RAD noted that the Applicants failed to provide any supporting document to show the Principal Applicant worked at the presidency office after 2014, and that the Applicants' argument is, in essence, that the RAD, by making this notation, implicitly found that the Principal Applicant was employed by the presidency office until 2014. The Respondent submits that the RAD ought not to be faulted for what it did not say.

[33] I am not persuaded that the Applicants are correct in their assertion. Having reviewed the reasons, I conclude that the RAD did not find the Principal Applicant was employed by the presidency office up until 2014. Nowhere does the RAD make that statement. The key paragraph of the RAD's reasons states:

[37] Based on his unreliable testimony about his visa application inconsistencies and omissions, the [Applicants'] lack of subjective fear, and the lack of supporting documentation to corroborate that the [Principal Applicant] was employed at the presidency office after 2014, the RAD finds the [Principal Applicant] has failed to provide sufficient credible evidence that he and his family are targeted due to his anti-corruption work. Specifically, the RAD finds, on a balance of probabilities, that the [Principal Applicant] was retired from 2014 until he left Iraq in 2016, and that he was not employed at the presidency office during this time. Consequently, the RAD finds on a balance of probabilities, that his government owned car was not bombed in an attempted assassination, nor was his whole family threatened. Therefore, the RAD finds the [Applicants] would not face more than a mere possibility of persecution should they return to Iraq, due to the [Principal Applicant's] alleged profile as a "government employee" and "anti-corruption" official.

[Emphasis added.]

[34] In my view, RAD's reasons must be read in the context of the Principal Applicant's allegation to the effect that the grave aspects of the alleged persecution started in 2015. The RAD rejected this allegation, finding that the Principal Applicant had "failed to provide sufficient credible evidence that he and his family are targeted due to his anti-corruption work." The period after 2014 was the most critical period the RAD had to deal with because of the Principal Applicant's allegation that the attempted assassination bombing took place in 2015.

[35] Although the RAD does not explicitly state that the Principal Applicant did not work for the Iraqi presidency office at any time, it made no finding that the Principal Applicant did work for the presidency office. It is important to appreciate that the RPD found the Principal Applicant never worked at the office of the president, neither before nor after 2014. With respect, and notwithstanding the submissions of counsel, I find nothing in the RAD reasons that either

displaces or rejects the RPD's finding in this respect. In my view the RAD affirmed the RPD in this respect.

[36] The Principal Applicant's credibility respecting his alleged employment at the presidency office was the key issue for the Applicants at the RAD, as it had been at the RPD. The RAD stated at para 15, "[...] the issue of the [Principal Applicant's] employment at the presidency office was a key issue at the RPD hearing and they were alerted to this issue." The Principal Applicant knew his alleged employment history at the office of the president would be considered by the RAD; indeed, he raised it himself. His credibility and his employment status were not in any sense new issues; they are different sides of the same coin. Both issues were central to the risk he unsuccessfully alleged at both tribunals. The RAD was obliged to review the matter for itself, which it did.

[37] In summary, the RAD did not need to give notice because neither the Principal Applicant's credibility nor his alleged employment at the office of the president were new issues. The RAD does not need to give notice when it deals with the same issues as those already before it. As a consequence also, *Ameeri* does not apply.

[38] The Applicants also provided documentary evidence, including the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq, which lists "individuals associated with (or perceived to be supporting) the Iraqi authorities [...]" in connection with the Principal Applicant's alleged risk profile. This evidence indicated employees of the presidency office were "likely to be in need of international refugee protection." However, the RAD did not need to consider this evidence because neither the RPD nor the RAD found the Principal Applicant was such an employee.

[39] Therefore, there was no procedural unfairness and this aspect of the application for judicial review does not succeed.

Issue 2: Is the RAD decision otherwise unreasonable?

[40] The Applicants raised a number of issues allegedly showing unreasonableness in the RAD decision:

- A. *That the Principal Applicant retired in 2014:* the Principal Applicant states that he inadvertently typed 2014 instead of 2016 on his employment chart, along with other typographical errors. This issue was not raised before the RAD or the RPD. The argument that there was a typo is refuted by the Applicant's own statements on his visa applications, none of which support his claim to have worked for the presidency office after 2014. Indeed, on his visa applications he claimed to be a hotel employee before 2014. I see no unreasonableness in the RAD's assessment of the evidence in this respect.

- B. *That there were irreconcilable omissions and inconsistencies in the visa applications:* with respect to the Principal Applicant's previous visa applications, the Principal Applicant claims he did not disclose his employment at the presidency office because he did not want to alert the presidency office that he planned to leave Iraq. The RAD accepted that sometime, applicants lie to get a visa to Canada to make a refugee claim, but that they ought to immediately correct the record. The Principal Applicant submits that he did correct the record upon making a refugee claim, through which he indicated that he was employed at the presidency office. In

my view, the RAD answered these allegations in its rejection of the Applicants' allegations generally, which rejection it said was,

Based on his unreliable testimony about his visa application inconsistencies and omissions, the [Applicants'] lack of subjective fear, and the lack of supporting documentation to corroborate that the [Principal Applicant] was employed at the presidency office [...].

- C. *That the Applicants lacked a subjective fear:* the Applicants submit that in returning to Iraq, they were trying to manage risk to avoid an unfortunate outcome, and because they returned to ensure the safety of their family should not undermine the genuineness of their motivations. Multiple re-availments were conceded; in the overall context of the record, I am not persuaded this aspect of the RAD's reasoning is unreasonable.

[41] Finally, the Applicants submit that the RAD made an unreasonable credibility finding. With respect, in my view that is not the case. The RAD points to many problems with the Principal Applicant's evidence: the lack of any evidence that he worked for the presidency office after 2014; the fact there was no supporting documentation that his car was bombed; the lack of evidence that his driver was injured; and his unreliable testimony about the significant inconsistencies and omissions in his multiple visa applications. The RAD appropriately deferred to the RPD's findings. It undertook its own analysis of the record and reached the same conclusion as the RPD on this key issue. The RAD's consideration and determinations in this respect are defensible on the record and are therefore reasonable.

VII. Conclusion

[42] I have found there was no procedural unfairness in the RAD's decision-making process. On the issue of reasonableness, and standing back to review the matter as an organic whole, in my respectful view the RAD's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. Because the RAD decision complies with the standards set out in *Dunsmuir*, this application for judicial review must be dismissed.

VIII. Certified question

[43] Neither party proposed a question of general importance for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed,
no question is certified, and there is no order as to costs.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3954-17

STYLE OF CAUSE: ANMAR HUSSEIN MOHAMMED AL-HAFIDH,
ZAINAB ANMAR HUSSEIN AL-HAFIDH, INAAM
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