Federal Court  Cour fédérale

Date: 20200128

Docket: IMM-6557-18

Citation: 2020 FC 150

Ottawa, Ontario, January 28, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

WISAL AHMED MANAN
(a.k.a. WISAL MANAN)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the February 6, 2019 decision of the Refugee Appeal Division [RAD], affirming the finding of the Refugee Protection Division [RPD] pursuant to section 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA] that the Applicant is not a Convention refugee or person in need of protection: IRPA ss 96 and 97.

[2] The Applicant, Wisal Ahmed Manan, is an Afghan citizen. He alleges the Taliban kidnapped and held him hostage for approximately 11 months because his family owned a paint manufacturing company which directly or indirectly sold paint to the Afghan government and foreign agencies, and therefore they were perceived as supporters and collaborators of the Afghan government, the United States of America [USA], and its allies.

[3] For the reasons that follow, this judicial review application is granted and the matter is to be remitted to the RAD for redetermination.

II. Background

[4] Mr. Manan's family fled Afghanistan to Peshawar, Pakistan in 2001 following the beginning of the War in Afghanistan. While still abroad, in 2005 they established a paint manufacturing company in Nangarhar province, Afghanistan. In around 2006, individuals claiming to be Taliban operatives allegedly confronted Mr. Manan's father in Peshawar and threatened that if he did not shut down his factory, "it would not be good for [his family]." Because of Taliban presence and support in Peshawar and fearing for their safety, Mr. Manan's family relocated to Nangarhar; however, as he was still attending secondary school, Mr. Manan was sent to live with his maternal uncle in another area in Peshawar to finish his studies. During summer vacations every year, Mr. Manan would return to Afghanistan to be with his family.

[5] Post-graduation, Mr. Manan returned to Nangarhar to visit his family. Against his father's warnings not to, Mr. Manan was playing cricket with friends outside his house on July 14, 2013 when he allegedly was kidnapped at gunpoint by five masked men. Mr. Manan suspects the men injected him with something, as he lost consciousness once forced into one of their two vehicles. When he awoke, Mr. Manan was tied and chained to the floor in a cell, which he describes in detail. He allegedly later was informed by one of his captors that they were in Kunar in an area under Taliban control.

[6] Approximately 7 months after his initial abduction, the kidnappers informed Mr. Manan they were going to call his father. He was instructed to tell his father that if he did not do what they demanded, they would kill him. Mr. Manan complied and conveyed these threats. Mr. Manan alleges that following this call, his kidnappers frequently came to his room to threaten him with guns, knives, and death threats. He also was kicked on a number of occasions and told he and his family were not true Muslims, as they dealt and collaborated with the Afghan government and Americans.

[7] Around June 5, 2014, four months after he had last spoken to his father, Mr. Manan was allegedly visited by three men. After being told everything would be okay, he was secured and once again lost consciousness. When he awoke, he was in a vehicle with his father and two cousins on his way home to Nangarhar province. His father later told him he had paid a ransom of $50,000 US dollars the abductors demanded for his release.

[8] Mr. Manan explained the small, dark space where he was held for months in isolation and with constant threats to his life significantly and negatively affected his mental health. For a long time, he wanted only to remain in his room alone with the lights off; he cried frequently [as he also did while in captivity]; he angrily told his parents to leave whenever they entered the room; and he refused to socialize with friends. Eventually his parents sent him to see a doctor who prescribed relaxation medicine which he did not take, fearing it would affect his ability to continue his studies. He nonetheless was unable to continue pursuing his studies because of the state he was in.

[9] One month after his release, he and his family moved to Kabul. Production at the paint factory, which had allegedly ceased during Mr. Manan's kidnapping, resumed slowly. Four months later, however, the Taliban murdered a factory worker, prompting Mr. Manan's father to once again stop production. An individual purportedly from the Taliban later contacted Mr. Manan's father and told him the Taliban would kill them all as they had not heeded the prior warnings to cease production. This man allegedly knew the family had relocated from Peshawar to Nangarhar, and from Nangarhar to Kabul.

[10] Fearing for their lives, one of Mr. Manan's brothers and two uncles returned to the UK where they held citizenship. Mr. Manan's father – the main provider for the family – chose not to leave and stayed in his house, unless necessary, for fear of being targeted. Mr. Manan alleges his father, despite having arranged for a USA student visa for Mr. Manan [to attend English as a Second Language training in connection with his acceptance into a USA college], advised him to travel to Canada and claim refugee protection once he arrived, as a student visa offered no

guarantee of permanent status and a former cousin's refugee application in the USA had failed. In short, his father believed Mr. Manan would be more likely to get protection in Canada from the persecution he faced in Afghanistan.

[11] Mr. Manan first arrived in New York, USA, on December 16, 2015. He then took a taxi to Washington, DC, and from there flew to Seattle. He next took a city bus to Blaine, walked through the Peace Arch Park, and then took a taxi to Vancouver, BC, Canada. Though his father allegedly had advised him to make his refugee claim in Vancouver, Mr. Manan took a bus to Toronto, as he knew more about the city from prior research, but did not realize the bus trip would take three days. Upon arrival in Toronto, he claimed refugee protection at the police station. In turn, the police officers contacted the Canada Border Services Agency, which placed Mr. Manan in immigration detention until January 8, 2016. Once released, Mr. Manan stayed at Youth Without Shelter, and was referred to a lawyer who provided him with advice and assistance in preparing his refugee claim.

III. RPD Decision

[12] After three hearings spanning two months, the RPD rejected Mr. Manan's claim on August 10, 2017 for lack of credibility in respect of both his experience in Afghanistan and his future risk were he to return there. In short, the RPD found Mr. Manan's evidence implausible and vague, and concluded that on a balance of probabilities the abduction in Afghanistan had not happened but was rather "a story concocted for the purposes of [his refugee] claim." As such, the RPD dismissed Mr. Manan's allegations of future risk, namely that he would be targeted on return because of his family's business, as speculative and insufficient to support a finding

Mr. Manan faced more than a mere possibility of persecution or risk of harm under IRPA s 97(1).

[13] In dismissing his allegations, the RPD found:

A. Mr. Manan had made no mention of "physical harm other than being tied up and injected with something which rendered him unconscious" in his Basis of Claim [BOC] narrative, but had testified he was beaten when asked about the origin of the scars in his accompanying photographs. The RPD found this omission material and problematic;

B. The medical letter Mr. Manan provided deserved little weight as it repeated Mr. Manan's allegations that he was abducted and beaten, and it did not explain the origins of his scars; the RPD found it was equally plausible the scars resulted from "the sort of minor injuries suffered by most boys in the course of childhood";

C. It was implausible that, apart from obtaining a prescription for medication to treat depression, Mr. Manan was not taken for a medical check after his release given his allegation he was tied up, beaten, and drugged into unconsciousness during the eleven months he was held captive;

D. The psychological report deserved no weight because the assessor did not state how he knew Mr. Manan's post-traumatic symptoms resulted from the alleged abduction, and therefore could not corroborate his allegations;

E. The letter from a counsellor at the Centre for Victims of Torture, though it confirmed Mr. Manan attended counselling and workshops, could not corroborate Mr. Manan's allegations in any way; and

F. The family's letters, which contained brief statements confirming the abduction, deserved "zero" weight because their contents were non-descriptive, vague, and the events only could be corroborated by the absentee father. The RPD noted Mr. Manan had failed to explain convincingly the father's absence or to contact other family members or business contacts concerning his father's whereabouts. Moreover, it was of the view his one brother's telephone testimony tended towards vague generalities, and it was highly improbable that the brother, who was an adult living at home during the relevant period, could not provide more details about Mr. Manan's abduction when given two opportunities through open ended questions.

[14] Moreover, the RPD found it implausible that Mr. Manan was the only family member targeted (of his father and seventeen siblings) just days after his return, despite Mr. Manan's family being threatened for many years. As it had already impugned Mr. Manan's credibility on other grounds, the RPD thus rejected his explanation he was less security-conscious than the rest of his family.

[15] Finally, the RPD found the country-specific documentary evidence of risk from the Taliban was generalized and, without credible testimony, there was insufficient evidence to conclude Mr. Manan in the past was, or in the future would be, targeted specifically based on his father's profile.

IV. Impugned RAD Decision

[16] Asserting it conducted its own analysis of the record , the RAD confirmed the RPD's determination that Mr. Manan was not a Convention refugee or person in need of protection and dismissed the appeal: IRPA s 111(1)(a); *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 58-59, 64, 78-79, 103.

[17] According to the RAD, Mr. Manan's credibility centred on whether he suffered physical injuries during his alleged 11-month abduction. While Mr. Manan testified that during his captivity he had been assaulted, had weapons pointed at him, threatened with death and injected with an unknown chemical on at least two occasions, the RAD noted he did not state in his BOC that he suffered physical injuries during his alleged abduction. The RAD found these omissions unreasonable as his injuries went directly to the heart of his claim, were outlined in a physician's letter, and disclosure of such was explicitly required per the RAD Rules: *Abiodun Napoleon v Canada (Citizenship and Immigration)*, 2011 FC 822 at para 30; *Kroka v Canada (Citizenship and Immigration)*, 2012 FC 728 at para 17; *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], Rule 3(3)(g). Moreover, the RAD noted Mr. Manan did not directly challenge the RPD's credibility conclusions or otherwise clarify the oral or written testimony he provided to the RPD in this respect. Though the RAD did not dispute Mr. Manan had the injuries outlined in the physician's letter, the RAD accorded this evidence little weight, finding it (a) could not verify how the injuries were sustained: *Egbesola v Canada (Citizenship and Immigration)*, 2016 FC 204 at para 12; and (b) was written four years after the alleged abduction. The RAD was of the view that it would have been reasonable for Mr. Manan to seek medical assistance to treat not

only his psychological state but also to determine if he had suffered physical injuries, which he did not do. The RAD also found it unreasonable Mr. Manan's family members [father and brother] failed to indicate, in their written and oral testimony, that he had received physical injuries while abducted.

[18] On appeal, Mr. Manan sought to admit a letter from his father explaining his absence and subsequent inability to testify, and to provide further information on the kidnapping. The RAD declined to admit the letter as it was not dated; without a date, the RAD asserted it could not determine when the letter was written and hence whether it met the admissibility requirements of IRPA s 110(4): *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 44. As a result, the RAD declined to hold a new oral hearing: IRPA s 110(6).

[19] Finally, the RAD agreed with the RPD Mr. Manan was not at future risk. Noting Mr. Manan alleged his family was at risk because they owned a business, the RAD found there was a lack of evidence his family members suffered any harm at the hands of the Taliban and found it was not credible that he was the only individual in his family to have suffered at the hands of the Taliban. The RAD also gave no weight to a psychological report diagnosing Mr. Manan with posttraumatic stress symptoms as the report was based on Mr. Manan's allegations which the RPD found not to be credible.

V. Issues

A. Did the RAD err by failing to admit Mr. Manan's proposed new evidence, pursuant to IRPA s 110(4)?

B. Did the RAD err in endorsing the RPD's credibility finding?

C. Did the RAD err in its IRPA s 97 (future risk) assessment?

VI. New Framework for Determining and Applying Applicable Standard of Review

[20] On December 19, 2019, the Supreme Court of Canada [SCC] issued its much anticipated decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], adopting "a revised framework for determining the standard of review where a court reviews the merits of an administrative decision" - having as the starting point "a [rebuttable] presumption that reasonableness is the applicable standard in all cases" - and providing "better guidance … on the proper application of the reasonableness standard": *Vavilov*, above at paras 10-11. I find none of the situations in which the presumption of reasonableness is rebutted [summarized in *Vavilov*, above at para 69] is present in the instant proceeding.

[21] Regarding reasonableness review, the SCC further stated in *Vavilov*, above at para 13:

> Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[22] In a nutshell, "[i]n conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov*, above at para 15.

[23] Regarding procedural fairness and reasonableness, the SCC held at *Vavilov*, above at para 81:

> … The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[24] A principled approach to reasonableness review puts the reasons first, "…by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion": *Vavilov*, above at para 84. The focus of reasonableness review, therefore, must be on the decision, including the decision maker's reasoning process and the outcome. The reviewing court must consider only whether the decision, taking into account the rationale and outcome, was unreasonable, and must avoid substituting its own analysis or preferred decision: *Vavilov*, above at para 83. As noted by the SCC, "[t]he burden is on the party challenging the decision to show that it is unreasonable. …the court must satisfied that any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable": *Vavilov*, above at para 100.

[25] The SCC found two types of fundamental flaws useful to consider: "[t]he first is a failure of rationality internal to the reasoning process"; and "[t]he second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it": *Vavilov*, above at para 101. In other words, to be considered reasonable, the decision must be based on rational and logical reasoning: *Vavilov*, above at para 102. The SCC defined a

reasonable decision as "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" and held that "… a reviewing court [must] defer to such a decision": *Vavilov*, above at para 85. The SCC also found, however, "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons…": *Vavilov*, above at para 86 [emphasis in original]. The decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility – and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, above at para 99. "[W]here reasons are provided but they fail to provide a transparent and intelligible justification …, the decision will be unreasonable": *Vavilov*, above at para 136. Written reasons, however, "must not be assessed against a standard of perfection": *Vavilov*, above at para 91. Rather, "they must be read holistically and contextually, for the purpose of understanding the basis on which a decision was made": *Vavilov*, above at para 97.

[26] In short, "judicial review is concerned with both outcome and process" when considering whether the challenged decision was unreasonable, having regard to the chain of analysis [was it internally coherent, rational and justified?] in relation to the facts and law that constrain the decision maker: *Vavilov*, above at para 87. With this framework and guidance in mind, I turn to the analysis of the challenged RAD decision, including the reasoning and outcome. I add that the instant matter was heard the same week as the SCC released the *Vavilov* decision. Both parties advocated the applicability of the reasonableness standard as articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9 and intervening cases. The reasonableness standard continues to apply

to this matter, albeit as rearticulated in *Vavilov*, with no difference to the outcome before this Court.

VII. Relevant Provisions

[27] The applicable provisions are found in Annex A.

VIII. Analysis

A. Did the RAD err by failing to admit Mr. Manan's proposed new evidence, pursuant to IRPA s 110(4)?

[28] I am of the view the RAD erred in its superficial consideration of the letter from Mr. Manan's father. The RAD stated in paragraph 20 of its decision: "…The RAD's analysis of the admissibility of the proposed new evidence will be carried out pursuant to the test set out in subsection 110(4) and in accordance with the Federal Court of Appeal Decision in *Singh* [cited above at para 44]." Paragraph 44 of *Singh* provides:

> … it would be difficult to argue that the criteria set out by Justice Sharlow in Raza do not flow just as implicitly from subsection 110(4) as from paragraph 113(a). It is difficult to see, in particular, how the RAD could admit documentary evidence that was not credible. Indeed, paragraph 171(a.3) expressly provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances." It is true that paragraph 110(6)(a) also introduces the notion of credibility for the purposes of determining whether a hearing should be held. In that regard, however, it is not the credibility of the evidence itself that must be weighed, but whether otherwise credible evidence "raises a serious issue" with respect to the general credibility of the person who is the subject of the appeal. …" [Bold emphasis added.]

[29] This is not how the RAD proceeded, however. It neither considered the letter for context to discern the approximate date of the letter in a timeframe subsequent to the RPD hearing [which is apparent on the face of the letter], nor considered whether the letter was "otherwise credible" and thus potentially supported Mr. Manan's credibility. On the contrary, the RAD disallowed the letter on the basis that it was not dated and therefore the RAD could not ascertain whether the letter met the requirements IRPA s 110(4), which provides:

> On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or **that was not reasonably available**, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. [Bold emphasis added.]

[30] As noted in *Akanniolu v Canada (Citizenship and Immigration)*, 2019 FC 311 at para 40:

> In *Singh* at para 63, the Federal Court of Appeal emphasized that the RAD cannot disregard the clear statutory criteria of subsection 110(4). In addition, the factors established in *Raza* at paras 13-14 (credibility, relevance, newness, and materiality) remain applicable to determinations by the RAD to admit new evidence. The Federal Court of Appeal added that only evidence that meets the criteria set out in subsection 110(4) is admissible.

[31] Yet the RAD in the instant matter, after mentioning the statutory criteria of IRPA s 110(4), proceeded to disregard them. Although the father's letter is not dated, a "technicality" as pointed out by Mr. Manan's counsel at the hearing, the letter itself and the accompanying affidavit of Mr. Manan provide a timeframe for the letter, that is sometime after the RPD hearing [content of letter], namely mid-October 2017 [content of accompanying affidavit]. Unreasonably, the RAD made no mention of the accompanying affidavit. Moreover, both the letter and the accompanying affidavit explain why the evidence, though it existed at the time,

was not available at the RPD hearing and why Mr. Manan's father was not available to give oral testimony at the hearing.

[32] The Minister submits Mr. Manan was required to provide the evidence contained within his father's second letter at the time of his hearing, and it was therefore reasonable for the RAD to exclude this evidence because it was not new information to begin with: *Singh*, above; *Dhrumu v Canada (Citizenship and Immigration)*, 2011 FC 172 at para 27. Given Mr. Manan reasonably knew this information was necessary to his claim and that his father may not be available for the second hearing, he should have requested an adjournment. Such an explanation, however, was not provided by the RAD, who as discussed above discounted the letter solely for lack of a date, and thus does not save the intelligibility of the RAD's decision making process.

[33] While "[t]he role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD" [*Singh*, above at para 54], nonetheless it was incumbent on the RAD to justify its conclusion regarding the admissibility of this evidence, by way of its reasons, in a transparent and intelligible manner, having regard to the record as a whole and the applicable legal constraints. This the RAD did not do.

[34] The RAD's decision, on this issue alone, is unreasonable in that it is not "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*, above at para 85. Furthermore, *Vavilov* clearly instructs that "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for [or, to supplement] the outcome": *Vavilov*,

above at para 96. In an effort to limit, however, to the extent possible, the "endless merry-go-round of judicial reviews and subsequent reconsiderations," I will address the remaining two issues: *Vavilov*, above at para 142.

B. Did the RAD err in endorsing the RPD's credibility finding?

[35] Mr. Manan submits the RAD erroneously endorsed the RPD's decision without conducting its own meaningful independent assessment: *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 [*Rozas del Solar*] at paras 125-126, 130, 135-136; *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702 at para 28; *Eng v* Canada *(Citizenship and Immigration)*, 2014 FC 711 at paras 29, 34. This approach led to the RAD missing important errors. For example, Mr. Manan asserts the RPD/RAD should make [im]plausibility findings only in the clearest of cases, as imposing Canadian standards of reasonableness may lead to unacceptable speculation and ignore diverse cultural practices: *Afonso v Canada (Citizenship and Immigration)*, 2007 FC 51 at para 26; *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at paras 28-33*; Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*] at paras 7-9 and 26; *Mahmood v Canada (Citizenship and Immigration)*, 2005 FC 1526 at para 16. In his case, he submits it was not implausible he only sought medical attention for his psychological state, as his physical injuries following the kidnapping were "very minor"—a fact accepted by the RPD. He asserts both the RPD and the RAD, in finding this implausible, failed to consider (a) his medical concerns were psychological in nature, for which his parents eventually sent him to the doctor and for which he was prescribed medicine; (b) his physical injuries were relatively minor; and (c) his physical injuries were healed at the time of his release when concluding such.

[36] Meanwhile, the Minister submits it is legitimate to impugn a claimant's credibility where the claimant fails to mention important facts in their BOC but later describes these events in oral testimony: *Sanchez v Canada (Citizenship and Immigration)*, [2000] FCJ No 536 (FCTD) at paras 5-9. Asserting Mr. Manan did not challenge these credibility concerns on appeal to the RAD, the Minister maintains Mr. Manan's negative credibility finding was reasonable and thus determinative: *Liu v Canada (Citizenship and Immigration)*, 2015 FC 207 at para 28; *Quintero Cienfuegos v Canada*, 2009 FC 1262 at paras 25-26.

[37] The Minister further submits this was not a case of applying unreasonable western standards to a different cultural context but was instead a case of insufficient evidence and credibility concerns, which falls within the jurisdiction of the trier of fact [RPD/RAD]: *Brar v Canada (Minister of Employment and Immigration)*, [1986] FCJ No 346 (FCA); *Castro v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 787 (FCTD). Accepting Mr. Manan's testimony was presumed to be true at the outset, the Minister submits it may be rebutted where evidence is not credible or is implausible, as in this case: *Veloz Gudino v Canada (Citizenship and Immigration)*, 2009 FC 457 at para 18.

[38] A refugee claimant's testimony is presumed to be true where the facts are within their personal knowledge unless there are clearly explained reasons for doubting it: *Maldonado v Canada (MEI)*, [1980] 2 FC 302; *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (QL) (FCA) at para 6. Moreover, except where it is clearly explained why the RPD enjoys a meaningful advantage in assessing an applicant's credibility, for example by

relying on demeanour evidence which cannot be replicated on the record, the RAD must conduct its own credibility assessment: *Rozas del Solar*, above at paras 93, 106.

[39] First, I agree the RAD unreasonably conflated the importance of Mr. Manan's physical injuries when assessing his claim. Mr. Manan's BOC narrative referred to being kicked on a number of occasions; it did not mention specifically injuries that resulted from the alleged treatment by his captors. He also testified his major concerns were psychological and he did not leave the house until these became major, causing his parents to send him to the doctor. It is clear the central aspect of his claim was not his physical injuries, but the kidnapping and subsequent mental trauma that arose from it. The RAD's focus properly should have been what his evidence does say, when considered in light of Mr. Manan's own testimony, photographs of his scars, the physician's letter and the clinical psychologist's letter, about his alleged injuries, both physical and psychological, rather than what it doesn't: *Feng v Canada (Minister of Citizenship and Immigration)*, 2019 FC 18 at para 37.

[40] Second, I note the RAD illogically discounted the psychological report or letter of clinical psychologist. While the report was based in part on Mr. Manan's allegations which the RPD found to be not credible, the psychologist's report also was based on his own observations of Mr. Manan in a one and a half hours meeting and his own expertise, neither of which was mentioned by the RAD in assigning no weight to the report. The extent to which the RAD actually considered the report cannot be discerned nor inferred from its decision, as the RAD decision refers to "the Appellant … suffering from PTSD" when the report in fact states: "…although Mr. Manan does not meet the full DSM 5 criteria for Posttraumatic Stress Disorder

(PTSD), he is experiencing **Posttraumatic Stress symptoms**." [Bold emphasis in original.] In short, while the hearsay evidence contained in medical documents reasonably may be considered to carry little to no weight, decision makers cannot be said to have discounted medical or health-related diagnoses reasonably where they are based on the doctor's or other health care provider's own expertise.

[41] Third, I find the RAD erroneously found Mr. Manan did not challenge the RPD's credibility concerns or provide any additional evidence to clarify what was before the RPD: Rule 3(3)(g)(i) and (iii) of the RAD Rules. I note that in his RAD submissions ["Memorandum of Argument"], Mr. Manan pointed to errors he believed the RPD had made, both with respect to its treatment of evidence and with respect to credibility concerns. For example:

> "The member erred in his credibility findings in this area of evidence [referring to Mr. Manan's failure to locate his father], and erred in finding it implausible that the Appellant's older brother … would have been given few details by his father."
>
> …
>
> "It is also an error to draw a negative inference from candid testimony that is reasonable. Where the Board finds a lack of credibility based on inferences, there must be a basis in the evidence to support the inferences. **It is not open to Board Members to base their decision on assumptions and speculation for which there is no evidentiary basis** [footnote number omitted]**, such as what the Member finds is a plausible information sharing in a traditional Afghan family.**" [Bold emphasis added.]

[42] It is therefore illogical to say he did not plead these errors.

[43] Fourth, I note the RAD's negative credibility assessment, which was used to justify excluding his testimony, focuses on Mr. Manan's alleged failure to (a) describe in his BOC the physical injuries he received while held captive, and (b) seek medical attention for these injuries upon his release. In my view, these were unreasonable conclusions for the RAD to draw. As emphasized by Mr. Manan, his BOC specifically mentions these assaults:

> "On a number of occasions, they [the kidnappers] also kicked me as they were entering or leaving the room."

[44] A BOC is expected to contain an overview of the material details of a refugee claimant's story, including all the important facts and details of the claim, and failing to do so can affect the credibility of all or part of a claimant's testimony: *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 [*Ogaulu*] at para 18. It serves to put the RPD on notice of the aspects [and possible issues] of a claimant's story, so that the RPD accordingly can prepare to test and verify the claimant's story. This Court long has accepted a claimant may provide details in oral testimony not included in a personal information form, and this will not serve to impugn an applicant's credibility, so long as the omitted information is not significant to the claim: *Ogaulu*, above at para 19, citing *Selvakumaran v Canada (Minister of citizenship and immigration)*, 2002 FCT 623 at para 20.

[45] In my view and as discussed, Mr. Manan's claim is not based on the physical violence he endured during his captivity; it is based on the fact he was allegedly forcibly abducted and held because of his family's business and perceived support for the Afghan government, USA and its allies. Mr. Manan therefore was not required to provide any more detail than he did when describing his physical wounds in his BOC; to require otherwise is an unacceptable microscopic

analysis of his evidence. I note when he was prompted by the RPD to explain how he received the scars for which he provided photographs, Mr. Manan merely reiterated he was hit and kicked and was “almost naked”. This testimony is consistent with his BOC, and in my view does not amount to embellishment. The RAD therefore was unreasonable in using this evidence to impugn his credibility, rather than assessing whether the photographs helped corroborate his claim.

[46] I also agree the RAD also was unreasonable for finding it implausible Mr. Manan had not sought medical attention for his physical wounds upon being released. Findings of implausibility are permissible only in the clearest of cases: *Valtchev*, above at para 7; *XY v Canada (Citizenship and Immigration)*, 2020 FC 39 at para 49. As cautioned in *Valtchev*, “[a] tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu”: *Valtchev*, above at para 7.

[47] The circumstances in which Canadians might seek professional medical care should not be superimposed upon non-Canadians, especially those living in highly-volatile environments such as Afghanistan and suffering from psychological trauma. I note both Mr. Manan and the RAD liken Mr. Manan’s physical injuries to minor [childhood] injuries—*i.e.* not very serious. Further, both Mr. Manan and his brother provided evidence their family did not leave their house unless absolutely necessary because of ongoing security concerns, concerns which are reinforced in the [disallowed] father’s letter. Moreover, Mr. Manan’s evidence is that following his release

he spent most of his time secluded in his room with the lights off because of his mental state. With this in mind, it is not implausible for Mr. Manan to believe his physical injuries did not demand professional medical attention, and thus to not attend a physician upon his release from his alleged captivity. His parents eventually sent Mr. Manan to see the doctor for his psychological state. The RAD made no mention of this visit, nor did it consider whether this corroborated his claim that he suffered ongoing psychological, but not physical, distress. The RAD's failure to do so was unreasonable. Moreover, its failure was compounded by its apparent failure to consider the clinical psychologist's report, having assigned no weight to it by reason of the RPD's credibility findings.

C. Did the RAD err in its section 97 (future risk) assessment?

[48] Mr. Manan asserts the RAD erred in several respects in its IRPA s 97 analysis by failing to (a) appreciate Mr. Manan's family was targeted because their business supplied paint to foreign and domestic companies that work on government-run projects; (b) assess whether the threat letter received from the Taliban, and Mr. Manan's father's second letter [which mentioned the killing of an employee of the family business by the Taliban but which the RAD refused to admit], sufficiently demonstrated ongoing risk because of the family's business interests; (c) acknowledge threats of violence also should factor into the assessment of future risk, as physical harm is not a precondition for assessing future risk; and (d) make adequate reference to the objective country evidence on country conditions, which is must do even where it rejects a claim based on credibility: *Attakora v Canada (Minister of Immigration and Employment)* (1989), 99 NR 168 (FCA) at para 13; *SS v Canada (Citizenship and Immigration)* (1999), 167 FTR 140.

[49] Mr. Manan submits the RAD was required to identify his specific risk factors and consider whether these were personalized or generalized: *Ortega Arenas v Canada (Citizenship and Immigration)*, 2013 FC 344 [*Ortega Arenas*] at para 9, relying on *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 [*Portillo*] at paras 40-41. Pointing to excerpts from the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (NDP Item 1.5) and the US DOS Country Reports on Human Rights Practices in Afghanistan (NDP Item 2.1), he submits there was ample evidence to support that he fit IRPA s 97 requirements. The RAD therefore conducted a reviewable error by failing to consider and assess this evidence: *Johal v Canada (Citizenship and Immigration)*, [1997] FCJ No 1760 (FCTD) at para 10. I add this applies equally to the previous issue concerning Mr. Manan's credibility and the evidence pertaining to his psychological state given its centrality to his claim.

[50] The Minister asserts the RAD's IRPA s 97 decision must be considered in the context of its credibility findings. Because his testimony was not credible and he failed to provide sufficient additional evidence on his alleged risk profiles, Mr. Manan's claim was insufficient. The RAD's conclusion was therefore reasonable in the circumstances.

[51] IRPA s 97 offers protections to claimants whose individual profile places them at a higher risk as compared to the general population, regardless of whether they fit under a *Convention* ground. Justice Norris recently summarized the two-part test applicable to the IRPA s 97 analysis: *Komaromi v Canada (Citizenship and Immigration)*, 2018 FC 1168 at paras 25-26, citing *Portillo*, above:

> [25] … First, the RPD should consider whether there is an ongoing future risk, and if so, what precisely the risk is. Once this is done, the RPD must next compare the risk faced by the claimant to that faced by a significant group in the country of nationality to determine whether the risks are of the same nature and degree. If the risks are not the same, the claimant will be entitled to protection under section 97. See *Portillo* at paras 40-41. As Justice Gleason later explained in *Ortega Arenas v Canada (Citizenship and Immigration)*, 2013 FC 344 (CanLII), the second step in the inquiry "is a forward-looking inquiry and is concerned not so much with the cause of the risk but rather with the likelihood of what will happen to the claimant in the future as compared to all or a significant segment of the general population" (at para 14).
>
> [26] *Correa [Correa v Canada (Citizenship and Immigration)*, 2014 FC 252] is consistent with this analytical framework. As I understand his reasons, what Justice Russell was attempting to do there was reconcile two lines of authority in this Court concerning how to distinguish between personal and generalized risk. In *Correa*, as in some other cases under section 97, the reviewable error arose from the RPD conflating the reason for targeting with the risk itself (at paras 93-94). Thus, in the case of, say, a business person who had been targeted for extortion, it would be an error for the RPD to find that the risk was generalized because business people generally are targeted for extortion without considering the particular manner in which the claimant had been targeted in the past and whether it gave rise to an ongoing future risk to the claimant personally as compared to others.

[52] Mr. Manan's s 97 claim is premised on him allegedly being abducted because his family is perceived as supporters and collaborators with the Afghan government, USA and allies [*i.e.* Western influences and interests] because of their family paint business. As part of this claim, Mr. Manan provided testimonial and documentary evidence on his family's business, and both he and his family attested to the threats the family received as a result of their business contracts with Western/Afghan government-affiliated parties. The targeting of individuals with such profiles is corroborated by objective information found in the National Documentary Package for Afghanistan: NDP Items 1.5 and 2.1. When the RPD dismissed this as insufficient, Mr. Manan

included this as a ground of appeal to the RAD. The RAD therefore was required to conduct a new or its own assessment on this ground.

[53] Instead of engaging with this evidence, the RAD found that since Mr. Manan's kidnapping allegations were not credible, he faced no forward-looking risk. The problem with this approach is that the RAD did not impugn Mr. Manan's entire credibility, only that which related to his alleged kidnapping. As such, evidence that Mr. Manan's family was in the paint business, had allegedly received threat letters from the Taliban [a copy of which was provided], the family's periodic relocations within Pakistan and Afghanistan, as well as the relocation of some family members to the United Kingdom, and the shuttering and reopening of the factory because of such threats, remained on the record, and consequently required consideration. The RAD never considered whether by virtue of this business he and his family were at a heightened degree of risk relative to the rest of the population, as is required under IRPA s 97.

[54] As detailed at great length in *Rozas del Solar*, the RAD conducts a full, fact-based appeal in recognition that an overarching objective of Canada's refugee program under IRPA is saving real lives: *Rozas del Solar*, above at paras 135-136; IRPA s 3(2)(a). It therefore was incumbent on the RAD to assess Mr. Manan's risk as a perceived Afghan government supporter and Western-collaborator and the consequent alleged impacts on his family, including death threats against family members, Mr. Manan's abduction for ransom, and the killing of an employee of the family business. Not having done so renders the decision unreasonable.

IX. Conclusion

[55] In my view, the RAD failed to conduct a full and holistic analysis of the record to determine if the RPD erred and thereby erred itself in its treatment of Mr. Manan's proposed new evidence, in endorsing the RPD's credibility findings and in failing to conduct a robust s 97 assessment. This judicial review application therefore is granted; the RAD's decision is set aside; and the matter is to be remitted to a differently constituted RAD for redetermination. Neither party proposed a serious question of general importance for certification.

JUDGMENT in IMM-6557-18

THIS COURT'S JUDGMENT is that: the judicial review application is granted; the Refugee Appeal Division's decision is set aside; the matter is to be remitted to a differently constituted Refugee Appeal Division for redetermination; and there is no question for certification.

"Janet M. Fuhrer"
Judge

ANNEX A: Applicable Provisions

[1] Part 2 of the IRPA governs Canada's refugee regime. Canada confers refugee protection upon individuals who are found to be Convention refugees or persons in need of protection: IRPA ss 95-97.

Immigration and Refugee Protection Act (S.C. 2001, c. 27)	**Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)**
95 (1) Refugee protection is conferred on a person when	**95 (1)** L'asile est la protection conférée à toute personne dès lors que, selon le cas :
(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;	**a)** sur constat qu'elle est, à la suite d'une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
(b) the Board determines the person to be a Convention refugee or a person in need of protection; or	**b)** la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;
(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.	**c)** le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).
(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).	**(2)** Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa

membership in a particular social group or political opinion,	religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	**a)** soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	**(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	**(ii)** elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions,	**(iii)** la menace ou le risque ne résulte pas de sanctions

unless imposed in disregard of accepted international standards, and	légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[2] At first instance, the RPD is the authorized decision maker in respect of a refugee claim: IRPA s 107(1).

107 (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.	**107 (1)** La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

[3] Applicants who are not otherwise precluded from doing so may appeal their negative RPD decisions to the RAD: IRPA s 110(1).

110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a	**110 (1)** Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte —

decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

[4] On appeal to the RAD, applicants may present only evidence that arose after the rejection of their claim, that was not reasonably available at the time of their claim, or that they could not reasonably have been expected in the circumstances to have presented: IRPA s 110(4).

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[5] In deciding whether to admit this new evidence, the RAD will consider several factors: RADR at Rules 29(1) and (4); IRPA s 171(a.3).

Refugee Appeal Division Rules (SOR/2012-257)	**Règles de la Section d'appel des réfugiés (DORS/2012-257)**
29 (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.	**29 (1)** La personne en cause qui ne transmet pas un document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.
…	…
(4) In deciding whether to	**(4)** Pour décider si elle

allow an application, the Division must consider any relevant factors, including	accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :
(a) the document's relevance and probative value;	**a)** la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the appeal; and	**b)** toute nouvelle preuve que le document apporte à l'appel;
(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.	**c)** la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.
171 In the case of a proceeding of the Refugee Appeal Division,	**171** S'agissant de la Section d'appel des réfugiés :
…	…
(a.3) the Division may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;	**a.3)** elle peut recevoir les éléments de preuve qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;

[6] The RAD and may confirm or substitute the RPD decision, or refer the matter back for re-determination: IRPA s 111(1).

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	**111 (1)** La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.
(a) confirm the determination of the Refugee Protection Division;	

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

FEDERAL COURT

SOLICITORS OF RECORD

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