

Federal Court



Cour fédérale

Date: 20200915

Docket: IMM-5393-19

Citation: 2020 FC 896

Toronto, Ontario, September 15, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

ALI WAQAS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This application judicially reviews a decision of the Refugee Appeal Division (RAD) to dismiss the Applicant's appeal on the ground that it lacked jurisdiction to hear the case. For the following reasons, I would dismiss the application for judicial review.

I. Background

[2] The Applicant, Mr. Waqas, is a 31-year-old citizen of Pakistan and a Shia Muslim. He claims that the Pakistan People's Party (PPP) targeted him and his family due to their support of the opposing Pakistan Muslim League Noon party. In particular, he claims that PPP supporters kidnapped and beat him in 2004, and again in 2006, and that they continue to harass his family.

[3] Mr. Waqas alleges that in 2009, his father sent him to Ecuador after death threats were directed at him. He subsequently moved to several different cities before arriving in the United States in 2014. Although he was initially issued a deportation order and spent over four months in immigration detention, he was eventually granted a work permit. He submitted a renewal application about a month prior to its expiry but never received a reply.

[4] Mr. Waqas entered Canada in May 2017 and sought refugee protection, citing his fear of being killed by PPP supporters upon return to Pakistan.

[5] In a decision dated September 6, 2018, the Refugee Protection Division (RPD) rejected Mr. Waqas' claim for refugee protection. The RPD found Mr. Waqas to lack credibility and believed his story to be a fabrication. The RPD concluded that Mr. Waqas was neither a Convention refugee nor a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] and that there was no credible basis to his claim under section 107 of the Act.

[6] Mr. Waqas claims that, by following the advice of his former counsel to appeal the RPD decision to the RAD at a time during which he was under great stress, he did not file an

application for judicial review of the decision and consequently missed the deadline to do so. The RAD decision is now the subject of this judicial review.

II. Decision under Review

[7] In a four-paragraph decision dated August 7, 2019 (Decision), the RAD dismissed the appeal. The RAD determined that it had no jurisdiction to hear the appeal pursuant to subsection 110(2) of the *Act*, which provides that no appeal may be made of an RPD decision rejecting a claim for refugee protection based on a finding that the claim has no credible basis.

III. Issues and Standard of Review

[8] Mr. Waqas raises several issues in his memorandum. However, none of these issues concerns the RAD Decision. Instead, though referring to the “Board” generally, the issues he raises – both procedural and substantive in nature – relate to the hearing and decision of the RPD. The specific errors alleged are:

1. The RPD breached procedural fairness by conducting a hearing with incompetent interpretation;
2. Mr. Waqas was denied procedural fairness through the incompetence of his counsel before the RPD;
3. The RPD’s decision was unreasonable; and
4. The RPD Member was biased.

[9] At the time he filed his written arguments in early October 2019, Mr. Waqas was not represented by counsel. Mr. Waqas did engage counsel to represent him before this Court in

March 2020. No further written submissions were filed between that time and the judicial review hearing. At the hearing, Mr. Waqas' counsel conceded that his client had not served his former representative(s), and was no longer challenging their competency before this Court. I agree that this concession was the principled position to take given the failure to follow the Federal Court's March 7, 2014 Protocol on Allegations Against Counsel, or to otherwise alert prior counsel to the allegations.

[10] Mr. Waqas' counsel, however, raised a new argument that did not appear anywhere in his written arguments, namely that the Court should stay its decision for a period of 30 days (or longer) to allow for his client to challenge the RPD decision as should have been done originally. The Court need not consider arguments raised at the 11th hour – in this case, at the hearing itself (see, for instance, *Yue v Bank of Montreal*, 2020 FC 468 at para 39). I will nonetheless consider the argument, and in so doing so, will reframe the questions the Court is being asked to answer as:

1. Did the RAD err in dismissing the appeal?
2. Should the Court consider the arguments regarding the RPD hearing and decision?
3. If the above question is answered in the affirmative, should the Court interfere with the RPD decision?

[11] The merits of administrative decisions – including decisions of the RPD and the RAD – are presumptively reviewed on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). In this case, neither legislative intent nor the rule of law rebuts this presumption. In reviewing for reasonableness, this Court asks “whether the decision bears the hallmarks of reasonableness – justification, transparency and

intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

IV. Analysis

A. *Was the RAD Decision Reasonable?*

[12] Mr. Waqas does not raise any arguments that specifically relate to the RAD Decision. He does not allege that the Decision was unreasonable (or, for that matter, that he was denied procedural fairness before the RAD). Nonetheless, because the RAD Decision is the subject of this judicial review, I will briefly explain why it is reasonable. The Decision spans a mere four paragraphs, which read as follows:

[1] Mr. Ali Waqas is a citizen of Pakistan. He appeals the decision of the Refugee Protection Board (RPD) rendered on 6 September 2018, rejecting his claim filed pursuant to section 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA).

[2] Pursuant to section 107(2) of the IRPA, the RPD concluded that there was no credible basis for the claim.

[3] Section 110(2) of the IRPA provides that no appeal may be made of “a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis ...”.

[4] Consequently, the RAD had no jurisdiction to hear this case.

[13] Subsection 110(2) of the *Act* places restrictions on when a decision of the RPD may be appealed. In particular, as noted by the RAD, paragraph 110(2)(c) prevents an appeal where the RPD decision states that the claim has no credible basis. In this case, the RPD found that there was “no credible basis to this claim as defined in section 107 of the *Act*.” Thus, the RAD’s

determination that it lacked jurisdiction to hear the appeal was entirely reasonable. Though short, the reasons provided reveal an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the RAD (*Vavilov* at para 85). Accordingly, this Court must defer to the RAD Decision.

B. *Should the Court Consider Arguments Regarding the RPD Decision?*

[14] While Mr. Waqas comes to the Court seeking judicial review of the RAD Decision, most of his remaining arguments are directed at alleged deficiencies in the RPD's decision. However, the RPD decision is not the one for which leave was granted. Mr. Waqas acknowledges missing the deadline to file an application for judicial review of the RPD decision with this Court. This deadline is provided under paragraph 72(2)(b) of the *Act*: for matters within Canada, the application must be filed within 15 days of the applicant being notified or becoming aware of the decision. As noted above, the RPD issued that decision over two years ago.

[15] While this Court retains discretion under paragraph 72(2)(c) to extend the time for filing "for special reasons," this generally occurs where the applicant has filed, along with the application for leave, an accompanying request for an extension of time. In fact, this procedural step is explicitly required by Rule 6 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR /93-22. As stated recently in *Kiflom v Canada (Citizenship and Immigration)*, 2020 FC 205 at para 25, "[t]he filing of applications on time is a mandatory requirement and extensions for bringing a late application for judicial review are not granted simply as a matter of routine. They must be justified by the applicant."

[16] In determining whether to grant an extension of time, the Court considers whether there is (i) a continuing intention to pursue the application; (ii) potential merit to the application; (iii) a reasonable explanation for the delay; and (iv) prejudice to the other party arising from the delay (*Canada (Attorney General) v Hennelly* (1999), 167 FTR 158, 1999 CanLII 8190 (FCA) at para 3 [*Hennelly*]). Not all four factors need weigh in the moving party's favour. The overriding question is whether an extension of time serves the interests of justice (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 62).

[17] Mr. Waqas has neither requested an extension of time nor explained why one should be granted. This represents a fundamental flaw in his case because, without an extension of time, this Court cannot now consider arguments aimed at the RPD decision.

[18] At the hearing, while Mr. Waqas' counsel acknowledged that no such extension motion had been filed, counsel used the errant filing at the RAD to argue that his client, while under stress, had clearly demonstrated an intent to challenge the refugee decision. As noted above, counsel for Mr. Waqas – citing *Mahdi v Canada (Citizenship and Immigration)*, 2016 FC 218 at para 15 [*Mahdi*] – requested that the Court stay its judgment in this judicial review for a period of 30 days, or such time that would allow Mr. Waqas to file the appropriate application, presumably for leave and judicial review of the RPD decision, with an accompanying request for an extension of time.

[19] I make two observations regarding this new ground raised (apart from what I noted above regarding the fact that Mr. Waqas' counsel had months to provide notice of it, having been retained in March 2020).

[20] First, counsel provided no basis in law for this Court to impose a stay of its judgment. I note that in *Mahdi*, unlike in this case, the applicant had properly challenged an underlying “no credible basis” decision at the RPD. In that case, Justice Michael Phelan of this Court found the RPD’s decision to be unreasonable, and the applicant to have been wrongfully deprived of a right of appeal before the RAD. It appears that Justice Phelan suspended his judgment in *Mahdi* to allow the Applicant to file an appeal at the RAD, and ruled that if no appeal was then filed, the suspension would expire. However, if an appeal were to be filed, Justice Phelan ruled that the Court would then dismiss the (successful) judicial review as moot without prejudice to any rights to seek judicial review of the RAD’s decision. Thus, the situation in *Mahdi* was entirely different from this matter because, in this case, the underlying decision concerning Mr. Waqas was entirely reasonable.

[21] Second, the fact that Mr. Waqas may have demonstrated an intent to challenge the RPD decision is not determinative of whether his request for an extension has merit. As noted during the hearing of this matter, if Mr. Waqas wishes to file such an application and move for an extension of time, he can certainly do so. However, a current and prior, continuing intention to pursue the application is only one of the *Hennelly* factors. Of note, while Mr. Waqas went unrepresented for a period before this Court, which I can understand is difficult, he nonetheless had counsel for the past six months before this Court, as well as representation at every stage previously, including in his refugee applications before the RPD and RAD.

V. Conclusion

[22] The RAD Decision to dismiss the appeal for lack of jurisdiction is the decision this Court must review. That Decision was reasonable, and Mr. Waqas does not appear to argue otherwise. Rather, his arguments seek to demonstrate how the earlier RPD decision was both unfair and unreasonable. However, leave to judicially review the RPD decision – which would require an accompanying request for an extension of time – has been neither requested nor granted. For these reasons, I must dismiss this application for judicial review.

JUDGMENT in IMM-5393-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No questions for certification were argued and I agree none arise.
3. There is no award as to costs.

“Alan S. Diner”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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