

Federal Court



Cour fédérale

Date: 20210928

Docket: IMM-4943-20

Citation: 2021 FC 1011

Ottawa, Ontario, September 28, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

MOHAMMED GADAFI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mohammed Gadafi, seeks judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board, which confirmed the Refugee Protection Division's (RPD) determination that he is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Gadafi is a citizen of Ghana, from Kumasi. He was born into a Muslim family and his elder brother is an Imam. Mr. Gadafi fears religious persecution due to his conversion to Christianity. In July 2015, the elder brother learned that Mr. Gadafi was attending Christian church services and threatened Mr. Gadafi with ex-communication and death if he did not revert to Islam. In August 2015, Mr. Gadafi was attacked by three armed men who claimed the attack was a warning from his family. The police provided no assistance, claiming there was no evidence that the family was behind the attack. Mr. Gadafi alleges that he tried to find safety by leaving Kumasi but his family continued to call and threaten him with death.

[3] The RPD determined that Mr. Gadafi is neither a Convention refugee nor a person in need of protection because he has internal flight alternatives (IFAs) in Sekondi-Takoradi and Cape Coast. The RAD dismissed Mr. Gadafi's appeal and confirmed the RPD's determination, finding that the RPD did not err in its IFA analysis.

[4] Mr. Gadafi submits that the RAD's IFA determination is unreasonable. He submits that his basis of claim (BOC) narrative raised a fear of religious persecution by his family as well as by intolerant and extremist Muslims, yet the RAD's decision focused almost entirely on persecution by his family. According to Mr. Gadafi, the fear of persecution by Muslim extremists was raised on appeal, but the RAD addressed the issue perfunctorily, finding that he would only be recognized as a former Muslim in the IFA locations through voluntary self-identification, and that he need not identify as a former Muslim. Mr. Gadafi argues that the RAD's findings amount to a determination that he would be safe in the IFA locations as long as his conversion from Islam to Christianity remains unknown, which is unreasonable because he

would be readily recognized as a convert due to his Muslim name. Furthermore, Mr. Gadafi argues that the RAD breached procedural fairness because the issue of self-identification was not addressed by the RPD, and thus the RAD raised a new issue regarding his risk in the proposed IFAs without providing notice and an opportunity to respond.

[5] Mr. Gadafi has not established that the RAD's decision is unreasonable as a result of the errors alleged above, and he has not established that the RAD breached procedural fairness. For the reasons below, this application for judicial review is dismissed.

II. Issues and Standard of Review

[6] The issues on this application for judicial review are:

- (1) Did the RAD err in analyzing the risk of religious persecution by intolerant and extremist Muslims?
- (2) Did the RAD breach procedural fairness by raising a new issue without notice?

[7] The applicable standard of review for the first issue is reasonableness, according to the guidelines set out in the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The reasonableness standard requires a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law

that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[8] The second issue, where an issue of procedural fairness is engaged, is reviewable on a standard that is akin to correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is “eminently variable”, inherently flexible and context-specific: *Vavilov* at para 77. A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

III. Analysis

A. *Did the RAD err in analyzing the risk of religious persecution by intolerant and extremist Muslims?*

[9] As noted above, Mr. Gadafi submits that his BOC narrative raised a fear of religious persecution not only by his family, but also by intolerant and extremist Muslims. Mr. Gadafi contends that the RPD had erred in analyzing his risk of persecution at the hands of Muslim extremists by relying on: (a) country condition evidence that Ghanaian society generally respects religious freedom, and (b) the absence of any mention of religiously-motivated violence in the country condition documents. These findings, Mr. Gadafi argues, were made in error because he does not fear the Ghanaian society generally or the government, but rather, religious extremists, and the state is unable to protect him from that risk. Furthermore, he argues it was an error for

the RPD to infer that religiously-motivated violence does not exist merely because it is not mentioned in country condition documents, particularly since Islamic extremism is a global issue and Mr. Gadafi had adduced evidence of Islamic extremism in Nigeria, Pakistan, and Somalia.

[10] Mr. Gadafi submits that he challenged the RPD's findings in his memorandum filed on appeal to the RAD, by arguing that "his name is suggestive of being a [M]uslim and if he does not profess the faith then he will be easily seen", and that the RPD "put little to no weight on the personal circumstances of the claimant as a [M]uslim born individual who by his actions and choice renounced the faith of his family". Mr. Gadafi alleges that the RAD unreasonably rejected his submissions, effectively finding that Mr. Gadafi would be safe in the proposed IFA locations if his conversion from Islam to Christianity remained unknown. Mr. Gadafi submits that apostasy is punishable by death, and the RAD failed to appreciate the breadth of his allegations of persecution by extremists. He submits that if the RAD had properly considered and found a serious possibility of persecution by Muslim extremists in the proposed IFAs, then it would have been necessary for the RAD to analyze whether state protection would be available.

[11] The respondent submits that, contrary to his assertion, Mr. Gadafi did not raise an issue regarding a risk of persecution by Muslim extremists on appeal to the RAD, and he impermissibly raises alleged errors of the RPD for the first time on judicial review: *Dahal v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1102 [*Dahal*] at paras 35-37; *Canada (Minister of Citizenship and Immigration) v R. K.*, 2016 FCA 272 at para 6. The respondent submits that Mr. Gadafi's arguments before the RAD about his name and his personal circumstances as a Muslim-born individual who renounced the faith of his family were

vague, and do not satisfy the requirements of Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. If a major component of Mr. Gadafi's claim was the risk he faced from the Muslim community in general or from Muslim extremists due to his conversion, as he argues before this Court, the respondent contends he should have clearly raised the issue on appeal to the RAD. The RAD cannot be expected to speculate or infer an applicant's position; an applicant must make his position clear with full and detailed submissions: *Adams v Canada (Minister of Citizenship and Immigration)*, 2018 FC 524 [*Adams*] at paras 28-30.

[12] The respondent maintains that the RAD properly conducted its appeal of the RPD's decision within the parameters of the *RAD Rules*, based on the errors that Mr. Gadafi raised. In any event, the respondent submits that Mr. Gadafi bears the burden of demonstrating he would face a risk of persecution in the proposed IFA locations, and he has failed to do so: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, (1993), [1994] 1 FC 589 at 5, 109 DLR (4th) 682 (FCA).

[13] I agree with the respondent. The reasonableness of a tribunal's decision is contextual—the decision must be justified “in relation to the constellation of law and facts that are relevant to the decision”: *Vavilov* at para 105. The RAD's reasons must be read in light of the history and context of the proceedings in which they were rendered, including Mr. Gadafi's submissions and how he framed his appeal: *Vavilov* at para 94. When read in context, I am not satisfied that the RAD's decision is unreasonable.

[14] The argument that Mr. Gadafi's name would make him "easily seen" supported an alleged error with the RPD's treatment of the fact that he had never been to the IFA locations, which the RPD had considered to be a positive factor supporting the viability of the IFAs. In his appeal memorandum to the RAD, Mr. Gadafi argued that the RPD had erred by treating this fact as a positive factor—not by failing to adequately consider a risk of persecution by intolerant and extremist Muslims in the IFA locations. The RAD's analysis of this alleged error focused on a risk of persecution by Mr. Gadafi's family because the RPD had held that Mr. Gadafi's family members were unlikely to locate him in Sekondi-Takoradi or Cape Coast since he had never been to those cities and did not know anyone there, reducing the chance that he would be recognized. The RAD saw no error in the RPD's finding.

[15] The argument that the RPD "put little to no weight" on Mr. Gadafi's personal circumstances was framed in a vague manner. The full extent of the argument appears to be that the RPD put too much weight on objective country condition documentation and too little weight on Mr. Gadafi's personal circumstances as a Muslim-born individual who had renounced his faith. In the RAD appeal memorandum, this argument appears in a section with the general heading "Overall viability of the proposed IFAs". There is no reference to a specific RPD finding that was allegedly made in error, or to any particular passage in the RPD's reasons where the alleged error occurred. There is no explanation as to how the RPD improperly weighed the evidence, and no reference to the portions of the evidence that were, according to Mr. Gadafi, weighed improperly.

[16] The RAD characterized Mr. Gadafi's argument on this point as a "general argument that the RPD failed to consider his personal circumstances in determining that he would be safe in either Sekondi-Takoradi or Cape Coast". The RAD concluded that the argument must fail, finding that the RPD had correctly noted that both IFA cities have sizable Christian populations and Mr. Gadafi would likely be welcomed. The RAD noted that Mr. Gadafi is a Christian, and need not identify as an ex-Muslim.

[17] I am not persuaded that the RAD's characterizations or analyses of the arguments are unreasonable. The RPD's decision had included five paragraphs that specifically addressed Mr. Gadafi's allegations that his Muslim name and open practice of Christianity would lead to violence by Muslims who would see him as an infidel. The RPD had considered the country condition documentation, referred to passages from the documentation, and concluded that the risk faced by Mr. Gadafi as a result of his open practice of Christianity as a convert with a Muslim name "would not rise above mere possibility in the proposed IFAs". On appeal to the RAD, Mr. Gadafi did not allege, as he does for the first time on this application for judicial review, that the RPD erred by relying on country condition evidence about Ghanaian society generally, or the absence of any mention of religiously-motivated violence in the country condition documents.

[18] To the extent Mr. Gadafi made any allegations that the RPD had erred in analyzing his risk of persecution by intolerant or extremist Muslims, such an argument was limited to a general allegation that the RPD put "little to no weight" on his personal circumstances. The RAD is not required to search the record to make the case for an applicant: *Broni v Canada (Minister of*

Citizenship and Immigration), 2019 FC 365 at para 15. Applicants who fail to specify in their submissions to the RAD where and how the RPD erred do so at their own peril: *Adams* at paras 28-30. In my view, Mr. Gadafi is challenging the RAD's analysis on the basis of errors allegedly made by the RPD that were not raised on appeal, and are raised for the first time before this Court: *Dahal* at paras 35-37.

[19] The RAD's finding that Mr. Gadafi would only be recognized as a former Muslim in the IFA locations through voluntary self-identification does not amount to a determination that he would only be safe in the IFA locations if his conversion from Islam to Christianity remains unknown. Again, the RAD's finding must be read in context. Mr. Gadafi made a vague argument that the RPD failed to consider or give insufficient consideration to his personal circumstances as a religious convert in determining that he would be safe in the proposed IFAs. Without further detail, it is difficult to understand how this could have been an error, as the RPD made a specific finding on this very point—after considering the evidence, the RPD had concluded there was no more than a mere possibility of risk from Mr. Gadafi's open practice of Christianity as a convert with a Muslim name. The RAD's findings that Sekondi-Takoradi and Cape Coast have sizable Christian populations, that Mr. Gadafi would likely be welcomed as a Christian, and that he need not identify as an ex-Muslim do not replace the RPD's analysis on this point, which was not challenged with any specificity on appeal, and was not found to be in error. The RAD simply noted additional points to support the viability of the IFA locations based on Mr. Gadafi's personal circumstances as a current Christian and former Muslim. This was open to the RAD, and does not render the RAD's decision unreasonable.

[20] Similarly, Mr. Gadafi's appeal memorandum does not raise any issue regarding the state's ability to protect him from Muslim extremists in the proposed IFAs of Sekondi-Takoradi and Cape Coast. It is well established that the RAD is not required to consider potential errors that an applicant did not raise: *Kanawati v Canada (Minister of Citizenship and Immigration)*, 2020 FC 12 at para 23; *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321 at paras 18-20; *Ilias v Canada (Minister of Citizenship and Immigration)*, 2018 FC 661 at para 39; *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103.

[21] Mr. Gadafi has not established that the RAD's decision is unreasonable due to a reviewable error in analyzing the risk of religious persecution by intolerant and extremist Muslims.

B. *Did the RAD breach procedural fairness by raising a new issue without notice?*

[22] Mr. Gadafi submits the RAD breached procedural fairness by raising a new issue without giving notice and an opportunity to respond. According to Mr. Gadafi, the RAD raised a new issue by finding that he would be recognized as an ex-Muslim only through self-identification. He asserts that the issue of self-identification was not addressed by the RPD. Furthermore, he argues the RAD's finding has no evidentiary foundation, and contradicts Mr. Gadafi's evidence that he would be identifiable as a former Muslim by his name, which was accepted at face value by the RPD. Mr. Gadafi submits the RAD should have provided an opportunity to respond before dismissing the appeal based on a different (and erroneous) factual basis than the RPD.

[23] The respondent submits the RAD did not raise a new issue, as the RAD did not rely on a new ground that was different from the grounds of appeal raised by Mr. Gadafi. The respondent relies on *R v Mian*, 2014 SCC 54 at paragraph 30, where the Supreme Court of Canada defined a “new issue” as one that is “legally and factually distinct from the grounds of appeal raised by the parties”. According to the respondent, the RAD’s finding that Mr. Gadafi need not identify as an ex-Muslim was a direct response to his submission that the RPD had put little or no weight on his personal circumstances as a Muslim-born individual practicing Christianity.

[24] I agree with the respondent. The RAD’s finding was a response to Mr. Gadafi’s submission on appeal, and not a new issue. The RAD has fact-finding authority, and may make additional findings or even different findings than the RPD in assessing the evidence; this alone does not elevate the findings to a new issue or trigger a breach of procedural fairness: *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2016 FC 380 at para 30; *Bakare v Canada (Minister of Citizenship and Immigration)*, 2017 FC 267 at paras 18-19. As noted above, the RAD did not substitute its own findings for those of the RPD on the issue of whether Mr. Gadafi would face risk in the proposed IFAs due to his personal circumstances as a religious convert. The RAD did not raise a new IFA issue that would require notification and an opportunity to respond.

[25] Mr. Gadafi’s argument that the RAD’s finding has no evidentiary foundation and contradicts his evidence is not a procedural fairness argument, but rather goes to the reasonableness of the RAD’s decision. For the reasons that were provided above, Mr. Gadafi has not established that the RAD’s decision is unreasonable.

IV. **Conclusion**

[26] In my view, the RAD's decision is reasonable, and the RAD did not breach procedural fairness. Accordingly, this application for judicial review is dismissed.

[27] Neither party proposes a question to certify, and in my view, no such question arises in this case.

JUDGMENT in IMM-4943-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question for certification.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4943-20

STYLE OF CAUSE: MOHAMMED GADAFI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: MAY 17, 2021

JUDGMENT AND REASONS: PALLOTTA J.

DATED: SEPTEMBER 28, 2021

APPEARANCES:

David Matas FOR THE APPLICANT

Sydney Pilek FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas FOR THE APPLICANT
Barrister and Solicitor
Winnipeg, Manitoba

Attorney General of Canada FOR THE RESPONDENT
Winnipeg, Manitoba