Federal Court  Cour fédérale

Date: 20220817

Docket: IMM-4781-21

Citation: 2022 FC 1207

Ottawa, Ontario, August 17, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

WAJID ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Wajid Ali, is a citizen of Pakistan. His family lives in Shergarh, Pakistan. He alleges he will be killed if he returns to Pakistan because on January 4, 2016, he refused to assist a local cleric to secure funding for an earthquake-damaged madrasa in Shergarh and uttered insulting remarks in the process.

[2] The next day, on January 5, 2016, the Applicant left for Canada, as had been previously scheduled, given he had obtained a student visa. The Applicant had been applying for study permits in various countries since 2014. He had applied twice for a student visa in Canada, once in July 2015, which was refused, and then again on December 4, 2015. In March 2018, over two years after coming to Canada as a student, the Applicant applied for refugee protection.

[3] The Applicant claimed that he fled Pakistan on January 5, 2016, in fear of his life. On January 9, 2016, several days after the incident on January 4, 2016, he claims that (i) the Tehereek-e-Taliban Pakistan [TTP] threatened his life; and (ii) masked men from the TTP came to his home and threatened his parents. Later that month, the Applicant claims that the local police attended his home to arrest him on the basis that a blasphemy complaint had been made against him. The Applicant claims that his life remains in danger should he return to Pakistan.

[4] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada found that the Applicant is neither a Convention refugee nor a person in need of protection. The RPD determined that a portion of the Applicant's allegations were not credible and that, in any event, he had an internal flight alternative [IFA] in either Islamabad or Karachi.

[5] The determinative issue before the Refugee Appeal Division [RAD] was credibility. The RAD concluded that the Applicant is not at risk and "that his allegations have been fabricated to support a claim for refugee protection after his application to renew his study permit in Canada was refused." The Applicant seeks judicial review of the RAD's decision dated July 21, 2021.

[6] The Applicant pleads that the RAD committed a number of reviewable errors, namely: (i) the RAD violated the Applicant's right to procedural fairness; (ii) the RAD erred by failing to convene an oral hearing under subsection 110(6) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; and (iii) the RAD's assessment of the Applicant's credibility was unreasonable.

[7] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicant has failed to persuade me that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is dismissed.

II. Standard of Review

[8] The Applicant alleges that his right to procedural fairness was violated by making additional credibility findings without providing him with an opportunity to be heard. Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The focus of the reviewing court is essentially whether the procedure followed by the decision maker was fair and just (*Canadian Pacific* at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[9] As to the remainder of the issues, the applicable standard of review is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicant who bears the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

III. Analysis

A. *The RAD Did Not Violate the Applicant's Procedural Fairness Rights*

[10] The RPD decided that the Applicant's claim should be rejected principally on the basis of the IFA. The RPD also made a credibility finding concerning the blasphemy complaint. Upon a review of the file and having listened to the hearing, the RAD considered that there were a number of issues with the Applicant's credibility that the RPD did not address in its reasons. Consequently, the RAD sent the Applicant a notice, by way of letter dated June 2, 2021, in which the RAD: (i) notified the Applicant that it has found a number of credibility issues in addition to the ones identified by the RPD; (ii) set out its credibility concerns in detail over the course of several pages, with references to the evidence; (iii) highlighted that, given the problems identified, the RAD is concerned that the Applicant's "entire story of being at risk due to his

political opinions and because of being falsely accused of blasphemy is a complete fabrication"; and (iv) provided the Applicant with the opportunity to make further submissions and submit any new documentary evidence along with a Rule 29 application.

[11] The Applicant responded to the letter, and provided new evidence including a copy of Google maps, the missing translation of a stamp on a letter previously filed with the RPD, a copy of an agreement between the Applicant and an immigration agent, and an affidavit from the Applicant's brother. The affidavit from the Applicant's brother was not accepted because it was considered to not be new but rather provided similar evidence to what was already on file with the RPD.

[12] The Applicant pleads that the RAD is not entitled to determine the issue of credibility afresh, particularly in a case such as this one with "the sheer number of new credibility issues", without providing the Applicant with the right to be heard.

[13] The Respondent submits that the Applicant was duly informed of the specific credibility issues and of the fact that the overall credibility of his claim was at issue, and was afforded an opportunity to make submissions. The Respondent notes that the RAD's findings were made on the basis of the record before the RPD and as such, there is no breach of procedural fairness.

[14] I am not persuaded that the RAD breached procedural fairness. The Applicant relies on *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*], however, in *Kwakwa*, the RAD identified additional arguments but did not afford Mr. Kwakwa with an

opportunity to respond to them. This is not the case here. The Applicant was provided with a detailed notice outlining the credibility concerns of the RAD. The Applicant provided submissions and evidence in response, and even clarified that he was not seeking an oral hearing.

[15] Furthermore, it has been widely accepted by this Court that there "is no procedural fairness issue when the RAD finds an additional basis to question the Applicant's credibility using the evidentiary record before the RPD."(*Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13). As my colleague Justice Richard G. Mosley explains in *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243:

> [37] The RAD can make independent credibility findings, without putting them to the Applicant and giving him an opportunity to make submissions: *Koffi*, above at para 38; see also *Ortiz*, above at para 22. In other words, the failure to give an applicant an opportunity to respond to a credibility finding does not necessarily constitute a breach of procedural fairness.

[16] In *Akram v Canada (Citizenship and Immigration)*, 2018 FC 785, Justice Keith M. Boswell found that the RAD may make credibility findings, in addition to those made by the RPD, based on an independent assessment of the evidence before the RPD:

> [18] The RAD may independently assess the documentary evidence or make credibility findings (see: *Bakare v Canada (Citizenship and Immigration)*, 2017 FC 267 at para 19, [2017] FCJ No 247; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at paras 36 to 41 and 46 to 49, [2016] FCJ No 840; *Oluwaseyi Adeoye* at paras 11 to 15; *Marin* at paras 35 to 38).
>
> [19] This is not a case where the RAD raised a new question or issue and identified additional arguments and reasoning, going beyond the RPD decision under appeal, without affording the appellant an opportunity to respond to them (*Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600, 267 ACWS (3d) 676). […]

> [20] In this case, although the RAD's negative credibility finding was not one made by the RPD, it was however based on the RAD's independent assessment of the evidence which was before the RPD. […]

[17] In the present matter, the credibility findings by the RAD were ultimately based on the record before the RPD. In addition, the Applicant was provided with an opportunity to address the issues. Accordingly, I am not persuaded that there was a breach of procedural fairness. The procedure followed by the RAD was fair and just.

B. *The RAD Did Not Err in Failing to Hold an Oral Hearing Under Subsection 110(6) of IRPA*

[18] The Applicant alleges that the RAD erred by refusing to hold an oral hearing. The Applicant submits that the new documents speak to the credibility of the Applicant and thus ought to have given rise to a hearing.

[19] The Respondent pleads that the criteria in subsection 110(6) of the IRPA were not met. The Respondent submits that the RAD accepted the new documents as credible and genuine, however, properly determined that they did not raise a serious issue as to the Applicant's credibility in that nothing turned on the information contained in those documents.

[20] Subsection 110(3) of the IRPA requires that the RAD proceed without an oral hearing, save for certain circumstances. Subsection 110(6) of the IRPA provides that the RAD may convene an oral hearing where new evidence (a) raises a serious issue with respect to the credibility of the person who is the subject of the appeal, (b) is central to the decision with

respect to the refugee protection claim, and (c) if accepted, would justify allowing or rejecting the refugee protection claim. The decision to hold an oral hearing is thus based on the RAD's assessment of whether the criteria set out in subsection 110(6) of the IRPA have been satisfied and, if so, whether the RAD should exercise its discretion to hold an oral hearing (*Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296 at para 44).

[21] I agree with the Respondent. While the Applicant's credibility was certainly in issue, the credibility issues arose from the record before the RPD and not from the new evidence. The RAD considered the criteria in subsection 110(6) of the IRPA, determined that all the new evidence was in fact credible, and reasonably concluded that because the new evidence did not raise a serious issue with respect to the Applicant's credibility, no oral hearing ought to be held.

[22] I find the present case to be distinguishable from *Bukul v Canada (Citizenship and Immigration)*, 2022 FC 118, upon which the Applicant replies, where the RAD was found to have failed to conduct a proper analysis as to whether the criteria in subsection 110(6) of the IRPA were met and did not justify its conclusion that the new evidence did not raise a serious issue with respect to the applicant's credibility.

[23] I therefore find that the Applicant has failed to identify a reviewable error in the RAD's decision to decline to hold an oral hearing.

C. *The RAD's Adverse Credibility Finding is not Unreasonable*

[24] The Applicant submits, in the alternative, that any credibility concerns were addressed in his response to the June 2, 2021 letter, and that the RAD's credibility findings are unreasonable.

[25] The Respondent submits that the Applicant's arguments go to credibility and weight, and that he has failed to provide a legal basis upon which this Court may intervene.

[26] Credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29 [*Fageir*]; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35 [*Tran*]; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should only be overturned "in the clearest of cases" (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12 [*Liang*]). Credibility determinations have been described as lying within "the heartland of the discretion of triers of fact […] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence" (*Fageir* at para 29; *Tran* at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22, citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[27] Having considered the credibility findings by the RAD, and the record upon which they were based, I am not persuaded that the decision is unreasonable. The RAD, in this regard, is to be afforded a significant level of deference. Furthermore, I find the RAD's reasoning exhibits the requisite degree of justification, intelligibility and transparency required by *Vavilov.*

D. *Proposed Question for Certification*

[28] The Applicant submits the following question for certification:

> Does the Refugee Appeal Division have jurisdiction to conduct a *de novo* assessment of a claimant's general credibility based on the existing record, new evidence and/or other written materials, or does procedural fairness or natural justice require the tribunal to convene an oral hearing under subsection 110(6) of the IRPA?

[29] As stated recently by the Federal Court of Appeal, to be properly certified, a question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance (*Canada (Immigration and Citizenship) v Laing*, 2021 FCA 194 at para 11). Moreover, a question that is in the nature of a reference or whose answer depends on the facts of the case cannot raise a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 46–47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[30] The question as formulated by the Applicant does not fit the criterion of a question of general importance. An appeal to the RAD is not a *de novo* proceeding (*Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at para 79). Moreover, the circumstances under which a hearing may be held under subsection 110(6) of IRPA have been considered by the Federal Court of Appeal in Canada (Citizenship and Immigration) v. Singh, 2016 FCA 96 and consistently applied by this Court:

> [51]….At the risk of repeating myself, the basic rule is that the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division […]" (s.

> 110(3)). The new evidence must meet the admissibility criteria set out in subsection 110(4), and a new hearing can be held only if the new evidence fulfils the conditions set out in subsection 110(6) […].

IV. Conclusion

[31] For the foregoing reasons, I am not convinced that the RAD's decision is unreasonable.

This application for judicial review is therefore dismissed.

[32] No serious question of general importance for certification will be certified.

JUDGMENT in IMM-4781-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed; and
2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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