Federal Court  Cour fédérale

Date: 20230113

Docket: IMM-5889-20

Citation: 2023 FC 53

Ottawa, Ontario, January 13, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

MOHSEN AKBARI
ENSIEH MERATI FASHI AND
SINA AKBARI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Mr. Akbari, Ms. Fashi, and their son Sina, are citizens of Iran. They submitted refugee claims in July 2019.

[2] Unfortunately, Ms. Fashi suffered from medical issues, including a miscarriage. These issues caused severe mental anguish and anxiety to her and her husband. Because Ms. Fashi had no family support in Canada, she wished to return to Iran. On September 3, 2020, the Applicants withdrew their refugee claims.

[3] October 16, 2020, the Applicants made reinstatement applications under Rule 60 of the *Refugee Protection Division Rules,* SOR/2012-256 [RPD Rules]. The Refugee Protection Division [RPD] rejected their reinstatement application. This is an application for judicial review of a decision by the RPD dismissing that application.

[4] For the reasons that follow, this application for judicial review is allowed. After consideration of the applicable law and the evidence before the RDP, I am not satisfied that the RPD's decision to refuse to reinstate the refugee claims of the Applicants meets the standard of reasonableness. In my view, the Decision does not explain why the psychological evidence presented by the Applicants was not "compelling or persuasive" and did not demonstrate that the Applicants' mental state prevented them from making a "logical, rational, or well-informed decision" to withdraw their claims. I must therefore send the matter back for redetermination before a different member of the RPD.

II. Background

[5] Ms. Fashi and her son, Sina, arrived in Canada in January 2019. Mr. Akbari, the husband and father, followed and arrived in Canada in July 2019. Together, they submitted refugee claims in July 2019 on the basis of religious persecution in Iran, due to their conversion to Christianity.

[6] Their refugee hearing, scheduled for March 2020, was cancelled due to COVID-19 closures. At the time, Ms. Fashi was pregnant. Starting March 2020, she was in the hospital for various medical issues. On June 11, 2020, Ms. Fashi suffered a miscarriage during her seventh month of pregnancy. Ms. Fashi's medical issues and miscarriage resulted in inconceivable mental anguish for both Ms. Fashi and Mr. Akbari. Their marriage suffered and became strained. Ms. Fashi suffered from suicidal ideations, severe depression, and anxiety. Because she was without emotional support from her family, Ms. Fashi wanted to return to Iran.

[7] Ms. Fashi pressured Mr. Akbari to withdraw their refugee claims due to her considerable emotional distress.

[8] The Applicants first submitted their notice of withdrawal of their refugee claims on July 21, 2020, but this was mistakenly communicated to the RPD as a request for the withdrawal of their counsel. They properly submitted their notice of withdrawal on September 3, 2020. The RPD issued a notice of confirmation on September 23, 2020.

[9] On October 16, 2020, the Applicants made reinstatement applications for their refugee claims, pursuant to Rule 60 of the RPD Rules. In support, they included new written submissions and evidence including medical documentation and a mental health assessment by a registered psychotherapist. Notably, the psychotherapist's report indicated that Ms. Fashi was suffering from anxiety and depression.

[10] The psychotherapist also opined that Ms. Fashi was not in a proper mental state to make important decisions, such as one affecting her and her family's future: "Unfortunately, no one can make a suitable decision under negative emotional and mental pressures." The psychotherapist concluded that the Applicants "were not in a proper mental health condition when they withdrew their case."

III. The Decision

[11] The RPD Member [Member] issued their reinstatement decision on October 21, 2020. The Member denied the reinstatement application for the following reasons:

> • The RPD did not deny the Applicants procedural fairness, nor did it fail to observe the principles of natural justice. The Applicants were represented by competent legal counsel when they made the decision to withdraw their claims, and they had the services of a translator.
>
> • The Member found that even if Ms. Fashi was suffering from severe anxiety and depression following her miscarriage, and Mr. Akbari also suffered from anxiety because of his wife's miscarriage and his concern for her wife's mental health, there was "no compelling or persuasive evidence […] to establish that the adult Applicants' mental health or cognitive abilities deteriorated to such an extent after the miscarriage of their child that they was [*sic*] rendered incapable or unable to make a logical, rational, or well-informed decision to withdraw their refugee claims […]."
>
> • The Member opined that the adult Applicants signed the notice of withdrawal, which indicated that they fully understood the consequence of withdrawing their refugee claims. If the Applicants had any serious doubts or reservations about withdrawing their refugee claims, it was their responsibility to consult with counsel before signing the notice.

[12] The Member considered the delay between the submission of the notice of withdrawal – done on September 3, 2020, or July 21, 2020, considering the earliest attempt to withdraw – and

the submission of reinstatement on October 16, 2020, to be contrary to a genuine fear of persecution and a genuine intention to diligently pursue their refugee claims in Canada.

[13] The Member concluded:

> Having taken all relevant factors into account, I find that there was no denial of natural justice, nor are there any other reasons to consider that it is in the interests of justice to reinstate this claim. In this regard, it is noted that allowing the reinstatement under the circumstances of this case would prejudice the RPD's ability to deal with refugee claims fairly and efficiently.

IV. Relevant Legislation

[14] The relevant statutory provision is Rule 60 of the RPD Rules. It reads as follows:

Application to reinstate withdrawn claim	**Demande de rétablissement d'une demande d'asile retirée**
60 (1) A person may make an application to the Division to reinstate a claim that was made by the person and was withdrawn.	**60 (1)** Toute personne peut demander à la Section de rétablir une demande d'asile qu'elle a faite et ensuite retirée.
Form and content of application	**Forme et contenu de la demande**
(2) The person must make the application in accordance with rule 50, include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer, and provide a copy of the application to the Minister.	**(2)** La personne fait sa demande conformément à la règle 50, elle y indique ses coordonnées et, si elle est représentée par un conseil, les coordonnées de celui-ci et toute restriction à son mandat et en transmet une copie au ministre.

Factors	**Éléments à considérer**
(3) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application.	**(3)** La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi ou qu'il est par ailleurs dans l'intérêt de la justice de le faire.
Factors	**Éléments à considérer**
(4) In deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay.	**(4)** Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment le fait que la demande a été faite en temps opportun et, le cas échéant, la justification du retard.
Subsequent application	**Demande subséquente**
(5) If the person made a previous application to reinstate that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.	**(5)** Si la personne a déjà présenté une demande de rétablissement qui a été refusée, la Section prend en considération les motifs du refus et ne peut accueillir la demande subséquente, sauf en cas de circonstances exceptionnelles fondées sur l'existence de nouveaux éléments de preuve.

V. Issues and Standard of Review

[15] There are three main issues in this case:

1. Did the Member adequately consider whether the reinstatement is in the interests of justice?

2. Is the Member's analysis of the Applicants' delay before applying to reinstate their claim reasonable?

3. Did the Member err by failing to consider the Best Interests of the Child [BIOC]?

[16] The parties submit that the applicable standard of review is reasonableness. I agree: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]. This Court has applied the reasonableness standard to other cases involving judicial review of a reinstatement application: *Rajput v Canada (Citizenship and Immigration)*, 2022 FC 65 at para 12 [*Rajput*]; *Dadashpourlangeroudi v Canada (Citizenship and Immigration)*, 2020 FC 424 at paras 25-26 [*Dadashpourlangeroudi*].

VI. Discussion

A. *Interests of justice*

(1) The parties' positions

[17] The Applicants submit that the Member failed to meaningfully consider whether a reinstatement was in the interests of justice. Rule 60(3) of the RPD Rules establishes that this is an important factor in a reinstatement application. However, the Applicants submit that the Member's consideration of the interests of justice was mere lip service.

[18] The Applicants submit that they demonstrated continuing intention to pursue their refugee claims until the trauma of the miscarriage. As explained by the psychological report, Ms. Fashi's severe depression and anxiety after the miscarriage affected her ability to make a rational

decision. However, the Member concluded that the evidence was not “compelling or persuasive” and did not demonstrate that the Applicants’ mental state prevented them from making a “logical, rational, or well-informed decision.”

[19] The Applicants point to the Refugee Division of the Immigration and Refugee Board’s decision in *X (Re)*, 2002 CanLII 52722 (CA IRB). In that case, the Board allowed a claimant’s reinstatement application, in part on the ground that there was no reason for the Member to dispute the claimant’s statements that she was distraught over the serious illness of her father, and that she was facing health challenges of her own which may have impacted her judgement. Despite the fact that the Board concluded that there had been no denial of natural justice, the Member accepted that the particular circumstances of the claimant at the time she made the decision to withdraw her application may have impacted her judgement.

[20] The Applicants rely on this Court’s decision in *De Lourdes Diaz Ordaz Castillo v Canada (Citizenship and Immigration)*, 2010 FC 1185 [*Castillo*]. In that case, this Court held that when the applicants make substantial submissions on whether it would be in the interests of justice to allow reinstatement of the refugee claim, the Board must consider those submissions and the particular circumstances of the applicants.

[21] The Respondent relies on this Court’s decision in *Dadashpourlangeroudi* where Justice Elliott concluded the RPD reasonably found that despite the stress and pressure on the applicant, the evidence did not demonstrate that the applicant was coerced into withdrawing his refugee

claim. The Respondent also emphasizes that pursuant to *Vavilov*, the Member did not ignore a central issue raised by the Applicants in their submissions.

(2) Analysis

[22] In my view, the Member's analysis of the interests of justice criteria was unreasonable.

[23] Rule 60 of the RPD Rules has two distinct grounds – the principles of natural justice, and the interests of justice. To be reasonable, a decision must address "both branches" of the Rule: *Castillo* at para 5.

[24] The "interests of justice" consideration is broad, "giving the Board a wide discretion to reinstate but which requires to Board to weigh all the circumstances of a case – not just from the vantage point of an applicant's interests": *Ohanyan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078 at para 13 [*Ohanyan*], citing *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2005 FC 279, as cited in *Castillo* at para 6.

[25] While prior jurisprudence has held that the Board is not required to consider the interests of justice if the claimant makes no submissions on that point (*Ohanyan* at para 10; but see *Castillo* at paras 11, 13 stating that the Board must consider such submissions when they are made), this Court recently held in *Rajput* at paras 22-23 that the RPD is *obligated* to consider the interests of justice, regardless of whether the applicant made submissions on the issue. Moreover, that analysis must be done holistically and contextually.

[26] In this case, the Applicants did argue and present evidence on the "interests of justice" branch of Rule 60. The Member was required to consider and analyse the evidence in their decision-making process. I am not persuaded that the Member properly considered the entirety of the evidence before it.

[27] The Applicants submitted substantial evidence and arguments about the circumstances surrounding the withdrawal and both adult Applicants' mental health, demonstrating the compromised status of their decision-making abilities at the time of the withdrawal. This clearly placed the interests of justice at the center of their application.

[28] The Member accepted that Ms. Fashi suffered from severe anxiety and depression, and that Mr. Akbari suffered from anxiety because of his wife's miscarriage and his concern for his wife's mental health. That evidence was supported by a report from a qualified professional. Despite accepting the mental conditions of the adult Applicants, the Member then dismisses the evidence as not compelling or persuasive.

[29] No reasons are offered, however, as to why the evidence of a qualified professional should be dismissed, especially in the absence of contrary evidence or issues in relation to the quality, relevancy or reliability of the expert evidence. Instead, the Member simply states: "I find that there is no compelling or persuasive evidence before me to establish that the adult Applicants' mental health or cognitive abilities deteriorated to such an extent after the miscarriage of their child that they was [*sic*] rendered incapable or unable to make a logical, rational, or well-informed decision to withdraw their refugee claim […]."

[30] In the end, on the "interests of justice" branch of the analysis, the Member stated: "I find that there was no denial or natural justice, nor are there any other reasons to consider that it is in the interests of justice to reinstate this claim" [emphasis added].

[31] The only evidence available to the Member does not support these conclusions.

[32] On the issue of the psychological evidence, the Member did not have to accept the expert report presented by the adult Applicants; but in dismissing that evidence, the Member had to provide an explanation (*Cay v Canada (Citizenship and Immigration)*, 2007 FC 759).

[33] In particular, the Member should have addressed the letter from the registered psychotherapist, which clearly and unequivocally stated that the Applicants' decision-making abilities were impaired by the significant mental health challenges they were facing as a consequence of the miscarriage. If the Member rejected this evidence, or considered that it was entitled to only little weight, it was incumbent on the Member to explain their reasons why (*Rojas Luna v Canada (Citizenship and Immigration)*, 2013 FC 758 at para 20 [*Rojas Luna*]). While *Rojas Luna* pertained to a refugee determination rather than a reinstatement application, the principle applies in this case.

[34] In light of the interest at stake in a reinstatement application, the reasons must explain why significant evidence weighing in favour of an applicant is rejected or assigned only minimal weight : "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov* at para 133). The RPD

decision at issue in this case is ten paragraphs long. While the reasons need not necessarily be longer, the length and depth of the reasons in this case do not reflect the significance of the interests at stake, nor do they provide an adequate rationale as to why the evidence of the adult Applicants' mental health was seemingly assigned so little weight, if any at all.

[35] In my view, the Member relied on fragmentary evidence and failed to properly assess and consider evidence demonstrating that the adult Applicants did not have the mental capacity to analyze, consider, and properly assess the extreme consequences of the withdrawal of their claims, including that no additional or future claim for refugee status could be made at a different time pursuant to paragraph 101(1)(c) of the *Immigration and Refugee Protection Act*.

[36] Instead, the Member adequately considered the "principles of natural justice" as required by the RPD Rules. Under the "interests of justice" analysis, however, the Member appears to only have considered the Applicants' delay in submitting their reinstatement applications (as discussed below), and the RPD's operations, when they state, "allowing the reinstatement under the circumstances of this case would prejudice the RPD's ability to deal with refugee claims fairly and efficiently."

[37] To be clear, the RPD's "ability to deal with refugee claims fairly and efficiently" is a relevant consideration in the "interests of justice" branch of the analysis. However, in this case, there are no reasons offered by the Member as to why reinstatement in this particular case would impair the RPD's "ability to deal with refugee claims fairly and efficiently." No reasons are offered suggesting, for example, that reinstatement in this case would establish too low of a

threshold for reinstatement applications such that it would impair the RPD's operations. There is also no attempt by the Member to balance the RPD's efficiency with the Applicants' interests.

[38] In light of the circumstances of this case, the Applicants' mental health was one of the most compelling factors that should have been considered in the "interests of justice" assessment. Other factors that may be relevant to the "interests of justice" branch of the analysis of reinstatement applications include: the level of risk in the underlying refugee claim (*Rajput* at para 26); the date of psychological evidence (*Dabo v Canada (Citizenship and Immigration),* 2019 FC 269 at paras 11-12); the period of time between the withdrawal and reinstatement application (*Orsa v Canada (Citizenship and Immigration),* 2014 FC 1163 at para 29 [*Orsa*]); the consideration or failure to consider the interests of minor applicants (*Castillo* at para 12); and the circumstances underpinning the withdrawal (*Castillo* at para 14).

[39] The interests of justice analysis need not require an explicit balancing of each of these factors, but the reasons must reflect that a holistic review was conducted. If an applicant advances a relevant factor, particularly one as significant as was at issue in this case – serious mental health challenges – the RPD is required to provide reasons to explain how this factor weighs in the assessment. The reasons provided in this case fail to satisfy me that the Member adequately assessed the evidence and conducted a holistic "interests of justice" analysis.

[40] The Respondent urged this Court to read the reasons as a whole and find that, taken together, the reasons reflect a consideration of the interests of justice. However, while the Court may look to the record to "connect the dots," as stated by Chief Justice Crampton, "the Court

cannot resort to that record to 'supply the reasons that might have been given and make findings of fact that were not made'": *Ibikunle v Canada (Citizenship and Immigration)*, 2020 FC 391 at para 12, citing *Vavilov* at para 97, quoting *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11.

[41] In this case, the record contains no justification that could explain why the Member dismissed the psychological evidence adduced by the Applicants. There is also no information explaining why a refusal is necessary and in the "interests of justice" in order to preserve the RPD's "ability to deal with refugee claims fairly and efficiently." Indeed, the record does not include any information on which the Court could rely to justify the Member's refusal to reinstate the refugee claims in this case.

B. *Delay*

[42] While the RPD's decision is set aside for the reasons above, the parties made representations on the issue of delay, on which I provide the following comments.

[43] Delay or the length of time between the application to withdraw and the application to reinstate a refugee claim is a reasonable consideration in the "interests of justice" branch of the analysis (*Orsa*; *Arcila v Canada (Minister of Citizenship and Immigration),* 2013 FC 210).

[44] In this case, the Applicants assert that the Member made a factual error and overstated the Applicants' delay in seeking a reinstatement of their claims. They argue that the delay should be calculated from the date they received the notice of confirmation of the withdrawal. From that

date, September 23, 2020, to the date they submitted their reinstatement application on October 16, 2020, the delay was only 23 days, and not 40-90 days as mentioned in the RPD's reasons. If one considers the week it takes for an applicant to receive the confirmation (i.e. seven days after the notice dated September 23, 2020), the delay was only 16 days. The Applicants argue it was unreasonable to expect them to apply for reinstatement when they had not yet received confirmation of their application to withdraw.

[45] Flowing from this unreasonable calculation of the delay, the Applicants argue that the Member drew an unreasonable negative inference about the Applicants' intention to pursue their refugee claims.

[46] The Respondent argues that the Member did not commit an error, as the Member's calculation of the delay can be seen to refer to the original September 3, 2020 date when the Applicants submitted their withdrawal notice, to the date they filed their reinstatement application on October 16, 2020.

[47] In my view, the Member reasonably calculated the delay from the date the Applicants submitted their withdrawal notice. Leaving aside the issue of mental health, noted above, and while I would perhaps draw a different inference from a delay of that length, I do not consider the Member's finding unreasonable.

[48] This being said, delay, on its own, is not necessarily instructive. There are many reasons that may explain a delay in filing a reinstatement application. These reasons need to be assessed

holistically. While it may be that a lengthy delay – even perhaps months – is indicative that an applicant lacks a genuine fear of persecution, it might also indicate a fundamental change of circumstances in the country of origin between the withdrawal and the request to reinstate.

C. *Best Interest Of the Child*

[49] As a final argument, the Applicants assert that the Member failed to consider the BIOC of the Minor Applicant, Sina. They argue the BIOC is a relevant factor, pointing to *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues*. The Applicants submit that the minor applicant cannot be blamed for the decision of his parents to withdraw their refugee application.

[50] The Respondent submits that the Member did not ignore a central issue raised by the Applicants. The Respondent also highlights that the adult Applicants acted as Sina's designated representative in these proceedings. As such, they had autonomy in framing their applications. They did not raise the BIOC as a relevant factor before the Member.

[51] As highlighted by the Applicants, the Chairperson's Guideline 3 states, "In determining the procedure to be followed when considering refugee claim of a child, the [Convention Refugee Determination Division] should give primary consideration to the best interests of the child."

[52] In *Canada (Citizenship and Immigration) v Tobar Toledo,* 2013 FCA 226 [*Toledo*], Justice Pelletier held:

> [68] The Act offers a child claimant for refugee protection the same protections that it offers his or her parents, but it also imposes the same consequences when the claim for refugee protection is rejected, unless the child's condition is different from that of his or her parent: see *P.D.B.* cited above. It is precisely this possibility of distinguishing between the condition of the child and that of the parent that makes the Act consistent with the Convention.

[53] *Toledo* establishes that the claims of minor children are separate and distinct from the claims of their parents. That being said, Sina was represented by his parents, who acted as his designated representative for these proceedings. His parents, through their counsel, did not raise Sina's interests as being separate and distinct from those of his parents. The Applicants have autonomy in how they choose to present their case. The Applicants chose not to raise this issue before the RPD.

[54] Unlike a humanitarian and compassionate decision pursuant to s 25 of the *Immigration and Refugee Protection Act*, the Member is not explicitly statutorily bound to consider the BIOC in a refugee determination, nor in the reinstatement of a refugee claim. In *Boguzinskaite v Canada (Citizenship and Immigration)*, 2012 FC 779 at para 14, Justice Zinn held that the RPD cannot be faulted for failing to consider the BIOC when that factor was not specifically raised before it. That is applicable to this case.

[55] While the BIOC and the specific circumstances of a minor claimant may be a relevant consideration in assessing forward-facing risk, as a consideration in the "interests of justice" branch of the analysis, the Member cannot be criticized for not specifically and explicitly considering this assessment when it was not raised by the parties.

VII. Conclusion

[56] This application for judicial review is allowed.

[57] The decision is set aside and remitted back to the RPD for redetermination by a different Member in accordance with these reasons.

[58] The parties have not proposed a question for certification and I agree that none arise in this case.

[59] As a last comment, I would like to thank both counsel for their courteous and helpful submissions.

JUDGMENT in IMM-5889-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, without costs.
2. The decision is set aside and remitted back to the RPD for redetermination by a different Member in accordance with these reasons.
3. The parties have not proposed a question for certification and no question of general importance is certified.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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