

Federal Court



Cour fédérale

Date: 20230922

Docket: IMM-4256-22

Citation: 2023 FC 1273

Ottawa, Ontario, September 22, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

SYED FAHEEM AFZAL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of Pakistan. He sought refugee protection in Canada on the basis that, as a Shia Muslim, he has a well-founded fear of persecution by Sunni extremists. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the claim on credibility grounds and because, in any event, the applicant has an internal flight alternative (IFA) in Islamabad.

[2] The applicant appealed this decision to the Refugee Appeal Division (RAD) of the IRB. The RAD agreed with the applicant that there had been a breach of procedural fairness because the RPD had relied on information in Port of Entry (POE) notes that had not been disclosed to the applicant. The RAD sought to remedy this breach by having the notes disclosed to the applicant and inviting submissions regarding the notes from the applicant. On the merits of the appeal, the RAD agreed with the RPD that the applicant had failed to provide sufficient credible evidence to establish his claim. The RAD further found that, since this was determinative of the appeal, it was not necessary to address the IFA issue. The RAD therefore dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

[3] The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). He submits that the manner in which the RAD dealt with the POE notes did not meet the requirements of procedural fairness. He also submits that the decision is unreasonable.

[4] As I explain in the reasons that follow, I do not agree that the manner in which the RAD dealt with the POE notes was unfair. Nor do I agree that the decision is unreasonable. This application for judicial review must, therefore, be dismissed.

II. BACKGROUND

A. *The Applicant's Narrative*

[5] The applicant was born in Mandi Bahauddin, Pakistan, in December 1983.

[6] According to his Basis of Claim (BOC) narrative, the applicant began serving as the general secretary of the youth wing of an Imam Bargah in Mandi Bahauddin in February 2017. The applicant claims that his problems began in September 2018, when he arranged an inter-faith cricket match with Sunni players. A fight broke out during the match. The applicant tried to stop the fight but, according to the applicant, after the match Sunnis started spreading rumours about him, alleging that he “took the side of the Shias.” The applicant claims that local Sunni clerics then became involved and began making anti-Shia speeches.

[7] In October 2018, the applicant began receiving threatening phone calls from individuals claiming to belong to the Sipah-Sahaba (SSP), a fundamentalist Sunni group. The applicant claims he reported this to the police, but they did not take any action. Fearing for his safety, the applicant stopped working for the Imam Bargah.

[8] The applicant states that, on November 18, 2018, he received a call from someone claiming to belong to the Lashkar-e-Jhangvi (LeJ), another fundamentalist Sunni group. The caller threatened to kill the applicant because of his work in the Shia community. The applicant claims that, after receiving this call, he cut down on his religious and social activities and mostly stayed at home.

[9] On December 2, 2018, a Sunni cleric issued a fatwa against the applicant identifying him as an infidel. The applicant claims he suffered a “social boycott” in his community after the issuance of the fatwa. The applicant submitted a copy of the fatwa to the RPD.

[10] On December 19, 2018, the applicant obtained a US visitor visa.

[11] On December 24, 2018, a mob attacked the applicant’s home. Neighbours intervened to stop the attack. The police attended and took a statement from the applicant. After this incident, the applicant, his wife, and their children left Mandi Bahauddin for the city of Multan and went into hiding there.

[12] The applicant left Pakistan for the United States on December 29, 2018. On January 3, 2019, he entered Canada irregularly at the Roxham Road border crossing and made a claim for refugee protection.

[13] On October 10, 2019, members of the LeJ and the SSP burned down the applicant’s home. On February 9, 2020, and again on November 17, 2020, members of the LeJ and the SSP attended the home of the applicant’s father looking for the applicant.

B. *The Minister’s Intervention*

[14] On September 17, 2020, the Minister filed a Notice of Intent to Intervene before the RPD. In summary, the Minister alleged the following:

- a) When interviewed by a Canada Border Services Agency (CBSA) officer after entering Canada, the applicant explained that it had not been his intention to come to Canada but, after arriving in the United States, he was informed that his agents of persecution had learned he was there and had threatened him again so he decided to seek refugee protection in Canada. These facts were not included in the applicant's BOC narrative, which was completed on January 22, 2019.
- b) The applicant had failed to disclose to Canadian authorities that he had applied unsuccessfully for a US visitor visa in December 2017, before any of the problems he was alleging had occurred.
- c) Personal information the applicant provided in connection with his 2018 US visa application (e.g. details of his education and employment) differed in material respects from what he provided to Canadian authorities in connection with his refugee claim.
- d) The applicant's publicly available Facebook page indicates that he lives in Toronto, Ontario.

[15] With the notice of intent to intervene, the Minister provided a Five Country Conference Biometric report regarding the applicant from the US Department of Homeland Security, a copy of the applicant's 2018 US visa application, and a screenshot of the applicant's Facebook page. The notice of intent to intervene refers to POE Examination Notes but no such notes were provided with the notice.

C. *The RPD's Decision*

[16] The hearing before the RPD took place on August 20, 2021. The RPD rejected the claim in a decision dated November 8, 2021.

[17] In summary, the RPD identified several areas in which it had concerns about the applicant's credibility:

- The applicant had stated in his BOC narrative that he obtained a US visitor visa on December 19, 2018, after the fatwa was issued. However, the applicant omitted any mention of his 2017 US visa application. The fact that the applicant had tried to obtain a US visa in 2017 suggested he was trying to leave Pakistan “even before any alleged risk.” The applicant's failure to mention this suggests that he “was aware that the claim would be less compelling if [he] had a history of trying to leave Pakistan” so he attempted to conceal this fact.
- The applicant gave inconsistent and vague explanations for why false information was used in his 2018 US visa application.
- The applicant's failure to include in his narrative the allegation that his agents of persecution had learned he was in the United States and that this was why he decided to go to Canada was a material omission.
- The applicant disclosing on his Facebook page that he is in Canada despite allegedly having had to leave the United States because his agents of persecution had learned he was there suggests a lack of subjective fear on the part of the applicant.

[18] The RPD noted that the applicant had provided a number of documents to corroborate his narrative: affidavits from various individuals confirming the events described by the applicant; police reports concerning attacks on the applicant and his home; and a copy of the fatwa. The RPD found that the affidavits used similar language and that it was unclear whether the affiants had personally witnessed the events they described or had been told about them by the applicant. As well, most of the affidavits were “from people close to the [applicant].” The RPD also noted that country conditions reports stated that fraudulent documents are readily available throughout Pakistan. For these reasons, the RPD found that the documents “have little probative weight” and did not overcome its credibility concerns.

[19] Regarding the events underlying the claim, the RPD concluded that the applicant had not been attacked after organizing an inter-faith cricket match and that the LeJ/SSP did not track him to the United States.

[20] In summary, the RPD found that the applicant does not have a subjective fear of persecution at the hands of the LeJ/SSP in Pakistan, nor does he face a risk of harm from these groups should he return to Pakistan. The RPD also found, in the alternative, that the applicant had a viable IFA in Islamabad. As a result, it rejected the claim for protection.

D. *The Applicant’s Appeal to the RAD*

[21] In his appeal, the applicant submitted that there had been a breach of the requirements of procedural fairness because the RPD had relied on information in the POE examination notes but those notes had not been disclosed to him despite his having requested them prior to the hearing.

He also challenged the correctness of the RPD's adverse credibility findings as well as its assessment of the documentary evidence provided to corroborate his narrative. The applicant also argued that the RPD erred in finding that he had a viable IFA.

[22] In response to a request from the RAD, on March 2, 2022, the Minister provided the notes taken by the Inland CBSA Officer who interviewed the applicant at the Montreal Urban Processing Centre on January 8, 2019. In material part, the notes read as follows:

I asked Mr. AFZAL why he made a claim for refugee protection today. Stated that as he is involved with the Shia Youth. A group he described as entirely religious and non political, he had been threatened by two groups Lashkar Jhangvi and Sipah e Sahaba. When asked why he in particular was threatened he stated that it was because he was the general secretary for this group. He described his role as taking care of his place of worship and helping with processions. Mr. AFZAL further stated that he initially did not intend to come to Canada, he travelled to the United States to get away from these threats, but once in the United States he was threatened again, and the group told him they knew he was in the United States. Stated that this is why he came to Canada. Stated his family do not have US visas so are in hiding in Pakistan.

[23] On March 9, 2022, the RAD wrote to the applicant identifying six "credibility concerns" that were not addressed in the RPD's reasons and inviting the applicant to provide submissions in response to the concerns. Among these concerns was the omission from the BOC narrative of the threats the applicant learned about after arriving in the United States and his fear of being located there. The RAD also invited the applicant to make submissions "in relation to the Port of Entry Examination notes."

[24] Counsel for the applicant (not Mr. Jeffery) responded to the RAD's invitation by way of a letter dated March 22, 2022. He addressed each of the six credibility concerns identified by the RAD. With respect to the POE notes in particular, he wrote: "[T]he only relevance I see is that it corroborates Mr. Afzal's position (described in paragraph 1 above) that he did not mention the fear in the USA in his narrative as it was previously mentioned at the port of entry." (In the earlier paragraph to which he refers, counsel had written: "There was no attempt to mislead or misinform or omit facts, it was just thought that it was not relevant to the present claim against Pakistan and besides he had already told immigration this.") Counsel concluded the letter by stating that, while he had done his best to respond to the RAD's stated concerns, "[i]f there are still concerns or my writing has raised other issues then perhaps a re-hearing could be offered to Mr. Afzal to better address these concerns."

III. DECISION UNDER REVIEW

[25] Looking first at the POE notes, the RAD agreed with the applicant that the Minister's failure to disclose the notes had occasioned a breach of procedural fairness at the RPD. The RAD was satisfied, however, that this was a minor breach because "the content of the Minister's intervention is consistent with the content of the POE Examination notes." The RAD was also satisfied that the breach had been remedied on appeal because the notes had been disclosed to the applicant and he was provided with an opportunity to address them in submissions.

[26] On the merits of the appeal, the RAD largely agreed with the RPD's negative assessment of the applicant's credibility. It addressed the applicant's arguments on appeal point by point. The RAD found that the applicant had failed to provide a reasonable explanation for the

omission of the threats he received in the United States from his BOC narrative. The applicant's disclosure of his location on social media was inconsistent with his claim in the POE interview that he was fearful in the United States because he had been located there. The applicant's failure to mention his 2017 US visa application, for which the applicant had not provided a reasonable explanation, warranted a negative inference as to his credibility. As for the applicant's supporting evidence, the RAD agreed with the RPD that two of the affidavits were almost identical. The RAD also agreed that it is unclear whether the affiants personally witnessed the events they describe.

[27] The RAD concluded as follows:

I have reviewed the supporting documents submitted by the Appellant and find that they do not overcome the significant credibility concerns outlined above, including the omission of the threats in the US from his BOC narrative; the Appellant's disclosure of his location on social media; and the Appellant's failure to disclose his prior application for a US visa. I find that the Appellant's explanations do not reasonably explain the discrepancies and that they undermine his credibility. I find that the Appellant did not establish, on a balance of probabilities, the allegations that form the basis of his claim.

[28] The RAD therefore dismissed the appeal and confirmed the RPD's decision that the applicant is neither a Convention refugee nor a person in need of protection.

IV. STANDARD OF REVIEW

[29] The applicant challenges both the fairness of the procedure by which the RAD dealt with the POE examination notes as well as the decision on the merits of his appeal. There is no dispute about how the Court should approach these issues on judicial review.

[30] First, to determine whether the procedure followed by the RAD met the requirements of procedural fairness, the reviewing court must conduct its own analysis of the process the decision maker followed and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; and *Perez v Hull*, 2019 FCA 238 at para 18. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The ultimate question “is whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific Railway Co* at para 56). No deference is owed to the RAD in this regard (*Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 45). The burden is on the applicant to demonstrate that the requirements of procedural fairness were not met.

[31] Second, the RAD’s decision on the merits of the appeal is reviewed on a reasonableness standard. A reasonable decision “is 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” (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). For a decision to be reasonable, a reviewing court “must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it

to the conclusion at which it arrived” (*Vavilov* at para 102, internal quotation marks and citation omitted). On the other hand, “where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable” (*Vavilov* at para 136).

[32] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). Nevertheless, the test of reasonableness and its requirements of justification, intelligibility and transparency apply to an administrative decision maker’s assessment of the evidence and to the inferences the decision maker draws from that evidence (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 46). Consequently, adverse findings of fact and or adverse inferences with respect to credibility must find their justification in the evidence before the decision maker and their expression in the decision maker’s reasons (*ibid.*).

[33] The onus is on the applicant to demonstrate that the RAD’s decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied 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” (*Vavilov* at para 100).

V. ANALYSIS

A. *Was there a breach of procedural fairness?*

[34] The applicant submits that the disclosure of the POE notes and the opportunity to address them in submissions did not cure the breach of procedural fairness in this case. On the contrary, this only exacerbated the breach of procedural fairness at the RPD because the applicant continued to be deprived of a meaningful opportunity to address a central piece of evidence. According to the applicant, the RAD should have returned the matter to the RPD for a new hearing.

[35] I disagree.

[36] I would begin by observing that the RAD's characterization of the failure to disclose the POE notes as a "minor breach" of procedural fairness is entirely apt. As the RAD points out, the information in the notes was set out accurately in the Minister's notice of intervention; the notes themselves did not contain any additional relevant information. As a result, even though he did not have the document from which the information the Minister relied on was obtained, he was aware of that information and had a full opportunity to respond to it at the RPD.

[37] In light of this, I am satisfied that the applicant had a meaningful opportunity to address the POE notes on appeal. In short, they added nothing new to the case the applicant already had a full opportunity to meet at the RPD. It is noteworthy that, when given the opportunity to provide further submissions on the notes, his counsel had nothing new to say. On review, the

applicant has not identified any additional information he was prevented from providing because of the manner in which the RAD proceeded.

[38] The RAD does not expressly address the applicant's request that the matter be referred back to the RPD for a new hearing. Nor does it expressly consider whether, having admitted the POE notes as new evidence, a hearing was warranted under subsection 110(6) of the *IRPA*. For the sake of transparency, it would have been better if the RAD had addressed these issues. Nevertheless, since the POE notes did not add anything new to the case the applicant had to meet, I am satisfied that the process followed by the RAD met the requirements of procedural fairness.

B. *Is the decision unreasonable?*

[39] The applicant submits that the RAD's decision is unreasonable because the RAD's adverse credibility determinations do not stand up to scrutiny. He also submits that the RAD ignored a substantial body of evidence capable of corroborating the core elements of his claim, leaving a fundamental gap in the RAD's analysis.

[40] Once again, I do not agree.

[41] In his appeal, the applicant challenged the RPD's adverse credibility findings as well as the IFA determination. As noted above, the RAD did not find it necessary to address the IFA issue. With respect to the adverse credibility determinations, the applicant submitted that the RPD had erred in the following respects: (1) by drawing an adverse inference from the

applicant's failure to mention the threats he received in the United States in his BOC narrative; (2) by drawing an adverse inference from the applicant's having disclosed his location on social media; and (3) by drawing an adverse inference from the applicant's failure to disclose his 2017 US visa application. The applicant also submitted that the RPD had erred in giving his supporting evidence "little probative weight" and in finding that the evidence did not overcome the credibility concerns it identified.

[42] Looking first at the RAD's credibility determinations, the applicant has not persuaded me that any of them are unreasonable. The RAD addressed in detail each of the errors the applicant had alleged. In transparent, intelligible, and justified reasons, it explained why it was not persuaded that the RPD had erred in any of the ways the applicant alleged and why it agreed with the RPD's findings. The applicant has not identified any fundamental flaws in the RAD's reasoning. Rather, he simply disagrees with the RAD's conclusions and urges me to do the same. As I have already noted, that is not the role of the Court on judicial review on a reasonableness standard.

[43] Turning to the applicant's supporting evidence, the applicant had submitted on appeal that the RPD's dismissal of this evidence lacked transparency because it did not identify the affidavits that bore striking similarities and about which it was unclear whether the deponents had first-hand knowledge of the matters described. The applicant had also submitted that the bald statement that fraudulent documents are readily available in Pakistan was an insufficient basis on which to dismiss the substantial body of supporting evidence he had provided.

[44] In its decision, the RAD identified the two affidavits in question. It found that the similarities “are obvious as they are almost identical.” It also agreed with the RPD that it is unclear whether the affiants personally witnessed the events described in the affidavits. On review, the applicant does not take issue with these findings. He argues, however, that the RAD fell into reviewable error by failing to consider the balance of the supporting documents.

[45] I do not agree. The RAD expressly states that it reviewed the applicant’s supporting documents and found that they did not overcome the significant credibility concerns that it had. While the RAD could certainly have said more about why it reached this conclusion, its brief reasons are a sufficient response given how the applicant framed this ground of appeal. The applicant had cast this ground at a very high level of generality. As *Vavilov* holds, the “principles of justification and transparency require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties” (at para 127). In the absence of more detailed submissions from the applicant on this issue, the absence of more detailed reasons from the RAD does not call the reasonableness of its assessment of this issue into question.

[46] I would note, finally, that the applicant has not even attempted to argue on review that it was not reasonably open to the RAD to conclude that the supporting evidence was insufficient to overcome its credibility concerns. His argument is simply that the RAD erred by failing to consider the supporting evidence. As I have just explained, I am not persuaded that the RAD so erred.

VI. CONCLUSION

[47] For these reasons, the application for judicial review will be dismissed.

[48] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-4256-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4256-22

STYLE OF CAUSE: SYED FAHEEM AFZAL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 28, 2023

JUDGMENT AND REASONS: NORRIS J.

DATED: SEPTEMBER 22, 2023

APPEARANCES:

Matthew Jeffery FOR THE APPLICANT

Kevin Doyle FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario