Federal Court  Cour fédérale

Date: 20240425

Docket: IMM-4250-22

Citation: 2024 FC 617

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 25, 2024.

PRESENT: Mr. Justice Pentney

BETWEEN:

ALEKSANDER MAKLAJ
EDMONDA MAKLAJ
KRISPA MAKLAJ
ERTON MAKLAJ

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] dated July 16, 2021, which confirmed the decision by the Refugee Protection Division [RPD] that the applicants are not refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The RPD has ruled on this case twice. A first RPD hearing was held on May 4, 2018, after which the panel rejected the claim on grounds of a lack of credibility and no credible basis for the claim [*RPD 2018*]. With the consent of the parties, the Federal Court set aside that decision and referred the matter back to the RPD for a *de novo* review. The second RPD hearing was held on November 20, 2020, and the panel also dismissed the claim on grounds of a lack of credibility. That second decision was appealed before the RAD.

[3] The applicants claim that the RAD did not raise a flagrant error in the RPD decision, namely that the RPD questioned the credibility of their written account because of the delay in filing their refugee protection claims, but that finding is based entirely on the analysis in *RPD 2018*. The applicants assert that it is incorrect to base a finding on a decision that has been set aside and that this indicates that the RPD did not in reality conduct a *de novo* review of their claims. According to them, this also indicates that the RPD failed in its duty to conduct an independent analysis of the matter.

[4] I cannot accept this theory for two reasons, which are explained in more detail below. First, the applicants did not raise this argument at the RAD hearing. Second, even if I were to accept the idea that the RAD erred by not addressing this point, the fact remains that these findings concerning the applicants' credibility are based on other grounds.

[5] For the following reasons, the application for judicial review must be dismissed.

I. Facts and proceedings

[6] The applicants, Alexsander Maklaj (the principal applicant), his spouse Edmonda Maklaj and their two minor children, are all citizens of Albania. The facts that they presented in support of their refugee protection claim are as follows.

[7] The principal applicant alleges that in his country of origin he fears members of a family named Sopjani, who declared a blood feud against his family. The applicants allege that the problems began in 2007 when they built a building on land that had been received from the female applicant's family. The Sopjanis claimed that they owned the land. To avoid problems, the applicants resold the building to the female applicant's family.

[8] The applicants moved to get away from the problems with the Sopjani family. Since then, they and other members of the family have been assaulted by members of that family. The principal applicant filed a complaint with the police to report the threats made by the Sopjani family. The authorities did nothing and confirmed that the source of the conflict between the families was related to the issue of the property.

[9] In January 2016, a member of the Sopjani family was murdered. The Sopjanis then declared a blood feud against the applicants, accusing them of being responsible for the murder.

[10] The applicants state that they tried to resolve the quarrel by seeking help from the Orthodox Church Divjake Lushnjen, the Peace Reconciliation Missionaries of Albania and the Chief Elder of the Village Shenepremte.

[11] The adult applicants left Albania for Canada in September 2016. The principal applicant's spouse then returned to Albania to bring the children to Canada. They came to Canada in March 2017. The entire family claimed refugee protection in May 2017.

[12] The RPD rejected their refugee protection claims on grounds of a lack of credibility and no credible basis for the claim (*RPD 2018*). Among other things, the RPD noted that their refugee protection claims were filed late and that there were contradictions in their written account, undermining their credibility. That decision was set aside, with the parties' consent, and the Court referred the matter back to the RPD for a *de novo* hearing and redetermination by another panel.

II. RPD decision

[13] Following a hearing held on November 20, 2020, the RPD again rejected the applicants' refugee protection claim on the grounds that the allegations were not credible.

[14] The respondent's intervention at the hearing was limited to written representations. In particular, the Minister submitted that the applicants' account was not credible because they were in Canada for 11 months before beginning refugee protection proceedings, which shows that the applicants lacked subjective fear.

[15] For the panel, the determinative issue in this case was credibility. The panel shares the Minister's reservations about the late refugee protection claim, which undermines the applicants' credibility. In addition, the panel was not satisfied on a balance of probabilities that the

applicants had established that the alleged blood feud was real. The principal applicant's testimony was not reliable, and his written account was tainted by significant inconsistencies.

III. Decision under judicial review

[16] In a decision dated July 16, 2021, the RAD dismissed the applicants' appeal and confirmed the RPD decision.

[17] The RAD was of the view that the issue to be decided was whether the RPD had erred in its assessment of the appellants' credibility. In analyzing the evidence presented, the RAD made the same finding as the RPD. More specifically, the RAD examined the following elements raised by the RPD:

- The late nature of the appellants' refugee protection claim in Canada undermines the credibility of their subjective fear of returning to their country.
- There is inconsistency in the allegation that the male appellant's brother-in-law and his wife had no problems with the Sopjani family, even though they own the land claimed by the family that is supposedly the source of their problems.
- There were contradictions in the male appellant's testimony that, on the one hand, they have had "ongoing problems" with the family since 2007 and, on the other hand, that those problems are due to the death of a member of the Sopjani family in 2016.
- There is inconsistency stemming from the allegation that the male appellant's oldest brother has had no problems with the Sopjani family, given that the blood feud would apply throughout the area.

- It is implausible that the male appellant could not find any news articles or had no knowledge of any police investigation following the alleged death of a member of the Sopjani family in 2016, given that they had produced an article on a previous death in the same family.

[18] The RAD dismissed the applicants' allegations that the elements raised by the RPD are only incidental to the claim and that the RPD applied Canadian standards to a situation in Albania. The RAD accepted the RPD's finding that the documents presented by the appellants that would corroborate the blood feud between the families had no probative value, as too many inconsistencies and contradictions were raised for the documents to resolve the credibility issues. The RAD also noted that the documentary evidence from the IRB National Documentation Package on Albania in fact indicates that fraudulent certificates are issued by various organizations.

[19] In light of that analysis, the RAD dismissed the applicants' appeal. The applicants are seeking judicial review of that decision.

IV. Issues and standard of review

[20] This case raises only one issue: whether the RAD decision is reasonable based on the analysis framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[21] To determine whether a decision is reasonable, the reviewing court must develop an understanding of the reasoning process and determine whether the decision bears the hallmarks

of reasonableness, in terms of 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).

V. Discussion

[22] The applicants argue that the RAD decision is unreasonable for one main reason: the failure to correct a key error in the RPD decision concerning the assessment of their credibility. They submit that the RAD's mission is to conduct its own independent analysis: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica*]. In this case, the applicants argue that the RAD confirmed all the RPD's findings with respect to the applicants' credibility. In particular, the RAD reiterated the RPD's findings concerning the time that had elapsed before the applicants claimed refugee protection in Canada.

[23] The applicants assert that the RAD erred in confirming that RPD finding because it did not conduct its own analysis of the evidence submitted in support of the refugee protection claim. The RAD confirmed the RPD finding without examining whether it is still valid given that its decision was set aside by this Court. Following the judgment in the Federal Court decision that set aside the original decision, the RPD was required to conduct a *de novo* analysis of the claim. According to the applicants, the RPD should not have relied in any way on the first RPD decision.

[24] The applicants thus submit that the RAD erred in confirming the RPD's reasoning because, in particular, it was based on a decision that was invalidated. The applicants also submit that the RPD did not ask them any questions about the reason for the delay and therefore relied

solely on the findings from the invalidated decision. The RAD should have referred the claim to a new RPD decision-maker so the applicants could be questioned about it. The RAD erred by confirming the RPD's error and by failing to conduct its own independent analysis.

[25] The applicants submit that at the very least the RAD should have explained why the following observation from *Huruglica* did not prevent it from considering the findings from a decision invalidated by the Court:

> [79] I also conclude that an appeal before the RAD is not a true *de novo* proceeding. Recognizing that there may be different views and definitions, I need to clarify what I mean by "true *de novo* proceeding". It is a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects. When the appeal is a true *de novo* proceeding, standard of review is not an issue. This is clearly not what is contemplated where the RAD proceeds without a hearing.

[26] The applicants submit that the RAD's findings in this respect are problematic, as they do not refer to the error committed by the RPD when that error was clear from the evidence, which goes against the teachings of case law: *Vavilov* at para 128. The applicants assert that the RAD failed to address the key issue, namely that the RPD could not judge their credibility on the basis of a decision invalidated by the Federal Court. The applicants also state that the RAD mentioned the first proceeding before the Federal Court earlier in its decision and therefore could not ignore this element: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at paras 15 and 17. It would thus be impossible to understand the RAD's reasoning, which supports an intervention: *Vavilov* at para 84.

[27] The respondent submits that an applicant seeking to have a decision based on a lack of credibility overturned bears a heavy burden: *Khelili v M.C.I*, 2022 FC 188 at para 24. According

to the respondent, the RAD could validly find the appellants not to be credible and confirm the RPD's findings.

[28] According to the respondent, the RAD could validly confirm the RPD's finding concerning the delay in claiming refugee protection, which, while not determinative, remains a relevant factor for the panel to consider. The RAD is entitled not to believe a claimant owing to contradictions between statements of fear and the claimant's facts and actions: *Munoz v Canada (Citizenship and Immigration)*, 2006 FC 1273 at paragraph 1. The respondent cites *Kayode v Canada (Citizenship and Immigration)*, 2019 FC 495 [*Kayode*] at para 29 on the governing principles concerning delayed refugee protection claims. More specifically, the issue of whether the claimant delayed seeking protection and the length of the delay must be assessed with regard to the time when the fear began.

[29] The respondent also submits that the applicants cannot accuse the RPD of not asking them about the reasons for their delay. The Minister intervened before the RPD on the issue of the delay. As a result, the applicants, who were represented, knew that the issue was raised and should have provided their best response. The respondent adds that the fact that the RAD made the same finding as the RPD does not mean that it did not conduct its own analysis: *Hamid v Canada (Citizenship and Immigration)*, 2021 FC 100 [*Hamid*] at para 28.

[30] As indicated previously, the respondent's argument does not call for the decision to be set aside. While acknowledging that it would have been preferable for the RPD not to refer to the previous decision, I cannot conclude that it is a sufficiently serious issue for the entire decision to be considered unreasonable. My conclusion on this aspect is based on three main considerations.

[31] First, the applicants did not raise that error by the RPD before the RAD. Essentially, the applicants are faulting the RAD for failing to address an issue that they did not raise before it. In general, new issues of law that were not raised at previous stages cannot be raised before the Federal Court at the judicial review stage: *Oluwo v Canada (Citizenship and Immigration)*, 2020 FC 760 at para 43; *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 at para 32.

[32] A consistent line of case law holds that the RAD cannot be faulted for not having considered and addressed arguments that were not raised on appeal. See the following observations by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v R.K.*, 2016 FCA 272:

> [6] In my view, this appeal turns on a single issue: the failure of the claimants, the respondents in this Court, to request a *de novo* hearing before the Appeal Division. Because the claimants did not request that the Appeal Division conduct a *de novo* hearing on all of the evidence, they were precluded from raising in the Federal Court any issue relating to the Appeal Division's failure to hold a *de novo* hearing. This is because the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 23–25).

[33] When the issue was not raised before the RAD, it cannot be raised for the first time as part of a judicial review proceeding: *Shaibu v Canada (Citizenship and Immigration)*, 2022 FC 109 at para 9.

[34] Second, I am of the view that the fact that the RPD cited the previous decision is not a clear indication that it did not conduct its own analysis of the delay issue. There is abundant

caselaw confirming that the issue of a delay in claiming refugee protection is a relevant issue in analyzing a refugee protection claim: see *Kayode* at para 29; *Nijjer v Canada (Citizenship and Immigration)*, 2009 FC 1259. The Minister intervened in the proceeding and submitted written submissions related specifically to the issue of the delay. The RPD's discussion of that issue was not a surprise to the appellants.

[35] Given the respondent's position, we must go back to the RPD's observations about the issue of the delay:

> [12] As indicated earlier in these reasons, the panel shares the Minister's concerns with respect to the delay in claiming. In this regard, the panel quotes in part the reasons of the first panel:
>
> > …the principal claimant knew when he was in Canada on his 7-year visa that it entitled him to remain in Canada as a visitor for only six months at a time. The adult claimants once they arrived at the airport in Canada came inland and did not make refugee claims. The principal claimant overstayed his six months stay and became out of legal visitor status in Canada for some five months. At his hearing, he testified he knew that during that time, he was deportable. This is highly significant.
>
> [13] The panel shares the finding of the previous panel that the delay is indicative of a lack of subjective fear and finds that the delay casts a dark shadow over the credibility of the claimant's story.

[36] Some points need to be highlighted in this passage. The wording used shows that the previous decision sets out the finding that the RPD drew from its own analysis—it is "shared" and not "retained". In addition, the facts related in citing the previous decision merely reiterate what is revealed by the evidence produced by the applicants' themselves. The applicants' factual basis remains the same in the second hearing. And the reservations about the delay are expressed in the Minister's intervention.

[37] In light of the above, I am not satisfied that this quotation shows a lack of analysis. It is instead a situation in which the decision-maker has drawn on the analysis of a previous decision-maker to express his own analysis.

[38] This is sufficient to respond to the applicants' main submissions. I am of the view that, even if I were to accept the idea that the RAD erred by not considering this error in the RPD decision, this would not be sufficient to render the RAD decision unreasonable. On this point, we must remember the teachings of *Vavilov*:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside 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. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[39] For the reasons set out above, I am not satisfied that the applicants have discharged their burden on this point.

[40] There is no need to examine the applicants' other arguments in detail. Essentially, they are asking this Court to reassess the evidence and reevaluate the credibility findings. The assessment of evidence and findings concerning the credibility of a refugee protection claimant are central to the mission of the RPD and the RAD. That is not the mission of this Court in a judicial review proceeding.

[41] For instance, the applicants claim that the RPD erred in confirming the RPD's finding that it is unlikely that the principal applicant's in-laws have not had any problems with the Sopjanis since the property was transferred. The RAD found the applicants' explanation to be "inconsistent", as they stated that the source of their problems was that family's claim over the land. It is a finding based on the evidence on the record, and the RAD clearly explained its analysis. That analysis is reasonable and consistent with the principles set out in *Vavilov*.

[42] For all of the above reasons, the application for judicial review is dismissed.

[43] Neither party proposed a question of general importance for certification. I agree that this case does not raise any such questions.

JUDGMENT in IMM-4250-22

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No serious questions of general importance were certified.

"William F. Pentney"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4250-22
STYLE OF CAUSE:	ALEKSANDER MAKLAJ, EDMONDA MAKLAJ, KRISPA MAKLAJ v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 24, 2023
JUDGMENT AND REASONS:	PENTNEY J
DATED:	APRIL 25, 2024

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