

Federal Court



Cour fédérale

Date: 20240712

Docket: IMM-8483-22

Citation: 2024 FC 1101

Ottawa, Ontario, July 12, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

MOHAMMED MOSTAFA CHOWDHURY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] that Mohammed Mostafa Chowdhury [Applicant] is neither a Convention refugee under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], nor a person in need of protection under s. 97 of the IRPA due to negative credibility findings [Decision].

[2] For the reasons that follow, this application for judicial review is dismissed because the RAD's Decision was not unreasonable. It was open to the RAD to conclude that the Applicant had not submitted sufficient corroborative evidence to alleviate their concerns as to his credibility.

II. Background and Decision Under Review

[3] The Applicant is a citizen of Bangladesh. He moved to New York City under a false identity in June 2001 and returned to Bangladesh twice: first in 2005, and then in 2011.

[4] During his return in 2011, the Applicant claims he began to fear persecution by members of the Awami League [AL] and local police because members of the AL had been threatening and extorting him after he donated money to the Liberal Democratic Party [LDP]. The Applicant also alleges his son is now associated with the LDP in Bangladesh.

[5] On February 14, 2022, the Refugee Protection Division [RPD] rejected the Applicant's refugee claim. The RPD concluded that the Applicant did not establish with sufficient credible evidence that he faces a serious possibility of persecution on a Convention ground or that, on a balance of probabilities, he would personally be subjected to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture should he return to Bangladesh. The determinative issue was the Applicant's credibility.

[6] The Applicant sought an appeal of the RPD's decision to the RAD. The RAD's Decision dated July 18, 2022 confirmed the RPD's conclusions. As a preliminary matter, the RAD

addressed new evidence the Applicant sought to admit for their review, consisting of three documents. These were an affidavit from the Applicant's son dated April 12, 2022; a letter from the president of the LDP dated March 28, 2022; and, a medical report dated March 26, 2022 regarding treatment the Applicant's son received.

[7] The RAD considered the eligibility criteria of new evidence in section 110(4) of the IRPA. The RAD described that the Applicant could only present evidence that arose after the rejection of his claim or that was not reasonably available at the time of the rejection, or that he could not reasonably have been expected in the circumstances to have been presented at the time of the rejection. If the evidence meets one of these requirements, the RAD cited *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 [*Singh FCA*] in identifying that it must consider whether it passes the tests of credibility, relevance, and newness.

[8] The RAD indicated that, for the alleged events of March 26, 2022, it was accepted that the evidence arose after the rejection of the claim and met the criteria under section 110(4) of the IRPA. However, the RAD found that the letter from the president of the LDP constitutes evidence that existed prior to the RPD hearing and upon which the central allegations in the claim were made before the RPD. The RAD noted that this new evidence was available at the time of the RPD's decision, and the Applicant did not explain why this evidence was not reasonably available at the time of the rejection or the Applicant could not reasonably have been expected to present it at the time of the rejection. The alleged LDP activities in the letter from the LDP president related to the 2011 timeframe.

[9] The RAD then applied the credibility test as laid out at paragraph 54 of *Singh FCA*, and considered the evidence being presented and the timelines of the immigration proceedings, among other things, to assess the three documents. Completing its analysis, the RAD found that the new evidence was not credible and characterized the new events that occurred shortly after the Applicant gave notice of his appeal on March 7, 2022 as suspiciously convenient and too fortuitous in nature to be believed such that it was intended to address the RPD's findings (citing *Meng v Canada (Citizenship and Immigration)*, 2015 FC 365 at para 22 and *Ankrah v Canada (Employment and Immigration)*, (FCTD, no T-1986-92), Noel, March 16, 1993). As a result, the RAD did not admit new evidence on appeal. Given this conclusion, the RAD determined that, pursuant to section 110(6) of the IRPA, it was unnecessary to have an oral hearing because no new evidence had been admitted.

[10] On the merits of the application, the RAD identified that the determinative issue was credibility, finding that the RPD reasonably considered discrepancies between the Applicant's evidence and his point of entry interview, discrepancies and omissions from his basis of claim narrative, and his failure to claim asylum while in the United States for several years indicated a lack of subjective fear, thus undermining his credibility.

[11] In response to the Applicant's submissions, the RAD found that the RPD erred in making a negative credibility inference based on the Applicant failing to provide a donation receipt, and also erred in dismissing corroborating evidence regarding the fraudulent evidence the Applicant admitted to providing to the United States immigration authorities. The RAD conducted its own assessment and, after assessing the evidence, found there was insufficient corroborative evidence

to offset their credibility concerns. Combined with the fact that the Applicant stayed illegally for several years in the United States without seeking asylum, the RAD found his credibility was undermined and that the Applicant had failed to establish the central allegations of his claim. The RAD also found the Applicant had not established a *sur place* claim because he had not established that his son was involved with the LDP. Due to the negative credibility inferences, and the lack of a *sur place* claim, the RAD dismissed the Applicant's appeal.

III. Issues and Standard of Review

[12] The Applicant raises the issue of the reasonableness of the Decision based on the RAD's negative credibility findings, and asserts a breach of procedural fairness because the RAD rejected the new evidence and did not hold an oral hearing.

[13] The Applicant has characterized the RAD's refusal to accept new evidence on appeal as a matter of procedural fairness. However, reasonableness is the appropriate standard of review on the RAD's interpretation and application of its home statute including subsection 110(4) of the IRPA (*Lamsal v Canada (Citizenship and Immigration)* 2023 FC 807 at para 43, citing *Ifogah v Canada (Citizenship and Immigration)* 2020 FC 1139 at para 35 and *Mchedlishvili v Canada (Citizenship and Immigration)* 2022 FC 229 at para 15).

[14] The parties agree the standard of review with respect to the merits of the RAD's Decision is reasonableness. I also agree that the applicable standard of review is reasonableness in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). On judicial review, the Court must assess whether the decision bears the hallmarks

of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *S. 110 – Admission of New Evidence & Oral Hearings*

[15] Subsection 110(4) permits evidence to be admitted to the RAD if that evidence either:

- a) arose after the rejection of their claim;
- b) was not reasonably available at the time of rejection; or
- c) could not reasonably have been expected in the circumstances to have been presented, at the time of the rejection.

[16] If evidence satisfies one of the criteria in subsection 110(4) of the IRPA, it can be admitted. Similarly, it is within the RAD's scope to consider the relevance and credibility of the evidence sought to be admitted (*Singh FCA* at paras 44-45). Once new evidence has been admitted, subsection 110(6) of the IRPA sets out circumstances when a hearing may be held.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

[17] The use of the word “may” in subsection 110(6) of the IRPA suggests that holding a hearing is not mandatory. Subsections 110(4) and 110(6) of the IRPA do not operate as mandatory clauses to require that the RAD hold an oral hearing when new evidence is submitted.

[18] The RAD is also not required to hold an oral hearing to assess the credibility of new evidence. It is when otherwise credible and admitted evidence raises a serious issue with respect to the general credibility of an applicant that the determination of an oral hearing becomes relevant. A “credibility finding” on the admissibility of new evidence is not equivalent to a credibility assessment on the applicant (*A.B. v Canada (Citizenship and Immigration)*, 2020 FC 61 at para 17; see also *Yusuf v Canada (Citizenship and Immigration)*, 2023 FC 1032 at para 19).

[19] I agree with the Respondent that the requirements of section 110(6) of the IRPA are conjunctive and all requirements must be met in order to warrant consideration of a hearing. The RAD was within their legislative scope and I do not see any error in how the RAD assessed the applicable legislation following receipt of the three new pieces of evidence submitted.

[20] As such, the RAD was not unreasonable in not admitting the new evidence. The RAD could not be unreasonable in not convening an oral hearing when not authorized to do so by the IRPA.

B. *The Decision Is Reasonable*

[21] On this front, the Applicant alleges it was unreasonable for the RAD to draw negative inferences of his immigration interactions in the United States. Second, the Applicant alleges it was unreasonable for the RAD to consider inconsistencies between his point of entry interview and his testimony to the RPD. Finally, the Applicant alleges that the RAD's reasoning was circular on the *sur place* claim, precluding the Applicant from having a *sur place* claim because he did not establish that his son was significantly involved with the LDP. The Applicant claims that his testimony was consistent. The RAD was wrong in not accepting his testimony, in its findings of omissions or discrepancies and therefore the Decision was unreasonable.

[22] The Respondent relies on *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 [*Espinosa*], for the proposition that the Applicant's illegal stay in the United States for approximately seven years while never seeking asylum can reasonably be found to undermine the Applicant's credibility on his refugee protection claim in Canada.

[23] The Court's jurisprudence since *Espinosa* confirms that delay in seeking refugee protection is not determinative, but remains an important factor in assessing a claimant's credibility and subjective fear (*Wang v Canada (Citizenship and Immigration)*, 2023 FC 1487 at para 24).

[24] If there is a delay, the RAD must then assess the claimant's explanation for the delay. In this case, the RAD's analysis took into account the Applicant's evidence about the circumstances

around the seven-year delay. As the Applicant had the opportunity to give evidence and submissions on this point, after analyzing the same, it was open for the RAD to conclude that his explanations were not satisfactory.

[25] The Applicant's other arguments relate to the RAD's findings on his credibility and the credibility of his claim.

[26] In that vein, it is important to underline that findings regarding the credibility of a claimant and the assessment of the evidence command a high degree of deference from this Court. Credibility determinations lie within the heartland of the RPD's and RAD's discretion and are not to be overturned unless they are perverse, capricious, or made without regard to the evidence (*Malik v Canada (Citizenship and Immigration)* 2022 FC 1097 at para 10, citing *Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29, *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35, *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6).

[27] One of the hallmarks of credibility is consistency and, with that in mind, prior inconsistent statements going to the core of the individual's claim can be a reasonable basis for finding that the person lacked credibility (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 179 at para 17, citing *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 41-46, *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 16-20).

[28] After a review of the evidence and submissions, the RAD's credibility findings were borne out of the record before it, including the inconsistencies and omissions arising from the Applicant's testimony and evidence. It is not the role of this Court to reweigh the evidence when the Applicant disagrees with the RAD's assessment.

[29] Finally, the Applicant also did not provide direct evidence to establish the facts substantiating his *sur place* claim. Without sufficiently helpful evidence on this point, it is not unreasonable for the RAD to conclude that there cannot be a *sur place* claim for a circumstance the Applicant did not prove.

V. Conclusion

[30] I agree with the Respondent's submissions that the Applicant is essentially asking the Court to reweigh the evidence, which I cannot do on judicial review. The RAD's Decision is justifiable in light of the legal and factual constraints that bear on it. As such, this application for judicial review is dismissed.

[31] The parties have not submitted any questions for certification and I agree that none arise in the circumstances.

JUDGMENT in IMM-8483-22

THIS COURT'S JUDGMENT is that:

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

"Phuong T.V. Ngo"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8483-22

STYLE OF CAUSE: MOHAMMED MOSTAFA CHOWDHURY v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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