

Federal Court



Cour fédérale

Date: 20120718

Docket: IMM-9276-11

Citation: 2012 FC 901

Toronto, Ontario, July 18, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

**MAEDAH ALAVI MOFRAD
ZOHA ALAVI MOFRAD**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Maedah Alavi Mofrad and Zoha Alavi Mofrad, are sisters and citizens of Iran, who fled that country and made refugee claims in Canada. They claim they would be at risk if returned to Iran by reason of their actual or perceived political opinions.

[2] The applicants' father was a civil servant in Iran and was detained by government authorities for approximately six months from 2008 to early 2009. Neither sister has a clear notion of the exact reasons for Mr. Mofrad's detention, other than it was apparently due to a belief that he

was opposed to the Ahmadinejad regime. In March 2009, Mr. Mofrad sent Maedah to England to study on a student visa, because he feared for her safety in Iran. That visa was set to expire in October 2009. Mr. Mofrad did not originally send Zoha out of Iran because she was then engaged to be married, and the family believed that she was accordingly less vulnerable than Maedah.

[3] In 2009, Zoha became active in the anti-regime “Green Movement”, and claims to have attended its meetings, distributed flyers, de-faced pro-Ahmadinejad billboards and participated in anti-regime demonstrations. She alleges that in August 2009 she was interrogated by members of the governmental security service at her work about her activities and politics and that following the questioning was summarily fired. Zoha claims that shortly thereafter her fiancé broke off their engagement, due to fear that he might be viewed as being complicit in her anti-regime activities or to share her anti-regime beliefs.

[4] In August 2009, by reason of what had transpired with Zoha, Mr. Mofrad made arrangements for Maedah to be brought to Canada, where she made a refugee claim in August 2009. A few months later, Zoha left Iran and went first to England and then, briefly, to Germany before coming to Canada. She arrived in Canada in May 2010 and, like her sister before her, made a refugee claim. She states she did not seek refugee status in England or Germany as she wanted to join her sister in Canada.

[5] Although the sisters filed separate claims and were represented by different counsel before the RPD, the Board joined their files for hearing and issued a single decision in respect of them. In its decision dated November 22, 2011, the RPD rejected the applicants’ claims, finding neither to be

a Convention refugee or a person in need of protection, within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act]. Most of the hearing before the Board and virtually all of its decision were devoted to consideration of Zoha's situation. The Board premised its decision on a finding that Zoha was not credible and accordingly determined that both applicants' claims were not well-founded.

[6] In this application for judicial review, the applicants seek to set aside the decision of the RPD, arguing that the Board's credibility determinations were unreasonable, that the RPD erred in not fully considering or discussing Maedah's claim and that its assessment of their *sur place* claim, or claim to be at risk by reason of the demonstrations they participated in while in Canada, was unreasonable. While the applicants make several arguments regarding the unreasonable nature of the Board's credibility determinations, only one of them need be considered by me, as, for the reasons discussed below, it is determinative and results in the Board's decision being set aside.

The applicable standard of review

[7] It is well-settled that the reasonableness standard of review is applicable to credibility findings made by the RPD (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4; *Singh v Canada (Minister of Employment and Immigration)* (1994), 169 NR 107, [1994] FCJ No 486 (FCA) at para 3 [*Singh*]; *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para 17, [2012] FCJ No 13).

[8] The reasonableness standard is an exacting one and requires the reviewing court afford deference to the tribunal's decision; a court cannot intervene unless it is satisfied that the reasons of

the tribunal are not “justified, transparent or intelligible” and that the result does not fall “within the range of possible, acceptable outcomes which are defensible in respect of facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). In applying this deferential standard, it matters not whether the reviewing court agrees with the tribunal’s conclusion, would have reached a different result, or might have reasoned differently. So long as the reasons are understandable and the result is one that is rational and supportable in light of the facts and the applicable law, a court should not overturn an inferior tribunal’s decision under the reasonableness standard of review.

[9] In assessing the reasonableness of a tribunal’s factual findings, the reviewing court cannot and should not re-weigh the evidence (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 64, [2009] 1 SCR 339; *Nekoie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 363 at para 40, 214 ACWS (3d) 572; *Matsko v Canada (Minister of Citizenship and Immigration)*, 2008 FC 691 at para 11). Indeed, the yardstick for determining the reasonableness of the RPD’s factual determinations, including credibility findings, is set out in paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC, 1985, c F-7 [FCA], which provides that the impugned finding must meet three criteria for relief to be granted: first, the finding must be palpably erroneous; second, it must be made capriciously, perversely or without regard to the evidence; and, finally, the tribunal’s decision must be based on the erroneous finding (*Rohm & Haas Canada Limited v Canada (Anti-Dumping Tribunal)* (1978), 22 NR 175, [1978] FCJ No 522 at para 5 [Rohm & Haas]; *Buttar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1281 at para 12, [2006] FCJ No 1607). Where a finding, including a credibility finding, contradicts the evidence before the tribunal, it falls within the scope of paragraph 18.1(4)(d) of the FCA as such a finding is made without regard to the evidence (see e.g. *Rahal v Canada (Minister of Citizenship and*

Immigration), 2012 FC 319 at para 38, 213 ACWS (3d) 1003; *Obeid v Canada (Minister of Citizenship and Immigration)*, 2008 FC 503 at para 13, [2008] FCJ No 633).

[10] The starting point in reviewing a credibility finding is the recognition that the role of a court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all of the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice, which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule.

[11] The recognition of the primacy of a tribunal's role in making credibility determinations has important implications in judicial review applications such as the present. On one hand, such recognition mandates a truly restrained approach by the court in concluding that a credibility determination is unreasonable and requires that the reviewing court assess both the reasons and the record before deciding that a decision is unreasonable due to an unreasonable credibility determination. On the other hand, where a tribunal's decision is determined to be based on an unreasonable credibility finding and the decision is therefore held to be unreasonable, the matter must be remitted to the tribunal for a re-hearing because it is for the tribunal, and not the court, to re-assess credibility.

The impugned credibility finding

[12] The applicants assert that the key credibility finding made by the Board in the decision was made without regard to the evidence before the RPD. This finding centres on the RPD's determination that Zoha did not offer any explanation for why she did not elaborate on her reasons for seeking refugee protection in Canada when she was interviewed by the port of entry official, prior to stating during her testimony before the Board that she was too frightened to do so and suffers from a heart condition that is worsened by stress. The Board found the delay in offering this explanation to significantly impugn Zoha's credibility.

[13] In terms of the delay in providing the explanation, the Board stated as follows: "It was only subsequent to the panel noting such serious omissions [i.e. the absence of details regarding the reason for her refugee claim in the statements made to the port of entry official] did the claimant inform the panel, for the first time, that she was too scared to explain why she was seeking Canada's protection when she first made her claim" (decision at para 14) [emphasis added]. In terms of the heart condition, the panel wrote: "With respect to her subsequent explanation [i.e. given during her testimony] that she was taking some sort of medication, not only was this the first time she informed the panel of this, as a result of her counsel's line of questioning, but she disclosed no documentation concerning such medication and/or that this medication would [affect] her ability to explain her refugee claim, until after the hearing" (decision at para 15) [emphasis added].

[14] Counsel for both parties concur that these findings are erroneous. Zoha mentioned her heart condition and the fact that she was taking medication for it to the port of entry official and explained in her Personal Identification Form [PIF], which she completed shortly after her arrival in Canada,

that she was too frightened to say more than she had to the port of entry official regarding the reasons for her seeking refugee status in Canada.

[15] As noted, the applicant asserts that these erroneous findings are sufficient, of themselves, to set aside the Board's decision as it was premised in large part on these findings. The applicant points in this regard to the fact that these issues were the ones first discussed by the Board in the decision, that they were discussed in detail and that the Board concluded in respect of them that Zoha's "significant omissions in this regard seriously undermine her credibility" (decision at para 16).

[16] Counsel for the respondent, on the other hand, asserts that the erroneous findings are not so central to the Board's decision that their erroneous nature should lead to the Board's decision being overturned. Rather, the respondent asserts that the Board's negative credibility determination can be upheld based on some of the other factors the Board considered. However, counsel candidly admitted that not all of these other factors are tenable and conceded that the Board's drawing a negative inference from the fact that Zoha did not attend a major Green Movement rally was unreasonable as missing a single rally is not inconsistent with the claim of being a Green Movement supporter and Zoha had offered an explanation for not having attended.

[17] In my view, the applicant's position must prevail and the decision must be set aside because it does turn in large part on the erroneous findings made by the RPD. The most significant basis for the Board's negative credibility determination was the finding that Zoha had not given the details behind her refugee claim until the hearing. As noted, following its erroneous determinations in this

regard, the RPD stated that these erroneous determinations “seriously undermined” Zoha’s credibility. The other points relied on by the RPD to undercut her credibility are much less significant and, as conceded by the respondent, at least one of them bears no weight.

[18] Because the Board’s determination that Zoha lacked credibility is largely based on findings which contradict the evidence, the determination is unreasonable as it was made without regard to the material before the Board. And, because the Board rejected Zoha’s refugee claim by reason of its credibility determination, it follows that the entire decision is unreasonable. This is not a situation where the Board failed to discuss a point or issued inadequate reasons such that the result might nonetheless be upheld as being reasonable. The core of the Board’s conclusion centres on the unreasonable determination that Zoha failed to provide details of her refugee claim until the hearing, which is unsupportable in view of the uncontradicted evidence that was before the Board. Accordingly, the portion of the Board’s decision that relates to Zoha’s claim must be set aside.

[19] The parties concurred that if the decision in respect of Zoha’s claim was set aside, the decision pertaining to Maedah’s claim must likewise be set aside as the Board in effect treated it as being derivative of Zoha’s claim. Thus, this portion of the decision will be set aside as well.

[20] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The decision of the RPD dated November 22, 2011 in these matters is set aside;
3. The applicants' refugee claims shall be remitted to the RPD for reconsideration by a differently constituted panel;
4. No question of general importance is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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