



Date: 20220126

Docket: IMM-5967-20

Citation: 2022 FC 89

Ottawa, Ontario, January 26, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SAHIL KHAN SHIRZAD

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision by the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada dated October 31, 2020. The RAD confirmed the Refugee Protection Division's ("RPD") decision that he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The Applicant is a 28-year-old citizen of Afghanistan

who alleges a fear of persecution from terrorist groups based on his social status and political opinion.

[2] For the reasons that follow the application is granted.

II. **Background**

[3] The Applicant attended university in Jalalabad, Afghanistan. He claimed that he had received a threatening phone call on or about December 21, 2016, which accused him of being an infidel and a spy for Western countries. A few days later, the Applicant says, he received a threatening letter from an extremist organization calling itself “The Islamic Emirate of Afghanistan”. He was not sure if this letter was written by the Taliban or by Daesh (ISIS). He alleges seeking help from the police but did not receive meaningful assistance. As a result, he stopped attending university except for taking his exams.

[4] A month later, on January 21, 2017, men allegedly visited the Applicant’s home searching for him. They assaulted his brothers and killed his father when they could not find him. The next day, the Applicant and his family fled to Kabul where they found a smuggler who obtained a Brazilian visa for him. The Applicant travelled to Brazil on March 5, 2017, made his way north through 12 countries and entered Canada on September 22, 2017. Initially, the Applicant was unable to establish his identity and was detained. While in detention, he completed his Basis of Claim (BOC) document with the assistance, at least partially, of counsel. His claim was filed on October 20, 2017. Hearings took place on November 6, 2018, and January

15, 2019. In addition to the Applicant, the RPD heard from his mother and brother by telephone from Kabul and considered documents submitted in corroboration of his claim.

[5] Extensive written representations were submitted by the Applicant's former counsel on January 21, 2019. In addition to a broad range of submissions on issues raised during the hearings, the representations contain statements by counsel about the advice she gave the Applicant regarding the completion of his BOC.

[6] The Applicant's claim was rejected by the RPD on March 7, 2019, on credibility grounds. The RPD found numerous omissions and contradictions between the Applicant's BOC, his testimony, that of his mother and brother, and his documentary evidence regarding events, dates and the threatening letter. The RPD Member drew on specialized knowledge regarding Taliban "night letters" in concluding that the letter did not relate to the Applicant and appeared to be written about someone else.

[7] On appeal to the RAD, the Applicant submitted that the RPD erred by conducting the hearings in a hostile environment, failed to correct translation issues, made unreasonable negative credibility findings and incorrectly used her specialized knowledge. After reviewing excerpts of the hearings, the RAD found that there was no breach of procedural fairness.

[8] The RAD concluded that the RPD was correct in drawing negative inferences about the Applicant's credibility on a number of grounds including:

- The omission of evidence of harm to the Applicant's family members in his BOC form;

- Contradictions between the Applicant's evidence and a letter from his classmates;
- A contradiction in the timeline of the Applicant's father's death and the Brazilian visa;
- A contradiction in the Applicant's evidence regarding the content of the threat letter;
- A contradiction in the Applicant's evidence regarding who wrote the threat letter;
- The reliability of the Applicant's father's death report.

[9] The RAD found that a number of the RPD's negative credibility findings were not contested on the appeal. Having conducted its own assessment of the evidence, the RAD arrived at the same conclusions as the RPD.

III. **Issues and Standard of Review**

[10] As a preliminary matter, in its Memorandum of Argument the Respondent objected to the Applicant's arguments regarding several points which were not presented to the RAD. Applicant's counsel contended that he was entitled to make such arguments but was unable to recall any authority for that proposition. As a result, I directed the parties to provide further post-hearing submissions in writing. The hearing proceeded on the basis that I would receive the Applicant's arguments and reserve on whether they were admissible or not. Written submissions were subsequently provided by letter from both counsel.

[11] The general principle is that the Court on judicial review will not address arguments that could have been raised before an administrative tribunal but were not: *Alberta (Information and*

Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654 [*Alberta Teachers*] at paragraphs 23-25; *Canada (Citizenship and Immigration) v R. K.*, 2016 FCA 272 at paragraph 6; *Efe-Agbonaye v Canada (Citizenship and Immigration)*, 2018 FC 1263 at para 19; and *Abdulmaula et al. v Canada (Minister of Citizenship and Immigration)*, 2017 FC 14 at para 15.

[12] I agree with the Applicant that the Supreme Court in *Alberta Teachers* left the door open for considering new arguments when the rationales for excluding them are not present. This is discussed in *Metallo v Canada (Canada (Citizenship and Immigration))*, 2021 FC 575 at paras 15-17.

[13] Having considered the parties post-hearing submissions, I am satisfied that none of the arguments objected to are fundamentally different from those raised before the RAD and that the Respondent was not prejudiced by their submission on this application. For that reason, they were not excluded.

[14] Numerous issues were raised by the Applicant with respect to whether the RAD rendered an unreasonable decision on the RPD's credibility determinations, failed to consider his risk profile and erred in determining that the RPD hearing was procedurally fair.

[15] Having considered the parties' submissions, I find that the determinative issues amount to whether there was a breach of procedural fairness before the RPD which the RAD failed to correct and whether the RAD's credibility findings were reasonable.

[16] With regard to procedural fairness, the proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 43. The question is not whether the decision was “correct” but whether the procedure used was fair. Deference to the decision-maker is not at issue: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 23.

[17] The parties agree, as do I, that the applicable standard of review for judicial review of credibility findings by the RAD is reasonableness. As determined in *Vavilov*, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker’s discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[18] To determine whether the decision is reasonable, the reviewing court must ask “whether the decision bears the hallmarks of reasonableness – 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). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

[19] Not all errors or concerns about a decision will warrant intervention. To intervene, the reviewing court must be satisfied that there are “sufficiently serious shortcomings” in the decision such that it does not exhibit sufficient justification, intelligibility and transparency.

Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep”. The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 33; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36.

IV. Analysis

[20] On this application, I have been of two minds as to whether the RAD decision was, overall, reasonable enough to withstand review notwithstanding what I considered to be shortcomings in the Member’s reasoning about certain of the RPD’s credibility findings.

[21] I have concluded that those shortcomings are more than merely superficial or peripheral to the merits of the decision. They are sufficiently central or significant to render the decision unreasonable. In the result, the matter must be returned for reconsideration by another Member.

[22] In light of that conclusion, I will provide my reasons on the question of fairness and certain of the RAD’s key credibility findings. I will not address those findings regarding which I am satisfied that the RAD committed no error or the “other” RPD credibility findings which the RAD listed and upheld but did not analyze. I note that the Applicant has argued that in failing to analyze those other findings, the RAD failed to justify its decision in a transparent manner. But those findings were not dispositive of the appeal or this application.

[23] In addition, I will not address the Applicant's arguments that the RAD failed to consider his risk profile as that was not determinative of the appeal.

A. Fairness

[24] The decision to grant this application does not turn on the Applicant's contention that the RPD hearing was unfair. I do not accept the Applicant's arguments that the RPD's questioning was intrusive, intimidating, and interfered significantly with the Applicant's presentation of his case, creating an environment that was adversarial and hostile. A number of excerpts from the transcript of the RPD hearing were submitted to illustrate these contentions.

[25] The RAD reviewed the excerpts of the hearings and the related audio recording. The RAD found that the RPD Member was neither hostile nor aggressive toward the Applicant. Her tone in asking questions remained neutral and respectful. No objections were made to the Member's questions by counsel.

[26] I agree with the Respondent that there was no error with the RAD's consideration of the RPD's conduct during the hearing. The RAD had the benefit of reviewing the portions of the transcript relied on in support of the Applicant's arguments and the audio recording. Its findings are grounded in the record of the RPD's proceedings. Those portions which I have read in the Application Record and Certified Tribunal Record disclose nothing of an intimidating or aggressive nature. While it would have been better for the Member not to have put several questions to the Applicant at the same time, this did not create a hostile environment.

[27] The Applicant raised issues on appeal with respect to interpretation and translation problems at the RPD hearing. The Applicant provided translated documents and testified through an interpreter who participated by telephone. There were apparent errors in the translations which needed to be corrected by the interpreter.

[28] The RAD rejected the Applicant's submission that the hearing was riddled with translation issues. Other than the issues related to translations of the Applicant's own corroborating documents, which were resolved at the hearing, the Applicant's submissions did not point to any specific instances of interpretation problems. In my view, the RAD did not err in reaching that conclusion.

[29] The Applicant's counsel attempted at one point to provide her own interpretation of the meaning of a word and was stopped from doing so as the RPD Member considered that to be testifying. The RAD considered that to be appropriate.

[30] The Applicant's counsel was attempting to be helpful when she offered her own understanding of the meaning of the word at issue. While I would not have found that to be an attempt by counsel to testify on her client's behalf, the RPD Member's intervention was not so overbearing as to taint the proceedings. She took the time to explain to counsel why it would be inappropriate for her to be a fact witness.

[31] The Applicant also objected to the fact that the Member abruptly left the room at one point without an explanation. The transcript indicates that when the Member left the room she

stated, “Okay, I just need to return a minute and I’ll be right back”. She left for one and a half minutes. This was after, the RAD found, the Applicant had completed his response to a question and it had been interpreted. While the Member did not provide her reasons for leaving the room, the RAD held that she was not required to. The portion of the hearing in which this occurred was not sensitive and involved questions regarding the issuance of the Applicant’s visa. The RAD did not err in finding that this had no adverse effect on the proceedings.

B. Reasonableness

(1) Omissions from the BOC

[32] The Applicant testified that his family had been injured in attacks related to the Taliban’s search for him. These facts were not included in his BOC. He argues that the RAD failed to consider his reasonable explanation as to why he did not include his family’s injuries in his BOC. He relied on advice received from counsel – to keep his BOC short and not to include many details.

[33] Counsel’s written submissions to the RPD following the hearing include the following statement:

Furthermore, the claim of The Claimant was amongst my first ones in refugee law. I received the advice that a too detailed claim could have a negative impact. Such as if the claimant would memorize his claim, he could look less credible. As well, there would be more details that the claimant could be contradicting himself; based on human flawed memory. Finally, I believed that a claimant would be more credible if he can add spontaneously details, especially if they can be corroborated by witnesses. I understand now that this is not the case.

[34] Taking into account that the lawyer in question was inexperienced in immigration law, this was seriously bad advice. It may even be characterized as improper. It does not appear to have occurred to counsel that this was wrong until it became clear during the RPD hearing that the omissions from the BOC undermined the Applicant's credibility. Nor did it appear to have occurred to counsel that the Applicant could have amended his BOC prior to the hearing to fill in the gaps.

[35] Not surprisingly, the RPD Member drew a negative inference regarding whether the incidents described in the BOC actually took place because of these omissions. The evidence of the Applicant's mother and brother supporting his testimony was not given weight because they contradicted the Applicant's BOC statements.

[36] In three brief paragraphs, the RAD addressed the assertion that the omissions in the BOC resulted from the lawyer's advice and rejected it, largely because the BOC directions expressly ask for such information. In the circumstances, this was unreasonable. The RAD failed to consider whether the circumstances in which the BOC was prepared, notably that the Applicant was still in detention, unfamiliar with the process and without counsel for at least part of the completion of the form provided a reasonable explanation for the omissions.

[37] Refugee claimants are responsible for the contents of documents filed in support of their claims. In most instances, reliance on legal advice will not excuse a failure to submit significant information in support of a claim. It is settled that an applicant must live with the consequences of the actions of counsel: *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT

266 at para 6, [*Cove*]. And judicial reviews are not to be seen as simply another chance for different counsel to reshape the case: *Singh v Canada (Citizenship and Immigration)* 2011 FC 1370 at para 12.

[38] However, in extraordinary cases, the Court has recognized that competency of counsel may give rise to a natural justice issue: *Cove* at para 7. In the particular circumstances of this matter, and the extraordinary concession made by the former counsel, the RAD erred in not considering whether a reasonable explanation had been provided for the omission based on the lawyer's statements about her inexperience and the poor advice she gave the Applicant.

(2) Source of the threatening letter

[39] The Applicant's BOC form states that he received a threat letter from the Taliban or the Daesh. The letter itself states that it is from the Islamic Emirate of Afghanistan. At the first hearing date, the Applicant testified that he did not know whether the letter was from the Taliban or the Daesh. On the second hearing date, the Applicant testified in response to a question from his counsel, that everyone knows that the Islamic Emirate of Afghanistan refers to the Taliban. The RPD drew a negative inference from these responses. The RAD found that the RPD was correct in finding that there was a material contradiction in the Applicant's evidence.

[40] It was unreasonable in my view for the RPD and the RAD to expect the Applicant to provide a definitive opinion as to which of the two extremist organizations sent the letter. It appears from the documentary evidence that both of them were active in the Applicant's province of Nangarhar at the time. The RAD relied on a Response to Information Request from

February 2015 which did not mention the Daesh engaging in the practice of sending night letters at the time while ignoring another more recent report to the contrary.

[41] The evidence as a whole supports a finding that the source of the letter was the Taliban which both the RPD and RAD accepted. It was unreasonable not to consider this as evidence of risk from that group.

(3) Content of the threatening letter

[42] The Applicant's BOC described how he had been "inviting friends to discuss ideas like a talk-show. Women's right to work and attend university, about accessing Western technologies and about Human Rights of Freedom of Thoughts and Freedom of Speech." The threat letter accused him of being a spy for Westerners, receiving money for that work, helping women in society, and for having reported their members who were arrested in the University to the government.

[43] The country reports included in the National Documentation Package for Afghanistan indicate that persons advocating for human rights can be perceived by extremists as supporting the former government and the international community and acting as spies.

[44] The RPD found that the content of the threat letter bore little resemblance to the reality of the Applicant's life and appeared to be written about someone other than the Applicant. The RPD member relied on her specialized knowledge in finding that factual allegations in Taliban threat letters closely resemble the lives of the persons targeted. While the RAD did not consider

it was necessary for the RPD to rely on specialized knowledge, the Member accepted the logic of the RPD's finding.

[45] The Applicant argued before the RPD and the RAD that he was not the author of the threat letter and it was not within his control to make it conform more closely to his actual activities. Moreover, he argued, what he had been doing could be interpreted as proposing western values contrary to Muslim culture and spying on behalf of the west. This was a plausible explanation for the content of the letter which, in my view, it was unreasonable to disregard.

(4) The schoolmates' letter

[46] In support of his evidence about his activities at the university, the Applicant provided a letter from schoolmates who had indicated that he had "combated" the extremists. The RPD found that this was a contradiction, as his human rights discussions could not be considered a form of "combat", physical or otherwise and drew a negative inference regarding the credibility and reliability of the Applicant's evidence. On appeal, the Applicant argued that the RPD had failed to recognize that the phrase could have multiple meanings including both physically combatting and ongoing advocacy in the face of oppression.

[47] The RAD rejected this submission while at the same time accepting that the phrase could have multiple meanings. The RAD found that the phrase was not reflective of the Applicant's activities which involved discussing human rights at meetings with friends. This was not an intelligible justification for the conclusion when the RAD had accepted the broader sense of the word. The RAD erred in finding a clear contradiction where none existed.

V. Conclusion

[48] As indicated above, the Applicant has raised a number of issues relating to the RAD's decision. I have chosen to address only those which I consider to be dispositive of this application with a view to providing some direction for the reconsideration of the appeal. In my view, the fairness of the RPD hearing does not need to be reconsidered, nor the credibility findings which I have not addressed. That does not apply to the "other" RPD findings which the RAD endorsed but did not analyze. Should they be taken into consideration, reasonableness requires that transparent and intelligible explanations be provided.

[49] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-5967-20

THIS COURT'S JUDGMENT is that the application is granted and the matter remitted for consideration by a different member of the Refugee Appeal Division in accordance with the reasons provided. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Daniel Kingwell FOR THE APPLICANT

Meva Motwani FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor FOR THE APPLICANT
Mamann, Sandaluk & Kingwell LLP
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Ottawa, Ontario