Federal Court  Cour fédérale

**Date: 20151021**

**Docket: IMM-518-15**

**Citation: 2015 FC 1191**

**Toronto, Ontario, October 21, 2015**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**SHAYAN SHAHIDI**
**ROYA HAJISEYED JAVADI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The applicants are Iranian citizens who claim to fear persecution in Iran because of their conversion to Christianity. The Refugee Protection Division of the Immigration and Refugee Board dismissed their claim for refugee protection on credibility grounds, and the RPD's decision was subsequently upheld by the Refugee Appeal Division.

[2] The applicants seek judicial review of the RAD's decision, asserting that the RAD erred in deferring to the RPD's credibility findings. The applicants further submit that having found

that the RPD committed several errors in its assessment of their credibility, the RAD's decision to uphold the RPD's decision was unreasonable. The applicants also contend that they were denied a fair hearing of their refugee claim as the RPD was over-zealous in its assessing their credibility in order to reach its desired result, and that the RAD erred in failing to recognize this fact. Finally, the applicants say that the RAD erred by failing to have regard to the *sur place* nature of their refugee claim.

[3] For the reasons that follow, I have not been persuaded that the RAD erred as alleged. Consequently, the application for judicial review will be dismissed.

## I. The Standard of Review Applied by the RAD

[4] While recognizing that the law on this issue is not yet settled, the RAD stated that it would apply the standard of review identified by this Court in *Huruglica v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 F.C.R. 81. The Court held in *Huruglica* that it was an error for the RAD to apply the reasonableness standard when reviewing decisions of the Refugee Protection Division, as if it were conducting a judicial review of the RPD's decision. The RAD should instead function as an appellate body, and conduct a "hybrid appeal" in which it reviews all aspects of the RPD's decision and comes to its own conclusion based on the evidence. The RAD should defer to the RPD's findings only where the RPD enjoys a particular advantage in making a determination, such as assessments of credibility.

[5] While the applicants generally accept the standard of review identified in *Huruglica*, they take issue with the notion that the RAD should ever defer to findings made by the RPD, including finding on credibility.

[6] The difficulty with the applicants' argument is that nowhere in the RAD's reasons is there any indication that the RAD deferred to any of the RPD's findings. The RAD reviewed the evidence that was before the RPD and it listened to the recording of the RPD hearing. It considered the evidence that was in the record and came to its own conclusions with respect to the significance of that evidence, agreeing with the RPD in some instances, and disagreeing with it in others.

[7] The fact that the RAD agreed with some of the RPD's findings does not mean that it deferred to the RPD's findings. Indeed, it is clear from the RAD's reasons that it carried out its own independent assessment of the evidence and came to its own conclusion with respect to the merits of the applicants' refugee claim. This is exactly what the applicants say that the RAD should have done.

## II. The "Microscopic" Analysis of the RPD

[8] On several occasions, the RAD found that negative credibility findings made by the RPD were the result of a microscopic analysis of the evidence. The applicants argue that the jurisprudence has long held that it is a reviewable error for the RPD to conduct a microscopic analysis of evidence adduced in support of a refugee claim, and that having found that the RPD did just that, it was unreasonable for the RAD to then uphold the RPD's decision.

[9] I do not accept this submission. The fact that the RAD found fault with certain of the RPD's findings provides further confirmation of the fact that it conducted its own independent assessment of the evidence and came to its own conclusion as to the merits of the applicants' refugee claims. While it did find that certain of the findings made by the RPD were based on a microscopic review of the evidence, it found that many other findings were warranted, and that these other findings were sufficient to undermine the overall credibility of the applicants' story. This was a conclusion that was reasonably open to the RAD on the record before it.

## III. The Denial of a Fair Hearing

[10] While insisting that they were "not making a formal allegation of bias" on the part of the RPD because the threshold for establishing bias is high, the applicants nevertheless say that they were denied a fair hearing of their refugee claim as a result of the over-zealousness of the RPD, which had "prejudged" the case and was "prejudiced" against the applicants. The applicants further assert that the RAD erred in failing to recognize that the RPD was "out to get" the applicants.

[11] Despite the protestations of the applicants, an allegation that a decision-maker has prejudged a case, is prejudiced against a party and is "out to get" them is an allegation of actual bias on the part of the decision-maker, and a party cannot avoid the test for bias by claiming otherwise.

[12] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: the question for the Court is what an

informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide the matter fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394, 68 D.L.R. (3d) 716.

[13] An allegation of bias, especially an allegation of actual, as opposed to apprehended, bias, is a serious allegation as it challenges the very integrity of the adjudicator whose decision is in issue. As a consequence, the threshold for establishing bias is indeed high: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 113, 151 D.L.R. (4th) 193.

[14] In support of their bias argument, the applicants point to the instances where the RAD had found the RPD's review of the evidence to have been microscopic, and to the RAD's finding that the RPD had been "a bit assertive" in its questioning of the applicants. With respect, this falls far short of establishing bias on the part of the RPD. This is especially so given that the applicants were represented by counsel before the RPD, and no objection was raised by counsel to the conduct of the presiding member at that time.

[15] The applicants point, in particular, to a finding by the RPD regarding the applicants' claim to have prayed over the telephone with fellow Christians in Iran as supporting their argument that their refugee hearing was unfair. The RPD found the applicants' claim to have prayed over the telephone to be implausible, given that the Iranian government was known to closely monitor telephone communications. The applicants say that this was an example of the

RPD "stretching or reaching to justify a negative decision", and that the RAD erred by simply "rubber stamp[ing]" this finding.

[16] There are two difficulties with this submission. The first is an implausibility finding such as this is hardly evidence of a closed mind on the part of the RPD. The second, and more fundamental problem with the applicants' argument is that they did not challenge the RPD's finding in their submissions to the RAD. The RAD can thus hardly be faulted for failing to consider submissions that were not made to it.

[17] Where an issue of procedural fairness arises, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339. Having reviewed the matter for myself, I find that the applicants have failed to demonstrate that they were denied a fair hearing in this case.

## IV. The "*Sur Place*" Claim

[18] Finally, the applicants say that the RAD erred by failing to have regard to the *sur place* nature of their refugee claim, even though they acknowledge that this issue was also not raised by them before the RAD.

[19] The applicants argue that they should not be faulted for having failed to claim refugee protection during the five months that they spent in the United Kingdom or during the seven months that they spent in Canada prior to making their refugee claim, as they did not have a

well-founded fear of persecution in Iran until September 2, 2013. This was the date on which the applicants were allegedly informed by the female applicant's mother that they were wanted by the Iranian Secret Service Police for apostasy, and that other members of their Church group had already been arrested.

[20] Once again, there are two problems with this submission. The first is that neither the RPD nor the RAD believed the applicants' claim that they were wanted for apostasy, and both explained clearly why no weight was being given to the summons that had been produced by the applicants in support of their claim.

[21] The second problem with the applicants' argument is that both the RPD and the RAD found as a fact that well-educated individuals such as the applicants would have been aware of the risk of persecution faced by Christian converts in Iran long before September 2, 2013. Given this, the applicants' failure to seek refugee protection in Canada was found to be inconsistent with the actions reasonably expected of individuals facing a risk of harm. This finding was entirely reasonable.

## V. Conclusion

[22] For these reasons, the application for judicial review is dismissed.

[23] The applicants suggested that a question might arise in this case as to whether the RAD had an obligation to consider a *sur place* claim, even if the issue had not been raised by an

applicant in his or her appeal submissions. No specific question was, however, proposed by the applicants in this regard.

[24] Given that the factual underpinning of the question has not been established, and that the answer to the question would not be determinative of this case, I decline to certify a question.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-518-15 |
| **STYLE OF CAUSE:** | SHAYAN SHAHIDI, ROYA HAJISEYED JAVADI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 15, 2015 |
| **JUDGMENT AND REASONS:** | MACTAVISH J. |
| **DATED:** | OCTOBER 21, 2015 |

**APPEARANCES:**

| | |
|---|---|
| J. Randal Montgomery | FOR THE APPLICANTS |
| Alexis Singer | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| J. Randal Montgomery<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| William F. Pentney<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |