

Federal Court



Cour fédérale

Date: 20181106

Docket: IMM-5006-17

Citation: 2018 FC 1105

Ottawa, Ontario, November 6, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MUHAMMAD FAISAL AKRAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This judicial review application arises from a rejection of the applicant’s claim for refugee status. The Refugee Protection Division (RPD) found that the applicant was neither a “Convention refugee” pursuant to section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), nor a “person in need of protection” pursuant to section 97 of the IRPA. The judicial review application was made pursuant to section 72 of the IRPA. Before reaching the merits of this case it became apparent that it was necessary to ascertain what information was

in fact before the RPD. As we shall see, there is enough uncertainty such that the matter must be sent back to the RPD for redetermination.

I. The Facts

[2] The applicant is a citizen of Pakistan in his mid-forties. His wife and four children currently reside in Lahore, Pakistan. The applicant owned and operated multiple businesses in Lahore, for which he has alleged he was targeted by fundamentalist Sunni groups and the Sipah-e-Sahaba Party. He decided to leave Pakistan and in February 2012, the applicant made a refugee claim in Toronto, where he now resides. On March 2, 2012, the matter was referred to the RPD. However, the claim was not dealt with for the following five years.

II. Decision under Review

[3] The RPD determined that the applicant did not have a well-founded fear of persecution related to a Convention ground in Pakistan; furthermore, the applicant was not a person in need of protection. For reasons that remain largely unknown, the claim was heard only on October 19, 2017, with a decision made a few days later, on October 31, 2017.

[4] The applicant applied directly to the Federal Court for the authorization required by section 72 of the IRPA since his claim was referred to the RPD prior to December 2012, thereby barring his statutory access to an appeal before the Refugee Appeal Division. Leave was granted by this Court on March 2, 2018. The matter came for hearing on September 12, 2018.

III. The Incomplete Certified Tribunal Record

[5] During the hearing before this Court on September 12, 2018, it became apparent that the Certified Tribunal Record (CTR) may be defective and incompatible with the record produced by the applicant before this Court. We find in the CTR the Personal Information form (PIF) dated March 26, 2012. It includes a narrative that is less than three pages long. There is also an amended PIF dated October 3, 2017; however, that amended PIF does not have a narrative, let alone an amended narrative.

[6] While the RPD hearing transcript mentioned an amendment to the Personal Information Form (PIF) narrative (CTR, p. 296, line 42) and the affidavit of the applicant's brother-in-law (CTR, p. 297, lines 27 to 30), neither of these documents appeared in the CTR as filed with the Court. However, both were found in the applicant's record before this Court (Rule 309 of the Federal Courts Rules, SOR/98-106). Furthermore, both the amended PIF and the brother-in-law's affidavit would appear to have been, according to the transcript, in the hands of the RPD member. To complicate matters, the applicant's amended PIF without a narrative in the CTR (pp. 29-39) is different, in other respects, from the amended PIF with an amended narrative featured in the applicant's record.

[7] The confusion stems, in part, from the fact that counsel appearing before the Court was not counsel of record before the RPD six years ago. Counsel for the applicant was unable to enlighten the Court on the obvious discrepancies at the September 12 hearing.

[8] Accordingly, the Court adjourned the matter to a later date and mandated counsel to clarify the situation. An Order was issued on September 13, 2018 directing counsel for the parties to ascertain whether the CTR as constituted was complete and accurate. Counsel for the applicant was also directed to identify the origin of the amended PIF, the amended PIF narrative and the affidavit of the applicant's brother-in-law presented in the applicant's record.

[9] On September 18, 2018, the applicant's counsel submitted a letter to the Court confirming that the amended PIF, the amended PIF narrative and the affidavit of the applicant's brother-in-law were indeed filed with the Immigration and Refugee Board (IRB) on October 5, 2017. Appended to the letter was the exchange of correspondence with Mr. Akram's former counsel before the RPD. Attached to the September 18 letter is the brother-in-law's affidavit, which was referred to in the transcript from the RPD hearing (CTR, p. 297). The affidavit appended by the applicant's RPD counsel is identical to that found in the applicant's record. I repeat for emphasis that the said affidavit could not be found in the CTR.

[10] In fact, there appears to be four PIFs. There is the original PIF, dated March 26, 2012; there is an amended PIF without a narrative dated 3 October 2017. Both of these PIFs are found in the CTR. The only narrative in the CTR is found in the March 26, 2012 PIF.

[11] Then there is the PIF found in the applicant's record. It appears at first blush to be identical to the one in the CTR. On closer examination, they are not identical. Page 3 of 13 in the CTR has two additions not found in the PIF found in the applicant's record. These two references to cities (Lahore and Edmonton) may well have been made by the RPD. There may

not be much riding on this discrepancy. The inclusion of the amended narrative in the applicant's record is more problematic because this amended narrative is not found in the CTR.

Furthermore, page 12 of 13 is significantly different in the two versions. These are two different pages of what ought to have been the same form.

[12] As for the amended narrative in the applicant's record, it is constituted of the narrative of March 26, 2012 found in the CTR with the changes handwritten. The changes appear to seek to avoid some possible discrepancies with the other information found in the PIF. This is not insignificant.

[13] The version of the PIF appended to the recent letter of Mr. Akram's former counsel appears to be different from the version of the amended narrative found in the applicant's record. First, the first page of the three-page narrative is missing. That is the page on which most of the handwritten changes were made. Then, on page 2, the correction made about the City of Calgary, to be replaced by Fort McMurray, is clearly different in the two versions with one of the versions misspelling "McMurray".

[14] To summarize, out of the four PIFs, we have the original one with the original narrative and an amended one, which is clearly different, and does not include an amended narrative. These are the only PIFs in the CTR. Then, there are the two other PIFs coming from the applicant. One includes an amended narrative, not to be found in the CTR, and one comes from the former counsel of Mr. Akram. However, the latter provides only two out of the narrative's three pages and page two of the narrative is not identical to page two in the applicant's record.

Page one of the narrative, where most of the corrections are to be found, was not provided by Mr. Akram's former counsel. Thus, the Court has not been able to ascertain if there are more discrepancies on page one. The applicant has provided no explanation for the various discrepancies, even after having communicated with the applicant's counsel before the RPD.

[15] On September 26, 2018, the IRB confirmed that there is only one amended PIF on record in the CTR. That amended PIF does not include an amended narrative. The CTR does not include either the affidavit of the applicant's brother-in-law. Therefore, neither the amended narrative nor the applicant's brother-in-law's affidavit is in the CTR.

IV. Analysis

[16] There is no clarity as to what was effectively before the RPD. The transcript shows that the RPD received an amendment to the PIF narrative and probably the affidavit of the brother-in-law; but they are not in the CTR. There is no way of knowing whether they were before the decision maker to consider in making the decision. At best there is a reference at paragraph 18 of the RPD decision that may end up being a reference to the affidavit; unfortunately that is less than clear. As with the affidavit it would appear that the amended narrative may have had some importance, at least in the applicant's view. Therefore, the determinative issue in this case is whether an incomplete CTR is tantamount to a breach of procedural fairness.

[17] The standard of review for the fulfillment of the duty of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). Accordingly, this Court

must determine whether the process followed in arriving at the decision has attained the requisite level of fairness in the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3).

[18] Two documents at issue in this case were not included in the CTR: the affidavit of the brother-in-law of the applicant (dated: September 22, 2017) and the amended PIF narrative (dated: October 3, 2017). The amended PIF that appeared in the applicant's record (dated: October 3, 2017) does not correspond to the amended PIF in the CTR. Not only is the amended narrative absent from the CTR, but it is clear that page 12 of 13 differs in the two documents. Nevertheless, the transcript of the hearing of the RPD hearing makes mention of an amended PIF (CTR, p. 296), amended PIF narrative (CTR, p. 296) and the affidavit of the applicant's brother-in-law (CTR, p. 297). While it remains rather unclear what exact form the amended narrative took, I am satisfied on a balance of probabilities that there was one. I would find likewise concerning the brother-in-law's affidavit.

[19] The respondent has taken the view that the missing documents were immaterial to the conclusion reached by the decision maker and thus, the incomplete CTR does not give rise to a breach of procedural fairness.

[20] Such conclusion cannot be reached on this record. Crown counsel is right that the materiality of missing documents is relevant. However, it cannot be said that the missing documents are not material. They appear to have been filed with the Board a few days before the RPD hearing. Counsel for the applicant before the RPD seems to have attempted to ensure at the

hearing that the documents had been received. Evidently the missing documents were seen as being important by the applicant.

[21] It is unknowable what impact they could have had, including on the credibility of the applicant. It is for the decision maker to make a determination of the impact a narrative amended years after the initial one can have. The Court on judicial review can only control the legality of a decision, not substitute its view of the matter. It is for the decision maker to assess what is the impact of an amended PIF and the brother-in-law's affidavit, assuming it is admitted into evidence. It is well established in case law that where a document is known to have been submitted by an applicant but not in the CTR and it is unclear whether this document was before the decision maker, the decision should be overturned (*Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103 at para 8-9, 88 ACWS (3d) 452 (Fed TD); *Agatha Jarvis v Canada (Citoyenneté et de l'Immigration)*, 2014 FC 405 at paras 18-24, 240 ACWS (3d) 955; *Vulevic v Canada (Citizenship and Immigration)*, 2014 FC 872; *Shirkhodaie v. Canada (Citizenship and Immigration)*, 2018 FC 429 at para 24; *Togtokh v. Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16).

[22] Procedural fairness provides for the right be heard (*audi alteram partem*) (*Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311). When a decision has been made based on the erroneous belief that an application was complete, the right to be heard has been compromised. Further, the five factors emanating from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, which help to define the content of the duty of fairness, pull the Court closer, in a refugee case, to a more stringent application of the principle

of procedural fairness. Indeed, the outcome of the applicant's refugee status in Canada hinges on the final decision of the RPD.

[23] In this instance, the hearing transcript suggests strongly that the RPD decision maker received from the applicant an amended PIF, an amended PIF narrative and an affidavit signed by the applicant's brother-in-law. The absence of these documents from the CTR means that the decision maker was not endowed with all of the relevant documentation in arriving at his written decision. Prudence commands that the case be sent back for redetermination. To comply with the applicant's right to be heard, it behooves a decision maker to make a decision based on the full breadth of information submitted by the applicant.

V. Conclusion

[24] The RPD decision in this case is therefore set aside and the matter is returned for redetermination in accordance with the reasons for this judgment. The amended narrative and the applicant's brother-in-law's affidavit are deemed to be part of the record that will be considered for redetermination. The parties did not raise a serious question of general importance and none is certified.

JUDGMENT in IMM-5006-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted and the matter must be the subject of a new determination by a different member of the Refugee Protection Division of the Immigration and Refugee Board in accordance with the reasons for this judgment.
2. There is no question certified.

“Yvan Roy”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: MUHAMMAD FAISAL AKRAM v THE MINISTER OF
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APPEARANCES:

Dan M. Bohbot FOR THE APPLICANT

Evan Liosis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dan M. Bohbot FOR THE APPLICANT
Montreal, Quebec

Attorney General of Canada FOR THE RESPONDENT
Montreal, Quebec