Federal Court Cour fédérale

Date: 20200302

Docket: IMM-3196-18

Citation: 2020 FC 319

Ottawa, Ontario, March 2, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MOHD HOMAYUN
(A.K.A. MOHD HOMAYUN SHAFE)
MARIA ONOPRIENKO
ARIAN MOHD SHAFE
(A MINOR BY HIS LITIGATION GUARDIAN MOHD HOMAYUN)
SOFIYA MODH SHAFE
(A MINOR BY HER LITIGATION GUARDIAN MOHD HOMAYUN)
TOGHRAL MOHAMMAD SHAFI
GULGUN MOHD SHAFEH
MOHD SHAFEH X
(A.K.A. MOHD SHAFEH, TAJUDIN)
SHUKERYAH X
(A.K.A. SHUKERYAH JALALUDDIN)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made on June 8, 2018 by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] in which it found that the Applicants are not convention refugees as set out in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] nor are they persons in need of protection as set out in section 97 of the *IRPA* [the Decision].

[2] The Applicants are multigenerational family members who are ethnic Uzbeks from Afghanistan. They seek protection from Afghanistan for four different reasons that will be examined in the following pages.

[3] The Applicants came to Canada seeking protection on November 9, 2012. The principal applicant [PA] was accompanied by his wife and two minor children. In addition, his brother and sister are claimants, as are his parents. The wife of the PA and her two children are not citizens of Afghanistan. In fact, the wife has never been to Afghanistan. She and her two children are citizens of Uzbekistan who are ethnically Russian. They fear returning to Uzbekistan as well as to Afghanistan.

[4] The RPD accepted the personal identities of the PA, his mother and father, his brother and sister and their citizenship as Afghanis. It also accepted that they were all ethnic Uzbeks. The RPD separately found that the wife and children of the PA were citizens of Uzbekistan and that the wife was a Russian and a Christian.

[5] For the reasons that follow, this application is denied.

II. **Issues**

[6] The Applicants take issue with the reasonableness of the Decision with respect to the way that the RPD dealt with three substantive risks they raised: (1) that they could not return to Dubai; (2) that the sister of the PA was not at risk in Afghanistan for refusing to marry the son of her father's friend, Dawood; and, (3) that the RPD failed to consider the full scope of the risks faced by the Applicants who are of mixed faith and ethnicity and are minorities in any country to which they might be returned. This was particularly the case in Afghanistan.

[7] In addition, the Applicants raise the question of whether their right to natural justice was breached when the RPD would not accept in evidence an untranslated document purporting to be evidence that they had owned land in Afghanistan. The Applicants claimed this land was taken by warlords. They feared that returning to Afghanistan would provoke the warlords to kill them.

III. **Standard of Review**

[8] This application was argued before the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] in which the standard of review of decisions by administrative tribunals was re-examined and clarified.

[9] The parties had argued that the standard of review of the findings made by the RPD is reasonableness. Under *Vavilov,* reasonableness is the presumptive standard of review for

decisions by the RPD. The presumption is rebutted where the legislature indicates it intends a different standard to apply or the rule of law requires a correctness review.

[10] As the legislature has not indicated a different standard ought to apply, the standard of review is reasonableness for the findings of the RPD.

[11] The Applicants have raised procedural fairness as an issue. *Vavilov* does not alter the existing approach to determining whether the procedural fairness rights of applicants have been met. When there is an issue of procedural fairness, 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: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 and *Federal Courts Act,* RSC 1985, c F-7 at para 18.1(4)(b).

[12] Although technically there is no standard of review to apply when considering whether the process followed has been fair, the term "correctness" is employed as the measure to determine whether in any particular case the right to procedural fairness has been met. Notably, what is fair in any given circumstance is highly variable and contextual: *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 [*CPR*] at paras 40 and 49.

IV. **Analysis**

[13] I will address the issues in the order they were argued at the hearing of the application.

[14] At the opening of the hearing of this application I granted the request of counsel to amend the style of cause to show the respondent as the Minister of Citizenship and Immigration.

A. *Did the RPD breach natural justice by refusing to accept an untranslated document?*

[15] The RPD found that the Applicants' claim that warlords stole their land was an essential aspect of their refugee claim.

[16] The RPD observed that "land-grabbing", facilitated by corrupt government officials, did occur in Afghanistan. However, the RPD found that there was no independent evidence showing the family had ever owned land in Afghanistan or that the family's agricultural land had been confiscated by a warlord or anyone else.

[17] The Applicants contend that the way in which the RPD arrived at that credibility finding was procedurally unfair and breached their right to natural justice. The RPD refused to accept into evidence an untranslated document that the sister of the PA said showed that the family had owned land in Afghanistan.

(1) *Refugee Protection Division Rules Rules 32 and 43*

[18] The RPD reviewed the untranslated document when it was presented, stating that it was written in a language the panel did not read. The document had not been translated into French or English as required by the *Refugee Protection Division Rules*, SOR/2012-256 [the *RPD Rules*].

[19] Subrule 32(1) of the *RPD Rules* is straightforward and clear. Any document submitted in evidence must be in English or French or it must be translated into English or French and submitted with a certified translation.

[20] Rule 43 provides a process whereby a document may be produced after a hearing but before the decision takes effect. It requires an application to the RPD. A copy of the document to be submitted must be attached and the Division must consider relevant factors as set out in subrule 43(3). Of those factors, the Applicants stress that the untranslated document was relevant and had probative value.

[21] In the Decision, the panel remarked that the Applicants had been represented by counsel throughout the process. The panel concluded that it was reasonable to expect that a properly translated document should have been tendered. In addition, the panel mentioned that the Applicants had not submitted a translated copy of the document post-hearing and that such a submission might reasonably have been expected.

[22] I see no error in the panel's application of the *RPD Rules* at the hearing.

(2) Was there an oral application for post-hearing submission of a translated document or, did the RPD refuse to accept a post-hearing document?

[23] The Applicants were represented by different counsel in this application than at the RPD hearing. They submit that the RPD should have treated the discussion at the hearing concerning the untranslated document as an oral application for the evidence to be considered. Their complaint is that "the Member dismissed it, simply because the document was not translated" and that it amounted to "the failure to consider the Application and consider the (*sic*) allowing the provision of post hearing evidence" which was in error.

[24] In addition, the Applicants say it was not the responsibility of their counsel at the time to ensure the hearing was conducted with fairness. Rather, they say it was the responsibility of the RPD to ensure the rules of natural justice were met. They argue that the RPD did not allow disclosure of the document or documents post-hearing.

[25] I cannot agree with those propositions.

[26] I have reviewed the transcript of the RPD hearing. At no point did the panel refuse to accept any document post-hearing or otherwise indicate that an application to tender post-hearing evidence could not be made. Refusing to accept the untranslated document during the hearing is not an indication that a translated one could not be submitted post-hearing. If anything, based on the comment made in the Decision, the RPD appears to have been surprised that no properly translated document was submitted post-hearing.

[27] If the Applicants had been self-represented there might have been an argument. That is not the case. They had experienced immigration counsel at the hearing. He had the opportunity in the hearing to request permission from the RPD to submit a translated version of the document post-hearing or, at the minimum, to indicate his intention to do so. He also had time from the end of the hearing on April 11, 2018 until the Decision was made on June 8, 2018 to submit a translation with an application for post-hearing consideration.

[28] The real question is whether the Applicants knew the case they had to meet and were given a fair chance to respond. The case to be met was squarely before counsel and the

Applicants. A translated copy of the document purporting to show that the Applicants owned land in Afghanistan was required.

[29] I see no fault with the reasoning of the RPD on this point or the fact that it returned the untranslated document to the Applicants.

[30] The case relied upon by the Applicants in support of their argument that the RPD was required to accept the untranslated document at the hearing is *Cox v Canada (Citizenship and Immigration)*, 2012 FC 1220 [*Cox*].

[31] *Cox* does not apply to these facts. It concerned a document that was submitted post-hearing, before the decision was rendered. In determining whether to accept a post-hearing document the *RPD Rules* require the panel to consider three factors that are set out in subrule 43(3) being: (a) the document's relevance and probative value, (b) any new evidence it contains and (c) whether it reasonably could have been provided in time for use at the hearing.

[32] In *Cox*, the only factor considered was whether an adequate explanation was provided for not being able to submit the evidence at the hearing. The other two factors were not assessed by the RPD. On judicial review, the Court found that failure to consider the relevance and probative value of the post-hearing evidence was a breach of procedural fairness.

[33] In the present case, as already discussed, the RPD did not err in applying the *RPD Rules* when it refused to accept the untranslated document at the hearing. The Applicants knew the case

they had to meet. They had the opportunity to apply to submit post-hearing evidence under rule 43 but they failed to do so.

[34] For the reasons set out above, I find that the RPD did not violate the rights of the Applicants to a procedurally fair hearing on the facts of this case. Nor did the RPD err in how it applied the *RPD Rules*.

B. *Did the RPD reasonably find that the Applicants could return to Dubai?*

[35] The Applicants submit that the RPD wrongly found that they could obtain permission to live in Dubai without the assistance of the sponsor upon whom they had previously relied. They say the panel did not understand immigration realities in the UAE. To obtain status in the UAE, a non-citizen requires a sponsor or employer to obtain the visa.

[36] The PA testified that he, his parents and his sister first went to Dubai in 1997. He also testified that a visa was required to work in Dubai but they could not obtain one on their own. The family annually paid a friend of their father's friend, Dawood, to sponsor them.

[37] After a falling out between the PA's father and Dawood, the sponsor asked for $35,000 in order to renew the visas. The Applicants say they cannot return to Dubai as a result of being unable to pay that fee.

[38] The Applicants state that the reference in the Decision to the Applicants being able to rely on a certain level of sophistication as business people in order to navigate the immigration

system without outside assistance shows that the RPD did not understand the necessity of a sponsor.

[39] The RPD did not believe the allegations concerning the sponsor. The panel noted that the family had been carrying on business in Dubai for approximately thirteen years. The panel found it implausible that after that length of time the Applicants would have to rely on a friend of a friend.

[40] The Applicants say it is unclear what sophistication the panel was contemplating that they possessed. On reviewing the Decision, it is clear that the panel was referring to the business acumen of the Applicants. That does not necessarily mean the Applicants can use their acumen to acquire a substitute sponsor.

[41] The panel made the inference that the Applicants were sophisticated shortly after noting that they owned a number of businesses, which they were operating in several countries. In addition, the panel noted that although their Dubai visa expired in early 2011, they successfully remained in Dubai until September 2012.

[42] It was reasonable for the RPD to find that after so many years in Dubai, regularly renewing visas, operating a business and successfully staying in Dubai for about 18 months after a previous visa had expired that the Applicants would possess the knowledge or sophistication to find their way around in the UAE visa system.

[43] There is no clear finding by the RPD about the ability of the Applicants to live in Dubai. It is unclear from the reasons whether a) the RPD believed that no sponsor was necessary for the Applicants to obtain a permit, b) it did not believe the Applicants were asked to pay $35,000 to renew the permit, or c) it was concerned about something else altogether.

[44] It is clear that the RPD found the Applicants to be less than credible but, that alone does not resolve the questions concerning Dubai. Whether or not the Applicants can live in Dubai is only relevant if they face risk in Afghanistan. The RPD reasonably found there is no such risk therefore, the Dubai analysis by the RPD is *obiter*. It does not affect the outcome.

C. *Did the RPD err in finding there was no risk to the sister in Afghanistan arising from her refusal to marry Dawood's son?*

[45] One of the risks claimed was that in 2012 the PA's sister was expected to marry Dawood's son. Her father never agreed to the marriage and the sister had made it clear that she did not wish to marry him. Dawood simply announced it. Therefore should she return to Afghanistan, she would be at risk of an honour killing from Dawood and his family.

[46] In evaluating this risk the panel made two findings. One was that given the sister's age and the emphasis in Afghani society on the role of women as wives and mothers, she would not be seen as a suitable match for Dawood's son. It was unlikely that he would still be waiting for her as she had alleged. The Applicants say this misstates the issue by not acknowledging the risk of the honour killing.

[47] The other finding the panel made answers the Applicants' question of the risk of an honour killing. The RPD stated that given the overall concerns it had about the lack of straightforward testimony by the Applicants it was not persuaded that Dawood ever made the proposal that the PA's sister marry his son or that he threatened the Applicants as they alleged - which was with an honour killing.

[48] The reasons provide a number of examples of the concerns the RPD had about the credibility of the Applicants that cumulatively support the finding that it did not believe that there ever was a marriage proposed between the PA's sister and Dawood's son or that an honour killing had been threatened if the family returned to Afghanistan. Examples follow.

[49] The PA's sister said that she worked as a telephone operator in the family business in Dubai but her parents described her duties as "marketing, purchasing and logistics". The panel found there was a pattern of obfuscation that undermined the credibility of the Applicants.

[50] The RPD was concerned that there were inconsistencies and discrepancies between the testimonies of the PA, his brother and their parents about the family company known as Badris Global, located in Uzbekistan. At various times the family members said that Badris Global was an American company; therefore, the brother who worked there and the entire family was at risk because of that association. When they applied for a super visa in Canada, the parents said that Badris Global was one of their companies. When the RPD questioned the PA about Badris Global he changed his initial answer from the company being part of the family business to it being an American company.

[51] As a result of the foregoing, the panel found that there was a lack of straightforwardness either with the immigration authorities in the application for the super visa or with the RPD. The panel stated that there was a pattern of obfuscation that undermined the overall credibility of the Applicants.

[52] The RPD reasonably concluded that as the testimony of the Applicants was not credible, the marriage proposal and honour killing allegations were not to be believed.

D. *Did the RPD fail to examine the full scope of the risks faced by the Applicants?*

[53] The Applicants argue that this issue is the most important one because the claim itself is so complex. They say that the RPD looked at the three issues already discussed as being the essence of the claim and thereby missed the full scope of the family's risk including that they are of mixed faith and ethnicity and that they are minorities in any country to which they could be returned. While it is a generally a problem for the Applicants in any country, they stress it is a particular problem in Afghanistan which is still a war-torn country.

[54] The RPD reasonably found that the general risks faced in Afghanistan as being war-torn are risks faced by the population generally that do not support a finding that the Applicants are persons in need of protection.

(1) Specific Risks in Afghanistan

[55] Regarding Afghanistan, the RPD considered the claim that the family would be at risk because they would be deemed to be spies and anti-government if returned to Afghanistan. When

questioned, the PA said that the basis for that risk was that the family had enemies in Afghanistan.

[56] The panel noted that the father's personal information form identified the two warlords and Dawood as the family's enemies. As there was no credible evidence tying these people to any risk to the Applicants in Afghanistan, the panel was not satisfied that the Applicants would be persecuted if they returned to Afghanistan.

[57] The Applicants also raised as an issue a February 1, 2018 Travel Advisory issued by the Canadian government which was still in force. The advisory stated that Canadians should avoid all travel to Afghanistan because of the unstable security situation and threats of kidnapping for ransom as well as terrorism, criminal violence and anti-Western demonstrations.

[58] The panel reasonably found that the Travel Advisory was a warning to Canadian citizens, not to citizens of Afghanistan.

[59] The Applicants claimed that, having spent more than five years in Canada, they would be seen as Westerners. The RPD agreed that the Applicants had lived outside of Afghanistan since 1997 but observed that much of that time had been spent in a Middle Eastern or former Soviet Union country. There was no objective evidence submitted as to the treatment of Afghanis returning from a Western country. Nor did the IRB's documentary evidence address the situation of Afghanis returning to Afghanistan from non-EU countries.

[60] The RPD acknowledged that the Independent Human Rights Commission [IHRC] painted a bleak picture for returnees to Afghanistan. The RPD found that the Applicants were different than the returnees in the IRHC report saying that the report featured people who were not of a similar socio-economic strata as the Applicants, making it difficult to assess whether the Applicants would face a similar situation or experience hardship or be targeted.

[61] The Applicants challenge that language saying it is not clear why the featured people do not appear to be of a similar socio-economic strata, why the difference matters or why it makes it difficult to assess the risks faced by the Applicants.

[62] The IHRC report indicates that most of the returnees to Afghanistan were deportees from other countries, primarily Iran and Pakistan but also Saudi Arabia and Turkey. There were over 2,000 deportees from Britain, none were from Canada.

[63] The IHRC report was compiled from interviews of deported refugees that were conducted at borders. The report identifies issues of limited access to work, meagre financial assistance and lack of shelter as issues for returnees. None of these risks were put forward by the Applicants to the RPD as possibly impacting them should they return to Afghanistan.

[64] In their counsel’s oral submissions to the RPD the risks identified in Afghanistan were stated in general terms as the risk of being perceived to be people who support pro-government forces or are viewed as westernized. It was submitted that people from Canada or the United States are perceived to be enemies of the Taliban as those countries sent forces to fight them.

[65] Counsel also submitted that as the PA had married a non-Afghani (Russian) who was also not a Muslim (Christian) and they had lived common-law prior to marriage, the whole family would be at risk.

[66] The RPD found the documentary evidence to be silent on those points, and given the credibility issues with the Applicants, the panel was not willing to accept their assertions of risk without objective evidence.

[67] The Applicants did not support with reliable evidence the personal risks they claimed to fear in Afghanistan. On the evidence, it was reasonably open to the RPD to draw the conclusion that the Applicants were not persons in need of protection under the *IRPA*.

(2) Specific Risks in Uzbekistan

[68] In the Decision, the RPD itemized seven different risks the PA's wife identified as her fears of returning to Uzbekistan.

[69] The panel found that the documentary evidence supported her concern that on return she would be interrogated by officials about her religious practices and her equipment including her telephone, tablet computer and flash drive. All of them would be examined for evidence of extremist or anti-government materials. The panel also acknowledged that people who travelled abroad would be viewed as potential state security threats and they would be followed and harassed by law enforcement agencies.

[70] The RPD found those actions would be inconvenient and harassing but not necessarily persecutory. The PA's wife was ethnically Russian. The measures described were geared toward ethnic Uzbeks.

[71] Overall, the panel found that the extent or scope of any future questioning by authorities was not clear. Also, there was no persuasive evidence that the PA's wife would be at risk of imprisonment and separation from her children.

[72] The PA's wife claimed that as her husband was Afghani he would be at risk because all Uzbekistan authorities view all Afghanis as threats. In addition, if he could not live in Uzbekistan, she would end up being alone and her children would be without their father.

[73] The RPD found that the documentary evidence for Uzbekistan indicated that those who were ethnic Uzbeks were able to integrate into local communities and were supported by the local population. While refugees from Afghanistan were mistreated, the PA was not a refugee from Uzbekistan. He was an ethnic Uzbek from Afghanistan.

[74] Those conclusions are reasonable. They are supported by the evidence in the record.

V. **Conclusion**

[75] I am satisfied that the Decision is reasonable.

[76] Although in some instances I may not have arrived at the same conclusions as the RPD, my role is to review the Decision. The Supreme Court has stated very clearly that when

conducting judicial review a Court is to refrain from deciding the issue afresh. I am to consider only whether the Decision, including the rationale for it and the outcome to which it led, is unreasonable: *Vavilov* at para 83.

[77] Provided that there is an internally coherent and rational chain of analysis that is justified in relation to the facts and law, the application of reasonableness review requires the reviewing Court to defer to the decision under review: *Vavilov* at para 85.

[78] This requirement is not a marked departure from prior jurisprudence. There can be no dispute that assessing evidence and making credibility findings go to the very core of the expertise of the RPD. As a result, the conclusions drawn are entitled to a high degree of deference: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 15.

[79] The determinative issue for the RPD was the significant lack of credibility with respect to various claims made by the family members. For example:

- there was conflicting testimony regarding ownership of Badris Global;
- the sister said she worked as a telephone operator in the family business in Dubai but her parents described her duties as "marketing, purchasing and logistics";
- the PA left Kyrgystan in fear for his life but subsequently returned and stayed for more than a year, undermining his claim of fear;
- the panel did not believe the sister's testimony that the son of her father's friend, Dawood, still wanted to marry her nor that there was ever a proposal of marriage made by Dawood for his son to marry her;

[80] The negative credibility findings of the RPD are supported by a clear and rational reasoning process that explains the lack of objective evidence to support the claims.

[81] In this application the Applicants, as the party challenging the Decision, bore the burden to show that it is unreasonable. To do so they had to satisfy the Court that "any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov*, at para 100.

[82] The Applicants pointed to peripheral or insignificant examples of wording in the Decision with which they disagreed or purported not to understand as they were taken out of context. When read in concert with the balance of the Decision and the underlying record, they were either understandable, in context, or were clearly not central to the Decision.

[83] The Decision is reasonable for the reasons set out above.

[84] There is no serious question of general importance arising on these facts nor was one suggested by either party.

JUDGMENT in IMM-3196-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to change the Respondent to the Minister of Citizenship and Immigration, effective immediately.

2. The application is denied.

3. There is no serious question of general importance for certification on these facts.

4. No costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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