Federal Court  Cour fédérale

Date: 20220615

Docket: IMM-6316-20

Citation: 2022 FC 896

Ottawa, Ontario, June 15, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MIAN AQEEL BARI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision rendered on November 6, 2020 by the Refugee Appeal Division [RAD]. The RAD confirmed the decision of the Refugee Protection Division [RPD], which determined that the Applicant is neither a *Convention* refugee

nor a person in need of protection in light of sections 96 and 97 of *IRPA*, respectively. Both the RPD and the RAD found the Applicant to be not credible.

II. Facts

[2] The Applicant is a citizen of Pakistan. He submits he fears persecution and/or a risk of harm from Sunni militants because he adheres to the Shia branch of Islam. He also submits he fears his ex-wife's family because they did not accept his and his ex-wife's marriage, the Applicant's ex-wife being of Sunni heritage.

A. *Fear of Sunni militants*

[3] The Applicant recounts three incidents in his Basis of Claim [BOC] form. In 2007, he says he was threatened with death if he did not convert to Sunni Islam and later beaten by a "group from [a] Sunni sect". In 2009, he says he was attacked again. In 2012, he says he was stopped in his car at gunpoint and robbed by "suspected people from [a] Sunni sect".

[4] In addition to these three incidents, the Applicant testified he was threatened at gunpoint in 2017, which allegedly led him to flee from his place of residence in Islamabad to Satellite Town.

B. *Fear of ex-wife's family*

[5] The Applicant married a woman who came from a Sunni family. After the marriage, he submits he started to receive threats and noticed people following him. More specifically, the

Applicant says he received phone calls “emphasizing [he] must divorce [his] wife, otherwise they will shoot both of [them]”.

C. *Refugee claim and RPD Decision*

[6] In March 2018, the Applicant left Pakistan for the United States [US]. He entered Canada shortly after arriving in the US through an unofficial border crossing. On April 10, 2018, he filed a claim for refugee protection.

[7] The RPD denied the Applicant’s claim. It found the Applicant not credible on the basis of omissions from his BOC form and inconsistencies in the evidence relating to central elements of his claim, namely the identity of his agents of harm, the 2017 incident and his requests for police assistance.

[8] The RPD alternatively determined the Applicant did not credibly establish his adherence to Shia Islam because he failed to provide evidence of his exemption from the compulsory religious tax under Sunni Islam (the religious tax), and did not provide evidence he was attending an Imam Barah in Canada.

[9] The RPD also determined the Applicant does not face a forward-looking risk of persecution or harm from his ex-wife’s family because as he is now divorced, there is no motivation for the family to continue to pursue him.

[10] Lastly, the RPD found the corroborative evidence provided by the Applicant was insufficient to overcome the credibility concerns identified.

III. Decision under review

[11] The RAD dismissed the Applicant's appeal, confirming the RPD's negative decision. The RAD, like the RPD, found the Applicant to be generally lacking in credibility.

[12] The Applicant submitted new evidence on appeal. However, the RAD found this evidence inadmissible, because it did not arise after the denial of the claim.

[13] The RAD found the contradictions and inconsistencies relating to the identity of the Applicant's agents of harm undermined his credibility. The Applicant identified the agents of harm as members of the Sipah-e-Sahaba in his testimony, but did not refer to this group in his BOC form. Like the RPD, the RAD did not accept the Applicant's explanation that he did not want to write down the name of the militant group in his BOC, noting the identity of the agents of harm is a central component to his claim. The RAD further found the Applicant's assertion that his agents of harm are members of the Sipah-e-Sahaba was contrary to the evidence in the National Documentation Package [NDP]. Evidence in the NDP indicates the Sipah-e-Sahaba group was banned in 2002 and its members regrouped to form the Ahl-e Sunnat Wal Jama'at. The RAD noted the Applicant referring to a group that was banned in 2002 while his problems began in 2007 was not credible.

[14] The RAD noted the 2017 incident was omitted from the Applicant's BOC form. It also found this incident to be inconsistent with the evidence the Applicant provided about his place of residence and employment. While the Applicant testified the incident, which allegedly occurred in September 2017, caused him to flee from Islamabad to Satellite Town, he indicated in the sworn Schedule A "Background / Declaration" that he lived in Islamabad from December 2014 to March 2018 and worked as an Uber driver in Islamabad from January 2017 to March 2018. The RAD found this omission and these inconsistencies undermined the Applicant's credibility.

[15] The RAD further noted while the Applicant indicated in his BOC form that he sought police protection on one occasion, he testified he sought police protection on four occasions. The RAD agreed with the RPD the Applicant's explanation he was confused when completing his BOC form did not adequately explain these omissions. The RAD also noted the Applicant, while stating in his BOC form reporting the 2012 incident to the police "was of no use", testified he went to the police after this incident. The RAD found that these omissions and inconsistencies further undermined the Applicant's credibility.

[16] The RAD confirmed the RPD's determination that the corroborative evidence provided by the Applicant did not help resolve the credibility concerns identified. The RAD added the undated Urdu-language newspaper article [the article] submitted by the Applicant raised further credibility concerns, as it does not provide details beyond the statement that "[t]hreatening letters were thrown into his house". There is no mention of threatening letters being thrown into the Applicant's house in the Applicant's BOC form.

[17] Lastly, the RAD agreed with the RPD the evidence does not establish a forward-looking risk of persecution or harm from his ex-wife's family.

IV. Issues

[18] The following questions arise from this application for judicial review:

a) Did the RAD breach procedural fairness by considering new issues on appeal without giving proper notice to the Applicant?

b) If not, is the RAD's decision reasonable?

V. Standard of review

A. *Procedural Fairness*

[19] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[20] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[21] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[22] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). 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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[23] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: Dunsmuir, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In Baker, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[24] Furthermore, *Vavilov* determined the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; Dr. Q, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[Emphasis added]

[25] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

A. *Did the RAD breach procedural fairness by considering new issues on appeal without giving proper notice to the Applicant?*

[26] The Applicant submits the RAD breached procedural fairness by considering new issues without putting them to the Applicant to allow him to explain himself. He submits the RAD has the duty to provide notice to the Applicant that it will consider new and distinct concerns from those relied on by the RPD (*Abraha v Canada (Citizenship and Immigration*), 2022 FC 100 [per Aylen J] at para 24; *Kwakwa v Canada (Minister of Citizenship and Immigration*), 2016 FC 600 [per Gascon J] at para 26). Essentially, the Applicant takes issue with four independent findings made by the RAD:

- The RAD finding the Applicant's assertion his agents of harm are members of the Sipah-e-Sahaba was contrary to the evidence in the NDP, therefore undermining his credibility;

- The RAD finding the Applicant testifying he sought police protection after the 2012 incident while he stated in his BOC form reporting the 2012 incident to the police "was of no use" undermined his credibility;

- The RAD noting the article raised further credibility concerns, as the fact "[t]hreatening letters were thrown into his house" was not mentioned in his BOC form;

- The RAD noting the Applicant's mother's affidavit (the affidavit) tendered into evidence does not mention the 2012 incident, despite the statement in the Applicant's BOC form that she was present when this incident occurred.

[27] The Respondent submits this aspect of the Applicant's argument is without merit. He contends the findings identified by the Applicant are not "new issues" because they are not legally and factually distinct from the issues raised on appeal. The Respondent Minister further submits the RAD is entitled to independently consider and assess the evidence, and make credibility findings.

[28] The jurisprudence of this Court is clear: where credibility is at issue before the RPD, a supplementary finding on credibility by the RAD does not amount to a new issue giving rise to a right of notice and response (*Oluwaseyi Adeoye v Canada (Citizenship and Immigration*), 2018 FC 246 [per Favel J] at para 13[*Oluwasevi*]; *Smith v Canada (Citizenship and Immigration*), 2019 FC 1472 at para 31; *Nuriddinova v Canada (Citizenship and Immigration*), 2019 FC 1093 [per Walker J] at paras 47–48; *Yimer v Canada (Citizenship and Immigration*), 2019 FC 1335 [per Bell J] at para 17; *Corvil v Canada (Citizenship and Immigration*), 2019 FC 300 [per

LeBlanc J as he then was] at para 13). Moreover, it is established law that "additional findings grounded in the record or derived from information known to an applicant are not a new issue in breach of procedural fairness" (*Oluwasevi, supra,* at para 13; and *Azalie v Canada (Citizenship and Immigration*), 2008 FC 517 [per Beaudry J] at paras 26-28).

[29] In light of the above-mentioned jurisprudence, and notwithstanding the well-argued submissions of counsel for the Applicant, in my respectful view the findings referred to by the Applicant are not "new issues" requiring the RAD to provide prior notice to the Applicant. Credibility was the determinative issue before the RPD, and the RAD made additional credibility findings on appeal. Furthermore, these additional findings are grounded in the record. As such, I am unable to find a breach of procedural fairness.

B. *Is the RAD's decision reasonable?*

[30] The Applicant submits it was unreasonable for the RAD to make an adverse credibility finding from his failure to identify his agents of harm in his BOC form. He submits the failure to name the group is in keeping with the narrative, which is only two pages in length and "relatively sparse". However, and with respect, whether the Applicant's BOC form is sparse or only two pages in length is not relevant because all important facts and details of a claim should be included in the BOC form. Failure to include them may – as it did here – affect a claimant's credibility (*Occilus v Canada (Citizenship and Immigration*), 2020 FC 374 [per LeBlanc J as he then was] at para 20, citing *Ogaulu v Canada (Citizenship and Immigration*), 2019 FC 547 [per McDonald J] at para 18; Z*eferino v Canada (Citizenship and Immigration*), and 2011 FC 456 [per Boivin J] at para 31). The identity of the Applicant's agents of harm is a central detail of his

claim which was omitted from his BOC form. The RAD was entitled to draw a negative credibility inference from this omission.

[31] The Applicant also submits the RAD's finding that it is not credible he would identify his agents of harm as the Sipah-e-Sahaba because the NDP indicates this group was banned in 2002 is unreasonable. He contends a ban does not equal to a cease of operations. I accept the gist of this argument because a "ban" does not necessarily equal to the cessation of operations. In my view, it is speculative to expect the Applicant would have referred to the group's new name. That said, the RAD is entitled to draw negative inferences based on inconsistencies in a claimant's evidence regarding central elements of the claim, which is what the RAD did here (*Lawani v Canada (Citizenship and Immigration*), 2018 FC 924 [per Gascon J] at paras 22-23[*Lawani*]).

[32] The Applicant submits the RAD unreasonably made an adverse credibility finding because of the omission in his BOC of the 2017 incident. He submits despite this omission, the RAD was obliged to assess the credibility of the incident itself as described in his testimony (*Oria-Arebun v Canada (Citizenship and Immigration*), 2019 FC 1457 [per Fuhrer J] at para 57 [*Oria-Arebun*]). He submits although the RAD might properly reject the incident based on the omission, it may only do so after grappling with the testimony about the event.

[33] The Respondent submits this argument is without merit because the RAD's credibility finding with respect to the 2017 incident is not based on the specific details of what happened, but rather because the Applicant's evidence about the identity of his agent of persecution was not credible. He also submits the Applicant did not raise any errors with the RPD's assessment of

this incident in his appeal submissions to the RAD and is therefore precluded from raising the issue for the first time on judicial review (*Benitez v Canada (Minister of Citizenship and Immigration*), 2006 FC 461 [per Mosley J] at para 219).

[34] Respectfully, the Applicant's argument fails for several reasons. First, important facts and details of a claim should be included in the BOC, and the failure to include them may – as happened again here – affect a claimant's credibility. Second, the RAD does not comment on whether or not it believes the 2017 incident occurred. Third, *Oria-Arebun* is distinguishable from the present case. In *Oria-Arebun*, the Court took issue with the RAD finding an incident to be not credible because the claimant's evidence regarding other aspects of her claim was not credible (at paras 56 to 58). Here, the RAD did not import other credibility concerns to the 2017 incident, but based its adverse credibility inference on the fact the 2017 incident was omitted from the BOC.

[35] The Applicant further submits it was unreasonable for the RAD to conclude his failure to state in his BOC he went to the police on four occasions undermined his credibility. In his BOC he referred to only one attendance on the police however in his testimony he refers to four. While the RAD faulted his credibility for not referring to the other three, he notes he filed a police report respecting one of them, and submits the RAD failed to grapple with the police report that was before it. He contends the police report could have established he reported one incident to the police, which would have established the credibility of that incident. While I agree with this submission, I note administrative decision-makers are presumed to have considered the entirety of the evidence before them, and there is no need to refer to every piece of evidence or argument

in their reasons (*Florea v Canada (Employment and Immigration*), [1993] FCJ No 598 (FCA) at para 1[*Florea*]).

[36] The Applicant further submits the RAD unreasonably assessed three pieces of corroborative evidence, namely the newspaper article, the affidavit, and letters and receipts from religious organizations. He submits the RAD assessed this evidence for what it lacked rather than for what it provided. The Applicant adds the RAD failed to consider a "more detailed" letter of support from a religious organization, rather focusing on a "less detailed" letter.

[37] The RAD found the corroborative evidence provided by the Applicant was not sufficient to overcome the credibility concerns identified. The fact the RAD pointed out what certain documents did not contain does not mean it did not consider the actual contents of the documents (*Eije v Canada (Citizenship and Immigration)*, 2021 FC 500 [per Roussel J as she then was] at para 28).

[38] Moreover, with respect to the newspaper article, I must note it was assessed specifically for what it contained, which is a statement that "threatening letters were thrown into [the Applicant's] house". I am not persuaded the article raises further credibility concerns, because that involves speculation as to how a reporter may choose to write their stories.

[39] Lastly, the Applicant submits the RAD unreasonably found he has no forward-looking risk of persecution or harm from his ex-wife's family because he is now divorced. He submits the "legal status of being divorced does not reflect the reality of the Applicant's relationship and

does not shield him from harm". The conclusion that the risk of harm has left because of the divorce may not be justified on this record.

[40] Looking at the reasons holistically and keeping in mind this Court is not to reweigh or reassess the evidence per *Vavilov* at para 125, the issue is whether the matters of concern noted in these Reasons establish the RAD fundamentally misapprehended or failed to account for the evidence before it as per *Vavilov* at para 126. On balance, I am unable to reach that conclusion.

VII. Conclusion

[41] For the reasons set out above, I would dismiss this application for judicial review.

VIII. Certified question

[42] Neither party proposed a question to certify and in my view none arises in this case.

JUDGMENT in IMM-6316-20

THIS COURT'S JUDGMENT is that this application is dismissed, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6316-20
STYLE OF CAUSE:	MIAN AQEEL BARI v THE MINISTER OF IMMIGRATION, REFUGEES AND CITZENSHIP CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	JUNE 7, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	JUNE 15, 2022

APPEARANCES:

Maureen Silcoff	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Silcoff, Shacter Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT