

Federal Court



Cour fédérale

Date: 20220617

Docket: IMM-6666-20

Citation: 2022 FC 920

Ottawa, Ontario, June 17, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

**SADIQ ULLAH KHAN
HAZRA BIBI KHAN
ABDUL RAHMAN KHAN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Sadiq Ullah Khan (“Mr. Khan”), Hazra Bibi Khan (“Ms. Khan”), and Abdul Rahman Khan are a family. Mr. Khan and Ms. Khan are married and Abdul is their minor child. The family made a claim for refugee protection based on their fears of persecution and risk to their lives from the Tehrik-i-Taliban (“Taliban”) in Pakistan. The Refugee Protection Division

[RPD] denied their claim in a decision dated November 25, 2020. The Applicants challenge the refusal in this judicial review.

[2] The Applicants argue that the RPD's negative credibility determination was based on implausibility findings that were unsupported by the evidence and could not be said to have been made in the "clearest of cases" as required (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [*Valtchev*]). They further argue that the credibility determination was determinative and affected the RPD's findings on internal flight alternative ("IFA") and state protection.

[3] I agree with the Applicants. I find that the RPD's credibility determination was unreasonable and that it was further relied upon to support the RPD's findings on IFA and state protection, and therefore the decision cannot stand.

[4] The Applicants also raised a further issue with respect to Ms. Khan's claim, arguing that the RPD failed to apply the *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*. As I have found the RPD's findings on credibility to be unreasonable and determinative of the claim, I find it unnecessary to address this issue.

[5] Based on the reasons set out below, the application for judicial review is allowed.

II. Background Facts

[6] The Applicants are members of the Pashtun ethnic group and citizens of Pakistan. Mr. Khan alleged that the Taliban attempted to recruit him as a member in December 2011, when they were seeking individuals from each family in his village. Mr. Khan refused to join. Over the years since then, Mr. Khan alleged that he and his family were threatened and faced violent attacks on multiple occasions and the police were not able to assist. Mr. Khan also alleged that he was required to relocate various times and kept a low profile due to these threats.

[7] In July 2017, Mr. Khan learned that his brother had been approached by the Taliban, who asked him about Mr. Khan's whereabouts and physically assaulted him.

[8] After this attack, the Applicants decided they had to flee. A few months later, they travelled to the United States and then made their way to Canada, where a family member lives. The family made a refugee claim upon their arrival in Canada.

[9] While in Canada, the Applicants learned that gunshots were fired towards their home in Pakistan.

[10] The Applicants' refugee claim was heard on November 4, 2020 and refused in a decision dated November 25, 2020.

A. *Preliminary Matter*

[11] The Respondent objected to a number of statements in the Applicants' further affidavit that introduced new evidence relating to the Applicants' personal circumstances in Canada and the country conditions in Pakistan. At the judicial review hearing, counsel for the Applicants conceded that it was improper to have included this evidence on judicial review given that it does not fall into any of the exceptions for when new evidence can be filed on judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). I agree and have not considered this material in coming to my determination.

III. Issues and Standard of Review

[12] The issues raised in this judicial review concern the RPD's credibility determination, and its analysis on IFA and state protection. The Applicants' challenge to the RPD decision relates to the merits of the decision. The parties agree that I should apply the reasonableness standard of review to my analysis. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits.

IV. Analysis

[13] The RPD found that Mr. Khan testified in a straightforward manner and that generally there were no inconsistencies between his prior statements about his claim and his oral

testimony. Its determination that the Applicants' allegations were not credible was based on three implausibility findings in relation to a threatening letter Mr. Khan's family received from the Taliban. I find each of the implausibility findings to be unreasonable and accordingly find the RPD's credibility assessment unreasonable.

[14] This Court and the Federal Court of Appeal have repeatedly held that implausibility findings in the refugee context must only be made in "the clearest of cases" where "the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant" (*Valtchev* at para 7; *Al Dya v Canada (Minister of Citizenship and Immigration)*, 2020 FC 901 at paras 27-29 [*Al Dya*]). None of the implausibility findings relied upon by the RPD could be described as being the "clearest of cases".

[15] The RPD found it implausible that the Taliban would issue a threatening letter approximately six years after they first attempted to recruit Mr. Khan. Not addressed by the RPD in making this finding was that according to Mr. Khan and his family members, who provided letters filed at the RPD, the Taliban continued to pursue him and his family members throughout those six years, including approaching his father, his former employer, and Mr. Khan himself. In these intervening years, Mr. Khan was attacked by men he recognized as members of the Taliban, who asked him why he had not been attending meetings, forced him into their car, and struck him in the face with a rifle. Moreover, there was evidence before the RPD that Mr. Khan was not in Pakistan for extended periods during this time. In these circumstances, I do not find the RPD's determination that it was implausible that a threatening letter was issued six years

after the initial attempt to recruit Mr. Khan is a reasonable one. Certainly, the RPD failed to examine these relevant circumstances in coming to its implausibility determination — it was based on nothing more than the RPD’s own view that this was not how the Taliban would operate. There is no reference to any documentary evidence to support this view and I do not accept that the Applicants’ claims about the Taliban’s actions are “outside the realm of what could reasonably be expected” in the circumstances (*Valtchev* at para 7; *Al Dya* at para 39).

[16] The second issue raised by the RPD was that the letter from the Taliban stated that “later on, the younger members of the movement found out you do not wish to join the movement” and that this statement conflicted with Mr. Khan’s own testimony that he refused to join from the outset. This is an example of a microscopic examination of the evidence and should not be used to ground a finding of implausibility (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) at para 9; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 [*Cooper*] at para 4; *Lawani v. Canada (Citizenship and Immigration)*, 2018 FC 924 at para 23). The way the Taliban chose to word its letter on this minor point is peripheral to the claim and not a reason to doubt Mr. Khan’s allegations or evidence.

[17] In any case, I do not understand the RPD’s finding that there is a conflict between this statement in the letter and Mr. Khan’s testimony. Mr. Khan’s evidence was that he refused to join and then avoided the Taliban by relocating; his evidence was not that he immediately told the Taliban that he refused. This is consistent with the statement in the letter that “later on”,

members of the Taliban learned that he refused to join. There is no basis to draw any adverse credibility finding on this ground.

[18] The final issue identified with the letter was that there were serious threats against Mr. Khan and his family that, according to the RPD, had not materialized. In particular, the RPD referenced the portion of the letter that stated “we swear that we will make you and your family shed tears of blood” and that “we will not rest until you are obliterated.” Though the RPD acknowledged that Mr. Khan’s brother was attacked by the Taliban approximately six months after this letter was received, it went on to find “in circumstances where, despite the Taliban’s ominous threats, the principal claimant’s family members have been living in relative peace, the absence of ‘follow through’ is not consistent with the claimed desire to harm the principal claimant and his family.” First, the RPD’s finding is at odds with the evidence; there is no explanation for how an attack on Mr. Khan’s brother could be characterized as “living in relative peace.”

[19] Second, there may be reasons why threats do not “materialize” — the reasons for which Mr. Khan and his family would be unaware. There may also be threats or violence that the family is unable to confirm as being at the hands of the Taliban. For example, in December 2019, shots were fired at Mr. Khan’s home in Pakistan. The RPD determined that it was speculative to find that the Taliban was responsible for the shooting. The problem with the RPD’s implausibility finding is that there are too many unknowns. The fact that Mr. Khan’s family has not been killed by the Taliban does not mean that the threat letter and the underlying allegations of Mr. Khan or his family are not credible. The RPD’s reasoning does not support a view that the

events, as described by the Applicants, are “clearly unlikely” or “outside the realm of what could reasonably be expected” “based on common sense or the evidentiary record” (*Valtchev* at para 7; *Al Dya* at para 32).

[20] Counsel for the Respondent acknowledged at the hearing that the basis for the RPD’s credibility determination may be on the weaker side, but argued that the Applicants faced an uphill battle because they would need to demonstrate that the decision was unreasonable on all three grounds of refusal: credibility, IFA and state protection. In the circumstances of this case, I find that the credibility determination — namely, that it was implausible that the Taliban behaved in the way as alleged by the Applicants — affected the RPD’s assessment of the IFA and state protection available to this family (*Lopez Santos v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1281 at para 59). The issues are linked. In other words, the determinative issue is credibility and the way the RPD assessed IFA and state protection was coloured by its finding that it was implausible the Taliban was still seeking Mr. Khan and his family members.

[21] For example, in the RPD’s discussion on the availability of an IFA in Rawalpindi, Faisalabad and Lahore, the RPD relied on its implausibility finding:

First, as set out above, the principal claimant has not credibly established that the Taliban is after him. Second, his brother and other family members continue to live in the family home in Abuha. They have not been obliterated. Neither was there any evidence that the Taliban has made the family “shed tears of blood” in the three years since its letter was allegedly written.

[22] On the first prong of the IFA analysis, the RPD explicitly based its reasoning on its finding that the Taliban was not seeking Mr. Khan and his family members. Accordingly, my finding that the credibility determination was unreasonable also applies to the IFA finding.

[23] On the state protection issue, the RPD disregarded the two police reports filed by the Applicants with respect to the 2013 and 2019 attacks because “having found that the allegations regarding the underlying incidents are not reliable the panel finds the probative value of these documents is limited.” Again, it is clear that the RPD’s credibility assessment affected its finding on state protection.

[24] The RPD’s credibility determination was unreasonable and was relied upon to support its findings on IFA and state protection. The application for judicial review is allowed. Neither party proposed a question for certification and I agree that none arises.

JUDGMENT IN IMM-6666-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of the RPD dated November 25, 2020 is set aside;
3. The matter is sent back to be redetermined by a different member at the RPD; and
4. No question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6666-20

STYLE OF CAUSE: SADIQ ULLAH KHAN ET AL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 15, 2021

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: JUNE 17, 2022

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