

Federal Court



Cour fédérale

Date: 20220705

**Dockets: IMM-7614-19
IMM-7617-19**

Citation: 2022 FC 989

Ottawa, Ontario, July 5, 2022

PRESENT: The Honourable Madam Justice Elliott

Docket: IMM-7614-19

BETWEEN:

STELA AKHTAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-7617-19

AND BETWEEN:

SALEEM RAFI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are, Stela Akhtar and her nephew, Saleem Rafi, who are citizens of Pakistan residing in Thailand. They fled Pakistan for fear of religious persecution as Christian minorities.

[2] The Applicants seek judicial review of the November 15, 2019 decision (the Decision) of a visa officer (the Officer) of the High Commission of Canada. The Officer found that the Applicants do not meet the requirements for a permanent resident visa in Canada as a member of the Convention Refugee Abroad class or as members of the Country of Asylum class, under paragraph 139(1)(e) and sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[3] The Officer identified discrepancies between the Applicants' respective accounts of an alleged incident of robbery and found they lacked credibility.

[4] For the reasons that follow, I find the Decision to be unreasonable. The Officer erred by engaging in a microscopic examination of peripheral issues and failed to examine the central basis of their claim for refugee protection as Christians in Pakistan. Accordingly, these applications for judicial review are granted.

II. Background Facts

[5] The Applicants, Stela Akhtar and her nephew, Saleem Rafi, are citizens of Pakistan residing in Thailand. They come from a Christian family in Faisalabad, Pakistan, where they resided until 2012.

[6] Ms. Akhtar was the owner of a global import/export trading company, where she employed Mr. Rafi. She states that she was well known in her community for her success as a businessperson.

[7] Ms. Akhtar testified that following the release of a movie against Islam titled “The Innocence of Muslims”, protests erupted throughout Pakistan and her family was targeted as the only Christians in a Muslim majority area.

[8] On September 29, 2012, the Applicants’ family home was broken into and the Applicants were robbed at gunpoint of one million rupees (\$7,643.07 CDN). The Applicants allege that there were 3 to 4 armed intruders who assaulted Mr. Rafi and forced him and Ms. Akhtar into a bathroom while they raided their home.

[9] The Applicants filed a First Information Report (FIR) with the police, but no action was taken.

[10] On October 23, 2012, Ms. Akhtar received a letter from Lashkar-e-Taiba threatening that if she did not prepare 10,000,000 rupees for them within ten days, they would kidnap Mr. Rafi and kill her family.

[11] On December 7, 2012, the Applicants fled Pakistan to Thailand where they have been residing without status since the robbery. They applied for refugee status with the United Nations High Commissioner for Refugees (UNHCR) in Thailand, but their claim was denied.

[12] In 2018, a Constitute Group (CG) of a Sponsorship Agreement Holder (SAH) in Grande Prairie, Alberta, applied to privately sponsor the Applicants to Canada. On October 1, 2019, the Applicants were interviewed together and separately by an Officer of the High Commission of Canada at the Canadian Embassy in Bangkok with the assistance of an Urdu interpreter. While at the Embassy, the Applicants were asked if they would be willing to start the interview an hour earlier than scheduled. The Applicants complied.

[13] By way of letter dated November 15, 2019, the Applicants' application for a permanent resident visa was denied.

III. **Decision under Review**

[14] The Applicants received identical letters of refusal.

[15] The Decision refused the Applicants' permanent resident visa applications under the Convention Refugees Abroad class and Country of Asylum class pursuant to sections 145 and 147 of the *IRPR* respectively.

[16] The determinative issue was credibility. The refusal letter explains:

As explained at the interview, there were several discrepancies and concerns noted in the information presented. Your accounts of being locked in the bathroom during the robbery, of looking for the phones belonging to you and your family member, of whether or not medical treatment was sought following the robbery and beating, and of receiving the threatening letter were all areas identified as problematic and detrimental to your overall credibility. Further, your evidence was frequently found to be vague and evasive. You were afforded an opportunity to address all of the identified concerns at the interview. I have considered and weighed your responses in my decision-making. However, I do not find that your responses sufficiently offset my assessment that your claim to refugee status lacks credibility and therefore fails to establish, on balance, that you are a member of one of the prescribed classes.

[17] According to the Global Case Management System (GCMS) notes, the Officer's negative credibility finding was based on the following discrepancies between Ms. Akhtar and Mr. Rafi's accounts of the incident:

A. *Being locked in the bathroom during the robbery*

[18] The Applicants both testified that, after they were physically assaulted, they were forced into the bathroom of Mr. Rafi's maternal grandmother for approximately 20 minutes.

[19] They were each separately asked if the bathroom door was locked or just closed shut. Ms. Akhtar first stated that it was locked from the outside as it was an auto-lock. She later clarified that it was merely shut. Mr. Rafi said he did not know if the bathroom door was locked.

[20] The Officer concluded, "This is far from determinative in and of itself, but I find that the confusion around the locking of the door leaves some doubt as to whether this aspect of the account is genuine."

B. *Looking for their phones after the robbery*

[21] Ms. Akhtar was asked what they did after being released from the bathroom. She testified that she and Mr. Rafi searched for her phone together. When asked whether they searched for Mr. Rafi's phone, she first stated that she did not know because "...he was sick before and then later on that night he was beaten up." Later she stated positively that they looked for his phone as well.

[22] Mr. Rafi stated first that they searched for Ms. Akhtar's phone together and he searched for his on his own. He later stated that they searched for his phone together.

[23] When asked again, Ms. Akhtar clarified that there is no discrepancy, they looked for her phone first and then they looked for Mr. Rafi's phone.

[24] The Officer found that these were illogical and confused responses, concluding, "...this alone is not determinative weight but I give it its appropriate weight."

C. *Seeking medical treatment following the robbery*

[25] Mr. Rafi was asked about the injuries he sustained during the robbery. He explained that he had previously injured his head, ribs, back and shoulder in a road traffic accident and these injuries were exacerbated by the assailants. When asked if he had sought medical treatment following the robbery, Mr. Rafi replied that he had a doctor's appointment scheduled for his pre-existing injuries in two or three days and decided to get his new injuries examined at that time.

[26] Ms. Akhtar was asked the same question, to which she replied that they did not seek a "special check-up" immediately after the robbery, but that her nephew's injuries were examined at his "routine medical treatment" in two or three days.

[27] The Officer found this explanation to be illogical. The Officer took issue with the reference to the road traffic accident, finding it irrelevant to the question of whether Mr. Rafi had received any injuries and raised suspicion that "...this whole account has been carefully rehearsed."

D. *Receiving the threatening letter*

[28] The Officer asked Ms. Akhtar why she was referred to by her first name in English in the threatening letter rather than in Urdu. She responded that she did not know. The Officer found it unlikely that the robbers would write the letter entirely in Urdu, but write her name in English.

IV. **Preliminary Issues**

[29] At the beginning of the hearing, counsel raised an issue that the CTR was missing a number of pages. After some discussion, counsel and I agreed the hearing should be adjourned pending resolution of that issue. The hearing was able to commence on September 23, 2021 when the missing pages were filed.

[30] There are two remaining preliminary matters to be addressed.

A. *Consolidation of Files*

[31] The submissions of the Applicants on the issues are essentially identical. Mr. Rafi raises one additional issue in his application for judicial review: whether the officer erred by not making an independent credibility assessment of his evidence, separate from the credibility assessment of his aunt's evidence.

[32] While these two matters were filed separately, given the virtually identical facts and common arguments, the two matters were heard together at the request and on the consent of the parties. One set of combined reasons will be issued to address both applications. Therefore, these reasons are consolidated into one decision and a copy will be placed in each file.

B. *Affidavit of Helen MacDonald*

[33] The Applicants filed a sworn affidavit from Helen MacDonald, the representative of the Sponsorship Agreement Holder (SAH) involved in the Applicants' sponsorship application.

[34] The affidavit included the affiant's interpretation of a medical document based on the affiant's personal knowledge as a speech pathologist and rehabilitation professional.

[35] The original medical document titled "DHQ Hospital Faisalabad Bed Head Ticket" was filed on its own, without an accompanying affidavit. It is a handwritten assessment in English of Mr. Rafi's symptoms and treatment on September 7, 2012.

[36] I agree with the Respondent that this document is not admissible. The scope of a judicial review must be limited to the record that was before the decision-maker: *Sedighi v Canada (Citizenship and Immigration)*, 2013 FC 445 at para 14.

[37] The MacDonald affidavit does not fall within one of the recognized exceptions to this general rule: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22.

[38] While the MacDonald affidavit will not be considered for the purpose of this judgment, I note here that the record does contain an interpretation of the medical evidence of Mr. Rafi's injuries at the time of the robbery.

[39] The following excerpt from Mr. Rafi's Schedule A form was before the Officer:

When we were robbed at gun point, I also suffered a beating. This happened after I had been in a Road Traffic Accident (RTA) where I had experienced a brain injury and was unconscious for several days. This happened on July 9, 2012. The medical documents said I had changes in behavior and a GCS of 10 out of 15 when I in hospital. My sponsor who worked in a hospital has told me that someone with a Glasgow Coma Scale of 10/15 is considered to

have a moderate brain injury. This did affect my memory and my aunt reports I had problems with my memory.

[40] Given this, it was incumbent on the Officer to consider this information in their assessment.

V. **Issues**

[41] The Applicants submit the Officer's decision is unreasonable because (i) the credibility assessment was microscopic; (ii) it failed to assess the central basis of the claim; (iii) it failed to take into account there may be an innocent misunderstanding with testimony through interpreters; and (iv) it was made without regard to the material before them.

[42] The Applicants also contest the procedural fairness of the Decision on the basis that the unanticipated change in the interview schedule, without a detailed explanation as to why it was necessary, caused stress and discomfort.

[43] As I have already indicated, I am satisfied the Decision is unreasonable based on the Officer's microscopic credibility assessment and their failure to assess the central basis of their claim for refugee protection as Christians in Pakistan.

[44] I find it unnecessary to consider the other two grounds. To be clear - I take no position with respect to those possible issues.

VI. Standard of Review

A. *Reasonableness*

[45] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. It confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness, subject to certain exceptions, which do not apply on these facts. The burden is on the party challenging the decision to show it is unreasonable: *Vavilov* at paras 23 and 100.

[46] A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification offered for it. To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at para 100.

[47] Overall, a reasonable decision is one based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at paras 15 and 85.

B. *Procedural Fairness*

[48] With respect to the Applicants' argument concerning the change in the interview schedule, a different standard applies. Mr. Justice Rennie reviewed and confirmed the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney*

General), 2018 FCA 69 [CPR]. He concluded that whether there has been procedural fairness does not require a standard of review analysis but “a court must be satisfied that the right to procedural fairness has been met.” In that respect, the ultimate question is whether the Applicant knew the case to be met and had a full and fair chance to respond: *CPR* at paras 49-50, 56.

VII. Analysis

A. *Was the Decision reasonable?*

[49] The Applicants’ argument is two-fold. They contest the reasonableness of the negative credibility findings on the basis that they concerned peripheral issues, and the Officer failed to consider the forward-looking risk they faced in reference to their undisputed profile as Christian minorities in Pakistan.

[50] The Applicants contest all four adverse credibility findings described under the heading “Decision”.

[51] First, they argue that the inordinate attention given to whether the bathroom door was locked or just shut combined with the absence of any inquiry into the substance of the claim is a trivialization of the claim.

[52] The Applicants submit the discrepancy with respect to the phone search was also a minute and inconsequential detail of an event which occurred seven years ago.

[53] With respect to the alleged inconsistency concerning Mr. Rafi's medical treatment, the Applicants stress they testified consistently that he was already "under treatment" at the time of the robbery as a result of a road traffic accident and he discussed the worsening of his symptoms at a scheduled appointment with his doctor two or three days after the robbery.

[54] Finally, they submit it was unreasonable to draw a negative finding from the Applicants' lack of explanation and subsequent speculation of why Ms. Akhtar's alleged perpetrators wrote her name in English on the threat letter.

[55] They also submit that testimony given through interpreters is fraught with the possibility of innocent misunderstanding, and even if that were not the case, this peripheral detail is irrelevant to the basis of the claim that they are Christian minorities of Pakistani nationality.

[56] The Applicants state that regardless of the discrepancies of concern, the Officer was required to assess the central basis of their claim. The Officer did not dispute the Applicants' Christian identity, the fact that Christians are a persecuted minority in Pakistan, or the events surrounding the release of the movie "The Innocence of Muslims" which the Applicants claim was the catalyst to Ms. Akhtar being targeted. The failure to consider the totality of their claim and assess the forward-looking risk as Christians rendered the Decision unreasonable.

[57] The Respondent submits the Officer was in the best position to assess credibility through first-hand observations and as such, they are owed significant deference in their findings. The Officer carefully explained their concerns to the Applicants, gave them an opportunity to respond and assigned appropriate weight to each of the inconsistencies identified.

[58] The Respondent emphasizes the Officer's finding that the Applicants' responses were frequently "vague and evasive" and found their explanations of the inconsistencies to be illogical.

[59] The Respondent argues that the Officer had no obligation to assess the remainder of the Applicants' claim once they are found not to be credible.

[60] Although credibility findings are owed significant deference, they are not immune from review: *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at para 24. This Court has warned decision-makers to refrain from an overzealous analysis of the evidence, recognizing that not all inconsistencies or implausibilities will support a negative finding of credibility: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 23.

[61] A determination of refugee status is not a memory test: *Sheikh v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15200 (FC), [2000] FCJ No 568 (QL) at para 28. Such an overzealous analysis of issues irrelevant or peripheral to the claim have been frequently found by this Court to be unreasonable: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 23; *Olajide v Canada (Citizenship and Immigration)*, 2021 FC 197 at para 13 and the cases cited therein.

[62] In the matter at hand, the contested facts occurred at the height of a traumatic event. According to their testimony, the Applicants' family home was broken into at midnight, Mr. Rafi was beaten and both he and Ms. Akhtar were threatened, forced into a bathroom and robbed at

gunpoint by armed intruders. Under such circumstances, I find it unreasonable to hold their recollections, seven years after the attack, to such an exactitude.

[63] Furthermore, the Applicants' respective recollections of the same event may very well differ in ways that cannot be reliably measured and compared as an indicator of credibility.

[64] The Officer failed to demonstrate a contextual analysis and made sweeping conclusions of the Applicants' credibility on the basis of these minor inconsistencies in their claim.

[65] To suggest that the Officer's concerns of whether the bathroom door was locked and whether they searched for their phones together were sufficient to cast doubt on the entire assertion that the Applicants were targeted for their Christian faith takes an overly microscopic view of the facts: *Kanagarasa v Canada (Citizenship and Immigration)*, 2015 FC 145 at para 13.

[66] I also find that the Officer failed to consider the basis of their claim as Christian minorities in Pakistan.

[67] In this case, the Officer did not make a finding of general non-credibility. Based on the record before me, there appears to be no dispute over the Applicants' identity as Christians, nor the country conditions that establish the history of persecution against Christian minorities in Pakistan. The adverse credibility findings had no bearing on these central aspects of their claim.

[68] Accordingly, the Officer was required to examine the Applicants' fear of persecution and forward-looking risks as Christians returning to Pakistan: *Safdari v Canada (Citizenship and*

Immigration), 2016 FC 1357 at para 14; *Okubu v Canada (Citizenship and Immigration)*, 2019 FC 980 at para 16.

[69] In my view, the failure to do so coupled with the microscopic examination of peripheral details to the Applicants' claim renders this Decision unreasonable.

B. *Was the Decision procedurally fair?*

[70] The Applicants submit that the Officer failed to explain why the schedule was changed for an earlier time and did not specifically ask the Applicants if they wanted more time to prepare. The Applicants simply state that the result was unfair to them.

[71] The Respondent submits that the slight schedule change did not breach procedural fairness. They note the Applicants have failed to provide evidence nor include in their sworn affidavit that the change caused stress or anxiety and impacted her ability to present her case fully. The Respondent notes the Applicants had 18 days notice of their interview and indicated twice that they were prepared to begin early.

[72] I agree with the Respondent. Issues of procedural fairness must be raised at the earliest opportunity, which in this instance, would be at the hearing when the question regarding the time change was posed to them. The failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness that may have occurred: *Kamara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 448 at para 26.

[73] Furthermore, I cannot agree with the Applicants that even if it had been raised, the Officer's conduct infringed upon the Applicants' participatory rights. A difference of one hour, though unsettling, cannot be said to have prejudiced the Applicants' awareness of the case to meet and ability to have their claim heard fully and fairly.

[74] On the facts before me, the Applicants have not demonstrated there was a breach of procedural fairness to warrant intervention from this Court.

VIII. Conclusion

[75] I find that the Applicants have established the Officer's decisions are unreasonable for the reasons set out above.

[76] Accordingly, the applications for judicial review in IMM-7614-19 and IMM-7617-19 are granted and a copy of these Reasons shall be placed in each court file.

[77] The decisions are set aside and these matters shall be returned for redetermination by a different Officer.

[78] Neither party proposed a question for certification and I find that none arises in the circumstances of this matter.

JUDGMENT in IMM-7614-19 and IMM-7617-19

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in IMM-7614-19 and IMM-7617-19 are granted and a copy of these Reasons shall be placed in each court file.
2. The decisions are set aside and these matters shall be returned for redetermination by a different Officer.
3. Neither party proposed a question for certification and I find that none arises in the circumstances of this matter.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7614-19

STYLE OF CAUSE: STELA AKHTAR v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

AND DOCKET: IMM-7617-19

STYLE OF CAUSE: SALEEM RAFI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF VIDEO CONFERENCE

DATE OF HEARING: AUGUST 17, SEPTEMBER 23, 2021

JUDGMENT AND REASONS: ELLIOTT J.

DATED: JULY 5, 2022

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