Federal Court  Cour fédérale

Date: 20221003

Docket: IMM-6777-21

Citation: 2022 FC 1367

Ottawa, Ontario, October 3, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SHAHIN SARKER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision [Decision] by the Refugee Appeal Division [RAD], dated September 10, 2021, affirming a decision of the Refugee Protection Division [RPD], which found that the Applicant was not a Convention refugee nor a person in need of protection.

[2] The RPD found the Applicant credible after an oral hearing. It determined he had an Internal Flight Alternative [IFA]. Therefore the RPD dismissed the claim. The Applicant appealed to the RAD on the IFA. The RAD reassessed credibility and dismissed the appeal. The RAD based its review on the transcript and documents.

[3] Neither party put the issue of credibility before the RAD.

[4] In the circumstance, I find the Decision of the RAD is unreasonable because it failed to grapple with or justify or explain its threshold determination that the RPD did not enjoy a meaningful advantage over the RAD in terms of assessing credibility. In my view, the RAD's wholesale redetermination of all issues of credibility unreasonably arrogated to the RAD a role constitutionally assigned to the RPD. This was all the more unreasonable because the RAD overturned central findings of the RPD, which enjoyed a meaningful advantage over the RAD on credibility. The RAD unreasonably deprived the Applicant of the benefits of an oral hearing to determine his credibility as established by the Supreme Court of Canada in *Singh v Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

II. Facts

[5] The Applicant is a 39-year-old man from Bangladesh. The RPD found he was targeted by members of the ruling Awami League political party to extort his family's grocery business.

[6] The Applicant faced three incidents beginning on January 15, 2006. At that time, the agents of harm attended his store and demanded three lakhs Taka. The Applicant was struck with

an iron rod and left unconscious when he refused. On this attack, the RPD had oral testimony and documentary evidence from the Applicant - which it accepted and found credible.

[7] On March 10, 2006, the Applicant was punched in the face when returning home with a friend. The Applicant again sought medical attention. Here too, RPD had oral testimony and documentary evidence from the Applicant - which it accepted and found credible.

[8] On July 27, 2006, the Applicant received a threatening phone call that he would be handed over to the Rapid Action Battalion, an anti-crime and anti-terrorist unit of the police, unless he paid three lakhs Taka within 10 days. The RPD had oral testimony and documentary evidence from the Applicant, which it accepted and found credible.

[9] The Applicant testified on these matters at the RPD, and set out these incidents in his Basis of Claim [BOC].

[10] The RPD found the two politically motivated attacks and the politically motivated extortion telephone call occurred as described both in the Applicant’s testimony and in his BOC.

[11] The RPD found the Applicant credible in respect of all three incidents of persecution.

[12] The Applicant left Bangladesh in December 2006, and eventually made his way to the U.S. in December 2017, where he remained until June 2019. His common-law spouse and son are citizens of the U.S.

[13] The Applicant entered Canada in June, 2019, and filed for refugee protection two weeks later.

III. Decision under review

[14] As noted the RPD found the Applicant's evidence credible and accepted that the politically motivated attacks and the politically motivated telephone call took place. But it found the Applicant had an IFA elsewhere in Bangladesh.

[15] The Applicant appealed to the RAD against the RPD's IFA finding.

[16] The RAD did not assess the IFA issue.

[17] Instead, having given notice, the RAD engaged in a wholesale review of all issues relating to the Applicant's credibility.

[18] The RAD reversed all findings of credibility, maintained two RPD findings against credibility and dismissed the appeal solely on credibility grounds.

IV. Issues

[19] The issue is whether the RAD acted unreasonably by failing to give any deference to the credibility determinations made by the RPD despite the advantageous position the RPD had, and

further erred by substituting credibility findings of its own based solely on its documentary review.

V. Standard of Review

[20] 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 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*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*).
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> [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).
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> [Emphasis added]

[21] 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.
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> [Emphasis added]

[22] 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

[23] In my respectful view, the RAD unreasonably undertook a wholesale review and reversal of the Applicant's credibility which the RPD had reasonably determined in the Applicant's favour after an oral hearing. In my view, while the RAD is entitled to review and consider credibility findings on appeal, it may not undertake such a wholesale review and reversal as took place in this case. Neither side could point to precedents. This case falls to be decided on first principles.

[24] The conclusion the RAD acted unreasonably is supported by two authorities, one from the Supreme Court of Canada, and one from the Federal Court of Appeal.

[25] In *Singh* v *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 the Supreme Court of Canada considered the *Charter*-compliance of the refugee determination scheme then in place. That scheme did not include an oral hearing. Because of that defect, the Supreme Court held the scheme unconstitutional. The Supreme Court ruled the relevant statutory provisions were "inconsistent with the principles of fundamental justice set out in s.7 of the *Charter*" and

held the refugee claimants before it were "entitled to a declaration that s.71(1) is of no force and effect to the extent of the inconsistency."

[26] The Supreme Court of Canada, per Madam Justice Berta Wilson, addressed the failure to provide an oral hearing as a matter of procedural fairness protected by section 7 of the *Charter* in the refugee context. Paragraph 59 of its reasons are relevant and speak to the case at bar:

> 58. Do the procedures set out in the Act for the adjudication of refugee status claims meet this test of procedural fairness? Do they provide an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? This seems to be the question we have to answer and, in approaching it, I am prepared to accept Mr. Bowie's submission that procedural fairness may demand different things in different contexts: see *Martineau*, *supra*, at p. 630. Thus it is possible that an oral hearing before the decision-maker is not required in every case in which s.7 of the *Charter* is called into play. However, I must confess to some difficulty in reconciling Mr. Bowie's argument that an oral hearing is not required in the context of this case with the interpretation he seeks to put on s.7. If "the right to life, liberty and security of the person" is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances.
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> 59. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be

> achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.
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> [Emphasis added]

[27] I am bound by this determination, noting it was made in the refugee context and that therefore the Supreme Court speaks directly to the case at hand. While this was not the only reason the Supreme Court found the absence of a hearing offender section 7 of the *Charter*, it is a central part of the Supreme Court's reasoning and conclusion.

[28] I therefore find the RAD by its wholesale reversal of the RPD's credibility findings in this case effectively deprived the Applicant of the inestimable benefit of an oral hearing so clearly given by our highest Court to refugee claimants as a *Charter* right.

[29] Notably and in this connection, Parliament responded by amending the legislation to provide for oral hearings, which role is now assigned to the RPD.

[30] The centrality of the RPD in credibility determinations is also recognized and reinforced by the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, which addresses the roles of the RAD and the RPD:

> [70] This also recognizes that there may be cases where the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears. It further indicates that although the RAD should sometimes exercise a degree of restraint before substituting its own determination, the issue of whether the circumstances warrant such restraint ought to be addressed on a case-by-case basis. In each case, the RAD ought to determine whether the RPD truly benefited

> from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim.
>
> [71] One can imagine many possible scenarios. For example, when the RPD finds a witness straightforward and credible, there is no issue of credibility *per se*. This will also be the case when the RAD is able to reach a conclusion on the claim, relying on the RPD's findings of fact regarding the relative weight of testimonies and their credibility or lack thereof.
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> [Emphasis added]

[31] I am bound by these passages also. The RAD offered no explanation or justification of any kind for its decision to conduct a wholesale review and reversal of all credibility findings in this case.

[32] The Federal Court of Appeal instructs that the RPD may in some cases enjoy a "meaningful advantage" over the RAD.

[33] On this critical point, the RAD offered only the bald conclusory statement: "…such an advantage does not arise in the present case."

[34] Unaccompanied by any analysis or reasoning, I am unable to ascertain why that critical and threshold decision was decided as it was by the RAD. In my view, the RAD's reasoning is wholly inadequate; the Decision in this respect is not justified and is contrary to paragraphs 86 and 126 of *Vavilov*.

[35] In addition and with respect the RAD failed to come to grips with why it was setting out to do what it did, thus contravening *Vavilov* at para 128.

[36] The RAD likewise unreasonably and without justification failed to afford any deference at all to the RPD's credibility determinations. Given the *Singh* decision of our highest Court, it seems to me the RAD did not respect constraining law in effectively depriving the Applicant of the entirety of the RPD's credibility assessment made after an oral hearing, which benefit the RAD did not enjoy.

[37] I am unable to see how the RAD is permitted to take away the constitutionally - required benefit the Applicant enjoyed of having credibility assessments made by the RPD at an oral hearing. I agree with counsel for the Minister that the RAD may make credibility findings upon giving notice, but I am simply not persuaded the breadth and scope of the RAD's Decision is maintainable in this case given *Singh* and *Huruglica*.

[38] I agree with the Applicant's submission the RAD's Decision is also unreasonable because it failed to give any deference whatsoever to the RPD's findings. *Singh* establishes if not conclusively at least as a starting point, that tribunals such as the RPD have a meaningful advantage over the RAD in making credibility findings based on oral testimony.

[39] The fact is, the RPD heard live testimony in relation to virtually every issue considered by the RAD. Notably, while nearly every issue considered by the RAD was considered by the RPD, the RPD did not conclude any of those issues were sufficient to overcome the RPD's overall credibility findings.

[40] The first issue the Applicant points to is the RAD's finding the Applicant gave inconsistent evidence on when he was first subject to extortion demands and whether his family was ever extorted. However, the RPD addressed this issue with the Applicant at his hearing. The RPD, having had an opportunity to hear the Applicant's testimony and observe his demeanor, was satisfied with the Applicant's explanation because it established the Applicant was subject to extortionate demands for payment.

[41] The second issue is the RAD's reassessment of credibility based on omissions from the BOC, namely the Applicant having gone into hiding. In the Applicant's view, the RPD addressed this by finding it did not occur. While it did not accept this portion of the Applicant's evidence, however and with respect, the negative inference drawn was insufficient to overcome the RPD's ultimate conclusion the Applicant was credible.

[42] The third issue the Applicant references is the RAD's conclusion the Applicant's credibility was negatively impacted because his BOC narrative excluded that the agents of harm continued to search for the Applicant. Again, however, this was not enough for the RPD to reject or undermine the Applicant's testimony about the central events namely the two attacks and the telephone extortion call.

[43] The Applicant also and correctly takes issue with the RAD's conclusion that the Applicant's failure to seek asylum in the U.S. undermined both his fear of persecution and credibility. With respect the RAD was simply relitigating, without benefit or hearing or seeing

the witness on this point, an issue expressly considered and decided in the Applicant's favour by the RPD.

[44] With respect to the RAD's finding on the number of assailants, one or more than one, it seems to me the RAD was extremely microscopic. The Applicant's BOC used the plural word "they" but referred to only one attacker. His oral testimony referred to only one attacker. In my view the BOC narrative was consistent that a single individual "Zafar" punched him in the face. To focus in on the use of one word that was quite possibly the product of both translation and grammatical issues is unreasonable and in my view missed what the Applicant communicated.

[45] The Applicant also submits and I agree the RAD should not have unreasonably interfered with the RPD's credibility determinations, because it is well established credibility findings by the RPD are "not be lightly interfered with". This is so because of the opportunity the tribunal has to observe witness demeanour firsthand. See *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319:

> [42] First, and perhaps most importantly, the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice, which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule. As stated in *Aguebor* at para 4:
>
> > There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility

> of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review…

[46] I agree this comment is in the context of judicial review, but and with respect it is also in my view central to the Supreme Court's determination in *Singh* and the Federal Court's ruling in *Huruglica*.

[47] In my respectful view, if the RAD had properly considered the applicable legal principles constraining its analysis, it would not have unreasonably interfered with the RPD's credibility determination.

VII. Conclusion

[48] In my respectful view, the Decision of the RAD is unreasonable for the reasons set out above. Therefore, the Application for judicial review will be granted.

VIII. Certified Question

[49] The Applicant set out a proposed question to certify namely: "Where the RPD denies a claim not on the basis of credibility, is it open to the RAD to revisit those findings in the absence of an oral hearing?"

[50] The Respondent did not propose a question to certify.

[51] I will decline to certify a question. It seems to me the issue in this case was resolved almost 40 years ago by the Supreme Court in *Singh* and sufficiently addressed by the Federal Court of Appeal in *Huruglica*, and in any event arises in what appears to be a Decision without precedent.

JUDGMENT in IMM-6777-21

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.
2. The Decision below is set aside.
3. The matter is remanded for reconsideration by a differently constituted decision-maker.
4. The reconsideration shall be done in accordance with these Reasons.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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