Federal Court  Cour fédérale

Date: 20221027

Docket: IMM-5071-21

Citation: 2022 FC 1479

Ottawa, Ontario, October 27, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MOHAMMAD YAMA AINI

Respondent

JUDGMENT AND REASONS

[1] The Minister asks this Court to review and set aside a decision by the Refugee Appeal Division [RAD] allowing an appeal and setting aside the decision of the Refugee Protection Division [RPD]. The RPD had determined that the Respondent was excluded from protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The exclusion was under Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [Refugee Convention]. Article 1F(b) states that the Refugee Convention does not apply to any persons with respect to whom there are serious reasons for considering that the Respondent has committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee.

[3] For the reasons that follow, this application is dismissed. The Minister's fundamental disagreement is with the weighing the RAD gave to the evidence before it. That is not a proper ground of judicial review. On applications for judicial review this Court does not reassess or reweigh the evidence on the merits (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 125). Rather, this Court must be satisfied that there are sufficiently serious shortcomings in the decision such that it does not exhibit sufficient justification, intelligibility, and transparency.

[4] The RAD made no material error in its analysis of the evidence and it provided reasons that bear the hallmarks of a reasonable decision.

Background

[5] The Respondent is a citizen of Afghanistan. He was the Counselor to the Afghan Permanent Mission at the United Nations and lived in New York with his wife and three children.

[6] Shortly after midnight on July 21, 2017, his wife, who has mental health issues, was restless and unable to sleep. She decided to leave their apartment and go for a walk with the youngest child. The Respondent tried to stop her, telling her that it was not safe to go out at that time of night. In his Basis of Claim [BOC] narrative, he alleges that as his wife turned away from the door, she tripped on a broom that was nearby and fell. She bruised herself on the side of her face near her right eye. The Respondent then drove his wife to Flushing Hospital for treatment.

[7] The hospital staff appeared to have had concerns about whether the Respondent had hit his wife. After an interpreter was found the following morning, they asked his wife about possible violence from her husband. She denied that he had harmed or abused her. She also spoke with someone from child services at the time. She was discharged and returned home.

[8] Over the next few days, the Respondent, his wife, and his children were interviewed by the police and representatives from child protection services. Both the Respondent and his wife denied any domestic violence had occurred.

[9] The Respondent was subsequently informed by the Afghan Ambassador that officials from the United States Department of State had called to advise the Ambassador about the incident. The Respondent was then told that his termination was being considered and he would be recalled to Afghanistan.

[10] On July 23, 2017, news about the alleged incident appeared in the New York Post, which named the Respondent and his wife. Articles providing essentially the same information as in the New York Post article appeared in other newspapers, including in some Afghani news services. A posting was also made on Facebook in Dari using the Respondent's picture and the picture of a beaten woman who was not his wife.

[11] On August 12, 2017, the Respondent was officially released from his position at the Afghani Permanent Mission. Fearing persecution by the Mullahs should he and his family return to Afghanistan, he and his family came to Canada on August 26, 2017 and filed refugee claims on September 6, 2017.

[12] By Notice of Intervention before the RPD, the Minister alleged that there were serious reasons for considering that the Respondent had committed a serious non-political crime prior to entering Canada, namely aggravated assault contrary to section 268 of the *Criminal Code*, RSC 1985, c C-46.

[13] The wife and children's claims were separated from the Respondent's claim. All were heard and decided by the same Member of the RPD. The wife gave her testimony in the absence of her husband and the children were represented by a designated representative. The Respondent testified in the absence of his wife on a subsequent day. Both the Respondent and his wife agreed that their respective testimonies and submissions could be used in each other's hearings, and signed a consent form.

[14] The RPD accepted the wife's claim, finding that she "would be physically and psychologically abused by her husband and she would receive no adequate protection from the Afghani state agencies" if she were return to Afghanistan. This finding was made notwithstanding that the wife testified that neither she nor her children had ever been abused by the Respondent. The RPD found that the Respondent's wife "received the injuries she reported to the hospital staff as a result of the beatings from her husband." In so finding, the RPD appears to have given considerable weight to the "newspaper articles from reliable and independent sources."

[15] Perhaps not surprisingly, the same Member of the RPD found the Respondent to be excluded from protection because the objective evidence indicated that on the night in question the Respondent had beat his wife. This objective evidence, which came in the form of news articles, also claimed that the claimant's wife had told the hospital staff that her husband pulled her hair, slapped her, and punched her in the face. The RPD noted that one article stated that hospital staff were so concerned that they called the police. Other news articles indicated that the Respondent would be summoned over the incident.

[16] At the RPD hearing, the Respondent admitted that the Afghani Government had terminated his position and had recalled him back to Afghanistan for investigations as to whether he beat his wife. However, at the hearing, both he and his wife testified that he had not beaten his wife and that she had tripped over a broom and fell.

[17] The RPD made a negative credibility finding. The RPD first noted a change, and the timing of that change, in the Respondent's BOC narrative. Initially, he indicated that his wife sustained a cut under her eye. At his hearing, which took place after his wife's hearing, he amended his narrative to say that his wife had redness and swelling (i.e., bruising) under her eye, not a cut. This accorded with his wife's testimony during her hearing. The RPD found that the Respondent had ample time before his wife's testimony to amend his BOC narrative, but did not do so until his wife's hearing was over.

[18] Second, the RPD placed great emphasis on the fact that the Respondent did not provide any documentary evidence from an independent and reliable source, such as the hospital, the police, or the social services, to corroborate his evidence regarding the incident. In light of this, the RPD's view was that the only independent and reliable source of information speaking to the wife's injuries sustained because of the July 21 incident were the newspaper articles submitted into evidence. As the onus was on him to establish his claim, the RPD concluded that he failed to establish persuasively that the injuries suffered were not to the extent reported in the newspapers.

[19] Third, the RPD noted that in the Respondent's BOC narrative he had indicated that his wife suffered from depression. However, the RPD took issue with the fact that he did not provide any documentary evidence to indicate that was the case. As a result, the RPD was not persuaded to believe that it was in the context of that issue (that the wife was restless and unable to sleep because of her mental health issues) that his wife decided to leave the residence, as alleged. Resulting from that determination, the RPD further concluded that it was not plausible

that the wife was hurt because she tripped on a broom beside the door on her way out of the home.

[20] Fourth, at her hearing the Respondent's wife testified that she went out with her baby in a stroller. However, the RPD noted that the Respondent's BOC narrative did not mention anything about his wife going out with a baby in a stroller. When this omission was put to him, he testified that his wife and he had prepared their BOC narratives as a general statement to narrate the incident itself. The RPD did not find this explanation to be reasonable, as in his testimony he had indicated that the noise of the stroller woke him up. The RPD therefore expected that he would see what woke him up when his wife decided to go out. This omitted detail was significant in the RPD's view.

[21] Finally, the RPD found it to not be plausible that the Respondent's employment would be terminated by the Afghan authorities if, according to his testimony, he got permission for his mother to come to New York to help his wife when his third child was born. In the RPD's view, it was not credible that he would be dismissed from his post three days after the incident exclusively due to his wife's depression.

[22] In its conclusion, the RPD determined that, based on the totality of the evidence adduced, the Respondent claimant committed a serious non-political crime in the United States. The RPD further found "that the claimant is a criminal and individuals like the claimant who have committed serious non-political crimes outside Canada do not deserve refugee protection in Canada". Therefore, he was excluded from refugee protection in Canada by the RPD.

[23] On July 7, 2021, the RAD allowed the Respondent's appeal. In addition to setting aside the RPD Decision, the RAD further determined that he is a Convention refugee.

[24] As a preliminary issue, the RAD admitted two pieces of new evidence proffered by the Respondent. First was an affidavit from his wife, sworn February 18, 2020, which also attached a copy of the RPD decision issued on December 23, 2019, allowing the wife and children's claim for refugee protection. Second was an article, dated June 18, 2021, entitled "Confusion in Afghanistan as U.S. cancels NATO flag-lowering ceremony." The article was submitted in response to the RAD's request for submissions regarding the well-foundedness of the Respondent's claim and the current National Documentation Package for Afghanistan.

[25] The only issue raised by the Minister in this application is with respect to the RAD's finding that the Respondent is not excluded from protection.

[26] The RAD first noted that the RPD was correct in highlighting the omission regarding the baby stroller in the Respondent's BOC narrative. However, the RAD disagreed with the RPD regarding the significance of the omission, finding it to deal with a peripheral matter that did not bring his entire testimony into doubt. The RAD found that the Respondent testified in detail about the July 21 incident and that his evidence was generally consistent with his BOC narrative on the detail of the incident.

[27] Similarly, the RAD also found that the Respondent's late amendment to his BOC narrative to indicate that his wife suffered a bruise, rather than a cut, to be peripheral.

[28] The RAD next took issue with the fact that the RPD drew a negative inference from the Respondent's failure to provide documentation to corroborate his testimony regarding the July 21 incident, and particularly his failure to provide hospital bills or reports from the hospital, police and/or social services. The RAD concluded, on the evidence before it, that the Respondent and his counsel sent requests for such records (along with a consent to release information form signed by the wife) to each department and sent follow-up letters to the hospital three more times.

[29] The RAD noted that the Minister had raised the issue of exclusion, and therefore it was the Minister's onus to demonstrate that there are serious reasons for considering that the Respondent has committed a serious non-political offence. In this case, the RAD had no evidence before it as to what would be required by the New York hospital, police or social services to release information about a woman who may have been a victim of domestic violence.

[30] Based on the above, and on the evidence before it, the RAD found the RPD to have erred in impugning the Respondent's credibility because his efforts to provide documentation were unsuccessful.

[31] Third, the RAD found the RPD to have erred in failing to consider a psychiatric report and letter from Dr. Clare Pain. In the RAD's view, the letter and report provided compelling, credible and reliable evidence that he did not commit a serious, non-political offence during the July 21 incident.

[32] In her report, dated August 1, 2018, Dr. Pain confirmed that she had been meeting with the Respondent's wife and an interpreter since January 2018 at the Centre for Addiction and Mental Health [CAMH]. The RAD found it clear from the report that the wife explained to Dr. Pain the incident in a manner that was consistent with both her and her husband's testimony. She also told the psychiatrist that she acquired a small skin wound on the right side of her face, which bruised, and that the claimant has never hurt her or their children.

[33] A follow-up letter was also submitted by Dr. Pain on May 30, 2019. This letter indicated that the wife had been involved with CAMH for 17 months and had several psychiatric assessments. These assessments take into account issues of violence and safety for the wife, the Respondent, and their children. The RAD noted that Dr. Pain wrote:

> No such issues were found, or suspected. In fact, we have never had any concerns about any type of violence with the Aini family.

In the RAD's view, if Dr. Pain had any concerns about violence by the Respondent against his wife or children, those concerns would have been included in the report and letters.

[34] The RAD was mindful that a wife might deny any violence has been inflicted on her by her husband for any number of reasons. Nevertheless, it found that the psychiatric report provided an objective basis for believing that the Respondent did not beat or abuse his wife on July 21, or at any time.

[35] Specifically, the RAD noted that the wife was able to testify without her husband being present and thus without feeling intimidated by his presence. She remained consistent in her story even when she was in a setting that would allow her to tell her story without fear of her

husband. Moreover, she remained consistent even after being granted refugee status and having the security of not being sent back to Afghanistan.

[36] Related to the issue of Dr. Pain's report and letter, the RAD took issue with the weight placed by the RPD on the newspaper articles. The RPD concluded that the only independent and reliable evidence were the newspaper articles that indicated the Respondent beat his wife. However, as previously mentioned, in the RAD's view there was independent, credible, and reliable evidence before the RPD in the form of the psychiatric report and letters, which the RPD failed to consider or mention. Apart from this, the RAD also pointed out that there was little information on how the journalists obtained the information they wrote about and very little information to corroborate the allegations in the newspaper articles.

Issue

[37] The sole issue in this Application is whether the RAD Decision is reasonable.

Analysis

[38] The Applicant advanced five submissions in its attempt to persuade this Court that the RAD decision is unreasonable.

Acceptance of New Evidence

[39] The Applicant first takes issue with the RAD's acceptance and giving weight to the new evidence presented by the appellant (Respondent) on appeal to the RAD. The Applicant submits

that the evidence did not meet the definition as articulated in *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96, and that all of the relevant or probative evidence presented by the Respondent was known at the RPD.

[40] This submission was not pursued in oral argument. The only new evidence relevant to the sole issue before the Court is the affidavit from the Respondent's wife attaching a copy of the RPD decision allowing her and the children's claim for refugee protection. The Minister included that decision in the Application Record. It was known to the RPD at the time of the decision and is arguably inadmissible. However, it is noted that it supports the position the Minister takes herein and I see nothing untoward in admitting it.

Respondent's efforts to obtain evidence

[41] The Minister submits that the RAD erred in accepting evidence that the Respondent had made sufficient efforts to obtain documentation from the hospital regarding the July 21 incident. The Minister points to the RPD transcript which shows that the Respondent did not get a letter from the social worker "because [the Respondent] believe that we will not be treated fairly". The Applicant also notes that the wife testified that every other time she went to the hospital for an emergency she was given a letter, except for the July 21 incident.

[42] The Minister submits that it was unreasonable for the RAD to conclude that the Respondent had discharged his efforts by simply showing letters sent requesting the information. While there was evidence letters were sent requesting the information, the Minister takes issue with the fact there was no explanation as to why the Respondent or his wife were unable to

obtain copies of the incident reports. While the Minister, before the RAD, noted that the Respondent had not provided follow-up materials to Flushing Hospital when it requested an original signature, the Minister says these submissions were not addressed by the RAD.

[43] I am not persuaded that the RAD erred in finding that the Respondent made sufficient efforts to obtain documentation from the hospital regarding the July 21 incident. Based on the record of numerous attempts to obtain that information, I find it reasonable for the RAD to find that the Respondent made reasonable efforts to obtain documentation regarding the July 21 incident from the hospital, the police, and social services.

[44] While the Minister repeatedly tries to impugn the Respondent for his inability to produce documentation related to the incident, the RAD was correct in noting it is the Applicant who bore the onus of demonstrating that there are serious reasons for considering that the Respondent committed a serious non-political offence (*Sing v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 23).

[45] In light of the fact that it is not the Respondent's onus when exclusion is put into play by the Minister, it is reasonable for the RAD to conclude that the Respondent in this case was only required to make reasonable efforts to obtain and provide documentation relating to the July 21 incident. Requiring a higher standard than this would impermissibly shift the burden onto the Respondent.

[46] Moreover, as noted by the RAD, the Minister also attempted, without success, to obtain those documents. The Minister's complaint brings to my mind an old saying involving pots and kettles.

Weight given to the Doctor's Report

[47] The Minister submits that the RAD's reliance on the CAMH report was unreasonable. It submits that the RAD allowed the CAMH report to usurp the role of the tribunal. This, says the Applicant, is contrary to this Court's teaching in a number of cases. For example, the Minister draws the Court's attention to *Salazar v Canada (Minister of Citizenship and Immigration)*, 2018 FC 83, where the Court at paragraph 42 stated, "The Court has cautioned that psychological reports cannot usurp the role of the decision-maker."

[48] The Minister says that although the RAD ought to have considered the report, it erred in according it an unreasonable amount of weight.

[49] I do not accept this submission.

[50] While the Applicant is correct in stating that this Court has cautioned that psychological reports cannot usurp the role of the decision-maker, the RAD did not fall into that error. I am unable to find that the RAD erred in placing significant weight on the CAMH report, and agree with the RAD's determination that the RPD fatally erred in not mentioning or considering the report at first instance.

[51] The Minister has not provided any substantive arguments to show how the RAD erred in determining that the report provides compelling, credible, objective, and reliable evidence that the Respondent did not commit a serious non-political offence during the July 21 incident. Quite simply, this was a finding open to the RAD to make. The Minister's arguments on this point amounts to a veiled attempt to get this Court to engage in a re-weighing of the evidence.

Discounting the Afghan Government's Actions

[52] The Minister submits that the RAD erred in two ways with respect to its consideration of the actions of the Afghani government. First, that the RAD unreasonably failed to appreciate the fact that the Afghani government had sufficient concerns regarding the July 21 incident, that it recalled the Respondent to Afghanistan to investigate the incident, and indeed removed the Respondent from his diplomatic position. Second, the Minister submits that the RAD ought to have considered the Minister's submissions regarding diplomatic immunity.

[53] In light of its finding that the Minister had failed to establish serious reasons to consider that the Respondent committed a serious non-political crime prior to coming to Canada, the RAD determined it was unnecessary to address whether or not the Respondent was prosecuted because of diplomatic immunity. This was a reasonable conclusion, and the Minister has not persuasively shown otherwise. Indeed, the RAD was not required to address every argument raised on appeal (*Mohamed v Canada (Minister of Citizenship and Immigration),* 2016 FC 1419 at para 16, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para 16).

[54] Moreover, I disagree that the RAD unreasonably failed to appreciate the Afghani government's actions. As the Minister stated before the RPD, the *Foreign Missions and International Organizations Act*, SC 1991, c 41, details the protocols and responsibilities for both the host and home countries of posted diplomats, particularly in the event a diplomat is facing criminal charges in the host country. According to the Minister, that Act is clear on the rights a foreign mission has when one of their diplomats is facing criminal charges. They can elect to waive diplomatic immunity and have the diplomat charged and tried in the host country, or they can elect to expel their diplomat, or end their posting, so that the incident can be investigated and dealt with in the home country.

[55] In light of those options, it is speculative for the Minister to submit that the Afghan government's action confirms that there are serious reasons to consider that the Respondent committed a serious non-political crime. There could be any number of reasons why the Afghan government reacted the way it did to the allegations made against the Respondent, including a desire to avoid adverse press and pubic reaction to the news story.

[56] There is no evidence on the record speaking to how one should interpret the Afghan government's actions, and I see little that can be read into them. As such, I find that the RAD did not err in the manner alleged.

Rejection of newspaper articles

[57] Finally, the Minister submits that the RAD unreasonably preferred the CAMH report and the testimonies of both the Respondent and his wife to the detriment of the newspaper articles

submitted into evidence. It says that the newspaper articles contain the only contemporaneous account of the incident.

[58] While the Applicant submits that newspaper articles should be treated with caution, they say that in appropriate cases, weight may be given to them. For this proposition, they draw the Court's attention to *Abbas v Canada (Minister of Citizenship and Immigration)*, 2019 FC 12 at paragraph 40, where the Court states that the RPD may or may not rely on newspaper articles, and that it is generally a matter for the RPD to decide.

[59] While the Minister is correct in stating that, in appropriate cases, weight may be given to news articles, it is equally open to a tribunal to discount news articles.

[60] The RAD reasonably concluded that there was little information about how journalists obtained the information reported in the various news articles, and especially the original New York Post article dated July 23, 2017. That article, which only cites on unnamed police sources, states that "An Afghan diplomat is accused of beating his wife so badly that she ended up in a Queens emergency room" and that "Obviously, [the wife] was hurt enough that she went to the hospital and the hospital felt compelled enough to notify the police."

[61] The contents of the news articles do not rise to the level of "serious reasons for considering." To quote a former President of the United States, these articles may be Fake News. Absent a named source for the information or corroborating evidence, they are

reasonably entitled to very little weight especially when placed in the context of the clear and consistent evidence of the only persons “in the room” who both deny the allegations.

[62] In essence, the Minister is asking this Court to re-weigh the evidence before the RAD. As the Minister knows well, having said as much in numerous judicial review applications, that is not the role of the Court.

[63] No question was proposed for certification.

JUDGMENT in IMM-5071-21

THIS COURT'S JUDGMENT is that this application is dismissed and there is no question for certification.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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