Federal Court Cour fédérale

Date: 20221117

Docket: IMM-560-22

Citation: 2022 FC 1577

Ottawa, Ontario, November 17, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Elham Sadat BAHREDAR
Benjamin BAHREDAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Elham Sadat Bahredar [PA] is a citizen of Iran and the Netherlands, while the Associate Applicant, her son Benjamin Bahredar [AA or son] is a citizen of the Netherlands only. The PA, a single mother, sought refugee protection in Canada fearing

her father's family with respect to both Iran and the Netherlands, and discrimination in the Netherlands.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] granted refugee protection, finding no state protection in either Iran or the Netherlands for these Applicants from the family of the PA's father. The Respondent appealed the RPD decision to the IRB's Refugee Appeal Division [RAD], solely with respect to the availability of state protection in the Netherlands. The Applicants alleged incompetence of their former counsel or representative for failing to submit to the RPD documentary evidence they had provided to counsel regarding this very issue. The RAD found in favour of the Minister and granted the appeal; state protection was the determinative issue [Decision].

[3] The Applicants seek judicial review of the Decision. They have convinced me that the Decision is unreasonable, thus warranting the Court's intervention. I therefore grant the Applicants' application for the more detailed reasons that follow.

II. Issues and Standard of Review

[4] Having considered the parties' written and oral submissions, I find this matter raises the following issues:

A. *The RAD erred by refusing to admit the Applicants' new evidence, despite finding that they could not reasonably have been expected to bring the information to the RPD before the RPD made its decision; relatedly, the RAD also erred in its analysis of the former representative's alleged incompetence; and*

B. *In concluding the Applicants failed to rebut the presumption of state protection, the RAD erred by not giving proper consideration to the Applicants' experiences with the Dutch*

> *police regarding other matters when evaluating their attempts to seek state protection in the Netherlands.*

[5] In my view, the presumptive standard of review for all the issues raised here is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25.

[6] The issue of incompetent counsel or representative often is brought before the Court on judicial review of an administrative tribunal decision; in other words, the alleged incompetence relates to the quality of representation before tribunal whose decision is the subject of the judicial review. In such circumstances, the applicable standard of review is correctness because of breached procedural fairness or denied natural justice by reason of the representative's alleged incompetence before the tribunal: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

[7] The matter before me is different, however. The issue of incompetent representation was raised before and considered by the RAD, itself an administrative appeal tribunal. In other words, the alleged incompetence occurred at the RPD level. Further, the RAD is required in any event to assess the correctness of the RPD decision, including in the context of the incompetent representation: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII), [2016] 4 FCR 157 at paras 78, 97, 103. At issue before this Court is thus the reasonableness of the Decision, including the RAD's treatment of the incompetence allegation: *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at para 12.

[8] To avoid judicial intervention, the challenged decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility; the party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above at paras 99-100.

[9] As I explain below, I am satisfied that the Applicants have met their onus.

III. Analysis

[10] I start my analysis by noting the RAD's acknowledgement of the RPD's credibility finding regarding the PA and her allegations.

A. *RAD's treatment of new evidence and incompetent representation allegation*

[11] In my view, the RAD unreasonably applied the test for assessing incompetent representation resulting in unreasonable treatment of the Applicants' new evidence.

[12] The RAD dealt with the Applicants' allegation of the incompetence of their former counsel as a preliminary issue. The RAD noted the Respondent's sole argument was that there is no legal basis for the RPD to conclude that state protection was unavailable to the Applicants.

[13] Citing *Nwafor Ep Antoine Sayegh v Canada (Citizenship and Immigration)*, 2021 FC 795 at paragraph 75 [*Nwafor Ep Antoine Sayegh*], the RAD found that the Applicants failed to demonstrate a reasonable probability that, but for the counsel's errors, the result of the

proceeding would be different. The RAD noted that the RPD found the most favourable outcome for the Applicants by concluding they are Convention refugees.

[14] The RAD then considered the new evidence the Applicants submitted in accordance with subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and the applicable jurisprudence, notably *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] [together, *Singh/Raza*]. See Annex "A" below for this legislative provision.

[15] The RAD examined (1) the evidence related to the allegation of incompetence of former counsel; (2) the statement from the PA's mother; (3) the PA's statement; (4) the affidavit of the current counsel's legal assistant and partial transcripts of RPD hearing; (5) a Netherlands police report dated May 15, 2015 (translated); and (6) various email messages. The RAD accepted only the police report into evidence.

[16] That said, except for item (4), the RAD found that all the other items, or portions of them, met the statutory test for "newness" under the *IRPA* s 110(4) in that the Applicants could not reasonably have been expected in the circumstances to bring the applicable information to the RPD before its decision (which was given orally at the conclusion of the hearing). In considering the *Singh/Raza* factors of admissibility, however, the RAD determined that the evidence it ultimately excluded was not relevant because the evidence related to the allegation of incompetent representation that the RAD disposed of as a preliminary matter.

[17] In sum, the RAD examined and disposed of the counsel incompetence argument, then turned to the evidence relating to counsel's incompetence under subsection 110(4) of the *IRPA*, found that the evidence met the statutory test until it assessed the *Singh/Raza* factor of relevance, and, based on the fact that it already examined counsel's incompetence, found that the evidence was not relevant.

[18] Bearing in mind that judicial review is concerned with both the decision maker's reasoning process and the outcome (*Vavilov*, above at para 83), I find the RAD's rationale here flawed.

[19] In considering the issue of whether the allegedly incompetent representation has resulted in prejudice, the Supreme Court of Canada guides that "**if it is appropriate** to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow" [emphasis added]: *R. v G.D.B.*, 2000 SCC 22 [*G.D.B.*] at para 29.

[20] The *Nwafor Ep Antoine Sayegh* decision on which the RAD relied, and in fact all of the decisions involving allegations of incompetent representation on which the Respondent relied in its submissions to the Court, involved a negative decision at first instance, usually the RPD, subsequently affirmed by the RAD on appeal. The RAD unreasonably failed in my view to consider whether any prejudice to the Applicants occurred, notwithstanding the RPD decision in their favour, such as the fact of the Respondent's appeal in itself, or whether the new evidence (some of which the Applicants provided to previous counsel but was not submitted to the RPD) could have reinforced the rebuttal of presumed state protection in the context of the RAD's

correctness review. As noted by the Supreme Court, “miscarriages of justice may take many forms […; i]n some instances, counsel’s performance may have resulted in procedural unfairness[, while i]n others, the reliability of the trial’s result may have been compromised”: *G.D.B.*, above at para 28.

[21] Further, the Applicants’ written arguments to the RAD disclose that the new evidence was submitted to show the indifference of Dutch authorities to the PA’s requests for help over a period of time and hence to reinforce the rebuttal of presumed state protection. The Applicants argued it was admissible because it was not reasonably available at the time of the RPD decision in light of the asserted incompetence of prior counsel. The RAD essentially agreed with the Applicants that they met the test for new evidence in subsection 110(4) of the *IRPA*. I thus find that in the circumstances, it behooved the RAD to consider the *Singh/Raza* factor of relevance in the context of state protection.

[22] Instead, in my view the RAD effectively siloed or isolated the new evidence in its unreasonable analysis of the incompetent representation and then failed, again unreasonably, to consider its relevance in the context of the ultimate purpose for which it was submitted, that is the rebuttal of presumed state protection, because in the RAD’s view the Applicants had not met the test for incompetent counsel, a test that no applicant with a positive RPD decision ever could meet in this RAD’s application of it.

[23] I find the following description offered by the Applicants’ in their written submissions to the Court aptly captures the unintelligibility of the Decision: “The RAD … summarily dispensed

with the question of counsel's incompetence as a preliminary matter, relying on a perverse logic that because the RPD found them credible and granted a favorable outcome, there could be no counsel incompetence – while at the same time allowing an appeal on the grounds that the record lacked exactly the evidence that former counsel failed to present."

[24] In the end, I am persuaded that the RAD's reasoning does not "add up," thus warranting the Court's intervention.

B. *RAD's treatment of state protection issue*

[25] The above findings are determinative, in my view. In the circumstances, I find it unnecessary to deal with this issue, especially because this matter will be sent back for redetermination.

IV. Conclusions

[26] The Decision is unreasonable for the reasons outlined above and, therefore, I grant the Applicants' judicial review application. The Decision is set aside and the matter will be remitted to a differently constituted RAD for redetermination.

[27] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-560-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial review application is granted.
2. The January 4, 2022 decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada is set aside. The matter will be remitted to a differently constituted RAD for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Appeal to Refugee Appeal Division **Evidence that may be presented** **110(4)** On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**Appel devant la Section d'appel des réfugiés** **Éléments de preuve admissibles** **110(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-560-22
STYLE OF CAUSE:	Elham Sadat BAHREDAR Benjamin BAHREDAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 11, 2022
JUDGMENT AND REASONS:	FUHRER J.
DATED:	NOVEMBER 17, 2022

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