Federal Court  Cour fédérale

Date: 20230331

Docket: IMM-8659-21

Citation: 2023 FC 438

Ottawa, Ontario, March 31, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

JONATHAN ALEXANDER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Jonathan Alexander, a citizen of Saint Lucia, seeks judicial review of the October 28, 2021 decision rendered by the Refugee Protection Division [RPD]. The RPD determined Mr. Alexander was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

II. Context

[2] In 2012, Mr. Alexander, arrived in Canada. A few weeks later, his mother and brother arrived in Canada and they all claimed refugee status, relying on the mother's Personal Information Form [PIF] narrative.

[3] In 2013, Mr. Alexander's mother withdrew her claim. In 2015, Mr. Alexander's file was suspended because of integrity issues related to criminal charges that were ultimately dropped. In 2019, Mr. Alexander's brother withdrew his claim and in December 2019, the RPD resumed processing of Mr. Alexander's claim and confirmed the hearing of his claim would take place on March 14, 2020.

[4] Mr. Alexander had not updated his information since his claim in 2012. On or about March 4, 2020, hence days before the hearing, Mr. Alexander provided the RPD with an Amended Basis of Claim [BOC] form and a narrative. Despite the fact that the Minister had signaled his concern in regards to the outdated document in the file, the RPD did not notify the Minister that an Amended BOC and narrative had been submitted. On March 11, 2020, the RPD granted Mr. Alexander's claim, relying on the updated 2020 Amended BOC and narrative.

[5] On August 27, 2020, the Minister applied to the RPD to re-open Mr. Alexander's claim, alleging the RPD failed to observe principles of natural justice. On September 28, 2020, the RPD allowed the Minister's application to re-open the claim and a new hearing date was scheduled for July 14, 2021. Mr. Alexander did not challenge the decision to re-open his claim, either before

the RPD or by way of judicial review to this Court. The decision to re-open is therefore final, and it cannot be challenged. I will thus not entertain the argument Mr. Alexander raised against the RPD decision to re-open his claim in this proceeding.

[6] On the morning of the new hearing on July 14, 2021, and despite having previously asked the Minister for the documents that were in the file, counsel for Mr. Alexander was provided with the mother's 2012 PIF and narrative. Having never seen these documents, counsel took a 20 minutes break after which she accepted to proceed with the hearing, with both the 2012 and the 2020 narratives in evidence.

[7] Counsel for Mr. Alexander raised issues related to the late filing of these documents for the first time in her post-hearing written submissions. She then submitted the RPD had breached the principles of natural justice and simultaneously confirmed that she and Mr. Alexander had agreed to continue with the hearing.

[8] On October 28, 2021, the RPD issued the decision that is the subject of this application. The RPD found that the claimant was neither a Convention refugee nor a person in need of protection, as the risk he faced in the past is generalized in Saint Lucia and does not exist on a forward-looking basis. The claimant has failed to demonstrate a serious possibility of persecution on a Convention ground, or a personalized risk of torture, or to life or of cruel and unusual punishment or treatment in Saint Lucia.

[9] In its decision, the RPD first examined counsel's post-hearing submissions that the RPD had breached the principle of natural justice. Noting that counsel and claimant had agreed to continue with the hearing after a 20 minutes break, and that no application had been raised at the hearing in regards to a possible breach of procedural fairness, the RPD found there was no such breach.

[10] On the merits, the RPD considered Mr. Alexander's credibility as the file contained two very different narratives; first, the one filed by Mr. Alexander's mother in 2012 and second, the Amended BOC filed by Mr. Alexander in March 2020. The RPD noted that both versions could not be true at the same time, as both versions had been submitted by the claimant with attestation that they were complete, true, and correct. The RPD added that since one of the two versions is a fabrication, without a reasonable explanation, it found that Mr. Alexander was not credible.

[11] The RPD noted that Mr. Alexander, along with one of his brothers, had relied on their mother's narrative and that Mr. Alexander was an adult at that time. The RPD added that the Amended BOC, written 8 years after the alleged incidents, is a total rewrite of the history while Mr. Alexander failed to provide a reasonable as to why it is so drastically differing from the original one.

[12] The RPD found, on a balance of probabilities, that Mr. Alexander was not credible. The differences between the two narratives and lack of reasonable explanations for these differences weighted heavily in the RPD's finding. The RPD also considered the expert report, Mr. Alexander's criminal history, counsel submissions on the various discrepancies, the fact that Mr.

Alexander did not enquiry to his family currently in Saint Lucia on their safety, and ultimately found he was not credible. The RPD also examined the nexus to the Convention claim and the forward-looking risk, and denied the claim.

[13] Before the Court Mr. Alexander essentially contends that the RPD breached procedural fairness by relying on the 2012 narrative his mother filed with her claim, erred in considering there existed two narratives, unreasonably assessed his credibility, and ignored evidence. I have already indicated that I will not entertain the allegations raised by Mr. Alexander against the decision to re-open his claim.

[14] The Minister responds that the RPD did not breach the principle of natural justice, did not err in relying on the narrative drafted by Mr. Alexander's mother and made a reasonable finding that Mr. Alexander was not credible.

III. Analysis

A. *Standard of review*

[15] Reasonableness is the presumptive standard of review of the merits of an administrative decision and nothing warrants a departure from this presumption. The Court must thus determine if the applicant has shown the RPD decision to be unreasonable per the teachings of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[16] On a reasonableness review, the focus of the inquiry "[…] must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). Ultimately, the reviewing court must be satisfied that the administrative decision is "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 para 85).

[17] Furthermore, the Court is mindful of the particulars when credibility findings are at play. As stated in *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at paragraph 11, "[...] the credibility finding is a question of fact that deserves deference and ought to be reviewed under the reasonableness standard". Moreover, "[t]hese credibility issues are the heartland of the RPD's jurisdiction and expertise (*Pepaj v Canada (Citizenship and Immigration)*, 2014 FC 938 at para 13), and have been described as lying within 'the heartland' of its jurisdiction (*Siad v Canada (Secretary of State)*, [1997] 1 FC 608 (FCA) at para 24; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 7, 8)" (*Lunda v Canada (Citizenship and Immigration)*, 2020 FC 704 at para 36). In *Aldaher v Canada (Citizenship and Immigration)*, 2021 FC 1375 at paragraph 23, the Court stated that "[…] the assessment of an applicant's testimony and their credibility is owed deference".

[18] In regards to procedural fairness, the reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21 to 28 (see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54

[*Canadian Pacific*], and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31). The burden is on the applicant to demonstrate that the requirements of procedural fairness were not met.

[19] It is not clear whether the RPD's determination of no breach of procedural fairness at its hearing is strictly an aspect of the substance of its decision and the reasonableness standard of review is therefore presumed to apply, pursuant to *Vavilov* (see e.g., *Ahmad c Canada (Citoyenneté et Immigration)*, 2021 CF 214 at para 13; *Brown v Canada (Citizenship and Immigration)*, 2022 FC 1607 at paras 6-7), or whether it is a matter of procedural fairness subject to the teachings of the Federal Court of Appeal in Canadian Pacific. Considering neither party made detailed submissions on this point, and that my decision does not depend on the standard of review, I need not decide this issue. As I explain below, I am satisfied that the hearing process at the RPD was fair, and that the RPD's decision on this issue was reasonable.

B. *The 2012 narrative from Mr. Alexander's mother*

[20] Mr. Alexander has not demonstrated that the RPD breached procedural fairness or erred in another way by relying on the 2012 narrative from his mother.

[21] First, the Court has stated that procedural fairness concerns must be brought at the very first opportunity and a failure to do so amounts to an implied waiver of any perceived breach of procedural fairness (*Sanusi v Canada (Citizenship and Immigration)*, 2020 FC 1004 at para 7; *Kamara v Canada (Citizenship and Immigration)*, 2007 FC 448 at para 26; *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at para 24; *Badulescu v Canada (Citizenship and*

Immigration), 2016 FC 616 at para 27; *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at para 66; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26).

[22] For example, in *Kamara v Canada (Citizenship and Immigration*), 2007 FC 448 at paragraph 26:

> Further, the transcript confirms, and the Applicant concedes, that neither she nor her counsel ever raised an objection to the order of questioning followed before or at the hearing. The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. See *Restrepo Benitez et al. v. M.C.I.* 2006 FC 461 at paras. 220-221, 232 & 236, and *Shimokawa v. M.C.I.*, 2006 FC 445 at paras. 31-32 citing *Geza v. M.C.I.* 2006 FCA 124 at para. 66.

[23] I agree that it is disturbing that the 2012 documents were remitted to counsel only on the morning of the hearing, particularly since she had asked the Minister to disclose all documents to her some time prior. On the other hand, one cannot ignore that Mr. Alexander himself knew of the documents at least since 2018. However, more importantly, there is no mention that counsel and Mr. Alexander objected to the hearing proceeding when the 2012 PIF and narrative were provided to them. Any concerns regarding procedural fairness was therefore not brought at the first opportunity. In fact, counsel and Mr. Alexander accepted to proceed with the hearing after a 20 minutes break. Counsel for Mr. Alexander raised concerns with procedural fairness after the hearing, in her post-hearing submissions; even then, she unequivocally confirmed that she and Mr. Alexander had agreed to continue with the hearing.

[24] Given that particular set of facts, Mr. Alexander has not convinced me that the RPD process was not fair or that the RPD decision is unreasonable in that regard.

[25] Furthermore, the record supports the RPD's conclusion that Mr. Alexander did rely on his mother's narrative as the basis for his claim in 2012.

[26] While the narrative portion of Mr. Alexander's 2012 PIF is blank, his claim was initially joined to that of his mother and brother. This is supported by these indications: (1) the claims were filed at the same time and both Mr. Alexander and his mother were represented by the same counsel; (2) the narrative was an essential part of the PIF, and Mr. Alexander's PIF could only have been considered complete if he relied on the narrative filed by his mother; (3) the narrative of the mother referred to herself and her two sons; (4) the correspondence between the RPD and the Minister confirms Mr. Alexander relied on his mother's narrative before she withdrew her claim (Certified Tribunal Record, p 459); (5) Mr. Alexander's previous counsel's post-hearing submissions unequivocally confirm Mr. Alexander reliance on his mother's narrative for his own claim in 2012. This testimony this is found at page 497 of the Certified Tribunal record where the record shows a confirmation of Mr. Alexander's testimony as such: "As we have just discussed my understanding is that when you first made your claim back in 2012 you were relying on the narrative and the allegations that your mother had set forth. Is that correct? Yes mam"; and (6) even assuming that the RPD's first decision had concluded that Mr. Alexander had not relied on his mother's narrative in 2012, the second RPD would not have been bound by this conclusion (*Nikolova v Canada (MCI*), 2018 FC 382 at para 26).

[27] Mr. Alexander's argument that the 2012 narrative should not have been considered is without merit.

C. *The RPD's credibility finding*

(1) Inconsistencies between narratives

[28] It was reasonable for the RPD to draw a negative inference from the inconsistencies in the two narratives; they outline different set of facts. Mr. Alexander's explanation – that he never saw the documents in question and was not allowed to review what he signed – at a time when he was an adult and represented by counsel, was not persuasive, and was reasonably rejected by the RPD. This is compounded by the fact that (1) Mr. Alexander testified he recalled filling out the initial forms; (2) his own PIF, which he signed as an adult, repeated some of the elements of his mother's narrative; (3) Mr. Alexander could not reasonably explain the two year delay to amend his narrative, as he testified having seen the initial 2012 form when he was informed his claim was continued.

(2) Failure to make inquiries of his family

[29] Mr. Alexander has not shown it was unreasonable for the RPD to draw a negative inference from his failure to make any inquiries with his family – his mother or his two brothers who are in Saint Lucia – about their safety and to consider his explanation unreasonable.

(3) The RPD did not ignore evidence

[30] Mr. Alexander has not cited the evidence the RPD would have ignored, and he has therefore not shown that any material evidence was ignored. I agree that there was little evidence of an ongoing risk, even if his 2020 narrative was to be believed.

IV. Conclusion

[31] Mr. Alexander's application for judicial review will be dismissed. The RPD's decision constitutes a reasonable outcome based on the law and the evidence before it, and it has the attributes of transparency, justification and intelligibility required by *Vavilov*. The RPD decision is based on an inherently coherent and rational analysis, and is justified having regard to the legal and factual constraints to which the decision maker was subject.

JUDGMENT in IMM-8659-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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