

Federal Court



Cour fédérale

Date: 20230405

Docket: IMM-8319-21

Citation: 2023 FC 489

Ottawa, Ontario, April 5, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

D.E.

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of Egypt. He seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. The RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] On December 1, 2021, Prothonotary (now Associate Judge) Trent Horne granted the Applicant's informal request for an Order amending the style of cause to protect his identity, and preserving his anonymity in all documents and recorded entries in the Court record that may be made available to the public.

[3] The Applicant claims to fear persecution by the Egyptian authorities due to his perceived political opinion. The RPD rejected the Applicant's claim, concluding that he did not face a credible risk in Egypt, and that he lacked a subjective fear of persecution.

[4] The RPD unreasonably found the Applicant to lack a subjective fear due to his failure to seek refugee protection earlier, and unreasonably found discrepancies in his account of his arrest by the Egyptian police in November 2018. The application for judicial review is therefore allowed.

II. Background

[5] The Applicant was born in Cairo, Egypt. He relocated to Dubai, United Arab Emirates in 2003 to pursue an employment opportunity. While living in Dubai, the Applicant frequently returned to Egypt to visit his mother. Occasionally he participated in protests against the Egyptian government.

[6] During a trip to Egypt in November 2018, the Applicant was on his way to renew a work permit for Kuwait when he was arrested by the police together with a number of other people

who were protesting against the government. He was questioned about his presence in Cairo, and accused of being a member of the Muslim Brotherhood, a political organization that is banned in Egypt. He was released the following day after he stated he was related to the Chief Justice of the Civil Court.

[7] The Applicant returned to Dubai. A few weeks later, police officers came to his mother's home in Egypt looking for him. A police officer returned to his mother's home in January 2019. He said he knew the Applicant was living in Dubai, and he would arrange to have him returned to Egypt. A few days later, the same officer again returned and threatened to add the Applicant's name to a list of wanted individuals unless the Applicant's mother paid a bribe, which she did.

[8] On February 5, 2019, the Applicant's mother visited him in Dubai and warned him that he was not safe because the Egyptian authorities would track him down. He travelled to Canada to visit family and "let things cool down". He stayed in Canada from February 19, 2019 to June 29, 2019. To avoid overstaying his Canadian visitor's visa, from June to December 2019 he spent time with friends and relatives in the United States of America [USA].

[9] In September 2019, police officers visited the Applicant's family in Egypt and inspected their mobile phones. This is when the Applicant decided he could not return to Egypt.

[10] The Applicant attempted to re-enter Canada on December 28, 2019, but was refused entry. An officer with the Canada Border Services Agency [CBSA] cautioned him that the USA

might deport him to Egypt. On January 2, 2020, the Applicant made a claim for refugee protection at the Douglas Port of Entry in Surrey, British Columbia.

[11] The Applicant was initially represented by a lawyer who assisted him in preparing his Basis of Claim [BOC] form and narrative. He says that the written narrative was not translated for him, but he nevertheless signed a declaration indicating he understood the form in English. He eventually retained new counsel due to difficulties communicating with his previous lawyer.

[12] The RPD heard the Applicant's refugee claim on August 27, 2021, and rejected it on October 20, 2021. The RPD inferred a lack of subjective fear from the Applicant's failure to make a refugee claim when he first arrived in Canada on February 19, 2019, or later when he was in the USA. The RPD rejected his explanation that he was hoping for a change of government in Egypt.

[13] The RPD also identified a number of concerns respecting the Applicant's credibility, but noted that none of these was in itself sufficient to refute his allegations. However, the cumulative effect of the concerns was sufficient to undermine his claim for protection.

III. Issue

[14] The sole issue raised by this application for judicial review is whether the RPD's decision was reasonable.

IV. Analysis

[15] The RPD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where “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).

[16] The criteria of “justification, intelligibility and transparency” are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] The Applicant challenges the RPD's decision on numerous grounds. Two of these are determinative. The application for judicial review must be allowed because the RPD unreasonably found the Applicant to lack subjective fear due to his failure to seek refugee protection earlier, and unreasonably found discrepancies in his account of his arrest in November 2018.

[18] The Applicant held valid visas for travel to both Canada and the USA. He argues that fear is subjective, and it was not implausible for him to hold an overly optimistic view of the changing political situation in Egypt. As Justice James Hugessen memorably remarked in *Yusuf v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 629 at 632, “[t]he definition of

a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent”.

[19] While a refugee claimant’s failure to seek asylum at the first opportunity may be indicative of a lack of subjective fear, it is not determinative (*Jumbe v Canada (Citizenship and Immigration)*, 2008 FC 543 at para 12). Here, the Applicant sought refugee protection only when he was refused entry into Canada and was told by a CBSA officer that the USA might deport him to Egypt.

[20] As Justice Danièle Tremblay-Lamer found in *Gyawali v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1122 at paragraph 18:

In the case at bar, the applicant had a student visa and had also made an application for permanent residency. It is clear that it was not until he lost his financial support from his family in Nepal that he feared having to return there because he could no longer pay for his studies. Clearly there is a direct parallel with the sailor on the ship who is finally given leave and has nowhere to go but home [see *Hue v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 283 (FCA)]. Both had left home for fear of persecution and had found a safe place to stay and work, so much so that they did not feel the need to apply for refugee status as they were safe for the time being. Suddenly, both found themselves in peril of returning home through circumstances over which they had no power or influence and immediately filed a claim.

[21] The Applicant did not seek protection on his arrival in Canada in February 2019 because he held a valid visitor’s visa and was not immediately at risk of removal. Nor did he consider himself to be immediately at risk of removal from the USA, until a CBSA officer suggested

otherwise. The RPD unreasonably rejected the Applicant's explanation for not claiming refugee protection earlier.

[22] The Applicant was interviewed twice at the Canadian point of entry: on December 28, 2019 and January 2, 2020. The interviews were conducted by the same CBSA officer, who made notes in the Global Case Management System [GCMS].

[23] The RPD drew a negative inference from the officer's GCMS notes of the first interview, according to which the Applicant said he was not currently wanted by the Egyptian authorities. However, the more detailed GCMS notes of the second interview clearly indicated that the Applicant had been detained in Egypt, and that he believed the authorities "might have a warrant for him".

[24] The RPD found inconsistencies in the Applicant's account of his participation in the demonstration that occurred in November 2018. In his BOC narrative, the Applicant claimed he had been arrested by the police, who wrongly believed him to be an active participant in the protest. In his testimony, the Applicant said he had joined the protesters to "show his support".

[25] The Applicant explained that he was on his way to renew a work permit; he had not intended to participate in a protest against the government; he joined the protesters spontaneously; and he did not shout slogans or carry a sign. The RPD unreasonably found that the minor discrepancy in his account of his arrest in November 2018, which may have been due to a translation error, was sufficient to reject his credibility.

[26] The Applicant also challenges the RPD's decision on the grounds of procedural fairness. However, in light of my conclusion that the decision was unreasonable, it is unnecessary to consider these additional arguments.

V. Conclusion

[27] The application for judicial review is allowed. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a differently-constituted panel of the RPD for redetermination.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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