Federal Court  Cour fédérale

Date: 20230428

Docket: IMM-1268-22

Citation: 2023 FC 622

Toronto, Ontario, April 28, 2023

PRESENT: Madam Justice Go

BETWEEN:

**ASHAR IQBAL, ZAIB KHURSHID,
MOSES IQBAL and SAMUEL SADIQ and SARAH SHAMIM
(by their Litigation Guardian ASHAR IQBAL)**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ashar Iqbal [the "Principal Applicant"], his wife Ms. Zaib Khurshid, and their three children [together, the "Applicants"] are Christian citizens of Pakistan currently residing in Thailand. They applied to resettle in Canada through the Convention refugees abroad class or the

country of asylum class under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] after receiving a private sponsorship through City of Refuge.

[2] The Applicants claim that they fear religious persecution based on their Christian faith. In particular, the Applicants claim that after the Principal Applicant facilitated the marriage of the daughter of a local Muslim Imam with a Christian man, they began facing threats based on their faith. The Applicants claim that following the marriage, the Imam, named Mr. Hanif, filed a First Information Report [FIR], a criminal complaint against the Principal Applicant for "acting against Islam." After this incident, the Applicants claim that the Principal Applicant and Ms. Khurshid were attacked on two separate occasions. The Principal Applicant applied to register a FIR against his attackers, but the police refused to take any action. Fearing the possibility of further attacks, the Applicants fled to Thailand in August 2013.

[3] In a letter dated December 16, 2021, a migration officer [Officer] at the High Commission of Canada in Singapore rejected the application on the basis that the Applicants have not been truthful, contrary to the requirement of subsection 16(1) of the *IRPA* [Decision].

[4] For the reasons set out below, I find that the Officer breached their duty of procedural fairness by failing to provide sufficient disclosure of the information relied on in the Decision, and in so doing, deprived the Applicants an opportunity to meaningfully participate in the process. As such, I grant the application.

II. Issues and Standard of Review

[5] The Applicants raise several arguments, which can be broken down into two main issues:

A. The Officer breached procedural fairness;

B. The Decision is unreasonable because the Officer made unsupported credibility findings and provided inadequate reasons.

[6] In my view, the determinative issue in this case is the breach of procedural fairness with respect to the disclosure of information relied upon by the Officer.

[7] The Applicants submit that issues of procedural fairness are reviewable on a correctness standard: *Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at para 25. The Respondent notes that the Court's role is to determine whether the process followed by the decision-maker was fair having regard to all of the circumstances: *Najjar v Canada (Citizenship and Immigration)*, 2022 FC 69 at paras 12-13.

[8] I adopt the following dicta of Justice Gleeson in *Canada (Citizenship and Immigration) v Cabigas*, 2023 FC 517:

> [4] Questions of procedural fairness are not decided according to any particular standard of review but instead engage a legal question: whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). The circumstances to be considered include the non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. A fairness review is functionally similar to, and

> is best described as, review on a standard of correctness (*CPR* at para 54).

III. Analysis

A. *Procedural History*

[9] Before addressing the issue at play, it is necessary to set out the relevant procedural history of this case.

i. Procedural Fairness Letters

[10] In July 2018, the Applicants submitted a refugee sponsorship application through City of Refuge. On February 4, 2020, the Applicants were interviewed at the Canadian visa office in Bangkok. On September 27, 2021, the Applicants received an email asking for the "FIR that relates to your application to file a FIR and Rapt. No 28 of [Police Station] Factory Area, which dates from 2013."

[11] The Principal Applicant responded to the email on the same day, and re-submitted two Urdu documents related to the FIR registered against the Principal Applicant, both of which are dated April 11, 2013. Based on the English translation, in the first document, Mr. Hanif writes to the Police Station at Factory Area, Lahore, to register a FIR against the Principal Applicant and another individual named Pervaiz Murad, for facilitating his daughter's marriage with a Christian man [Mr. Hanif's FIR Application]. The second document, which is the "Rapt No. 28" form, is an entry on the Factory Area Police Station's "Daily Diary Book", which describes the FIR

application Mr. Hanif submitted [Rapt No. 28 Form]. The Rapt No. 28 Form states that the application was handed over to a sub-inspector for further proceedings.

[12] On October 15, 2021, the Applicant received a procedural fairness letter from the visa office [First PFL] raising concerns about the authenticity of the documents submitted "in regards to your application to register a [FIR]." The First PFL noted that despite the request to submit the FIR (that the Principal Applicant tried to register against Mr. Hanif and others), the Applicants submitted the same documents as previously submitted. The First PFL also noted that the February 2020 interviewing officer had "concerns with your testimony in regards to your refugee claim", and asked for details about why the Applicants retuned to Syria.

[13] The Principal Applicant responded to the First PFL by explaining that the FIR was registered against him, not by him, and that he is not from Syria. He also stated that he asked a friend in Pakistan to try and obtain more documentation about the FIR itself, and subsequently submitted another document. This document appears to be the FIR against the Principal Applicant itself, as registered by Mr. Hanif, and contains the same allegations as in Mr. Hanif's FIR Application.

[14] On December 10, 2021, the Applicant received a second procedural fairness letter, which stated that the further FIR submitted was "verified as fraudulent" [Second PFL]. The Principal Applicant responded on December 14 explaining that he knew nothing about any fraudulency and that he merely forwarded the document he received from his friend in Pakistan in good faith. In this email, the Principal Applicant also provided an update about others who were implicated

in the FIR against him. He explained that Mr. Murad's family went to Canada in November 2021 through a refugee sponsorship, and that the married couple has also gone to Canada for safety.

ii. Officer's concerns about the FIR

[15] In the Decision, the Officer confirmed their finding that the FIR that the Applicants submitted "was confirmed fraudulent by the alleged issuing authorities." No other details were provided with regard to that finding.

[16] In the Global Case Management System [GCMS] notes, which form part of the reasons, more details about the Officer's conclusions can be ascertained. Notably, before the First PFL was sent, the Officer reviewed the documents on record and the interview notes, and entered the following note on October 15, 2021:

> […] After the interview, the officer had concerns with the applicant's testimony regarding his refugee claim, as the officer had concerns that the events described may not have happened, and cannot be relied upon to support the applicant's claim of persecution due to inconsistencies noted in his narrative and documents submitted. Those concerns were presented to the applicant during the interview and the applicant was given a chance to answer to those concerns. The applicant also submitted the following documentation in support of his claim: 1. [Mr. Hanif's FIR Application] 2. Rapt No. 28 […] Upon verification of these documents, no record could be found for the documents provided by the applicant. We have requested that the applicant submit the FIR related to his application to register a FIR, however the applicant submitted the same two documents already submitted. Therefore, given discrepancies in the applicant's testimony during the interview as well as concerns over the authenticity of documents submitted, I am not satisfied that the applicant has been truthful and therefore I am not satisfied that the applicant meets the requirements under IRPA A(16) […]

[17] The GCMS notes also show that an officer with the initials WD reviewed the file in July 2021 and was concerned about the two documents submitted by the Applicants, namely Mr. Hanif's FIR Application and the Rapt No. 28 document. Officer WD requested for these documents to be verified by the Risk Assessment Unit [RAU] in the Islamabad visa office. The results of this verification were received on August 17, 2021 [First RAU Report] but were not disclosed to the Applicant pursuant to a "DO NOT DISCLOSE" note in the GCMS, purportedly based on an exemption under paragraph 16(1)(c) of the *Access to Information Act*, RSC, 1985, c A-1 [*ATIA*].

[18] Another officer, Officer XJ, entered another request to the RAU on November 25, 2021 to verify the FIR that the Principal Applicant's friend obtained in Pakistan. The results of this second verification were received on December 10, 2021 and were also subject to a "DO NOT DISCLOSE" note pursuant to paragraph 16(1)(c) of the *ATIA* [Second RAU Report]. The GCMS notes on this entry state that the "FIR submitted by the applicant was verified and confirmed to be fraudulent." Officer XJ is the Officer who rendered the Decision and who sent the two PFLs.

iii. Disclosure of the RAU Reports

[19] The original certified tribunal record [CTR] produced for the purposes of this application for judicial review did not contain the contents of the First and Second RAU Reports. However, in response to the Applicants' motion dated February 2, 2023 for the production of the full CTR, an amended CTR was submitted, which contains the two RAU Reports. The amended CTR was accepted for filing on March 8, 2023 by order of this Court.

[20] The First RAU Report was with respect to Mr. Hanif's FIR Application and the Rapt No. 28 Form. It states that the RAU contacted the Factory Area Police Station by telephone and received a response from a Mr. Liaqat, who explained that the Daily Diary Books are only kept for two years. After searching for the file related to Rapt No. 28, Mr. Liaqat indicated that no record was found under the provided reference number and that "it appears to be invalid."

[21] The Second RAU Report was purportedly with respect to the FIR the Principal Applicant submitted after the First PFL. The report indicates that the RAU contacted a Mr. Qasim over the phone, who checked the records for a FIR 198/13 and found that it related to an incident dated February 16, 2013 against an unrelated individual pertaining to an unlicensed pistol.

B. *There was a Breach of Procedural Fairness*

[22] I agree with the Applicants that the Officer breached procedural fairness by relying on the two RAU Reports, which constitute undisclosed extrinsic evidence, without providing the Applicants a meaningful opportunity to respond. I need not address the other procedural fairness arguments raised by the Applicants.

[23] The Respondent submits that in general, the level of procedural fairness owed by visa officers is at the low end of the spectrum. However, I am guided by the Federal Court of Appeal [FCA] in *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para 58, which highlights that the parameters of procedural fairness are particularly pertinent for refugee applicants applying from overseas. As the FCA noted at para 59:

> When considering the importance of the decision to the appellants, the Motions Judge made the following statement [at paragraph 76]: "While, on a subjective basis, the decision is of great significance to an applicant, on an objective basis a negative decision does not deprive an applicant of any right or benefit. This factor, therefore, does not support enlargement of the content of the duty of fairness." With respect, the Motions Judge failed to appreciate the significance of the fact that the appellants are applying for admission to Canada as Convention refugees.

[24] Further, it is trite law that an important factor in determining the extent of the duty of fairness owed is the importance of the decision to the individuals affected. As the Supreme Court of Canada set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 25, "[t]he more important the decision is to the lives of those affected and the greater its impact on… those persons, the more stringent procedural protections will be mandated."

[25] The Officer's decision to accept or deny their application has a significant impact on the Applicants, who seek to enter Canada as Convention refugees. The Decision will determine whether the Applicants can find sanctuary from the alleged persecution, or continue to live their lives in uncertainty and fear. Decisions of this nature, in my view, carry more serious consequences than decisions concerning applications for a study or work permit, where the impact on the individual is generally less significant and not permanent. As such, I find the cases cited by the Respondent suggesting the level of procedural fairness to be at the lower end distinguishable: *Asl v Canada (Citizenship and Immigration)*, 2016 FC 1006 at para 23; *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 23.

[26] As the cases cited by the Applicant show, this Court often intervenes in cases involving refugee applicants where a breach of procedural fairness has been found: *Mushimiyimana v*

Canada (Citizenship and Immigration), 2010 FC 1124 [*Mushimiyimana*]; *Hailu v Canada (Citizenship and Immigration)*, 2015 FC 1096 [*Hailu*] at para 18; *Helal v Canada (Citizenship and Immigration)*, 2019 FC 37 [*Helal*] at para 19.

[27] While the circumstances in each of these cases are unique, they reflect several principles that are equally applicable to the case at hand. In *Mushimiyimana*, a case specifically involving a Convention refugee from abroad application, the Court found that the officer breached their duty of procedural fairness by relying on extrinsic evidence without giving the applicant an opportunity to respond: at para 23. In *Hailu*, at para 18, the Court took issue with the officer's reliance on certain reports without giving the applicant an opportunity to comment on them. In *Helal*, the Court examined the issue of procedural fairness by determining whether the nature of the information being relied on was sufficiently disclosed to allow the applicant to meaningfully participate in the process: at para 19.

[28] In the case at bar, neither of the two PFLs mention the First or the Second RAU Report. Nor did the PFLs set out the information obtained by the Officer through the RAU Reports including, among others: that the Daily Diary Books are only kept for two years, that no record was found under the provided reference number, or that the records for the FIR submitted by the Principal Applicant related to an unrelated incident. Instead, the Officer simply raised concerns about the authenticity of the documents submitted "in regards to the [Principal Applicant's] application to register a [FIR]." Not only was this statement misleading, as the Principal Applicant did not provide a copy of ***his*** application to register a FIR, it also disclosed insufficient information such that the Applicants could supply a meaningful response.

[29] I am not entirely in agreement with the Applicants that for them to know the case they had to meet, they should have been given information about who performed the RAU assessments. However, I agree that the Applicants should have been advised of the actual findings that were determinative of the Decision, beyond the general concerns, in order for them to know the case against them: *Toki v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 606 at paras 24-25.

[30] The Applicants also argue that the procedural fairness issues are exacerbated due to the RAU's reliance on unreliable and insufficient sources of information in Pakistan. The Applicants highlight several concerns, which I need not address in detail. Suffice to say that these concerns relate to the reliability of the RAU assessments, particularly in light of the country condition evidence with respect to police abuse and corruption in Pakistan and how it may affect the handling of blasphemy allegations and charges. I agree with the Applicants that, by failing to disclose the RAU Reports, the Officer deprived the Applicants an opportunity to comment on the content and reliability of these reports, which may have materially impacted the Officer's assessment of authenticity of the documents provided by the Applicants.

[31] The Respondent disagrees that any breach of procedural fairness arose from the failure to disclose the two RAU Reports. The Respondent argues that the Officer did not have a duty to disclose internal information they received and that the content of the First and Second PFLs sufficiently informed the Applicants of the concerns, namely that the FIR was found to be fraudulent: *Jemmo v Canada (Citizenship and Immigration)*, 2021 FC 1381 at paras 38-52 [*Jemmo*]; *AB v Canada (Citizenship and Immigration)*, 2020 FC 461 at paras 26-27 and 30-32;

Amiri v Canada (Citizenship and Immigration), 2019 FC 205 at paras 33-35; *Hamid v Canada (Citizenship and Immigration)*, 2016 FC 1115 [*Hamid*] at paras 15-17. The Respondent contends that the Applicants received a meaningful opportunity to respond.

[32] I disagree with the Respondent for the reasons already stated above.

[33] I also find the cases cited by the Respondent distinguishable on facts.

[34] Further, as noted by Justice Brown in *Jemmo*, the issue to be determined when assessing if the duty of procedural fairness required the decision-maker to disclose extrinsic evidence is whether "meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts": at para 28, citing *Hamid* at para 16. In this case, I find the facts disclosed were insufficient to offer the Applicants a meaningful opportunity to respond.

[35] At the hearing, the Respondent further submitted that there is no breach of procedural fairness, as the Applicants have received the RAU Reports by filing the judicial review application and a motion. I reject this argument in its entirety. A breach of procedural fairness cannot be cured after-the-fact just by seeking intervention from this Court. If that were the case, officers in charge of administrative decision-making need not disclose any material information; they could simply wait and see if their decisions get challenged in court. Not all applicants have the wherewithal to bring a judicial review application; those who do not have the resources to do so will be left without any remedy.

[36] In conclusion, I find that the Officer breached procedural fairness by not disclosing the RAU Reports, or at least the pertinent information arising from the RAU Reports, in order to give the Applicants a meaningful opportunity to respond. On that basis, the Decision must be set aside.

[37] While I find the procedural fairness issue to be determinative, this finding should not be taken as my endorsement of the credibility findings made by the Officer. As the case will be returned to a different officer for redetermination, the Officer's other findings will need to be reviewed. The Applicants should be given a further opportunity to respond to the RAU Reports and to any concerns that the new decision-maker may have.

C. *There will be no order as to costs*

[38] The Applicants submit that there are special reasons for granting costs in this matter, as there are blatant errors on the face of the record. The Applicants submit that this Court has granted costs in similar situations: *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 3; *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154 at para 34. Further, the Applicants argue that the Respondent's eleventh hour disclosure of the two RAU Reports accentuates the errors.

[39] I am not so convinced.

[40] This Court may only award costs in an application for judicial review for special reasons.

[41] In *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, Justice Dawson stated at para 26 that:

> Special reasons may be found if one party has unnecessarily or unreasonably prolonged proceedings, or where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith.

[42] As Justice Mosley remarked in *Ndererehe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 880 at para 35, a breach of procedural fairness or other legal error "will not alone constitute special reasons for awarding costs."

[43] The initial decision not to disclose the RAU Reports was based on a purported exemption under the *ATIA.* The Respondent eventually did disclose the RAU Reports after the Applicants filed their motion. While there is no doubt that the Applicants have been negatively affected by the Decision and have had to extend resources to bring the RAU Reports to light, I do not find that the circumstances of this case meet the high threshold to warrant an award of costs.

IV. Conclusion

[44] The application for judicial review is allowed and the matter is returned for redetermination by a different officer.

[45] There is no question to certify and no order as to costs.

JUDGMENT in IMM-1268-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different officer.

3. There are no questions to certify.

4. There is no cost award.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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