Federal Court  Cour fédérale

Date: 20230608

Docket: IMM-5141-21

Citation: 2023 FC 785

Ottawa, Ontario, June 8, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

CHAUDHRY RASHID MAQBOOL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Rashid Maqbool Chaudhry, seeks judicial review of a decision of the Refugee Appeal Division (RAD) confirming a decision of the Refugee Protection Division (RPD) that he is not 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 [IRPA].

[2] The Applicant's refugee claim was based on his fear of religious extremists, after he spoke out against the type of religious education being offered in some madrassas (religious schools) in Pakistan, which he said had been subverted by terrorist groups. Both the RPD and the RAD found the Applicant credible but denied his claim after finding that he had an Internal Flight Alternative (IFA).

[3] The Applicant argues that he was denied procedural fairness because the RAD did not deal with his request to file new evidence on his appeal. He also submits that the RAD decision is unreasonable because it failed to take his profile into account and it imposed an unrealistic expectation that he would be able to identify his agents of persecution with greater precision.

[4] For the reasons that follow, the RAD decision will be quashed and set aside. I find that the Applicant was denied procedural fairness because the RAD failed to consider his request to file new evidence, and certain of the RAD's key findings on the IFA question are unreasonable.

I. Background

[5] The Applicant is a citizen of Pakistan who fears religious extremists will harm him if he returns there, due to his activism against madrassas connected to the Taliban and other, similar extremist groups. He said that his experiences being educated in religious extremism at a madrassa led him to publicly speak out against the risk they present for children and that, in June 2017, he received death threats and was attacked, suffering a broken shoulder as a result. He sought police protection, but they failed to act. Thereafter, he put his advocacy work on pause.

[6] In April 2018, the Applicant resumed his work. On July 29, 2018, he held a seminar at the local Chamber of Commerce on the advantages of advanced study and disadvantages of the religious education provided by madrassas. On August 20, 2018, two individuals wearing green, a colour associated with religious workers, shot at him and his friend, and two bullets hit his friend's leg. This attack prompted the Applicant to flee to Canada using a previously acquired business visa.

[7] The Applicant's refugee claim was rejected by the RPD because the panel found that he faced a localized threat from an extremist group, and therefore he had a valid IFA in either Islamabad or Karachi.

[8] The Applicant provided notice of his intention to appeal the RPD Decision before the RAD on December 14, 2020. On February 2, 2021, he sought to adduce new evidence pursuant to subsection 110(4) of *IRPA* and Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [*Rules*]. The new evidence was a transcript of an oral RPD decision in a separate claim rendered on November 27, 2020, dealing with proposed IFAs in Pakistan for claimants facing threats from the Taliban. The Applicant's counsel provided written submissions in support of this application, arguing that although the facts of the other case were not identical to the Applicant's situation, the IFA findings were persuasive evidence that individuals facing threats from extremists were not safe anywhere in Pakistan. The Applicant did not request an oral hearing, and none was held.

[9] The RAD dismissed the Applicant's appeal on July 12, 2021, finding that the RPD came to the correct conclusion on both branches of the IFA test. The Applicant seeks judicial review of this decision.

[10] To complete the background, it should be noted that the Applicant applied to the RAD to reopen his appeal on September 7, 2021, alleging incompetence on the part of his then-counsel (who did not represent him at the current hearing). The Applicant said the hearing should be reopened because the former counsel had not proceeded in a timely manner to submit an affidavit he had obtained after he received the RPD's decision, and thus the affidavit was not provided to the RPD before it issued its decision.

[11] The RAD refused to reopen the appeal, because it found there was no reasonable possibility that the result of the original hearing would have been different had the evidence been before the RPD. The matter before the Court, therefore, concerns the RAD's July 12, 2021 decision dismissing the Applicant's appeal.

II. Issues and Standard of Review

[12] There are two issues in this case:

A. Was the Applicant denied procedural fairness when the RAD failed to deal with his request to file new evidence?

B. Was it unreasonable for the RAD to find that the Applicant had an IFA in Pakistan?

[13] Regarding the first issue, in a case such as this the ultimate question for a reviewing court is whether the procedure was fair in all of the circumstances. This is similar to correctness review, although technically no standard of review is being applied: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. This point is particularly clear here, because the procedural unfairness claim rests on the failure of the RAD to consider the application to file new evidence, and so there is no "decision" to be reviewed.

[14] The second issue is to be assessed under the framework set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[15] In summary, under the *Vavilov* framework, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95). The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). The decision must be assessed in light of the history and context of the proceedings, including the evidence and submissions made to the decision-maker (*Vavilov* at para 94). Finally, "absent exceptional circumstances, a reviewing court will not interfere with [the decision maker's] factual findings" (*Vavilov* at para 125).

III. Analysis

A. *Was the Applicant denied procedural fairness?*

[16] The question on this aspect of the case is whether the RAD's failure to deal with the Applicant's request to submit new evidence amounted to a denial of procedural fairness. A related question is whether this turns on the probative value of the new evidence.

[17] The Applicant argues that he was denied procedural fairness because while it was open to the RAD to refuse the application, it could not simply ignore his request altogether. In addition, he contends that the fairness claim should not depend on whether the new evidence is convincing, because he was denied the chance to have that very question assessed by the RAD. While the RAD was not bound by a decision of the RPD, the similarity between the factual situations concerning the IFA determination required that the RAD at least consider whether it should depart from the other ruling given the interest in consistency of decisions.

[18] The Respondent submits that this argument must fail because the new evidence dealt with a case that bears no similarity to the factual situation here – in the other case, the claimants had produced substantial persuasive evidence that they faced persecution by the Taliban. That was not done here, and so the new evidence would not have affected the outcome. The Respondent submits that even if I find there was a breach of procedural fairness, the case should not be sent back to the RAD because the new evidence would not change the outcome (citing *Vavilov* at para 142).

[19] In my view, the RAD's complete failure to mention the application to admit new evidence denied the Applicant procedural fairness, in the circumstances of this case. Under subsection 110(4) of the *IRPA*, the RAD is not granted any discretion regarding whether to

consider the application or not, and Rule 29(4) of the RAD Rules states that "(i)n deciding whether to allow an application [to admit new evidence], the Division must consider any relevant factors…" (emphasis added). Once again, this language does not indicate that the RAD has any discretion to refuse to consider an application (subject to questions of timeliness that do not arise here).

[20] In this case, the record shows that the application was submitted in a proper form, and within the applicable timeline. Neither party had any explanation for why the RAD did not consider it, and a review of the file indicates that it may well have been missed. In the RAD Disposition Record, an internal administrative document contained in the Certified Tribunal Record, the heading for "IRPA 110(4) – New Evidence" is marked "N/A" but the application is included in the Certified Tribunal Record provided by the RAD. There is no mention of the application in the reasons provided by the member, nor any indication in the record that the matter was considered.

[21] In my view, the Applicant is correct to state that he was entitled to a decision from the RAD on his request. It is not a matter of discretion, according to the statute and the Rules. The complete failure to consider the Applicant's request cannot result in a process that is fair, or that is perceived to be fair by the Applicant, the party most affected by the proceeding.

[22] I am not persuaded that the assessment of whether the procedure was fair should turn on the persuasiveness of the new evidence. That is a question for the RAD to assess at first instance, and speculation about what it might have concluded had it considered the issue cannot be a basis

for finding that the procedure was fair. This is not a situation where the RAD's failure to consider evidence objectively had no impact on the outcome because the decision turned on a question not affected by the new material: see, for example, *Serikova v Canada (Citizenship and Immigration)*, 2016 FC 814 at paras 14-17; *Ozomba v Canada (Citizenship and Immigration)*, 2016 FC 1418. Instead, in this case the Applicant had argued that the new evidence was directly relevant to the essential finding on which the RPD and RAD decisions are based. In such a situation, it is not the role of the Court to try to guess what the RAD's assessment of this evidence might have been.

[23] Based on these considerations, I find that the Applicant was denied procedural fairness. This finding would usually result in an order to quash the decision and send it back so that the procedural defect can be repaired. The Respondent submits that this is a situation where that should not be done, because the outcome is so clear that there would be no point in sending it back, citing *Vavilov* at paragraph 142.

[24] I am not persuaded that this case falls within the scope of the exception set out in *Vavilov*, because I do not agree with the Respondent that the outcome of a redetermination on the issue of the new evidence is inevitable, nor that its potential impact on the ultimate decision is so trivial as to not merit further consideration. In this case, the key question is whether the Applicant has a viable IFA in Pakistan, given the nature of the threats he faces. The new evidence consists of another decision where a different result was reached on that very question. At this stage, it is entirely uncertain whether the evidence that gave rise to the finding in the other case, or the panel's reasoning, will be found to be persuasive here. This is not the type of case where the

exception applies, in particular given my findings set out below regarding certain aspects of the reasonableness of the decision.

B. *Was it unreasonable for the RAD to find that the Applicant had an IFA in Pakistan?*

[25] The Applicant submits that the RAD's determination that he had a viable IFA in Pakistan is unreasonable for three interrelated reasons. First, he argues the panel failed to consider his public profile as a community leader and its risk assessment was therefore invalid. Related to this, the Applicant submits that the RAD erred by imposing an unrealistic burden on him to identify his agents of persecution with greater precision, given the circumstances. Finally, he says that the panel erred in assessing the country condition documentation about the means by which the agents of persecution would be able to locate him anywhere in the country. The Applicant contends that the combined effect of these errors is sufficient to make the decision unreasonable.

[26] On the assessment of the Applicant's profile, both the RPD and the RAD accepted his evidence about his background in business and the advocacy activities that gave rise to the threats and violence he faced. However, in assessing the risks that he would face from religious extremists, neither decision-maker discussed the risks associated with his profile as a community leader who had spoken out against the type of education being provided in some madrassas in Pakistan.

[27] In particular, the Applicant points to the evidence about the conference he spoke at in July 2018 at the Chamber of Commerce. The event was well attended and a newspaper article

was published about it. Photographs were taken and published. The Applicant spoke against madrassas and explained that they teach children to become religious extremists. As a result of his efforts, some parents took their children out of madrassas and enrolled them in other schools instead.

[28] The Applicant submits that this evidence makes it clear that he was not only engaged in local activity directed towards a particular group or school, but rather he had raised a direct challenge to the religious education system that was supported by the extremist organizations, and by virtue of his activities he had become recognized as a community leader.

[29] The RPD and RAD did not question the Applicant's evidence that he had faced physical attacks on two separate occasions as a result of his advocacy, but he argues that they failed to extend this to their assessment of his risks elsewhere in the country. Instead, the RAD relied on evidence that individuals facing localized threats from extremists could find safety elsewhere in the country.

[30] Related to this, the Applicant submits that the RAD discounted his evidence of risk because he could not identify with any degree of certainty the precise affiliations of his agents of persecution. The Applicant's evidence was that he was attacked by individuals who looked like Islamist terrorists because of how they dressed and their overall appearance; on this point, the Applicant's evidence was that his assailants had beards, covered their faces to hide their identities, and wore the green clothing associated with religious fanatics.

[31] Despite this evidence, which was not contradicted or challenged, the RAD concluded that the Applicant had failed to establish that his agents of persecution were associated with the Taliban or to the other major Islamist organization in Pakistan, the Tehrik-i-Taliban (TTP), or that the terrorist networks would be used to track him down elsewhere in the country.

[32] The Applicant asserts that this finding is unreasonable for two main reasons. First, he argues that the RAD required him to provide evidence that was not reasonably available to him, since members of terrorist organizations in Pakistan do not wear uniforms or otherwise identify themselves, and he did not have access to national security or police intelligence or information that could make the linkage. In doing so, he says the RAD imposed an unreasonably high threshold rather than accepting that his evidence demonstrated a sufficient degree of risk.

[33] In addition, the Applicant points to a contradiction in the RAD's reasoning process. In assessing the risks he would face in the IFA locations, the RAD accepted the Applicant's evidence that after he fled the country, the followers of the religious extremists approached his friends and relatives both in his home town of Faisalabad, and also in Lahore. In the RAD's subsequent decision refusing to re-open the appeal, it refers to his sister's evidence corroborating the threats received by the Applicant's family members in Lahore, and stating that "the Taliban visited her again and were looking for the [Applicant] at her home in Lahore." The RAD accepted her evidence, but found that it simply confirmed a fact already found to be credible by the RPD and the RAD, "namely, that the agents of risk were looking for the [Applicant] in Lahore."

[34] The Applicant points out that the RAD treated a sworn affidavit from his sister stating that the Taliban questioned her about the Applicant's location as confirmation of a previous finding of fact about his agents of persecution. The RAD had previously also found, however, that the prior evidence was insufficient to show that he faced threats from the Taliban. This is logically inconsistent, and unreasonable. The Applicant argues that the RAD cannot both accept the evidence that he was being hunted by the Taliban while also finding that he had not established that he faces a risk from the same group.

[35] Finally, the Applicant argues that the RAD ignored the evidence in the record showing the links that had developed between the various extremist groups throughout the country. He says that this evidence supports his claim that he would face risks in the IFA cities because he had not only criticized the local education system in his hometown; instead, he had attacked the system of religious schools more generally. The Applicant says that the evidence also shows that he could be tracked by use of the tenant registration system, since he would be required to register in either of the IFA cities, and this information would be available to the police in his hometown. He says this puts him at risk because the police work closely with the religious extremists, and could share information about his location with them.

[36] The Respondent contends that the decision is reasonable, because the Applicant failed to meet his onus of showing that the IFA did not exist or was not reasonable. In this case, the Applicant failed to show with concrete evidence that the agent of persecution had the capacity and intention to track him elsewhere in Pakistan. The Respondent asserts that the RAD took account of the Applicant's personal profile, and reasonably concluded that he had not

demonstrated that the police or agents of persecution would search for him or be able to locate him in the IFA cities.

[37] The Respondent points out that the Applicant's evidence on the identity of his agents of persecution, the risks he might face, and the means by which he could be located were all expressed in tentative terms. He testified that he "suspected" that the threats and physical attacks were carried out by religious extremists because of the garb they wore, that there "could" be more than one madrassa involved, and he could be identified in the other cities because he "might" run into someone who knows him. The Respondent argues that the RAD could reasonably conclude that this was not persuasive evidence of risks that would call into question the viability of the IFA cities.

[38] In addition, the Respondent submits that the RAD considered the documentary evidence, and it is not the role of the Court to re-weigh this evidence. The record shows that Pakistan's government and security forces are actively taking steps to offer protection to individuals facing threats from the Taliban and TTP, which runs counter to the Applicant's narrative that the local police were collaborating with these groups. On the allegation that the Applicant could be identified through the tenant registration system, the Respondent notes that the evidence shows that this system is unreliable because police cannot keep up with the volume of applications and the system is still largely manual rather than automated. This makes searches of the system unreliable. The RAD reasonably discounted this as a source of risk for the Applicant in the IFA locations.

[39] Although I am not persuaded by all of the Applicant's arguments, I find the decision to be unreasonable on two interrelated grounds. First, in assessing whether the Applicant had a viable IFA in Pakistan, the RAD was required to come to a determination as to the nature of the risk he faced. On this point, the RAD's key finding is set out in the following passage:

> The Appellant's community work was limited to Faisalabad and aside from criticizing madrassas training children in religious extremism, his community work also focused a great deal on the benefits of education generally. The Appellant testified that some madrassas are tied to the Taliban, however, he did not provide evidence establishing that, on a balance of probabilities, the men who threatened and attacked him are connected to the Taliban or to religious extremists in Karachi and Islamabad. In addition, I find that, based on the objective evidence, the Appellant's past local community work is unlikely to render the Appellant a high value target that would attract attention from religious extremist groups should he relocate to the IFA.

[40] It is not the Court's role to re-weigh the evidence that was considered by the RAD, but I agree with the Applicant that the analysis set out in this passage does not discuss his argument regarding evidence about the profile his advocacy had achieved, or the potential impact of that on his risk. In particular, the details of his advocacy set out in the newspaper article suggest that his criticism extended beyond the situation in his home city. Whether this affected the risks he might face elsewhere in Pakistan is not specifically discussed.

[41] The greater problem with the RAD's analysis, however, is the apparent inconsistency between its original decision and its denial of the request to re-open the hearing. Although a latter decision will generally not be grounds to find an earlier one unreasonable, in this particular

case the specific and detailed reasoning of the same RAD member on a key point cannot be ignored.

[42] As noted above, the RAD dismissed the application to re-open, largely on the basis that the Applicant's claim that the failure by his former counsel to provide his sister's affidavit to the RPD was not a significant issue because her affidavit was simply confirmatory of the prior findings the RAD made in the decision under review here. The specific point in question was that the Taliban had been searching for the Applicant, including by contacting his sister in Lahore. But in the earlier decision, the RAD found that the Applicant had failed to establish this vital fact, and thus it discounted his fears of being pursued by the Taliban in the IFA cities.

[43] I agree with the Applicant that the two RAD's decisions rest on inconsistent findings. That, in itself, may not be a ground to find the earlier decision – the one under review here – unreasonable. However, in this case, I find that the latter decision calls into question a key element of the prior one, and the inconsistency is so fundamental to the reasonableness of the outcome of the decision under review that it provides a basis to quash it.

[44] One key element of the RAD's IFA analysis was that the Applicant failed to demonstrate a link between his agents of persecution and the Taliban or other extremist groups. It is notable that the RAD accepted that the Applicant had faced threats and violence, and that individuals had continued to search for him after he left Pakistan, both in his home city and in Lahore. The RAD found the Applicant's physical descriptions of the men insufficient to connect the individuals who persecuted the Applicant with the Taliban or other extremist groups, and so it discounted the

risks he might face elsewhere in Pakistan. The RAD found that he simply faced a localized threat from particular unknown individuals. That finding cannot stand alongside a determination that his sister's specific and detailed evidence that members of the Taliban had come to her house in Lahore to inquire about the Applicant's location was simply confirmation of an earlier finding made by the same RAD panel in the original decision.

[45] According to *Vavilov*, one of the indications that a decision is unreasonable is that it is based on internally contradictory reasoning or leaps of logic that are not explained. I find that the RAD decision in this case suffers from this fatal flaw.

[46] The IFA finding was fundamental to the RAD's reasoning and the outcome of the case. One key element of that is its determination that the Applicant failed to link the threats and violence he experienced with the Taliban or other extremist groups. The same RAD panel subsequently refused to reopen the hearing, in large part because it found the new evidence establishing this link that the Applicant sought to introduce would not add to the earlier proceeding, because it only served to confirm the RAD's previous findings. These two findings cannot stand together.

[47] For the reasons set out above, I find that the RAD's findings are contradictory and the the RAD does not give an explanation for these inconsistencies. This is a sufficiently important flaw in the decision to make the entire decision unreasonable.

IV. Conclusion

[48] For all of the reasons set out above, I find the decision to be unreasonable, and the process to have been procedurally unfair.

[49] The RAD's decision dated July 12, 2021 is set aside and quashed. The matter is sent back for reconsideration by a differently constituted panel.

[50] There is no question of general importance for certification.

[51] It should be mentioned that although the materials were filed in English, the case was argued in French and so, in conformity with paragraph 20(1)(b) of the *Official Languages Act*, RSC 1985, c. 31 (4th Supp), the Judgment and Reasons are being issued in both languages.

JUDGMENT in IMM-5141-21

THIS COURT'S JUDGMENT is that:

1. The decision of the Refugee Appeal Division dated July 12, 2021, denying the Applicant's appeal, is quashed and set aside.

2. The matter is referred back for reconsideration by a differently constituted panel of the Refugee Appeal Division.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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