Federal Court Cour fédérale

Date: 20230727

Docket: IMM-8408-22

Citation: 2023 FC 1031

Toronto, Ontario, July 27, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

ABDUL QUDUS ALVI
MOHAMMED MAHIR QUDUS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are a father and son. The father, Mr Alvi, is a citizen of Pakistan. Mr Alvi is separated but not divorced from his wife, who lives in Pakistan. Their minor son is a citizen of the United States of America.

[2] Mr Alvi is in a common law relationship with Ms G. She is a citizen of Russia. They met in Prague in 2016 after Mr Alvi separated from his wife. Together they now have two other children, born in Canada.

[3] In 2019, Mr Alvi, his son and Ms G sought protection in Canada under the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*"IRPA"*). Mr Alvi's claim was based on his fear of persecution from his wife in Pakistan due to possible charges under Pakistan law arising from his relationship with Ms G. According to the evidence, sexual relationships outside wedlock can result in significant social and legal consequences in Pakistan. The legal consequences arise under *"zina"* laws.

[4] By decision dated February 3, 2022, the Refugee Protection Division ("RPD") denied all three *IRPA* claims. Mr Alvi's claim was denied owing in part to credibility issues. The son had no claim against the United States. Ms G had an internal flight alternative in Russia.

[5] Shortly after the RPD's decision, hostilities began between Russia and Ukraine. On appeal from the RPD's decision to the RAD, Ms G made a new *sur place* claim for *IRPA* protection against Russia. Her claim succeeded.

[6] Mr Alvi's claim against Pakistan did not succeed at the RAD. The RAD did not admit new evidence for Mr Alvi's claim, including an affidavit from Mr Alvi's brother and a letter from a lawyer in Pakistan who advised that he had represented Mr Alvi.

[7] Because the RPD's dismissal of the son's claim was not challenged before the RAD, the RAD upheld that determination.

[8] The applicants applied for judicial review of the RAD's decision denying Mr Alvi's claim. They argued that the RAD erred by not admitting the new evidence and that it made a decision that was unreasonable, based on the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, [2019] 4 SCR 563. Their submissions also raised a question of procedural fairness.

I. Analysis

A. The Reasonableness Standard of Review

[9] The standard of review for the RAD's substantive decision is reasonableness. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov,* at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers,* 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

[10] Not all errors or concerns about a decision will warrant the Court's intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings"

in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. The problem(s) cannot be merely superficial or peripheral, but must be sufficiently central or significant to render the decision unreasonable: *Vavilov,* at para 100; *Canada Post,* at para 33.

[11] Absent exceptional circumstances, this Court's role is not to agree or disagree with the decision under review, to reassess the merits, or to reweigh the evidence: *Vavilov*, at paras 125-126.

B. Issues related to RAD's Conclusions on Proposed New Evidence

[12] The applicants challenged two conclusions by the RAD not to admit new evidence.

[13] Proposed new evidence before the RAD must meet both the express statutory requirements in *IRPA* subsection 110(4) and the factors set out in *Raza* (credibility, relevance, newness and materiality) as approved in *Singh*: see *Canada (Citizenship and Immigration) v Singh,* 2016 FCA 96, [2016] 4 FCR 230, at paras 38–49, 64; *Raza v Canada (Citizenship and Immigration),* 2007 FCA 385, at paras 13-15.

[14] The applicants did not allege an error of law in the RAD's conclusions not to admit new evidence.

[15] The applicants first challenged the RAD's decision not to admit an affidavit from Mr Alvi's brother, who was in Canada. That affidavit contained information about Mr Alvi's alleged

false arrest and detention in Pakistan relating to police charges under *zina* laws. To explain why the affidavit was not reasonably available to be tendered to the RPD, the applicant submitted to the RAD that his brother was in the process of sponsoring his wife and children to come to Canada from Pakistan and was fearful of filing the affidavit publicly with the RAD, and possibly with this Court, until his family landed here. In this Court, the applicant argued that the RAD failed to account for those fears and that he could not compel his brother to testify, so the evidence was out of his control. He argued that the RAD erroneously believed that the brother's affidavit was tendered to repair a defect or gap in the evidence before the RPD.

[16] Most of the applicants' submissions were a re-argument of their position at the RAD. Vigorous disagreement with the RAD's conclusion, or an argument showing that the RAD could have come to another conclusion, does not demonstrate a reviewable error that permits this Court to intervene. The RAD expressly considered the applicants' position concerning why he did not adduce the evidence before the RPD based on the brother's evidence about his fears. In my view, the RAD's conclusions were open to it on the record. In addition, it was reasonably open to the RAD to characterize the new evidence as an attempt to repair a defect in the applicant's evidence at the RPD about his fears of arrest and charges on returning to Pakistan.

[17] The applicants also challenged the RAD's conclusion not to admit into evidence a letter from Mr Alvi's legal counsel in Pakistan related to the circumstances surrounding his alleged arrest and charges, including the alleged involvement of his wife and her family in instigating them. The applicants argued that the RAD should have admitted the letter, applying the principles in *Raza*.

[18] In my view, the RAD made no reviewable error when it did not accept Mr Alvi's explanation that he could not obtain the letter sooner due to workplace closures in Pakistan during the COVID pandemic and due to smog. Neither the law nor the evidence constrained the RAD in a manner that would permit this Court to intervene. In addition, even if the proposed new evidence met the requirements in *Raza* as the applicants argued, it still had to meet the statutory requirements in subsection 110(4).

C. Did the RAD make a reviewable error by ignoring a legal opinion filed by the applicants related to *zina* laws in Pakistan?

[19] At the RPD, the applicants filed a letter from a law firm in Pakistan addressing "[w]hether a man and a woman can live without wedlock in Pakistan." It described penal provisions including committing *zina*, described as a man and a woman wilfully having sexual intercourse without being married to each other. The same letter also addressed whether a child born out of wedlock is "acceptable" in Pakistan. According to the letter, the child is considered illegitimate, is not acceptable in Pakistan society and will experience misery, hardship and suffering during their life or may even be killed.

[20] The applicants argued in detail that the RAD's decision should be set aside because it made one or more errors relating to its failure to consider and apply the contents of the law firm's letter when it considered Mr Alvi's claim for protection. The applicants' submissions coalesce around the following material arguments:

a) The RAD erred, as a matter of procedural fairness and natural justice, by failing to disclose the "new fact" or "new finding" that it had concluded that Ms G's *sur place* claim would succeed and by failing to provide the applicants an additional

opportunity to make submissions (citing *Ali v Canada (Citizenship and Immigration),* 2022 FC 442, at para 28);

b) The RAD failed to address Mr Alvi's claim for *IRPA* protection on its merits and on the evidence. More precisely, the applicants argued that the RAD "sidestepped" the merits analysis by accepting Ms G's claim and erroneously concluding that Mr Alvi's fears of persecution in Pakistan were speculative because (i) the children could stay with Ms G in Canada and (ii) it was speculative that anyone in Pakistan would learn of their two Canadian-born children; and

c) The RAD expressly stated that it would deal with the letter, but did not.

[21] The applicants' submissions have not persuaded me that the RAD was required, as a matter of procedural fairness in this case, to disclose the outcome of Ms G's *sur place* claim and seek more submissions from the applicants, before making its decision on Mr Alvi's claim. The applicants did not make submissions based on the *Baker* factors and did not identify any compelling policy or other reason why the RAD had to disclose its intended outcome for Ms G's claim in advance of deciding Mr Alvi's claim for protection. See *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, at paras 21-28.

[22] This Court has held that procedural fairness may require notice and an opportunity to be heard if the RAD's decision raises an issue that is new in the sense that it is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues raised on the appeal: see *Ching v Canada (Citizenship and Immigration),* 2015 FC 725, at

paras 65-76; *Kwakwa v Canada (Citizenship and Immigration),* 2016 FC 600, at para 25; *Lopez Santos v Canada (Citizenship and Immigration),* 2021 FC 1281. This test for a new issue originated from the Supreme Court's decision in *R v Mian,* 2014 SCC 54, [2014] 2 SCR 689, which stated that "new issues are legally and factually distinct from the grounds of appeal raised by the parties" that "cannot reasonably be said to stem from the issues as framed by the parties": *Mian,* at para 30. The Court in *Mian* also stated that "issues that are rooted in or are components of an existing issue" are also not "new issues".

[23] In this case, the applicants have not identified such a new or distinct issue analyzed in the RAD's decision that was not raised in their appeal. Rather, their argument is based on the RAD's decision to grant Ms G's *sur place* claim made to the RAD during the appeal. The applicants and Ms G were all part of the same appeal to the RAD that raised her *sur place* claim, and it was foreseeable that the RAD could accept her claim and dismiss Mr Alvi's appeal from the RPD's negative decision.

[24] In that context, the Court's decision in *Ali* is inapplicable. While the applicants also referred in passing to the RAD sending them an "*Alazar* notice" during the hearing, they did not elaborate on how that case could apply to the present circumstances: see *Canada (Citizenship and Immigration) v Alazar,* 2021 FC 637.

[25] The RAD did not unlawfully sidestep making a decision on the merits of Mr Alvi's claim, which was based on his fear that his wife and her family would cause him to be arrested and charged under the *zina* laws. That argument was premised on Mr Alvi returning to Pakistan

with his Canadian-born children with Ms G, or that the two children's existence in Canada would inevitably be discovered. The applicants argued that Mr Alvi should not have to (and could not) hide their existence on his return to Pakistan.

[26] The RAD found that it was speculative to argue that the Canadian-born children would return to Pakistan given the success of Ms G's claim for protection. Therefore, according to the RAD, it was speculative to argue that anyone in Pakistan would come to know about the two Canadian-born children who were born out of wedlock and it was therefore also speculative to claim that Mr Alvi would face a serious possibility of persecution under *zina* laws owing to the existence of those children.

[27] I am unable to conclude that the RAD's conclusions were not open to it as a trier of fact. As the RAD's decision recognized, the RAD is entitled and expected to come to its own view as an independent decision maker of the merits of the applicants' claims. The Court is not permitted to re-evaluate or reassess the evidence on this judicial review application. No reviewable error arises merely because there was evidence before the decision maker that could possibly have led it to a different conclusion. In this case, the applicants made submissions to the RAD about how the children may be identified in Pakistan as having parents in a common law relationship, which could raise risks under *zina* laws. However, the applicants' position was that if Ms G were returned to Russia, the children "may" go with their father to Pakistan. Although their appeal asserted Ms G's new *sur place* claim for protection, their submissions did not address the alternative factual scenario in which the (Canadian-born) children stayed in Canada with Ms G. It is the RAD's role to assess the strength of the evidence before it and come to a conclusion,

which it did by finding that the scenarios proposed by the applicants were speculative based on the evidence. That conclusion was open to it in the circumstances.

[28] Similarly, the applicants have not shown that the RAD fundamentally misunderstood or misapprehended the evidence, ignored any material evidence, or reached an untenable conclusion: *Vavilov,* at paras 101, 125-126. To the analysis above I add that the RAD agreed with the RPD that Mr Alvi's testimony about his alleged arrest and detention was not credible due to inconsistencies and omissions. The applicants did not focus their submissions to challenge that conclusion.

[29] Finally, it is unfortunate that the RAD stated that it would deal with the letter and did not, but it was not fatal to the reasonableness of its decision.

D. Remaining submissions by the applicants

[30] The applicants made several other submissions which mostly reiterated arguments made at the RAD related to the merits of their appeal. None of them demonstrated a reviewable error in the RAD's decision.

II. Conclusion

[31] The application will therefore be dismissed. Neither party identified a question to certify for appeal and none arises.

<u>JUDGMENT IN IMM-8408-22</u>

1. The application is dismissed.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8408-22
STYLE OF CAUSE:	ABDUL QUDUS ALVI, MOHAMMED MAHIR QUDUS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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