Federal Court  Cour fédérale

Date: 20231130

Docket: IMM-3973-22

Citation: 2023 FC 1569

Ottawa, Ontario, November 30, 2023

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SHARMINA RASHID
MAHIYA MUSHFIQ WARDA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS AND JUDGMENT

[1] Ms. Sharmina Rashid (the "Principal Applicant") and her daughter Mahiya Mushfiq Warda (collectively "the Applicants") seek judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD"), dismissing their appeal from a decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD"). The

RPD had dismissed the Applicants' claim for refugee protection and the RAD confirmed that decision.

[2] The Applicants are citizens of Bangladesh. Their claim was based upon a fear of violence from the Awami League due to the involvement of the Principal Applicant's husband with the Bangladesh Nationalist Party. The claim was rejected on the basis that there was a lack of credible evidence establishing the events central to the claim.

[3] The claim of the Principal Applicant's husband was suspended pursuant to subsection 103(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The hearing of the Applicants' claim proceeded before the RPD without the adjudication of the claim of the Principal Applicant's husband.

[4] In pursuing their appeal before the RAD, the Applicants sought to introduce new evidence. They made two applications pursuant to Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257. Rule 29 allows a party to an appeal to seek leave to introduce a document that had not previously been provided.

[5] In their first Rule 29 application, the Applicants sought leave to introduce psychotherapist reports for the Principal Applicant's husband and for themselves. The RAD granted leave for the introduction of the psychotherapy report relating to the Principal Applicant only.

[6] In the second Rule 29 application, the Applicants sought leave to introduce documents after the perfection of their appeal. These documents were new letters from a doctor who had treated the husband and a tea-stall owner. Each of these persons had provided evidence before the RPD.

[7] The RAD dismissed the second Rule 29 application on the grounds that the Applicants could reasonably have been expected to submit these documents before perfecting their appeal.

[8] As well, the Applicants included 15 documents in their Appeal Record which they sought to introduce as “new evidence”, including the Principal Applicant’s affidavit dated December 30, 2021, an arrest warrant for the Principal Applicant’s husband and his mother issued on August 19, 2021, and an article in the Daily Janakantha indicating the Principal Applicant’s husband’s mother was attacked by Awami League members on August 28, 2021.

[9] The RAD assessed these documents against the criteria set out in subsection 110(4) of the Act.

[10] The RAD refused to accept another copy of the Principal Applicant’s affidavit on the basis that it addresses the arguments relating to the new evidence and the merits of the appeal. It determined that it was unnecessary to accept it as “new evidence”.

[11] The RAD rejected other documents as lacking credibility. It rejected other documents on the grounds that they predated the rejection of the Applicants’ claim before the RPD.

[12] The RAD did accept, as “new evidence”, documents relative to claims of incompetence on the part of former counsel.

[13] Although the RAD accepted some documents as “new evidence” within the scope of subsection 110(4) of the Act, it declined to hold an oral hearing because it found that the new evidence “does not justify allowing or rejecting” the Applicants’ claim.

[14] The RAD proceeded to assess the documents presented in support of the allegation of incompetent counsel and concluded that several of the Applicants’ claims against former counsel lacked credibility.

[15] The Applicants now argue that the lack of an oral hearing before the RAD amounted to a breach of procedural fairness. They submit that the RAD made credibility findings in rejecting certain documents as “new evidence” without providing them the opportunity to respond. They claim that “new” credibility findings by the RAD entitled them to an oral hearing.

[16] The Applicants argue that the breach of procedural fairness is reviewable on the standard of correctness, relying on the decision in *Canadian Pacific Railway Company v. Canada (Attorney General)*, [2019] 1 F.C.R. 121 (F.C.A.).

[17] The Minister of Citizenship and Immigration (the “Respondent”) submits that the RAD reasonably considered the documents that were tendered against the applicable legal test and reasonably concluded that no oral hearing was required.

[18] The Applicants, in their written submissions, challenge the merits of the RAD's credibility findings. They also argue that the RAD erred by failing to assess their claim separately under sections 96 and 97 of the Act.

[19] Issues of procedural fairness are subject to review on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.).

[20] The merits of the decision are reviewable on the standard of reasonableness, following the instructions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 (S.C.C.).

[21] In considering reasonableness, the Court is to ask if the decision under review "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"; see *Vavilov*, *supra*, at paragraph 99.

[22] The Applicants focus on the lack of an oral hearing, and argue that the RAD's findings about the lack of credibility in the documents that were accepted as "new evidence", that is relating to the competence of counsel, mean that they should have been given the opportunity, through an oral hearing, to allay the credibility concerns.

[23] I disagree with the propositions of the Applicants.

[24] Subsections 110(3), (4) and (6) of the Act are relevant to the issues of "new evidence" and an oral hearing before the RAD. These subsections provide as follow:

Procedure	**Fonctionnement**
(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.	**(3)** Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.
[…]	[…]
Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.
[…]	[…]

Hearing	**Audience**
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	**c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[25] The RAD indeed made credibility findings about the documents it allowed the Applicants to submit relative to the alleged incompetence of Counsel. It found that the documents were not credible.

[26] This finding did not mean that the RAD was obliged to give the Applicants an oral hearing. The operative word in subsection 110(6) of the Act is "may", a verb that indicates a discretion on the part of the RAD about granting an oral hearing. "May" is not the same as "shall", a verb that imports a positive obligation.

[27] The lack of an oral hearing, by itself, does not give rise to a breach of procedural fairness. The RAD made a credibility finding about documents, not about the Applicants. The RAD determined that no oral hearing was required.

[28] In my opinion, this finding was made by the RAD in the exercise of its discretion. It was not a procedural fairness issue. The finding is reviewable on the standard of reasonableness; see the decision in *Madu v. Canada (Citizenship and Immigration)*, 2022 FC 758, at paragraph 23.

[29] On considering the evidence that was before the RAD and the submissions of the parties upon this application for judicial review, I am not persuaded that the RAD's credibility assessment was unreasonable.

[30] The RAD provided clear and intelligible reasons for its assessment.

[31] Likewise, I am not persuaded that the RAD unreasonably assessed the Applicants' claim for protection under section 96 and subsection 97(1) of the Act.

[32] The Applicants proposed four questions for certification, as follow:

1. In an appeal before the RAD where new evidence are not admitted, whether the RAD has the jurisdiction and is required to hold an oral hearing under 110(6) of the *IRPA* because the tribunal intends to raise new credibility issues, which were not raised by the RPD during the refugee hearing and the RAD's new concerns are related to any evidence from the record of the proceedings that are central to the appeal?

2. Whether the RAD is obligated to comply with the rules of natural justice i.e principles of procedural fairness and is required to convoke a voir dire hearing if the tribunal wishes to

rely on *Singh* and *Raza* and raise and assess the credibility of the new or fresh evidence tendered during an appeal as par of the RAD's assessment of admissibility of the evidence.

3. What is the minimum procedural fairness an appellant before the RAD is owed when the tribunal decides to raise new credibility issues with regards to determining the admissibility of the new or fresh evidence at the appeal?

4. Whether the RAD, an administrative tribunal, has the jurisdiction to make assessment and/or decide a counsel's conduct or competence under *Solicitor Act* akin to a court of common law such as the Federal Court or whether the jurisdiction of the tribunal is limited to only making findings of fact to determine whether the person before the tribunal suffered any prejudice due to a counsel's errors, omission or neglect?

[33] The Respondent opposed certification of any question.

[34] Subsection 74(d) sets out the test for certifying a question, that is a question that raises a serious question of general importance that is dispositive of the case, as discussed in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.).

[35] I agree with the submissions of the Respondent.

[36] In the result, there is no basis for judicial intervention and the application for judicial review will be dismissed. No question will be certified.

JUDGMENT IN IMM-3973-22

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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