Federal Court  Cour fédérale

Date: 20150831

Docket: IMM-283-15

Citation: 2015 FC 1028

Ottawa, Ontario, August 31, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

AMIN SIDDIQUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr Amin Siddiqui, a citizen of Afghanistan, seeks judicial review of the January 13, 2015 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board which dismissed his appeal of the decision of the Refugee Protection Division [RPD]. The RPD found that he was not a Convention refugee or a person in need of protection.

[2] For the reasons that follow, the application for judicial review is dismissed. The RAD did not err in finding that there was no breach of procedural fairness arising from the interpretation of the applicant's testimony before the RPD. In addition, the RAD did not err in refusing to admit new evidence or in declining to hold an oral hearing. The RAD conducted an appeal, independently assessed the evidence and reasonably concluded that the applicant had not established that he was a Convention refugee or a person in need of protection.

Background

[3] The applicant is a citizen of Afghanistan. He recounts that about 35 years ago, a dispute over land escalated between his family and the family of his father's cousin (Afzal Karimi). The applicant states that in an exchange of gunfire between the applicant's father and Afzal Karimi two of Karimi's sons were killed. The applicant's family moved from the Paktia province to Kabul out of fear of retaliation.

[4] The applicant states that his family believes that his brother was killed in Kabul 21 years ago by a hit man hired by Karimi. The police were advised, but nothing was done.

[5] The applicant claims that in 2003, he was shot twice from a moving vehicle while he was walking on the street. He believes that he was shot by his family's enemy. He also claims that he received threatening calls about a year after the shooting. He states that due to the conflict in Kabul, the police could not assist him. He did not report the incident to the police until 2013.

[6] The applicant arrived in Canada via China and Dubai in 2013.

The RPD Decision

[7] To provide the necessary context for the issues that arise on judicial review of the RAD decision, it is helpful to summarise the RPD decision.

[8] The RPD found that the applicant had not provided sufficient reliable and credible evidence to establish his identity or the credibility of the risks he alleges on a forward looking basis and had, therefore, not established his claim under section 96 or subsection 97(1).

[9] With respect to the applicant's identity, the RPD found that, given the inconsistencies with his Tazkira card, his travel from Dubai to China with a UK passport bearing his picture and other credibility issues, it was not satisfied that he had established his identity as Amin Siddiqui rather than Hashim Saeeda (the name on the UK passport) or some other person.

[10] The RPD found that the applicant's inconsistent answers about whether he spoke only Pashto or both Pashto and Persian also undermined his credibility relating to his identity.

[11] The RPD made several other credibility findings. The applicant's inconsistent testimony regarding what happened to his Afghan passport, his lack of a reasonable explanation why he destroyed his passport and his lack of explanation for not seeking a new Afghan passport resulted in a negative credibility finding.

[12] The RPD noted the applicant's inconsistent answers regarding the start of the feud and the date his family moved to Kabul to escape the feud. The RPD noted that if the feud began 35 years ago, but the family only moved when the applicant was a child, then the family had remained in Paktia, where the dispute existed, for several years before moving. The applicant attempted to clarify his answers and provide an explanation for the inconsistency, which the RPD did not accept. The RPD found this undermined his credibility regarding the feud which was central to his claim.

[13] The RPD also noted that the applicant claimed he was shot in 2003 and received threatening calls in 2004, but remained in Kabul in the same house from 2003 until he left for Canada in 2013. The RPD found that the fact that he remained in the same house for over a decade without any threats undermined the credibility of a serious threat to his life.

[14] The RPD noted that the applicant stated that he made a report to the police in 2013. However, the police report is dated 2011. The RPD acknowledged the applicant's explanation that the date stamp relates to the date the officer took office, but found the answer to be speculative. The RPD also noted that a report to the police in 2013 for an incident that occurred in 2003 "undermines the nature and severity of the risk."

[15] The RPD further noted that at his hearing, the applicant raised, for the first time, that he fears Azim Karimi because he learned from two others, named Kamal and Jamal, that Karimi wants to kill him. The RPD noted that the applicant had amended his Basis of Claim form [BOC]

twice and was represented by Counsel yet omitted this detail. The RPD found the omission undermined his credibility regarding recent threats.

[16] The RPD also found that the 2003 medical report which referred to the applicant's gun wound did not support a forward looking risk in light of the other inconsistencies and credibility findings.

Issues on Appeal to the RAD

[17] On appeal to the RAD, the applicant submitted four documents as new evidence: a corrected translation of his Tazkira card with an explanation from the interpreter; his Afghan passport; a letter from a Vancouver Coastal Health nurse practitioner dated July 28, 2014; and a letter from the President of the Afghan Benevolent Association of British Columbia [ABABC] dated June 24, 2014.

[18] Several months after filing his appeal, on December 30, 2014, the applicant applied pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] to admit further new evidence, specifically his affidavit noting that his nephew in Afghanistan had been recently shot and that his family had been receiving threatening letters.

[19] On appeal, the applicant argued that the RPD breached procedural fairness by failing to adjourn the hearing to permit him to obtain his Afghan passport and by failing to ensure that he had precise and competent interpretation. The applicant also argued that the RPD

misapprehended or failed to consider the evidence and, as a result, made erroneous findings of fact.

The RAD Decision Now Under Review

[20] The RAD confirmed the decision of the RPD, finding that the applicant is neither a Convention refugee nor a person in need of protection.

The New Evidence

[21] The RAD noted the criteria in subsection 110(4) of the Act and accepted the correct translation of the applicant's Tazkira card and his Afghan passport as new evidence. The RAD found that this new evidence established the applicant's identity.

[22] The RAD found that the letters from Vancouver Coastal Health and ABABC were not admissible because the applicant had not provided a reasonable explanation for why this information was not provided to the RPD.

[23] With respect to the applicant's December 30, 2014 affidavit [December affidavit], the RAD noted the requirements of Rule 29(4) of the *Refugee Appeal Division Rules*, SOR/2012-257) [Rules] and did not admit the affidavit.

[24] The RAD added that, in considering whether to admit new evidence, a relevant factor is the materiality of the evidence; i.e., whether the new evidence would have resulted in a

successful claim to the RPD. The RAD also found that even if it had admitted the affidavit, it would have rejected the evidence. The affidavit indicates that the nephew could not identify the men who attacked him and that his family suspects it was the Karimi family. The RAD noted that there is no material evidence to support this speculation and the pictures provided do not provide any details about the incident or how it is related to the applicant's claim.

No Oral Hearing

[25] The RAD noted that the general rule is to proceed without an oral hearing and that when subsections 110(3), (4) and (6) of the Act are read together, it is clear that the RAD must not hold an oral hearing unless certain criteria are met: if there is new documentary evidence relating to the credibility of the applicant, that is central to the RPD decision and that, if accepted, would justify allowing or refusing the claim. If the criteria are met, the RAD may hold a hearing.

[26] The RAD found that, given its determination on the appeal, it was not necessary to deal with the question of whether the evidence is new, in accordance with subsection 110(4) of the Act, because the evidence had no impact on its analysis. In other words, the new evidence admitted did not relate to the applicant's credibility.

The Standard of Review

[27] The RAD reviewed the prevailing jurisprudence on the standard of review and stated that it applied the standard from *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811 [*Huruglica*]. The RAD then reviewed all aspects of the RPD's

decision and conducted its own independent assessment of all the evidence to determine whether the applicant is a Convention refugee or a person in need of protection.

Interpretation Issues

[28] The RAD noted the importance of interpretation and translation, which should be continuous, precise, impartial, competent and contemporaneous, but does not need to be perfect.

[29] The RAD found that the applicant did not provide persuasive arguments that his right to a fair hearing was breached due to interpretation issues at the hearing, noting that neither the applicant nor his counsel raised concerns at the hearing and there was no evidence that he had problems understanding the interpreter.

[30] The RAD acknowledged that the RPD Member raised a potential interpretation issue regarding a date at the hearing, but if other concerns arose, the applicant or his counsel should have raised these concerns, citing *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 FC 85 [*Mohammadian*]).

Credibility

[31] The RAD conducted an independent assessment of the applicant's claim and concluded that he was not credible regarding his allegations of who he fears in Afghanistan.

[32] The RAD found that there was no nexus between the applicant's allegations of risk from a blood feud and a Convention ground and therefore assessed the claim only under section 97 on a balance of probabilities. The RAD found that the applicant's fear is based on mere speculation and that he had not provided sufficient evidence in support of his allegations about why he thinks he is targeted by his father's cousin and cousin's family.

[33] The RAD noted that the applicant had lived at the same address in Kabul since 1982 and continued to live there after he was allegedly shot in 2003 and received threatening calls in 2004. The RAD reviewed the applicant's testimony regarding who he fears in Afghanistan, noting his statement that "I'm just guessing maybe its Alza Kareemi [sic] or maybe son, maybe brother, but I am just guessing" and that he had no other threats since 2004.

[34] The RAD found that the omission from the BOC regarding the allegations of more recent threats relayed by Jamal and Kamal, despite that the applicant had made other amendments to his BOC, undermined his credibility. The RAD noted that the RPD had questioned the applicant about the omission and his answer was unsatisfactory.

[35] Taking into account all the evidence, the RAD found no persuasive evidence to indicate that the applicant is being targeted due to the land dispute between his father and his father's cousin. The RAD added that the applicant's behaviour is inconsistent with a person who fears for his life. The RAD also noted that there is no evidence that the applicant's family, who still lives in Afghanistan, has had anything happen to them. The RAD concluded that the applicant's fear is based on speculation that bears little weight.

Issues

[36] On judicial review the applicant raises four issues and submits that the issues are interrelated, particularly to the failure to provide accurate translation: the RAD erred in finding that there was no breach of procedural fairness arising from the problems with the interpretation at the RPD hearing; the RAD erred in refusing to admit new evidence; the RAD erred in refusing to hold an oral hearing; and, the RAD made unreasonable credibility findings.

[37] I would characterize the issues as follows:

- Did the RAD correctly find that there was no breach of procedural fairness arising from the interpretation at the RPD hearing?
- Was the RAD's decision to refuse to admit new evidence reasonable?
- Was the RAD's decision to decline to hold an oral hearing reasonable?
- Was the RAD's determination that the applicant had not established his claim with credible evidence reasonable?

The Standard of Review

[38] The parties agree that the standard of review to be applied by the Court regarding the RAD's decision on whether there was a breach of procedural fairness arising from the interpretation of the RPD hearing is correctness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1161 at para 2, 195 ACWS (3d) 528; *Lawal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 861 at para 15, 173 CRR (2d) 309; *Licao v Canada (Minister of Citizenship and Immigration)*, 2014 FC 89 at para 18, 303 CRR (2d) 228).

[39] The standard of review to be applied by this Court to decisions of the RAD on the issue of the standard of review the RAD should use in its consideration of appeals from the RPD has been the subject of a great deal of recent jurisprudence. In *Huruglica*, at paras 25-34, Justice Phelan provided a comprehensive analysis leading him to the conclusion that this Court should review the RAD's choice of standard of review on the correctness standard. Several other decisions followed the same approach. However, a different conclusion was reached in other cases which found that the reasonableness standard should apply, for example, *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at paras 17-26, [2014] FCJ No 1116 (QL) [*Akuffo*] and *Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080 at paras 13-37, [2014] FCJ No 1130 (QL) [*Djossou*]. The jurisprudence continues to grow. The issue will be resolved by the Court of Appeal in the near future in *Huruglica*.

[40] However, the jurisprudence has consistently held that it is an error for the RAD to perform a judicial review function and apply the reasonableness standard to the RPD's decision. The RAD should perform its appeal function: *Huruglica* at para 54; *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 10, [2014] FCJ No 989 (QL); *Guardado v Canada (Minister of Citizenship and Immigration)*, 2014 FC 953 at para 4, [2014] FCJ No 1038 (QL); *Diarra v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1009 at para 29, [2014] FCJ No 1111 (QL); *Djossou* at para 41; and other more recent cases.

[41] In the present case, the RAD indicated it had applied *Huruglica* and it performed an appellate role.

[42] The jurisprudence is also consistent that the Court should review the RAD's application of the law to the facts of the case and the RAD's decision regarding the RPD's credibility findings on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54, [2008] 1 SCR 190).

[43] With respect to questions of credibility, the jurisprudence has established that the RAD may or should defer to the RPD because the RPD has heard the witnesses directly, has had an opportunity to probe their testimony or has had some advantage not enjoyed by the RAD; see, for example, *Hurug*lica at para 55; *Akuffo* at para 39; *Nahal v Canada (Minister of Citizenship and Immigration*), 2014 FC 1208 at para 25, [2014] FCJ No 1254 (QL). In *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 31, [2015] FCJ No 156 (QL) [*Khachatourian*], Justice Noël noted that the RAD should assume its appellate role and that the same level of deference may not be applicable to credibility findings in an appeal as in a judicial review. Justice Noël added that an independent assessment or analysis of the evidence would be necessary to permit some level of deference.

[44] In *Balde v Canada (Minister of Citizenship and Immigration)*, 2015 FC 624 at para 23, [2015] FCJ No 641 (QL), Justice Mosley noted that: "The court has been consistent that the RAD ought to defer to findings of fact or credibility made by the RPD but must also conduct its own analysis of those findings." More recently in *Denbel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 629 at para 37, [2015] FCJ No 646 (QL), Justice Mosley commented that he did not agree that the RAD should "routinely conduct a fresh assessment of credibility" on appeals.

[45] In the present case, the RAD conducted an assessment of all the findings, including credibility. The RAD's approach addresses the nuances in the jurisprudence regarding deference to the RPD on its credibility findings. The RAD made its own findings which confirmed the RPD's findings of credibility.

[46] With respect to the admissibility of new evidence at the RAD, the standard of reasonableness applies (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42, 246 ACWS (3d) 433 [*Singh (2014)*]; *Khachatourian* at para 37).

Did the RAD correctly find that there was no breach of procedural fairness arising from the interpretation at the RPD hearing?

The Applicant's Submissions

[47] The applicant notes that the RPD has a duty to provide continuous, precise, competent, impartial and contemporaneous translation (*Mohammadian*). The applicant submits that it is unreasonable to put the onus on an applicant to raise concerns about the translation given this may not be readily apparent (*Mujadidi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 979 at para 9, [2014] FCJ No 1026 (QL) [*Mujadidi*]. The applicant notes that his counsel did not speak either of the languages and could not, therefore, identify translation errors. The applicant also submits that his inability to raise translation errors should not be regarded as a waiver, contrary to the view of the RAD (*Bidgoli v Canada (Minister of Citizenship and Immigration)*, 2015 FC 235, [2015] FCJ No 206 (QL) [*Bidgoli*]).

[48] The applicant further submits that he did raise concerns and the RAD did not take into account that he raised the issue at the beginning of the hearing when he said he did not adequately understand the interpreter.

[49] The applicant argues that proof of actual prejudice arising from an inaccurate translation is not required and it is sufficient to find a breach of procedural fairness based on the problems identified with the translation.

[50] The applicant submits that although he may have understood the interpreter, this does not establish that the interpreter properly interpreted his testimony.

[51] The applicant noted specific concerns. He points out that he spoke Afghani Pashto but the interpreter spoke Pakistani Pashto. He also points out instances of confusion about dates, gaps in the translation where it indicates "foreign language spoken," and comments by the interpreter and Board member noting the need to confirm or clarify the question or answer.

The Respondent's Submissions

[52] The respondent notes that the jurisprudence has established the principles governing interpretation. Interpretation issues must be raised at the earliest opportunity. The onus is on the applicant to show that the translation fell below a reasonable standard. Translation does not need to be perfect and problems must be viewed in the context of the whole decision. Discrepancies in translation do not necessarily give rise to a breach of procedural fairness. The requirement is that an applicant must be able to adequately express themselves through the interpreter.

[53] The respondent points out that after the applicant indicated that the interpreter spoke a different dialect of Pashto, the Board member directed the applicant and interpreter to have a conversation to determine if they understood each other. The applicant then confirmed that he understood the interpreter and vice versa.

[54] The respondent submits that it is apparent on reading the transcript that the applicant understood the questions, provided answers to those questions and conveyed his story.

[55] The respondent also points out that the discrepancies in the translation of the Tazkira card were not the result of the interpretation at the hearing.

The RAD did not err in finding that there was no breach of procedural fairness due to interpretation concerns

[56] I have reviewed the transcript carefully and noted all the instances where a potential interpretation issue arose.

[57] At page 887 of the Certified Tribunal Record, the applicant, after first stating he understood very little and noting that there were two Pashto languages or dialects, was directed by the Board member to have a conversation with the interpreter to determine if they could understand each other. At pages 887 and 888, the applicant confirmed that he did understand the interpreter.

[58] At page 894, the Board member noted the need for short sentences to assist in translation and advised the applicant that if the questions are not clear, he should so indicate.

[59] At pages 904-905, the transcript reveals some confusion regarding the applicant's age at the time he obtained his Tazkira card that he presented to the Board. The applicant stated it was in 2003-2004 when he was "maybe 13, 14." The Board member noted that if the applicant had been born in 1982, he would have been 21 or 22 at that time. The interpreter acknowledged that this may have been her mistake due to dialect differences. The Board member then cautioned that it was important to be very careful regarding the translation of dates. The applicant then clarified his answer stating that he said he was "23 or 21."

[60] However, the problems regarding the Tazkira card were related to the card incorrectly stating the applicant's gender, occupation, that he was single and other errors, but were not about the applicant's testimony about the age at which he obtained the card.

[61] With respect to the date of the applicant's marriage, the transcript at page 907 notes an answer not translated, but "[f]oreign language spoken." However, it is clear that the Board member agreed that it was essential that all answers be translated and the interpreter went back and indicated that the applicant stated, "[m]y father got that," which appears to refer to a record of his marriage.

[62] At pages 924-927, the Board member questioned the applicant about the date on the police report regarding the 2003 gunshot incident. The stamped date indicated 2011, but the applicant stated he made the report in 2013 and there was also the date of 25/05/1392 noted.

[63] The interpreter was asked to confirm the 1392 date from the Iranian calendar in the Western calendar. The interpreter indicated she would need use the Internet to do so. Although the applicant argues that this shows that the interpreter did not understand the language, the question was about why the report was stamped 2011 and not 2013. The applicant provided an explanation – that the date stamp reflects the date on which the public official assumed his or her duties or authority. Therefore, the conversion of 1392 to the Western calendar was not necessary or determinative. The interpreter's suggestion that it could be converted using the Internet does not suggest that the interpreter could not properly interpret the applicant's testimony.

[64] At page 929, there is another reference to "[f]oreign language spoken," in response to the Board member's question about why the applicant did not mention Kamal and Jamal in his BOC or amended BOC. The Board member asked the interpreter what had been said and she clarified that she had asked the applicant to repeat his answer. The transcript (at page 930) reveals that the applicant provided an answer which was then translated, the Board member probed the answer and the applicant responded again at length. The applicant acknowledged that the question was about the fact that nothing had occurred in the 11 years since the 2003 incident and threats and he indicated that Kamal and Jamal had come to Kabul and told him to "get some safety for [his] life." Counsel then asked again why he did not mention Kamal and Jamal sooner. The applicant replied that he gave their names because he was asked to provide names. Although he did not

respond to the question, this appears to have nothing to do with the translation, but rather with that the applicant could not provide a better explanation for this omission.

[65] There is no dispute about the principles that apply regarding translation. In *Mohammadian*, the Federal Court of Appeal established that translation must be continuous, precise, competent, impartial and contemporaneous, but does not need to be perfect (at paras 4 and 6). In addition, the Court of Appeal noted at para 18 that the applicant is in the best position to know if the interpretation is accurate and cannot wait and do nothing only to raise an issue about the quality of the translation after the hearing, unless there are exceptional circumstances.

[66] The applicant relies on *Mujadidi* for the proposition that putting the onus on an applicant to raise concerns about translation is manifestly unfair. Although on the facts in *Mujadidi*, it was found to be unfair, the facts were different and the Court did not establish this as a general proposition. The Court noted at para 9 that the applicant's counsel had raised concerns about the translation. At para 10, the Court noted:

> The record discloses that, as a result of the RPD's approach to the interpretation issue, there certainly were serious problems with the interpretation of the Applicant's evidence at the hearing, which resulted in highly contested findings of negative credibility made by the RPD. In the result, I find that the RPD's conduct of the hearing was in breach of the duty of fairness owed to the Applicant.

[67] The applicant also relies on *Bidgoli* and submits that there is no need to show that the errors in translation were material or prejudicial. In that case, Justice Simpson found that there was a failure to provide interpretation services, despite the fact that the applicants' counsel did not clearly object.

[68] In *Bidgoli*, Justice Simpson referred to *Mohammadian*, noting that an applicant need not show that an interpretation error caused actual prejudice. Justice Simpson also questioned whether errors in translation must be material. She agreed with the conclusion reached by Justice Gleason (as she then was) in *Mah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 907 at para 26, [2013] FCJ No 907 (QL) that "once an applicant establishes that there was a real and significant translation error, he or she is not required to also demonstrate that the error underpinned a key finding before the RPD decision can be set aside" [emphasis added].

[69] Justice Simpson found, upon review of the transcript, on the facts of *Bidgoli* that the errors were serious because the applicant's version of events was not communicated accurately to the Board and, therefore, the applicants did not receive continuous, precise or competent translation.

[70] Justice Simpson concluded at para 24:

> The interpretation errors were serious in that the meaning of the Applicants' evidence was distorted. As well, the right to interpretation was not waived. Although the errors were not material/prejudicial in the sense that they caused the Board to reach the negative credibility determinations which resulted in the refusal of the Applicants' refugee claims, there is no requirement for such materiality or prejudice. Accordingly, the application will be allowed.

[71] I do not agree with the applicant that *Bidgoli* supports the view that trivial or non-serious translation issues are sufficient to find a breach of procedural fairness. Although an applicant may not be required to show actual prejudice arising from a serious or a significant error, this

does not extend to translation errors which are minor and which do not affect the applicant's ability to convey his claims and answer questions.

[72] The jurisprudence requires that there be serious, non-trivial, problems with a translation in order to find a breach of procedural fairness. A lower standard would demand perfection, would permit an applicant to point to one error as justification for holding a new hearing and is inconsistent with the principles established in *Mohammadian*.

[73] Considering the principles from the jurisprudence, I do not find that the RAD erred in finding that the RPD did not breach procedural fairness by providing inadequate interpretation. The applicant did not raise interpretation concerns at the hearing; rather, he confirmed that he understood the interpreter. The transcript read in its entirety reveals that the applicant was able to convey his allegations: he provided answers to all questions, including in response to probing questions of the Board member arising from his inconsistent testimony, omissions in his BOC, the errors in the previously translated Tazkira card and about his passport.

[74] As noted above, the applicant's references to specific instances in the transcript do not show any serious problems with the translation. In all instances, the potential issue was clarified or the interpreter was asked to ensure that the answer was translated. The transcript demonstrates that the applicant was able to convey his claims and to respond to questions and the Board member's follow up questions convey that the interpreter was able to translate the applicant's answers.

Did the RAD reasonably refuse to admit new evidence?

The Applicant's Submissions

[75] The applicant sought to admit five pieces of new evidence. The RAD accepted two which were related to his identity.

[76] The applicant argues that the medical letter from Coastal Health was unreasonably rejected because he could not reasonably be expected to know that this evidence would have been required (*Bahta v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1245 at para 18, 248 ACWS (3d) 419). He was not aware that the RPD would discount his 2003 medical report from Afghanistan.

[77] The applicant also argues that the letter from ABABC should also have been admitted. He was not aware that his identity would be in dispute and that he would need this additional document. However, the applicant agrees that, given that his identity was later confirmed by his Tazkira card, the letter from ABABC does not provide material evidence.

[78] With respect to his December affidavit describing his nephew's gunshot wounds and enclosing pictures, the applicant argues that this was recent evidence that could not have been provided earlier because the incident had just occurred.

[79] The applicant argues that the RAD did not explain why it rejected the affidavit, which is highly relevant to the issue of the continuing risk he faces due to the feud. The applicant submits

that the RAD must be sufficiently flexible in admitting evidence to allow for a full, fact-based appeal (*Singh (2014)* at paras 55-58).

[80] The applicant also submits that RAD erred by rejecting this evidence without holding an oral hearing to provide an opportunity to establish his credibility. Similarly, the RAD erred in ignoring the evidence of the recent threatening letters without holding an oral hearing in order to make its own credibility findings.

The Respondent's Submissions

[81] The respondent submits that the RAD reasonably found that the new evidence should not be admitted in accordance with subsection 110(4) of the Act and Rules 29(3) and (4) of the Rules.

[82] With respect to the ABABC letter, the applicant failed to provide a reasonable explanation why the letter was not available at the RPD hearing.

[83] With respect to the medical letter, although the applicant explained that he was not able to get a medical appointment until July 2014, the applicant knew that he was required to present all relevant evidence at the RPD hearing and was represented by Counsel who was aware of the requirements. The RAD considered his explanation but reasonably rejected it.

[84] With respect to the December affidavit, the respondent submits that the RAD found that it did not satisfy the factors set out in subsection 110(4) of the Act and Rules 29 and 37 of the

Rules. Moreover, it was speculative and uncorroborated and, therefore, had little probative value and would not have changed the outcome of the RAD's decision.

The RAD did not err in rejecting the new evidence

[85] Subsection 110(4) of the Act provides:

(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.

[86] Rule 29(4) of the Rules provides:

(4) In deciding whether to allow an application, the Division must consider any relevant factors, including	(4) Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :
(a) the document's relevance and probative value;	a) la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the appeal; and	b) toute nouvelle preuve que le document apporte à l'appel;
(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the	c) la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations écrites avec le

appellant's record, respondent's record or reply record.	dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.

[87] As noted above, the standard of review for the RAD's determination whether to admit new evidence is reasonableness (*Singh (2014)*).

[88] With respect to the medical letter, the applicant may not have anticipated that his 2003 medical report would be insufficient and that he would need confirmation of his gunshot wound. However, the admission of the medical letter would not have had an impact on the RAD's decision. The RAD acknowledged the gun shot claim, but found that the medical report was not evidence of the circumstances of the wound or evidence that it was caused by the family feud. Similarly, the letter from Vancouver Coastal Health would not have provided such evidence.

[89] It was also reasonable for the RAD to refuse to admit the letter from ABABC given the applicant provided no explanation for its late submission. Regardless, that evidence only confirmed the applicant's identity and the RAD accepted the properly translated Tazkira card which established his identity.

[90] With respect to the December affidavit, although the applicant argues that the RAD failed to provide a reason for rejecting this evidence, this is not the case. The RAD provided its reasons with reference to the requirements of the Act and the Rules.

[91] The RAD noted that in deciding whether to admit the new evidence, Rule 29(4) requires it to consider any relevant factors, including: the document's relevance and probative value; any new evidence the document brings to the appeal; and whether the person who is the subject of the appeal could have provided the document or submissions with the appellant's, respondent's or reply record.

[92] The RAD acknowledged that the applicant stated it was impossible to provide the document earlier because the incident had just occurred. The RAD also acknowledged his statement that he was trying to get further documents, but noted that he had not advised the RAD when these documents would be provided. The RAD found that to respect the integrity of its process, given that the 90 day period for final determination of the appeal was over, it would make a final determination only on the evidence before the RAD at that time, without the affidavit and without waiting for other documents.

[93] The RAD also explained that a relevant factor in considering whether to admit new evidence is the materiality of the evidence; i.e., whether the new evidence would have resulted in a successful claim to the RPD.

[94] The RAD then found that if it had admitted the affidavit as new evidence it would have rejected this evidence. The affidavit indicates that the nephew could not identify the men who attacked him. Although his family suspects it is the Karimi family, the RAD found that this is speculation. The RAD notes there is no material evidence to support these speculations and the

pictures provided do not provide any details about the incident of how it is related to the applicant's claim.

[95] The RAD carefully scrutinised the new evidence and reasonably refused to admit it. The alternative finding that if the new evidence had been admitted it would have been rejected, based on its speculative content and lack of materiality, was also reasonable. Subsection 110(4) requires the RAD to consider relevance and probative value. The RAD also considered the materiality of the evidence. The RAD's finding that the affidavit was speculative is clearly based on its contents, which indicate that the applicant does not know who shot his nephew or why. The RAD was understandably cautious in considering the affidavit, given that the RPD had noted the lack of evidence of any threats since 2003-2004 and this affidavit was put forward immediately before the RAD hearing seeking to provide very recent evidence of such a risk.

[96] The RAD did not need to specifically address the threatening letters. The RAD explained that it would make its determination on the evidence before it and the threatening letters were not provided at that time.

Did the RAD reasonably decline to hold an oral hearing?

The Applicant's Submissions

[97] The applicant submits that his new evidence contradicted the RPD's findings that he had not established his identity, which was the central finding of the RPD. The applicant disputes

that the credibility findings were independent findings. The applicant submits that the RPD did not believe he was who he said he was and, therefore, did not find his story credible.

[98] The applicant argues that once the new evidence of his identity was accepted, an oral hearing should have been held as all the criteria set out in subsection 110(6) of the Act were met. He should have had an opportunity to recount his claims before the RAD.

[99] The applicant argues that even if the RAD conducted an independent assessment of the evidence, the RAD could not reasonably find that he was not credible without an oral hearing (relying on *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) [*Singh (1985)*]). The faulty interpretation resulted in a faulty record and the RAD could not rely on the record to assess his credibility. The applicant submits that this was a breach of procedural fairness.

The Respondent's Submissions

[100] The respondent notes that the RAD is not required to hold an oral hearing; oral hearings are exceptional and are only held if new evidence has been admitted pursuant to subsection 110(4) of the Act and the criteria in subsection 110(6) of the Act have been met.

[101] The new evidence admitted by the RAD was identity evidence and did not give rise to credibility issues. The December affidavit was not admitted as new evidence. Therefore, subsection 110(6) of the Act was not engaged. There was no basis for an oral hearing.

The RAD reasonably refused to hold an oral hearing and did not breach procedural fairness

[102] Subsection 110(3) of the Act provides:

(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. [Emphasis added]	(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.

[103] Subsection 110(6) of the Act provides:

(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.

[104] Section 110, read as a whole, provides that the RAD has the discretion to hold an oral hearing, but only where certain criteria are met. Even if the criteria are met, the RAD could decline to hold an oral hearing.

[105] The new evidence admitted by the RAD established the applicant's identity. The applicant now argues that his identity is bound up with his credibility and that the RPD made credibility findings because it could not confirm his identity and whether his claims related to him or someone else. I do not agree. The RPD made several credibility findings that are independent of the applicant's failure to establish his identity before the RPD. Once the applicant's identity is established – as it has been due to the RAD accepting his properly translated Tazkira card and passport – the credibility findings remain as alternative findings of the RPD to be to be considered by the RAD on appeal.

[106] The key finding of the RPD was that the applicant had not established the feud and had not established that he faced a serious risk to his life on a forward looking basis. This finding remains regardless of whether the applicant had established himself to be Amin Siddiqui.

[107] The new evidence does not raise a serious issue regarding the applicant's credibility such that if accepted it would justify allowing the claim. The credibility findings of the RPD are

related to inconsistencies in the applicant's testimony and, more importantly, the applicant's behavior following the 2003 incident: not filing a police report until 2013, remaining at the same house in Kabul and not receiving any threats since the alleged threats in 2004, all of which the RPD found to be inconsistent with a person who faces a risk of harm or who has a fear of such a risk.

[108] As noted above, the issues with respect to the translation were minor and were all resolved. The applicant was not denied his right to continuous, precise, competent, impartial and contemporaneous interpretation (*Mohammadian*). Therefore the RAD reasonably relied on the record, including the transcript of the hearing, to conduct the appeal and to assess the credibility of the applicant's claims.

[109] Although the applicant relies on *Singh (1985)* for the argument that credibility findings should not be made without an oral hearing, the jurisprudence regarding the standard of review the RAD applies to RPD decisions and the prevailing view that the RAD should defer to the RPD on its credibility findings given that the RPD has had the benefit of hearing an applicant first hand should also be considered.

[110] In *Malambu c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 CF 763 at para 38, [2015] ACF no 753 (QL), the Court held that, because an applicant had the opportunity to present oral submissions before the RPD, the fact that the RAD made new credibility assessments without an oral hearing on the basis of that evidence was not contrary to *Singh (1985)* and was consistent with subsections 110(3), (4) and (6) of the Act.

[111] In the present case, the RAD conducted its own assessment of the applicant's claim based on the record and in the context of the applicant's arguments on appeal, including the translation allegations. The RAD made its own findings which were analogous to the findings of the RPD and, as a result, confirmed the RPD's decision.

[112] The RAD reviewed the applicant's testimony regarding who he fears in Afghanistan, noting his statement that, "I'm just guessing maybe its Alza Kareemi [sic] or maybe son, maybe brother, but I am just guessing." The RAD also found that the omission from the BOC regarding the allegations of more recent threats relayed by Jamal and Kamal, despite other amendments to the BOC, undermined his credibility. The RAD noted that the RPD had questioned the applicant about the omission and his answer was unsatisfactory.

[113] The RAD reasonably found that there was no credible evidence that the 2003 gunshot incident was linked to the alleged family feud and there was no evidence that the applicant had been targeted after 2004. The RAD found that because there was no sufficient evidence to even find that the applicant is the subject of a feud and that he stayed in the same home since 2003, without incident and without incident to his family, his claims were not credible. This behaviour and his failure to report the incident until 2013 was reasonably found to be inconsistent with the behavior of a person who fears for his life. The RAD concluded that the applicant's fear is based on speculation that bears little weight.

[114] The RAD's findings are reasonable; they are justified by the evidence and the RAD's reasons are clear and transparent.

The RAD reasonably found that the applicant had not established his claim with credible evidence

[115] The applicant argues that cumulatively, the problems with the translation and the refusal to admit new evidence, coupled with the RAD's findings regarding the applicant's credibility, resulted in the RAD unreasonably finding that the applicant has not established his claim for protection.

[116] As noted above, I find that the translation met the standard required by the jurisprudence and the applicant was able to tell his story and be understood. The RAD's refusal to admit three pieces of new evidence was reasonable. Similarly, the RAD's decision not to hold an oral hearing is entirely within the discretion of the RAD where the criteria are met. The RAD reasonably found that the criteria were not met, because the new evidence did not relate to credibility and that if admitted, the new evidence would not have resulted in a successful claim given that the RAD found the new evidence to be speculative.

[117] Individually, the arguments of the applicant do not constitute reviewable errors, nor do they amount to reviewable errors cumulatively.

[118] As noted above, the RAD conducted an independent assessment of the claims based on the record, including the applicant's testimony, and reasonably found that the applicant had simply not established that he faced a risk as a result of the alleged feud.

JUDGMENT

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

There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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