Federal Court Cour fédérale

Date: 20160721

Docket: IMM-4994-15

Citation: 2016 FC 855

Ottawa, Ontario, July 21, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

NABEEL IBRAHIM KHAN, SALWA NABEEL KHAN, YOUSAF NABEEL KHAN, RUSTOM NABEEL KHAN, LAIBA NABEEL KHAN, IFFAT NABEEL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to paragraph 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the October 16, 2015 decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD], confirming the decision

of the Refugee Protection Division [RPD], and finding that the Principal Applicant and his family were not Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

II. Background

[2] The Principal Applicant, Mr. Nabeel Ibrahim Khan, is a citizen of Pakistan. In November 2005, he joined the United Nations [UN] World Food Program earthquake emergency operations and moved from Islamabad to Muzzaffarabad for this position.

[3] In January 2006, the Principal Applicant received two calls from a man who identified himself as Haji Omer Khan, threatening to kill the Principal Applicant and his family if he did not stop working for the UN.

[4] The Principal Applicant was also confronted on several occasions by three individuals claiming to be Taliban, who chastised his work for the UN and his western appearance and violently threatened him and his family.

[5] The Principal Applicant reported the threats to his supervisors and received UN protection while travelling and conducting UN business. He was not approached again, but continued to receive threatening phone calls.

[6] In September 2006, the Principal Applicant's family moved to be with him in Muzzaffarabad.

[7] On November 20, 2006, while walking their children from school, the Principal Applicant's wife was approached by two men who threatened to kill the family if her husband did not stop working for the UN. That evening the Principal Applicant received a call from Haji Omer Khan ensuring he had gotten the message.

[8] On November 28, 2006, the Principal Applicant returned home to find two armed men shouting, berating him as a traitor, and shooting in the air.

[9] Upon informing UN officials, the Principal Applicant was directed to the local police, who refused to act without a bribe. The Principal Applicant and his family returned to Islamabad.

[10] On June 15, 2007, the Principal Applicant's car was shot by two men in another vehicle wearing traditional garb.

[11] On June 30, 2007, the Principal Applicant resigned from his position at the UN and in January 2008, he and his family moved to Qatar.

[12] On August 19, 2013, the Principal Applicant organized a seminar for the UN World Humanitarian Day. His involvement was published in the local newspaper, and he again began receiving threats from a man named Muhammad Khan, a cousin of Haji Omer Khan. The threats forced the Principal Applicant to resign and move back to Pakistan, and he filed a police report against Muhammad Khan.

[13] In July 2014, the Principal Applicant's car was again shot at and his son Yousef was almost kidnapped. The Principal Applicant believed these incidents were related to his previous problems with extremists.

[14] The Applicants came to Canada on July 18, 2014, and claimed refugee protection on October 2, 2014.

[15] On January 20, 2015, the RPD found that the Applicants were not Convention refugees or persons in need of protection.

[16] On March 20, 2015, the Applicants filed a complaint with the Law Society of Alberta against their counsel, Mr. Raj Sharma, alleging he had excluded necessary information from their narrative, which led to a negative disposition of their claim.

[17] On appeal, the RAD confirmed the RPD decision, finding that the Applicants were neither Convention refugees nor persons in need of protection.

[18] The only issue raised on appeal was whether the incompetence of the Applicants' former counsel constituted a breach of procedural fairness by undermining the Applicants' ability to fully present their case to the RPD. The RAD noted that the Applicants did not challenge the finding of the RPD, but instead conceded that their narrative did not include the necessary information for a successful refugee claim as a result of counsel incompetence.

[19] Nonetheless, the RAD conducted an independent review of the RPD record, including listening to the audio recording of the hearing and, combined with the fact the Applicants raised no issue with the RPD decision, found no reason to delve into the RPD's analysis that resulted in rejection of the claim.

[20] In addressing the new evidence submitted at the appeal stage, the RAD rejected an affidavit by the Principal Applicant, as he had testified to the issues contained therein at the hearing, and the majority of the evidence was contained in the RPD record. The RAD did however admit into evidence all documents pertaining to the allegations of counsel incompetence, but concluded a hearing was unnecessary pursuant to subsection 110(3).

[21] The RAD identified three components required for a successful incompetence claim: a factual component, a prejudice component and a performance component. The RAD found that the Applicants had not met the first component, which required them to establish the facts on which the claim of incompetency is based. The RAD noted that the Principal Applicant had been offered numerous chances to amend his Basis of Claim and his narrative. Moreover, notwithstanding the opportunity to do so, the Principal Applicant had never indicated that the reason for the discrepancy between his narrative and his testimony was due to his counsel's instruction.

[22] The jurisprudence sets out a strong presumption in favour of counsel's competence. The RAD noted that Mr. Sharma was an experienced immigration lawyer and that he or his associate had made several attempts to ascertain all the details of the Applicants' claim to ensure their

inclusion into the narrative. The RAD also noted that the attorney-client relationship was strained over the issue of payment.

[23] Further, Mr. Sharma had advised against amending the Basis of Claim close to the hearing date, so as not to trigger Ministerial intervention, which the RAD found to be a professional decision, not a sign of counsel incompetence. It also noted that the Applicants both speak and read English and did not require an interpreter. They were therefore clearly aware of the obligation to include every relevant detail in their narrative, and it is difficult to understand why the missing information was not included in the first place.

[24] The RAD concluded that the Applicants' subjective belief was insufficient to overcome the presumption of counsel competence and there was insufficient evidence to establish, on a balance of probabilities, the factual component required in a successful counsel incompetence allegation.

III. Issues

[25] The issues are:

A. Did the RAD conduct an independent analysis of the evidence and apply the correct standard of review?

B. Was the RAD's decision unreasonable on the basis that it only reviewed the allegation of counsel incompetence and refused to consider new evidence?

IV. Standard of Review

[26] The RAD's assessment of the evidence is reviewable on a standard of reasonableness. Questions of fact, discretion and policy, and questions where the legal issues are intertwined with the factual issues attract a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 25).

[27] The Federal Court of Appeal has also determined that questions of law arising from the interpretation of an administrative body's home statute – such as the RAD's selection of a standard of review or the RAD's assessment of the admissibility of evidence – attract a standard of reasonableness.

[28] In the recent decision of *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paragraphs 30-35 [*Huruglica FCA*], the Federal Court of Appeal determined that for findings of fact (and mixed fact and law) which raise no issues of credibility or oral evidence, the RAD is to review RPD decisions applying the correctness standard.

V. Analysis

[29] As a preliminary matter, the Respondent objects to the Applicants raising a new argument on judicial review that was not before the RAD – that the RAD failed to assess a substantive ground of risk to life if returned to Pakistan.

[30] I agree with the Respondent that the sole issue identified by the Applicants in the RAD appeal was competency of counsel, and this judicial review is not the proper forum to raise new arguments that were not made before the RAD (*Zakka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1434 at para 13).

A. *Did the RAD conduct an independent analysis of the evidence and apply the correct standard of review?*

[31] The Applicants submit that the RAD applied the standard of reasonableness to the RPD's findings while neglecting to conduct its own assessment of the factual evidence and the new evidence submitted.

[32] Though the RAD applied the standard set out by the Federal Court in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica FC*], I find it did not commit a reviewable error. The RAD conducted in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*.

[33] As stated at paragraph 29 of the RAD decision:

> In keeping with the majority of the Court's findings, I undertook to examine and review all the evidence in the RPD Record and conducted my own independent assessment of the evidence and came to my own conclusion based on all the evidence applying the standard of correctness.

[34] The RAD further reiterates at paragraph 36:

> I have conducted an independent review of the RPD Record (RPDR) which included listening to the audio recording of the hearing in its entirety and, combined with the fact the appellants

> have raised no issue with the RPD decision and reasons, I find no reason to delve into the analysis of the RPD that resulted in the rejection of this claim.

[35] After reviewing all the evidence, the RAD clearly indicated it found no error in the RPD decision. The RAD made no error in independently analysing the evidence, and it applied the correct standard of review.

B. *Was the RAD's decision unreasonable on the basis that it only reviewed the allegation of counsel incompetence and refused to consider new evidence?*

[36] In their appeal to the RAD, the Applicants did not take exception with the RPD's finding. Instead, the only issue identified before the RAD was that the Applicants had been victims of incompetent counsel.

[37] It was not unreasonable for the RAD to limit its substantive analysis to reviewing the only issue raised before it – the allegation of counsel incompetence. As above noted, the RAD independently reviewed the record, but found no reason to delve into the RPD's analysis, with which the Applicants did not take issue. Nor was it unreasonable for the RAD not to examine the risk to life faced by the Applicants if returned to Pakistan, as that issue was also not raised on appeal. As Justice Mosley noted in *Makoundi v Attorney General*, 2014 FC 1177 at paragraph 57:

> [t]he general rule in judicial review is that the Court cannot proceed on the basis of evidence or arguments that were not before the decision-maker. […] The Court does not have the role of making the decision anew by analysing arguments that were never made to the administrative body. See for example: *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 (FCA) at para 15; *Zakka v Canada (Minister of Citizenship and*

> *Immigration)*, 2005 FC 1434 at para 13; *Zolotareva v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at para 36.

[38] The Applicants only raised one argument on the issue of counsel incompetence – that the RAD's decision was unreasonable because it should have waited for the Law Society of Alberta decision on the complaint before issuing a decision.

[39] The result of a disciplinary matter before a professional regulatory board, though it cannot be ignored, is not binding upon the Court (*Moryakina v Canada (Citizenship and Immigration)*, 2012 FC 1455 at para 11 [*Moryakina*]; *Dukuzumuremyi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 278 at para 10).

[40] The test for counsel incompetence under the Act is as stated in *Moryakina*, above, at paragraph 9:

> To succeed, Ms Moryakina must show that her lawyer's incompetent behaviour resulted in a miscarriage of justice (*R v GDB*, 2000 SCC 22 (CanLII), at paras 26-27). Her allegations must be specific and supported by the evidence (*Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196 (CanLII), at para 36). She must also show that the lawyer's conduct caused her prejudice in the sense that the outcome of the decision would likely have been different if the lawyer had acted competently (*Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 (CanLII), at para 9). This is a very strict test (*Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173 (CanLII), at para 15).

[41] The RAD found that the Applicants' allegations of counsel incompetence could not be supported by the evidence. At paragraphs 78 and 79 of its decision, the RAD noted that:

> The appellants offer no proof of their allegations other than their oral evidence.
>
> As the evidence now stands the RAD has nothing more than counsel stating one thing and the principal appellant stating another. This is insufficient evidence to establish, on a balance of probabilities, the factual component required in a successful counsel incompetence allegation.

[42] The Applicants otherwise gave no examples in support of their allegations that counsel was unprepared, or had not demonstrated the competence expected of members of the Law Society of Alberta. Given the high threshold required to establish counsel incompetence, it was reasonable for the RAD to conclude that the Applicants had not met their onus, and to find this issue – the only one on appeal – determinative.

[43] With regards to the RAD's determination that the Principal Applicant's affidavit and corresponding documentation was inadmissible, the Federal Court of Appeal has provided clear guidance with respect to new evidence at the RAD under subsection 110(4) of the Act in *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*]. The Court determined that "there is no doubt that the explicit conditions set out in subsection 110(4) need to be met", and further held that the "conditions appear to me to be inescapable and would leave no room for discretion on the part of the RAD" (*Singh*, above, at paras 34-35).

[44] The Court of Appeal further held in *Singh* that appeals to the RAD are not opportunities to complete a deficient record submitted before the RPD. The Federal Court applied a similar

rationale in *Abdulahi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 260 at paragraph 15, wherein Justice Peter Annis concluded as follows:

> […] responding to an inadequacy identified by the RPD in a party's case cannot be a legitimate foundation for the party to claim that had she known about the deficiency she could have presented better evidence that was always in existence from persons that could have been called, in this case from her cousin. This would make the RPD process a monumental waste of time, which is surely not Parliament's intention in providing appeal rights.

[45] The Applicants attempted to admit before the RAD the March 26, 2015 Affidavit of the Principal Applicant. The RAD reasonably determined this evidence did not comply with the conditions set out in subsection 110(4) of the Act: the evidence was available to the Applicants before their RPD hearing, and the content of the affidavit and its accompanying exhibits already formed part of the RPD record.

[46] Overall, I find that the RAD's decision was reasonable, and there is no basis for the Court's intervention.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is to be certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	NABEEL IBRAHIM KHAN ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Birjinder P.S. Mangat	FOR THE APPLICANTS
David Shiroky	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mangat Law Office Calgary, Alberta	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT