Federal Court  Cour fédérale

Date: 20180409

Docket: IMM-3887-17

Citation: 2018 FC 360

Ottawa, Ontario, April 9, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MAHMOOD SAED FAEQ AL-ABAYECHI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision [the Decision] by the Refugee Appeal Division [RAD], dated August 18, 2017, dismissing the appeal of a Refugee Protection Division [RPD] decision that determined that the Applicant was not a Convention Refugee or a person in need of protection.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant is a citizen of Iraq. He arrived in Canada on November 1, 2015 after fleeing Iraq due to an alleged fear of persecution, kidnapping, torture, and death based on his religion as a moderate Sunni Muslim, his former occupation at the Baghdad International Airport, and his real and perceived political opinion as a result of his attempts to report corruption at work and of sharing his political beliefs while at work.

[4] Once in Canada, the Applicant prepared a refugee claim with an immigration consultant who asked the Applicant to write what had happened to him in Arabic at home and to collect any documents he could get for his case.

[5] The Applicant made his refugee claim on December 15, 2015. His hearing before the RPD took place on December 5, 2016.

[6] On December 19, 2016, the Applicant's refugee claim was refused on the basis of credibility and his failure to meet the profile of the person at risk in his circumstances.

[7] On February 6, 2017, the Applicant filed his appeal to the RAD. On August 18, 2017, the RAD dismissed the Applicant's appeal of his negative RPD decision and found that the Applicant was neither a Convention Refugee nor a person in need of protection.

III. Impugned Decision

[8] The RAD concluded that the Applicant's submissions on section 97 referred to country conditions documentation that is linked to a nexus ground, which the RPD assessed under its section 96 analysis. The RAD also found that no section 97 claim was articulated, as the Applicant's fears were directly linked to his profile, which had a nexus. The Applicant cited his risk as an engineer, but provided no country conditions documentation referring to this risk profile in Iraq. The RAD therefore concluded that the RPD did not err since the Applicant did not raise arguments about general criminality or violence or a non-nexus basis for his fear.

[9] After conducting its own analysis of the entire record, the RAD found that the Applicant did not establish that his former consultant was incompetent and that this resulted in a breach of natural justice. In addition, the RAD found that although the RPD erred in some of its credibility findings, there were additional credibility concerns noted by the RAD that supported the RPD's final determination that the Applicant is neither a Convention refugee nor a person in need of protection.

IV. The Issues

[10] The following issues arise in this application:

1. Did the RAD err in its section 97 analysis?

2. Did the RAD err in its conclusion that the consultant's actions and omissions did not amount to a miscarriage of justice?

3. Did the RAD err in its credibility analysis?

4. Did the RAD err in not granting an oral hearing in light of its credibility findings and acceptance of new documents?

V. Standard of Review

[11] Reasonableness is the standard of review that the Federal Court should generally apply in reviewing a RAD decision: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 74. As for the question of whether a claimant faces a generalized risk to violence pursuant to section 97, the standard of review is reasonableness: *De Jesus Aleman Aguilar v Canada (Citizenship and Immigration)*, 2013 FC 809 at para 20; *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at para 18. This standard also extends to review a decision not to hold an oral hearing, as it involves the RAD's interpretation of its own statute: *Balde v Canada (Citizenship and Immigration)*, 2015 FC 624 at para 21.

[12] A correctness standard of review applies to the Applicant's allegations that their former consultant is incompetent, as this issue "goes to the Applicant's right to fully present his case, which is an issue of procedural fairness": *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27. However, "incompetence is determined by a reasonableness standard", *R v GDB.*, 2000 SCC 22 at para 27 [*GBD*].

VI. Analysis

A. *Section 97 Analysis*

[13] The Applicant submits that had the RPD erred in its section 97 analysis by relying on its credibility findings under section 96, and relying on irrelevant considerations. The Applicant also argues that the RAD erred in its own analysis by imposing a more onerous test than required. Although only the RAD's Decision is before the Court, it disagreed with the Applicant's submissions in both instances.

[14] With respect to the RPD's decision, the Applicant argues that the section 97 analysis is independent from a section 96 analysis such that a claim which does not meet the stringent standards of the section 96 analysis, may still be successful under section 97. The Applicant cites the decision of *Paramananthalingam v Canada (Citizenship and Immigration)*, 2017 FC 236 [*Paramananthalingam*] in support of this submission. The Applicant argues that the RPD erred by relying on its credibility findings under section 96 to dismiss the claim under section 97. In this regard he characterizes the RPD decision as standing for the proposition that a connexion to a nexus ground nullifies a claim under section 97.

[15] The Court finds that the Applicant has mischaracterized the RPD's decision and failed to recognize the Applicant's requirement to provide probative evidence in support of a section 97 risk claim. After the RPD concluded its analysis that the Applicant lacked credibility, although not required for a section 96 analysis, it reviewed the country conditions documentation, the choice of which the Applicant also disputes. The Court also rejects this argument as the choice of

evidence was reasonably within the RPD's discretion. Citing a recent United Kingdom Home Office report, the RPD concluded that Sunnis do not face a real risk of persecution or harm from the State. However, non-state actors, particularly the Shia militants act with impunity against Sunnis. The RPD noted that the report indicated that the risk was nevertheless required to be established on a case-by-case basis that "depends on their personal profile, including their family connections, profession and origin".

[16] Thereafter, the RPD examined the Applicant's profile based upon his job, education, frequent travel abroad, where he worked, his capacity to travel to work and to pass through checkpoints, noting as well that his entire family resided in Baghdad. The RPD found that none of these factors demonstrated any concerns of risk for the Applicant. This, in combination with the negative credibility findings regarding his claims of personal risk, led the RPD to conclude that there is no serious possibility of the Applicant's persecution in Iraq. On the basis of the same evidence, the RPD concluded that the claim also failed under section 97. Having conducted both the subjective and objective analysis in consideration of the section 96 claim, it was up to the Applicant to provide independent and credible documentary evidence in the record capable of supporting a successful section 97 claim. The Applicant bears the onus of demonstrating there was such evidence: See *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paras 3−4 [*Sellan*].

[17] In this vein, the Court understands that the purpose of section 97 is to provide protection to persons who were at risk, but who could not show a nexus to any factor of discrimination that amounted to persecution under section 96. Targeting by family members, kidnapping and other

situations of violence or threatened violence not related to a prescribed category of persecution are intended to be protected by section 97.

[18] Moreover, the Court respectfully does not understand that the test under section 96 of proving both an objective and subjective fear of persecution is "very difficult", if this is intended to be in comparison with proving the requirements under section 97. The Court here makes reference to *Paramananthalingam* at paragraph 16, as argued by the Applicant. The Court is of the view that the challenge of proving the risk in both situations is to an opposite effect, inasmuch as the claimant must prove both his personal risk as supported by country conditions documentation against a legal standard of a probability to succeed in a section 97 claim. Proving a well-founded fear as a serious possibility is less onerous than establishing the risk as a probability. This is the *ratio* of *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, where the applicant unsuccessfully argued that section 97 should have the same legal standard as applied to section 96.

[19] In applying this jurisprudence, the RAD noted that the Applicant's country conditions evidence related to a nexus ground, but additionally specifically referred to what might constitute the available section 97 evidence being that of his risk as an engineer. The RAD rejected this contention, noting that there was no country conditions documentation supporting this risk profile. It also pointed out that the Applicant had not raised arguments about general criminality or violence or a non-nexus basis for his fear, and that accordingly, the RPD did not err. The Court sees no grounds for complaint in the analysis of either the RPD or the RAD.

[20] The Court also concludes that the Applicant has misconstrued the *Paramananthalingam* decision, which specifically made reference to *Sellan* and the requirement for the Applicant to present independent documentary evidence of a section 97 risk. In the former matter, the Court noted that the generalized risk related to torture which was "endemic in Sri Lanka and is practised at every police station and detention centre": *Paramananthalingam*, *supra* at para 20. Although not relevant given the RAD's conclusions, the Court in *Paramananthalingam* also cited the decision of *Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at para 64 which noted circumstances when an independent section 97 analysis was not necessary following an exhaustive credibility analysis as follows:

> [64] The Respondent submits that the Board was not required to conduct a separate section 97 analysis as it made very clear findings that it found the Applicant's story to be false. While case law has held that there may be circumstances where a separate section 97 is appropriate (*Kilic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 84 (CanLII) at para 29; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 (CanLII) at para 15), it is not necessary where the applicant has been found to be not credible (*Plancher v Canada (Minister of Citizenship and Immigration*), 2007 FC 1283 (CanLII) at paras 16-17 [*Plancher*]). In this case, the Board clearly did not believe that the Applicant was in a homosexual relationship and found that he fabricated his story to support a false claim. Having rejected the Applicant's story outright, there was no remaining basis upon which a claim of risk was made out.

B. *The Applicant's Former Counsel's Actions and Omissions Amounting to a Miscarriage of Justice*

[21] The Applicant submits that the RAD erred in its findings and conclusion that the Applicant's previous consultant's actions and omissions did not amount to a miscarriage of justice because of his incompetence and omissions as detailed in specific allegations.

[22] There is no issue about the RAD misapplying the three-pronged test applicable to this issue, or that it presents a high threshold in terms of the circumstances and evidentiary criteria that must be met before finding negligence of the consultant. “The analysis proceeds upon a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance”: *GBD, supra* at para 27. Similarly, Justice Marshall Rothstein stated that a new hearing should be granted only in the most exceptional cases: *Huynh v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 642 (TD) (QL).

[23] Applicants are bound by their choice of counsel. If the Applicant chooses to hire an immigration consultant rather than a member of the immigration bar, he has to deal with the consequences. Having decided to engage a consultant, the client cannot seek to measure his competence by that of a lawyer. That is not to say that there are not aspects of the standard imposed on an immigration consultant similar to those of a lawyer: see *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305.

[24] With respect to any alleged negligence, the starting point is to determine the appropriate standard of conduct that should be imposed on an immigration consultant concerning the alleged incompetence. “The wisdom of hindsight has no place in this assessment”: *GBD, supra* at para 27. This is usually established by expert evidence. Given that none is presented here, the alleged incompetence must be obvious. In addition, the Applicant must demonstrate that there is a reasonable probability that the result of the original hearing would have been different, otherwise the claim must be rejected: *Yang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1189 at para 21.

[25] The Applicant has met the requirement to complain to the consultant's governing body. His consultant has not responded. Nevertheless, the RAD concluded that the consultant's conduct fell within the wide range of reasonable professional assistance, citing paragraph 27 of *GDB.*

[26] With respect to the RAD's conclusions, the Court finds that the RAD may rely on the Applicant's signed acknowledgment in the Basis of Claim [BOC] form as "complete true and accurate", as well the interpreter's declaration that the entire content of the form and all attached documents were translated to him.

[27] Similarly, concerning the BOC, the RAD may rely upon the Applicant's acknowledgment before the RPD stemming from his solemn affirmation that his BOC was complete, true and accurate. The Applicant has also not convinced the Court that the RAD's finding that the BOC was substantially completed was not correct, or that his former consultant did not adequately advise him in the preparation of the form when it was interpreted to him. It is noted that the Applicant is well-educated, understands some English and that his consultant spoke the Applicant's language. Similarly with respect to any issue of the omission of ISIS as an agent of persecution, the Applicant's affidavit acknowledges that his former consultant told him to put it in his BOC, yet he failed to indicate that ISIS was one of the agents of his alleged persecution. It turned out, in any event, that he explained away this omission.

[28] No incompetence is apparent on the part of the Applicant's consultant by him allegedly failing to instruct the Applicant to provide a detailed list of documents when directing him to

collect any documents he could for his case. There was also documentation supporting the Applicant's case before the RPD. This included country conditions documentation from the UNHCR and other relevant documentation from a former colleague at the airport who the Applicant alleged was in a similar situation to his own.

[29] Moreover, the Court finds that the Applicant's criticism that his consultant was incompetent in not advising him to provide documents concerning his parents and siblings fleeing Iraq to Turkey and Jordan is ingenuous. This would have constituted a serious misrepresentation, as his family members never fled Iraq. In summary, the Court finds no error in the RAD concluding that the Applicant failed to establish that his former consultant's conduct fell outside the wide range of reasonable professional assistance.

C. *Credibility Analysis*

[30] The Applicant submits that the RAD found that the RPD had erred in three of its credibility findings, but then erred in its own credibility analysis by misunderstanding and/or misrepresenting the evidence, relying on inconsistencies which were not supported by the evidence, ignoring or unreasonably giving little weight to evidence and ignoring reasonable explanations while making plausibility findings based on a microscopic analysis and non-existent inconsistencies. The Court disagrees with these submissions.

[31] The RAD considered in detail the Applicant's various submissions challenging the credibility findings of the RPD. On some the RAD agreed with the Applicant, such as criticisms

for the omission of ISIS from his BOC and that his neighborhood was targeted and the answer given to a question from the RPD which was not sufficiently specific with respect to a random mugging. Otherwise the RAD upheld the RPD on the remainder of its numerous negative credibility findings regarding the Applicant.

[32] These included such matters as omitting to mention being targeted once or twice a week because it was a Sunni neighborhood; failing to mention that he received a call from an unidentified person who wanted to gain access to the airport for terrorism purposes; his decision not to report the call to his supervisor because he was Shia, which itself was not credible in implying that his supervisor would condone an act of terrorism; that the description of the call was too vague to be reliable, particularly in only mentioning that it was for a nefarious purpose, and then only after the RPD member questioned him about it; omitting to mention an important colleague in his BOC, although allegedly in a similar situation, who left work for that reason, and the implausible conclusion that he could have forgotten about this colleague, while mentioning other employees working with him; and significantly alleging incompetence against his former consultant for not obtaining letters from his family to establish they had fled Iraq to Turkey and Jordan, when the RPD found on the balance of probabilities that the family did not flee Iraq.

[33] The Court finds no basis to claim that the RAD erred by misunderstanding or misrepresenting the evidence before it, or by engaging in a microscopic analysis in upholding the RPD with respect to these findings. Indeed, the Applicant enters into a form of microscopic review of the evidence, in effect asking the Court to reweigh the evidence.

[34] The RAD also did not err in giving little weight to evidence contained in letters introduced during the RAD, which were not sworn. In particular, for an out-of-court statement that could be drawn up by anyone, authentication of the document as being the sworn testimony from the person identified as its author is a first prerequisite for its admissibility, and certainly a sufficient ground to diminish the document's weight. It is not apparent in any event, that admitting the friend's statement would have impacted on the credibility findings given that the negative credibility conclusion was founded on numerous factors. That the author of the statement in question was the same "similarly situated" person that the Applicant failed to mention in his BOC in the first place, is another factor undermining the weight of the statement.

[35] The Applicant also argues that the RAD erred in its credibility finding based upon its own examination of the transcript, and in doing so, breached natural justice principles by not offering an opportunity to reply. The Court disagrees. Implicit in the RAD's jurisdiction to reconsider credibility is its requirement to draw its own conclusions from the evidence, which may be taken from a transcript of the proceedings. Indeed, this happens often with decision-makers, who upon examining questions and answers on a transcript, note obvious inconsistencies that defy a rational explanation. The Court does not find that any of the ancillary findings made in the one paragraph by the RAD were of the type that could not be drawn from the transcript without the need to provide the Applicant with an opportunity to respond.

[36] The Court rejects the Applicant's argument that the RPD and the RAD made erroneous findings for his lack of credibility in his testimony.

D. *Oral Hearing*

[37] Although the Applicant did not specifically request an oral hearing, the RAD nevertheless considered whether one was appropriate. It properly instructed itself as being required to hold a hearing if new evidence raised a serious issue with respect to the credibility of the person who is the subject of the appeal, was central to the decision with respect to the refugee protection claim, and, if accepted, would justify allowing or rejecting the refugee protection claim.

[38] The Applicant argues that the failures of his former consultant to stress the importance of documents, where credibility findings were largely based on omissions or lack of evidence and where the RAD accepted these new documents, should have been grounds for holding an oral hearing. Given that the RAD rejected the contention that the Applicant's former consultant was incompetent, while concluding that the new documents were of little weight, and that it found pursuant to its own analysis that the Applicant was not credible, there is no basis to uphold the argument that an oral hearing should have been accorded.

JUDGMENT in IMM 3887-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question for certification was proposed and none is certified.

3. The style of cause is amended to reflect the correct Respondent, the Minister of Citizenship and Immigration.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3887-17
STYLE OF CAUSE:	MAHMOOD SAED FAEQ AL-ABAYECHI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	MARCH 6, 2018
JUDGMENT AND REASONS:	ANNIS J.
DATED:	APRIL 9, 2018

APPEARANCES:

Aleksandr Radin	FOR THE APPLICANT
Alex Kam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Radin Law LLP Barrister & Solicitor Toronto (ON)	FOR THE APPLICANT
Attorney General of Canada	FOR THE RESPONDENT