

Federal Court



Cour fédérale

Date: 20190111

Docket: IMM-2287-18

Citation: 2019 FC 30

Ottawa, Ontario, January 11, 2019

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

FARHAN AZFAR BUTT

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. PROCEEDING

[1] This application is for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated April 23, 2018 [the Decision] in which the RAD confirmed a decision of the Refugee Protection Division [RPD], which held that the Applicant is neither a Convention Refugee or a person in need of protection. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001,

c 27 [the *IRPA*]. The Applicant seeks an order sending the matter back to the RAD for redetermination.

II. BACKGROUND

[2] The Applicant is a twenty-two year old citizen of Pakistan. He claimed protection under s. 97 of the *IRPA*. His claim is based on having witnessed the murder [the Murder] of his sister, Rabia Yasin [Sister] by her brother-in-law Muhammad Asghar [Asghar]. She was murdered because on her return to Pakistan from London, she refused to relinquish her passport and airline tickets to members of her husband's family.

[3] The Murder occurred on April 4, 2012. The Applicant alleged that he witnessed it, along with his uncle Humayoun Fazir ur Rasool [the Uncle] and several of his Sister's husband's relatives. After the Murder, Asghar escaped, but members of his family were arrested and charged in connection with the Murder.

[4] The Applicant alleged that he and his family went to the United Arab Emirates [UAE] in June 2012 in order to flee from Asghar who threatened them to keep them from speaking about the Murder and from participating in the trial of his family members [the Trial].

[5] The Applicant returned to Pakistan on three occasions, in 2014, 2015 and 2016, in order to testify at the Trial. The Applicant alleged that in 2013, Asghar also fled to the UAE and he threatened the Applicant's family there. Asghar is still at large today.

[6] In his Basis of Claim Form [BOC], the Applicant states that he attempted to go to England and the USA to seek refugee status, before eventually arriving in Canada on September 16, 2016.

III. DECISION OF THE RPD

[7] In a decision dated March 24, 2017, a Member of the RPD rejected the Applicant's claim on the basis of credibility. The Member found that his testimony was vague and inconsistent, and on multiple occasions, he was unable to provide detailed answers to questions about his allegations. For example, he stated that Asghar threatened his family, but could not say when the threats were made or what was said. Further, his BOC said that his parents had been threatened, but in his testimony he stated that no such threats had been made. The Applicant also testified that he had not had contact with his Uncle since coming to Canada, but later said that he had spoken with him twice.

[8] Lastly, there were two significant omissions from his BOC which are discussed below in the context of the RAD Decision.

[9] The RPD acknowledged that Asghar had murdered the Applicant's Sister. However, the RPD did not believe that the Applicant was being sought by Asghar because he had witnessed the Murder and participated in the Trial. In other words, the RPD did not accept that Asghar was an agent of persecution. As well, the RPD did not believe the Applicant's testimony that his Uncle had been attacked at his place of business on the day before the RPD hearing [the Attack].

IV. DECISION OF THE RAD

A. *New Evidence*

[10] The Applicant submitted two new pieces of evidence with his appeal record. They were an affidavit from the Applicant's father, Muhammad Zafar Iqbal Butt, dated May 23, 2017 and an affidavit from his Uncle, dated May 20, 2017.

[11] The RAD did not accept this evidence. It found that although the affidavits were dated after the RPD decision, they contained no new information.

[12] The Applicant also submitted additional new evidence pursuant to RAD Rules 29(2) and 37. The RAD described it as follows:

- Item 1 Affidavit from the Uncle dated May 20, 2017;
- Item 2 Affidavit of the Uncle dated August 8, 2017;
- Item 3 Death report for the Sister dated April 4, 2012;
- Item 4 Police complaint made by the Uncle regarding the Attack on March 2, 2017;
- Item 5 Warrant of arrest for Sister's murderer, dated July 20, 2012;
- Item 6 Warrant of arrest dated April 26, 2012;
- Item 7 Warrant of arrest dated July 20, 2012;
- Item 8 Police complaint filed by the Uncle on June 6, 2012;
- Item 9 Certified true copy of the trial record *The State v. Akbar* etc.;
- Item 10 Judgement in the above case; and
- Item 11 *The State v Akbar*, further trial documents.

[13] The RAD accepted the following items: the Affidavit of the Uncle dated May 20, 2017 (Item 1), the Affidavit of the Uncle dated August 8, 2017 (Item 2), and the Police Complaint regarding the Attack on the Uncle (Item 4).

[14] The RAD rejected items 3 and 5 to 11 [the Excluded Evidence]. Regarding the Sister's death report (Item 3), dated April 4, 2012, the RAD said:

This item is six years old. I have read no reasonable explanation as to why it was not presented at the hearing. I understand that the Appellant had some difficulty obtaining this document; however, he had five years between the time he fled Pakistan to the point of his refugee hearing. During those five years, the Appellant returned to Pakistan at least three times for as long as two months on one occasion, giving him ample opportunity to obtain all the documents produced up until that time. The Appellant had fled Pakistan in fear for his life yet apparently did nothing to prepare for an eventual claim for refugee protection. He apparently took refuge in the United Arab Emirates (UAE) in 2012-2013 but did not apply for protection. As the Appellant was physically able to obtain this document at any time after 2012, but did not, I find that this item is not new and is therefore dismissed.

[15] The RAD provided the same reason for rejecting items 5 to 11. The RAD said "I have insufficient reasonable explanations before me as to why these documents were not obtained years ago in support of a refugee claimant that the Appellant must have known he would one day make, as he had already fled Pakistan to seek refuge in the UAE by 2012."

[16] The RAD addressed the Applicant's explanation that he made attempts to get the Excluded Evidence by contacting relatives and his lawyer in Pakistan, but was unable to obtain them until very recently. The RAD said that this explanation might have been reasonable if the Applicant had just recently fled Pakistan, but that he "had ample opportunity in the five years between his initial flight and the RPD hearing during which time he spent a total of almost 5 months over three return visits in Pakistan, time during which he could have personally obtained evidence for his future refugee claim wherever he decided to make it."

[17] In my view, this conclusion was unreasonable in view of the Applicant's age. He was 16 when he fled Pakistan with his family, and 18, 19 and 20 years of age when he returned for the

Trial. I think it was unreasonable to conclude that a teenager should have had the understanding and foresight to realize that he should have been assembling documents for a refugee claim which might be required in the future.

[18] In view of this conclusion, the issue is whether the RPD made a material error when it refused to accept the Excluded Evidence.

B. *The Merits of the Appeal*

[19] The RAD accepted that the Applicant and his Uncle were witnesses to the Murder in the sense that they heard the shots and thereafter saw Asghar holding a gun.

[20] The RAD noted that the RPD had found many inconsistencies and omissions in the Applicant's evidence. In particular, the RAD noted two omissions from the BOC narrative. First, the Applicant testified that during the Trial he was intercepted by Asghar's associates after leaving the court. However, there was no mention of this incident in his BOC. Second, the Applicant testified that he would not be able to secure police protection because Asghar was a member of a political party. This fact was also omitted from the BOC. Further, when asked at the RPD hearing, the Applicant was unable to name the political party in question.

[21] The RAD addressed the Applicant's explanation that the contradictions and omissions were caused by his nervousness. The Applicant also explained in his affidavit that he was very upset and nervous when he came to Canada following the Murder and the recent threats to his life.

[22] The RAD found that the explanation that he was nervous did not account for the omissions in his BOC narrative. The RAD said:

The narrative was presumably completed with the aid of counsel and in a non-stressful environment where there was no urgency to answer the questions, under the pressure of a hearing room. The narrative was prepared five years after the murder the Appellant's sister and even though the writing of such document may well bring back sad memories, the Appellant had the time and the means to relax and to think about what it was he was writing.

I agree with counsel that there are pressures on refugee claimants in the hearing room and one as young (21 years old) as the Appellant, alone in a foreign land, may well feel the pressure enough as to cause memory lapses; however, that does not explain the omissions and more in the BOC which was not done in the pressure cooker of a hearing room. Even as I consider the errors made by the Appellant at his hearing as honest mistakes, that does not overcome the credibility concerns with the BOC narrative and other testimonial errors.

[23] Further, the RAD did not accept the Applicant's submission that some of the inconsistencies were the result of interpretation errors made during the preparation of the BOC. The RAD noted that the interpreter in this case was presumably hired by counsel, who had the Applicant's best interests in mind. Further, the RAD noted that the Applicant signed Declarations A and B in the BOC, agreeing that he is able to read English and that the entire content of the BOC and narrative had been read back and interpreted for him.

[24] The RAD rejected the Applicant's argument that the new evidence from the Uncle substantiated the Applicant's case. The RAD found that the evidence only proved that the Uncle had been the victim of the Attack and that he had reported that crime to the police. The RAD found that the Uncle and the Applicant were speculating that the attacker was somehow related to Asghar.

[25] The RAD found that the RPD's negative credibility findings were not microscopic, as alleged by the Applicant, but related to the core complaint. It accepted that the RPD made minor errors, but found that they "were not significant enough to mitigate the totality of the credibility issues."

[26] Accordingly, the RAD dismissed the appeal.

V. THE ISSUES

- i. Is the Excluded Evidence material because it establishes the profiles of the Applicant and his Uncle?
- ii. Once the RAD concluded that the Applicant had witnessed the Murder and had testified at the Trial and was therefore at risk, should he have been accepted as a refugee notwithstanding the credibility concerns?
- iii. Was it unreasonable of the RAD to describe the Attack as a robbery?
- iv. Was it unreasonable of the RAD not to criticize the RPD for finding that the Applicant had tried to mislead the RPD?
- v. Was it unreasonable of the RAD to reject the possibility of interpretation errors?

VI. DISCUSSION

A. *Issue i*

[27] The Applicant submits that the Excluded Evidence is material because it reinforces the Applicant's profile as a witness to his Sister's Murder and his visibility as a witness at the Trial.

It also shows the involvement of the Uncle. However, I have not been persuaded by this

submission. The record shows that the RAD accepted that the Applicant was present when his Sister was murdered and that he returned to Pakistan three times for a total of five months to testify at the Trial. In these circumstances, I do not agree that the Excluded Evidence would have added to the RAD's understanding of the Applicant's role.

[28] Based on the BOC narrative and the Applicant's Affidavit at page 127 of the Certified Tribunal Record [CTR] and the Uncle's Affidavits at pages 119 and 120 of the CTR, I am satisfied that the Uncle's profile as a witness to the Murder, as the Complainant about the Murder and as a witness at the Trial were also known to the RAD. Accordingly, the documents about the Trial were not material in the sense that they were needed to educate the RAD about the Uncle's profile.

B. *Issue ii*

[29] The Applicant also submits that given that the RAD accepted that he had been present at the Murder and had testified at the Trial, it was unreasonable of the RAD to reject his refugee claim because the RAD accepted that he was at risk. In my view, this submission is not supported by the Decision. The RAD did not conclude that the Applicant was at risk at the hands of Asghar. Instead it declined to disturb the RPD's findings which included the following at paragraph 25 of the RPD's decision:

However, given the noted omissions and contradictions, which could not be explained, the panel does not believe that the claimant was being sought by Asghar because he witnessed the murder and, consequently, it does not believe his alleged fears.

C. *Issue iii*

[30] The evidence showed that the Attack occurred at the Uncle's place of business at night and that the shooter was riding a motorcycle. The Uncle was unable to identify the attacker and

so he was described as a “Person Unknown.” I agree with the Applicant’s submission that it was unreasonable of the RAD to describe the Attack as a possible robbery when it appears to have been a targeted attempt to shoot the Uncle. However, in my view, this error is not material. The important point was that there was nothing to directly link the attacker to Asghar.

D. *Issue iv*

[31] The RPD criticized the Applicant because it believed that the evidence of the Attack was untrue and was meant to mislead [the Finding]. The RAD, on the other hand, accepted that the Attack had occurred but did not criticize the RPD for its Finding. The Applicant says that it was unreasonable of the RAD not to appreciate the fact the RPD’s decision was largely based on the Finding.

[32] Again, I am not able to accept this submission because it is clear from paragraph 31 of the RPD’s decision that it had already rejected the Applicant’s allegations of fear before it turned its mind to the Attack. The RPD said:

Since the panel does not believe the claimant’s allegation of fear, it also does not believe the claimant’s latest statements and is of the opinion that the claimant attempted to mislead the panel by adding those elements in order to support his refugee protection claim.

[33] Further, it would not have been appropriate for the RAD to admonish the RPD in circumstances in which the RAD reached a different conclusion based on the new evidence in the Uncle’s Affidavit and the Police Complaint (items 1 and 4, *supra* para 12).

E. *Issue v*

[34] Lastly, I have concluded that the RAD reasonably rejected the Applicant’s allegation that there were interpretation errors in his BOC. The RAD noted that the Applicant can read English

and that the narrative was read back to him and interpreted for him. In these circumstances, it does not make sense that an error on an important subject such as threats to his parents would appear in the signed version of the BOC.

VII. CERTIFIED QUESTION

[35] No question was posed for certification for appeal.

VIII. CONCLUSION

[36] For all these reasons, the application for judicial review will be dismissed.

JUDGMENT IN IMM-2287-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct Respondent; and
2. The application for judicial review is hereby dismissed.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2287-18

STYLE OF CAUSE: FARHAN AZFAR BUTT v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 13, 2018

JUDGMENT AND REASONS: SIMPSON J.

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