Federal Court  Cour fédérale

Date: 20190321

Docket: IMM-1047-18

Citation: 2019 FC 350

Ottawa, Ontario, March 21, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MOHAMMADREZA DAVOODABADI

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The respondent, Mohammadreza Davoodabadi, is a citizen of Iran who has sought refugee protection in Canada. He claims that he fears persecution in Iran because he converted to Christianity. He alleges that he is wanted by Iranian authorities because he was present when an illegal house church in Tehran was raided in May 2015. He also maintains that his continuing

adherence to Christianity while he has been in Canada places him at further risk of persecution should he return to Iran.

[2] The respondent arrived in Canada from Iran in December 2015 and claimed refugee protection at that time. He submitted his Basis of Claim [BOC] form in January 2016. His hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] took place on April 26, 2016, and March 24, 2017.

[3] In detailed written reasons released on April 4, 2017, the RPD rejected the respondent's claim for protection on credibility grounds. The RPD disbelieved the respondent's allegation that he had converted to Christianity in Iran, that he had to go into hiding there, and that he fled to Canada because his conversion had been discovered by the authorities. The RPD also disbelieved the respondent's claim that he has been a genuine adherent to Christianity while he has been in Canada. The RPD also found that, in any event, there was no evidence that the Iranian government would be aware of the respondent's involvement with Christianity in Canada. The RPD therefore concluded that the respondent was neither a Convention refugee nor a person in need of protection.

[4] By Notice of Appeal dated April 24, 2017, the respondent appealed this decision to the Refugee Appeal Division [RAD] of the IRB. In support of his appeal, the respondent presented a number of documents that were not before the RPD. They included two letters from Tom Mayvaian, the pastor of the church the respondent attended in Toronto, and a letter from a

friend, Amir Heidarian, who attended the same church. The respondent requested an oral hearing before the RAD.

[5] In October 2017, the RAD member seized with the respondent's appeal granted the request for an oral hearing. According to the List of Issues provided by the RAD, the hearing would be restricted to the "truthfulness of the contents" of the two new letters from Mr. Mayvaian and the letter from Mr. Heidarian. The RAD also stated that the oral testimony of Mr. Mayvaian and Mr. Heidarian was required.

[6] The hearing was held on February 8, 2018. Both Mr. Mayvaian and Mr. Heidarian attended. The RAD member explained that the purpose of the hearing was to "determine the facts" that were presented in the new documents the respondent had filed. Specifically, the member wanted to obtain more information with respect to the witnesses' knowledge of the respondent's conversion to Christianity. In the end, only Mr. Mayvaian was called to testify. After his evidence was completed, the member explained to Mr. Heidarian that it was not necessary hear from him because the member had "all the information [he needed] from the testimony of the pastor." The hearing was then adjourned.

[7] For written reasons dated February 13, 2018, the RAD allowed the respondent's appeal, set aside the determination of the RPD, and found that the respondent is a Convention refugee. The entirety of the RAD's reasons on the merits of the appeal are the following:

> [20] The RPD concluded that the Appellant was not a credible witness with respect to his identity as a Christian convert.
>
> [21] On February 8, 2017 [*sic*], the RAD held a hearing to determine the veracity of the facts as presented in the new

> evidence. In particular, the RAD summoned as witnesses, Pastor Tom Mayvaian and Mr. Heidarian. At the hearing, Pastor Mayvaian provided oral evidence. After listening to the testimony of Pastor Mayvaian, the RAD concludes that the Appellant is a credible witness with respect to his conversion to Christianity. The RAD is satisfied that if the Appellant were to return to Iran, he would be persecuted on account of his conversion to Christianity.
>
> [22] Based on the new evidence, the RAD will substitute the decision of the RPD.

[8] The Minister of Citizenship and Immigration has applied for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Minister submits that the RAD failed to provide meaningful reasons for allowing the appeal. In particular, the Minister submits that the RAD failed to provide any explanation for why it found the new evidence admissible, why it found the respondent's conversion to Christianity credible, or why Mr. Mayvaian's evidence warranted overlooking the numerous issues raised by the RPD concerning the respondent's credibility.

[9] For reasons I will develop below, in my view the RAD's decision is unreasonable because it does not explain why the new evidence was admitted. This is a sufficient basis to set aside the decision and order a new hearing. As a result, it is not necessary to address the other deficiencies in the decision alleged by the Minister.

II. STANDARD OF REVIEW

[10] The RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*,

2016 FCA 93 at para 35 [*Huruglica*]). This standard applies to, among other things, the RAD's assessment of the admissibility of new evidence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*]). The reviewing court does not decide whether the new evidence is admissible but only whether the RAD's determination is reasonable.

[11] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). That is to say, the reviewing court must look at both the outcome and the reasons that are given for that outcome (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 27 [*Delta Air Lines*]). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland and Labrador Nurses*]). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

III. BACKGROUND

[12] In view of the disposition of this application, it is not necessary to set out the basis of the respondent's claim for protection in any greater detail than has already been done above. Rather, the focus will be on the evidence the respondent presented to support his position, first at the RPD, and then on appeal to the RAD.

A. *Documentary Evidence Presented to the RPD by the Respondent*

[13] The respondent presented a number of items of documentary evidence pertaining to his specific circumstances to the RPD:

- Two notices (one dated December 24, 2015; the other dated February 2, 2016) directing the respondent to attend before officials in Iran for questioning.

- An email from the respondent's friend Ali Najafi dated February 2, 2016. The email described a trip the respondent and Mr. Najafi took together to Armenia. On this trip, the respondent had taken an interest in Christianity. He returned to Iran with a Bible and a cross pendant he had purchased.

- An email from the respondent's friend Saeed Rabiei dated February 3, 2016. The email described efforts Mr. Rabiei had made on the respondent's behalf attempting to locate the person who the respondent claimed had helped introduce him to Christianity and to the house church in Tehran.

- An email from the respondent's uncle Hamidreza Davoodabadi dated February 2, 2016. In the email, the respondent's uncle described the steps he took to assist the respondent to leave Iran for Canada after the uncle learned the authorities were looking for the respondent, including arranging to have a third party apply for a Canadian visitor's visa for the respondent.

- A letter from Dr. Mostafa Showraki dated March 7, 2016, reporting the results of an assessment conducted of the respondent by Dr. Showraki that day.

- A letter from Siamak Shafti-Keramat, the pastor of the Spirit of Truth Church in Willowdale, dated February 17, 2016. The letter stated that the respondent had been attending services at the church since January 2016.

- A letter from Reverend Sam Nasser of the Mohabat Alliance Church dated April 24, 2016. The letter stated that the respondent has been attending the church since February 14, 2016, and that he was baptized there on April 17, 2016.

- A letter from Tom Mayvaian, the pastor of the Mohabat Alliance Church in Toronto, dated March 18, 2017. The letter stated that the respondent had been attending the church since February 14, 2016, and that he had been baptised there on April 17, 2016. The letter also stated that the respondent had participated in prayer meetings and Bible studies there and he volunteered regularly to assist at Sunday services. Mr. Mayvaian added: "As a very well-mannered young man in today's society who has given his heart to Christ, Mohammad is fully aware of the consequences of his decision in this regard. He is a very hard-working and goal-oriented person, and strives to learn more about the Word of God through the study of the Bible in order to live a better Christian life."

- A Certificate of Baptism in the respondent's name dated April 17, 2016.

- The program from the April 17, 2016, baptism service.

B. *New Documentary Evidence Presented to the RAD by the Respondent*

[14] In support of his appeal to the RAD, the respondent tendered the following documents that were not before the RPD:

- Copies of U.S. Passports and Certificates of Naturalization for the respondent's parents; a copy of a U.S. Permanent Resident Card for the respondent's brother; copies of Florida Driver's Licenses for the respondent's parents and his brother; and a copy of a U.S. Petition for an Alien Relative pertaining to the respondent.

- A letter from the respondent's father dated May 10, 2017, stating that he and his wife had left Iran in September 2007 and had lived in the United States since then. The letter also provided the addresses at which the respondent had lived in Iran. The respondent's father added: "I'm truly sad, I cannot see my son go back to Iran, they will hang him and kill him and his life will be in danger."

- A letter from the respondent's uncle Hamidreza Davoodabadi dated April 21, 2017. The letter provided further information concerning he had assisted the respondent to leave Iran. Among other things, the respondent's uncle stated: "I arrange all of his application form for his visiting visa by myself and I did not notify him about that."

- A letter from Nasrin Sharifi, the respondent's aunt, stating that the respondent had lived at her summer cottage from May to December 2015.

- A letter from Tom Mayvaian, pastor of the Mohabat Alliance Church, dated May 3, 2017. The letter reiterated much of the content of his earlier letter of March 18, 2017, although it was now expressed as information Mr. Mayvaian had received from others.
  Mr. Mayvaian added that it had been confirmed to him that the respondent had participated in the meetings of the men's group at the church in 2017 and that he volunteers not only at Sunday services but at other events and willingly serves in any capacity which may be required at the church. Mr. Mayvaian also stated: "I was also informed that Mohammad's thirst to learn and grow in his Christian faith was very evidence from the beginning of his attendance at [Mohabat Alliance Church]. He has also engaged in many conversations with our church leaders to have many of his questions answered. Mohammad is a very eager and ambitious person and has a plan for his future and he is a very hard working person."

- Another letter from Mr. Mayvaian, this one dated May 8, 2017. Mr. Mayvaian explained that he had written this additional letter in his personal capacity to respond to the RPD's decision regarding the respondent. Referring to the RPD's reasons by paragraph number, Mr. Mayvaian set out why he disagreed with many of the member's findings, often citing his own personal experiences with the respondent and other information of which he was aware in support of his position.

- A letter from Reverend Timothy Quek, PhD, lead pastor at North Toronto Chinese Alliance Church, dated May 13, 2017. Reverend Quek stated that Reverend Sam Nasser was a member of his congregation. Prior to joining his congregation, Reverend Nasser was the senior pastor of Mohabat Alliance Church. Reverend Quek also stated that

Reverend Nasser had confirmed to him that he had baptized the respondent on April 17, 2016.

- A letter from the respondent's friend Amir Heidarian dated May 14, 2017. In the letter, Mr. Heidarian explained why he, the respondent, and others had left the Spirt of True [*sic*] Church and decided to attend the Mohabat Alliance Church instead.

C. *Evidence Adduced at the February 8, 2018, Hearing*

[15] As a result of the decision by the RAD to conduct a hearing on February 8, 2018, additional evidence was adduced from Mr. Mayvaian in the form of *viva voce* testimony. At the member's invitation, counsel for the respondent conducted the initial examination. The member then asked a few follow-up questions.

[16] The member indicated that he was mainly concerned with Mr. Mayvaian's letter of May 3, 2017, because it did not appear to be based on first-hand information. Mr. Mayvaian testified that he began working at the church in January 2017 so anything in the letter relating to events prior to that was based on information provided to him by members of the church board. Anything relating to events after that time was based on his own experiences with the respondent.

[17] In response to questions put to him, Mr. Mayvaian also offered the opinion that the respondent's conversion to Christianity was genuine, and he explained why he was of that view.

IV. ANALYSIS

[18] As I stated at the outset, the failure of the RAD to explain why it admitted the new evidence tendered by the respondent is determinative of this application.

[19] The admissibility of new evidence on an appeal to the RAD is governed by subsection 110(4) of the *IRPA*. This provision states:

110(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.	110(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.

[20] The RAD must apply this test when determining whether or not to admit new evidence presented by the person who is the subject of the appeal (*Singh* at paras 34-35). It has no discretion to disregard these criteria (*Singh* at para 63). The only time they do not apply is when the person who is the subject of the appeal presents evidence in response to evidence presented by the Minister (see *IRPA*, subsection 110(5)). The factors discussed in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13-14 [*Raza*] (credibility, relevance, newness, and materiality) are also applicable, although they must be adapted to the context of a RAD appeal (*Singh* at paras 44-49).

[21] Subsection 110(3) of the *IRPA* expressly provides that generally an appeal to the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division." Subsection 110(4) creates an exception to this general rule (as does subsection 110(6), which permits the RAD to hold a hearing provided certain preconditions are met). As the Federal Court of Appeal explained in *Singh*, the existence of criteria governing the admissibility of new evidence on appeal helps to preserve the integrity of the judicial process by promoting finality with respect to the factual record at the first level of decision-making (with very limited exceptions) and encouraging the narrowing of issues as matters move up the appellate ladder (*Singh* at paras 43 and 50).

[22] The RAD conducts an appeal of the RPD's decision. It reviews the RPD's findings on the standard of correctness, although it may defer to the RPD on credibility findings "where the RPD enjoys a meaningful advantage" (*Huruglica* at para 70). The RAD has a broad mandate to intervene to correct any error of fact, law, or mixed fact and law made by the RPD (*Huruglica* at paras 78 and 103). Nevertheless, it is clear that generally this mandate is to be exercised on the basis of the record that was before the RPD (*Huruglica* at paras 97-98). An exception is warranted only if the requirements of subsections 110(4) or (6) of the *IRPA* are satisfied.

[23] The Minister challenges the sufficiency of the RAD's reasons for admitting the new evidence. The insufficiency of the reasons provided by an administrative decision-maker is not a stand-alone ground of judicial review (*Newfoundland and Labrador Nurses* at para 14). This is not to say, however, that a decision cannot be set aside on the basis that the decision-maker's reasons are insufficient.

[24] Giving reasons is an essential part of the decision-making process. When they are required (cf. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 43 [*Baker*]), reasons are "the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court" (*Khosa* at para 63). They serve several beneficial purposes including focusing the decision-maker on the relevant factors and evidence, providing the parties with the assurance that their representations have been considered, permitting the parties to frame potential grounds for judicial review, and permitting a reviewing court to determine whether the decision-maker erred (*Baker* at para 39; *VIA Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25 at paras 17-19 (FCA)). Insufficient reasons undermine a reviewing court's ability to discharge its fundamentally important responsibility of upholding the rule of law by ensuring the lawfulness of the decision. In terms of review for *Dunsmuir* reasonableness, insufficient reasons can leave the court unable to understand why the decision was made or unable to determine whether the result falls within the range of acceptable outcomes on the facts and the law.

[25] It is well-established that these principles apply to the RPD: see, for example, *Canada (Citizenship and Immigration) v Mokono*, 2005 FC 1331 at paras 13-15; *Canada (Citizenship and Immigration) v Shwaba*, 2007 FC 80 at paras 10-16; and *Canada (Citizenship and Immigration) v Balogh*, 2014 FC 932 at para 36. There can be no question that they apply equally to the RAD: see, for example, *Kotai v Canada (Citizenship and Immigration)*, 2018 FC 678 at paras 14-19. I would also suggest that these principles apply not only to the ultimate result but also to rulings on the admissibility of evidence, particularly when, as in the present case, the ultimate result is so closely connected to the admissibility determination.

[26] The *IRPA* stipulates that the RAD must give reasons for its final decisions (subsection 169(b)). In fact, it must give written reasons (*IRPA*, subsection 169(c)). The RAD's reasons do not need to be perfect or exhaustive but they must say enough to permit the parties to understand why the result was reached, to allow the parties to make an informed decision about whether or not to seek judicial review and, if such review is sought, to be able to meaningfully advance their respective positions. The reasons must also say enough to permit a reviewing court to determine whether the decision meets the minimum standards of legality as framed by section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 and (at least for the time being) by *Dunsmuir* (*Newfoundland and Labrador Nurses* at para 16; *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 46).

[27] The respondent submits that the RAD's reasons in this case are "sufficiently clear, precise and intelligible." I cannot agree. They are effectively non-existent on the critical question of why the member concluded that the test for admitting new evidence was met. I have already set out the entirety of the RAD's reasons on the merits of the appeal (see para 7, above). For the most part, the balance of the reasons (specifically, paragraphs 6 to 19 of the reasons) simply recites in generic terms the test for admitting new evidence in an appeal to the RAD. The member certainly appears to have understood the test correctly. The problem is that his reasons tell us nothing about how he applied this test to the new evidence the respondent presented.

[28] Counsel for the respondent provided the RAD with written submissions addressing the admissibility of the new documentary evidence. The RAD member notes in his reasons that the onus is on the respondent to make "full and detailed submissions in his Memorandum about how

any proposed new evidence meets the requirements of Section 110(4) and how that evidence relates to the Appellant" (citing subsection 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257) but he does not mention the respondent's actual submissions. Even making the bold assumption for the sake of argument that the member admitted the evidence because he agreed with those submissions, this does not help to resolve the issue of why the evidence was admitted.

[29] For example, in its decision, the RPD had emphasized a number of discrepancies between information in the visitor's visa application (e.g. that the respondent's parents lived in Iran, that the respondent was married, and that he had two children) and the information the respondent provided in his BOC. The respondent acknowledged that many details in the visa application were false but he claimed that his uncle had made all the arrangements for the application and he had simply signed the completed application when it was presented to him. Where the respondent's parents lived was a material issue because the respondent claimed that the personal difficulties he experienced after his parents moved to the United States in 2007 contributed to his decision to convert to Christianity. The RPD member found that the respondent had not sufficiently explained the discrepancies between the visa application and the BOC and drew a negative inference from these inconsistencies.

[30] The respondent presented several items of new documentary evidence to establish that his parents in fact reside in Florida, as he stated in his BOC. In support of the admissibility of this evidence, the respondent submitted to the RAD that he could not reasonably have expected the

RPD to place more weight on the information in the visitor visa application than the information in his BOC. It is far from obvious to me that this is the case.

[31] The visitor visa application was not disclosed to the respondent until shortly after the first day of the RPD hearing but he would have been on notice about the discrepancies between the information there and the information in his BOC when the hearing resumed nearly a year later. It is certainly arguable that by the conclusion of the second day of the hearing, the respondent would have known that this was an issue. In its reasons, the RPD observed that

> it would be reasonably available to the claimant to provide some evidence of his family relations and where they were, especially if they were as close as the U.S., a country where they could freely and without concern for their safety provide such evidence. When asked, the claimant indicated that this would be available but he had not sought to obtain it. While time was granted post-hearing for the provision of other documents, the claimant did not provide anything from his family nor request additional time to obtain them.

Against this backdrop, it is very much an open question whether the respondent has discharged his onus of demonstrating that he could not reasonably have obtained, or been expected to have obtained, documentation relating to where his parents lived. The RAD member's reasons do not assist us in understanding why the member answered this question in the affirmative.

[32] Similarly, the respondent submitted to the RAD that the letters he had filed were admissible because they all arose after the RPD's decision. While they were all apparently written after the RPD's decision, this is not the test (*Raza* at para 16; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at paras 15-21). The relevant question is whether their contents relate to events occurring after the hearing or not. From my review of the letters, it

appears that most of the information in them relates to events that occurred before the RPD hearing. In that case, the onus was on the respondent to show either that this information was not reasonably available to him at the time of the hearing or that he could not reasonably have been expected to present it at the hearing. Once again, it is far from obvious to me that either branch of this test is met, especially considering the evidence the respondent did see fit to put before the RPD (see para 13, above).

[33] On the present application, the respondent submits, correctly, that "courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (citing *Newfoundland and Labrador Nurses* at para 15). Unfortunately for the respondent, this exercise does not assist him. As I have attempted to demonstrate, examining the evidence against the backdrop of the record as a whole raises more questions than it answers about why the member found the evidence to be admissible. As noted above, the RAD member stated the test for admitting new evidence correctly. The problem is that, even when read against the backdrop of the entire record, the member's reasons offer no insight whatsoever into why he found that the new evidence satisfied this test. Moreover, the reasons leave me unable to determine whether the decision to admit the evidence falls within the range of reasonable outcomes.

[34] I offer no opinion one way or the other on whether any of the new evidence before the RAD is admissible. That is not my role. This will be for the RAD to determine at the new appeal if the respondent continues to rely on any or all of this evidence. The critical point for present purposes is that it is not for me to speculate as to what the RAD member might have

been thinking when he decided that the evidence was admissible (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, cited with approval in *Delta Air Lines* at para 28). There were real questions concerning the admissibility of the new evidence. In the complete absence of any explanation for why the RAD member found the new evidence presented by the respondent to be admissible, the decision lacks justification, transparency and intelligibility. It is unreasonable and must be set aside.

V. CONCLUSION

[35] I realize that this result will be profoundly disappointing for the respondent. I also realize that, as a result of this decision, the respondent will lose the refugee status that had been recognized by the RAD, at least for the time being. This is something that cannot be taken lightly. However, the member's decision is so flawed that there can be no other outcome.

[36] The parties did not suggest any serious questions of general importance for certification under subsection 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-1047-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated February 13, 2018, is set aside and the matter is remitted for redetermination by a differently constituted panel.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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