Federal Court Cour fédérale

Date: 20190424

Docket: IMM-5125-17

Citation: 2019 FC 520

Ottawa, Ontario, April 24, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

MUHAMMAD RIAZ CHAUDHRY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of Pakistan. He was born in August 1947. He is a Shia Muslim by faith. He claims that he is at risk of persecution in Pakistan because of his religious identity and his role with a local Imam Bargah, a Shia religious study hall.

[2] The applicant's claim for refugee protection was heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] over four days beginning on November 13, 2015, and concluding on September 15, 2016. For reasons dated January 9, 2017, RPD member Natalka Cassano rejected the claim, primarily because she found that the applicant "generally was not credible and that he fabricated his allegations of persecution."

[3] The applicant appealed this decision to the Refugee Appeal Division [RAD] of the IRB. He did not file any new evidence or request a hearing before the RAD. For reasons dated November 1, 2017, the RAD dismissed the appeal and confirmed the decision of the RPD. The RAD concluded that the applicant "is not credible and that overall his allegations lack veracity."

[4] The applicant now seeks judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The applicant contends that the RAD's credibility determinations, its assessment of the documentary evidence, and its assessment of the risk the applicant faces in Pakistan are unreasonable. As well, relying on evidence that Member Cassano left the IRB at some point in early 2018 and that complaints had been made about how she had conducted other hearings, the applicant also contends that his hearing before the RPD resulted in a denial of natural justice.

[5] For the reasons that follow, I have concluded that there is no merit to any of the grounds raised by the applicant. This application for judicial review will, therefore, be dismissed.

II. STYLE OF CAUSE

[6] The applicant named Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, rule 5(2); *IRPA*, section 4(1)). The style of cause is amended accordingly.

III. BACKGROUND

[7] The applicant was a wheat farmer in Pakistan. He was also active in his local Imam Bargah. In March 2015 he was selected to serve as its financial secretary. Around the same time, he obtained a Canadian visitor visa so that he could visit his brother-in-law, who had recently been granted refugee status in Canada. The applicant states, however, that he had no intention of seeking asylum in Canada at the time.

[8] According to the applicant's narrative, his troubles began after he became financial secretary. He began receiving calls from unknown numbers threatening him about his work for the Imam Bargah. He complained to the police but nothing was done and no one was arrested. At the end of April 2015, he received a call from the Taliban in which his life was threatened. The applicant states that he reported this to a "high level police officer" in Lahore but the officer simply advised him to stop working as financial secretary and not to venture out of his house very often.

[9] The applicant states that he followed this advice. Despite this, on May 24, 2015, some "gangsters" belonging to Sipah Sahaba (a fundamentalist Sunni Muslim group) forcefully entered his house. These "hooligans" beat him along with his family members and destroyed many household items. Afterwards, the applicant "took medical first aid from the local clinic."

[10] The applicant decided to travel to Canada for a few months in the hope that after a while these "fanatics" would forget about him. He arrived in Canada on June 9, 2015. He kept in touch with his family in Pakistan over the phone. In one call, his wife informed him that at about 11:30 p.m. on July 3, 2015, two "religious fanatics" came to his house in Pakistan and asked her about him. The applicant's wife told the men he was in Canada. The men said "we know that Riaz ran away like a dog – his days are over and when we see him we will cut his neck." Before leaving, they insulted and harassed the applicant's wife "very badly."

[11] After this incident, the applicant decided to seek asylum in Canada. With the assistance of counsel and an interpreter, the applicant completed his Basis of Claim [BOC] form on August 14, 2015.

IV. DECISION UNDER REVIEW

[12] In his appeal to the RAD, the applicant submitted that the RPD erred in its findings with respect to:

- the assessment of the documentary evidence regarding the risk he faced in Pakistan;
- the applicant's identity as a high profile individual in Pakistan;
- omissions from the applicant's BOC form;

- the significance of the absence of police reports;
- the interpretation of the letter corroborating the medical attention the applicant received; and
- the analysis of the other supporting documents the applicant provided.

[13] In assessing the applicant's appeal, the RAD member instructed himself in accordance with the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] as well as the decision of the three member RAD panel in *X (Re)*, 2017 CanLII 33034 (CA IRB). That is to say, the RAD is to conduct its own analysis of the record to determine whether the RPD erred. The RAD will normally apply a standard of correctness to all the findings of the RPD. Where the RPD enjoys a meaningful advantage over the RAD in making a particular finding, the RAD may assess that finding using a standard of reasonableness, modified to suit the RAD context. Where the RAD finds that deference is warranted, it must explain how the RPD enjoyed a meaningful advantage over the RAD with respect to the finding in question. The RAD must be able to read the RPD's decision and understand how it reached the conclusions it did. The RPD's findings must be based on the evidence in the record. In determining whether this is so, the RAD must undertake an independent assessment of the evidence, which may include re-weighing that evidence as necessary. The RAD will consider the RPD's ultimate determination on a standard of correctness, even where it has deferred to the RPD on some or all of the findings upon which that determination is based.

[14] Following this approach, the RAD did not find merit in any of the grounds of appeal the applicant raised.

[15] With respect to the risk faced by Shia Muslims in Pakistan generally, the RAD member reviewed a number of country condition documents. He found that the information regarding the level of threat faced by Shia Muslims was contradictory, with one source describing the situation as "extremely serious" while another expressed the opinion that the problem is "not severe." The information demonstrated that the Shia population faces the potential of recurrent discrimination. The information also demonstrated that there had been attacks on Shia Muslims but generally either the victims had a high profile in the community or they were present when a specific location or event was attacked. Particularly considering the number of attacks relative to the size of the Shia population in Pakistan, the member determined that the applicant "will face no more than the mere possibility of persecution in Pakistan due to being a Shia Muslim and practicing his faith."

[16] The RAD member also determined that there was nothing in the applicant's individual profile that increased the risk he faced. The applicant had confirmed that he had had no difficulties when he was simply a congregant and volunteer at the Imam Bargah. His duties as financial secretary were routine and confined to assisting members of the congregation. The member concluded that the applicant's profile as the financial secretary "is not one that would cause him to be highly visible in his community beyond the immediate confines of the Imam Bargah" and that it did not align with that of individuals who had been specifically targeted.

[17] With respect to the applicant's credibility, the RAD member agreed with the RPD that this was adversely affected by the fact that the applicant had provided information in his

testimony before the RPD on a number of issues that were omitted from, or were inconsistent with, his BOC narrative. These included the identity of the alleged agents of persecution, whether the "religious fanatics" who visited his home on July 3, 2015, already knew that he had left Pakistan, and why the police had refused to assist the applicant after he reported the threats. The RAD member rejected the applicant's contentions that these matters were not central to his claim and that his testimony simply elaborated on information contained in his BOC narrative.

[18] With respect to the absence of police reports to corroborate his complaints, the RAD member found that the applicant's testimony regarding his interactions with the police lacked credibility. In fact, the member concluded after a review of all the evidence touching on this issue that, on a balance of probabilities, the applicant had not contacted the police in Pakistan regarding any of the incidents he alleged had occurred in April and May 2015.

[19] With respect to the medical care the applicant received after the incident on May 24, 2015, the applicant had stated in his BOC narrative that he had been beaten and that he "took medical first aid from the local clinic." However, a "Certificate" dated March 9, 2016, which the applicant produced to corroborate this medical treatment was on the letterhead of Nawaz Pathological Laboratory and signed by Muhammad Nawaz Natt, Senior Lab Technologist. The certificate stated that the applicant was seen at midnight on May 24, 2015, and had suffered superficial injuries to his forehead and both legs. The author stated that he provided the applicant with first aid and applied bandage. The RAD member found that the applicant's "evolving testimony about the attack, his injuries and the initial lack of a medical report is not credible. It undermines the seriousness of the alleged attack and the injuries he

received, and leads the RAD to find that the attack did not take place as alleged." Further, the member found that the letter from the pathologist "does not provide persuasive documentation to support the author's medical background and qualifications to compose a medical report concerning the Appellant's injuries or his suitability to diagnose and treat the Appellant's injuries."

[20] Finally, with respect to the other supporting documents, the RAD agreed with the RPD that they deserved little weight. Several statements from third-parties related that the applicant experienced difficulties after he became financial secretary of the Imam Bargah but none explained how the declarant learned this information. For example, Ashraf Chaudhary, a family friend of the applicant, stated that he knows the applicant "was threatened and beaten up along with his family members" but he does not say how he knows this.

[21] In her reasons, the RPD member had also expressed concerns about the illegibility of the identification accompanying the statements. The RAD member observed that while it would have been preferable for the RPD member to have raised this concern at the hearing, so that the applicant had an opportunity to meet it by filing better copies, this was not the only reason the member attributed little weight to the statements. In any event, as the RAD member also noted, the applicant could have filed better copies of the identity documents as new evidence on the appeal but did not do so. The RAD found that the RPD "conducted a thorough review of each of the supporting documents" and it "related many of its findings with these documents to credibility concerns addressed in other aspects of the hearing." The RAD member agreed with these findings.

[22] In summary, the RAD member found that the applicant "was lacking in credibility concerning the core aspects of his claim, such as his interaction with the police and his allegations of harm from fundamentalist groups in Pakistan." The member found that the applicant's evidence "was undermined by inconsistencies and discrepancies with respect to material facts and that his supporting evidence raised credibility issues." After considering all of the evidence, the member found, on a balance of probabilities, that the applicant was not targeted by fundamentalist extremists in Pakistan. Accordingly, the member concluded that the applicant is neither a Convention refugee nor a person in need of protection.

V. STANDARD OF REVIEW

[23] The RAD's determinations of factual issues and issues of mixed fact and law are reviewed by this Court on a reasonableness standard (*Huruglica* at para 35). 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). 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). 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*]).

[24] The reasonableness standard also applies to the RAD's determinations with respect to whether there was a breach of procedural fairness before the RPD (*Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 33). On the other hand, if the issue is whether there was a breach of procedural fairness before the RAD, no standard of review is engaged. Rather, the reviewing court must determine for itself whether the process the member followed satisfied the level of fairness required in all the circumstances (*Khosa* at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54).

VI. ISSUES

[25] The applicant raises a number of discrete issues concerning the RAD member's findings but the ultimate issue is whether the RAD's decision is unreasonable. In addition, the applicant contends that the hearing before the RPD breached the rules of natural justice because of the manner in which the member conducted the hearing. I will address the latter issue first and then turn to the question of whether the RAD's decision is unreasonable.

VII. ANALYSIS

A. *Did the RPD hearing breach the rules of natural justice?*

[26] Pursuant to a direction issued by Prothonotary Aalto on April 3, 2018, the applicant was permitted to file new evidence in the form of an affidavit sworn on March 13, 2018, to which are attached as exhibits two online news articles from Global News.

[27] One article, dated January 29, 2018, reports on a complaint by a lawyer, Nastaran Roushan, concerning how Member Cassano had conducted a refugee hearing on which she was counsel in April 2017. The article reports that as a result of the complaint, Member Cassano was removed from that particular matter. According to the article, the then-chairperson of the IRB stated to Ms. Roushan in a letter that the member's behaviour during the hearing resulted in a "lack of fairness," that the issue was a "serious concern" and that "appropriate measures" would be taken to ensure it did not happen again.

[28] The second article, dated March 8, 2018, reports that the IRB had confirmed that Member Cassano was no longer an employee of the IRB but would not say why this was the case. The article also reports that another complaint had been made about Member Cassano but it was not being investigated by the IRB because of Member Cassano's departure.

[29] In his affidavit, the applicant states that at his hearing Member Cassano "asked lengthy questions," "twisted" his answers, and "acted aggressively" towards him. (These complaints echo those made by Ms. Roushan as reported in the January 29, 2018 article.) The applicant also

states that the member "shocked [him] by stating on the record her belief that claimant's [*sic*] personal histories were not coming from the claimant's [*sic*] themselves but usually were prepared by the interpreter in the case."

[30] The applicant then states the following in his affidavit:

> Although the IRB has not confirmed to stakeholders that Member Cassano is no longer before the Board for reasons of incompetence, that would be a reasonable conclusion given the complaints cited in these articles. My lawyer advises me that on the Refugee Lawyers Association listserve or online chat forum, Member Cassano has been the subject of more complaints than any other IRB Member in recent memory.
>
> My refugee claim was refused because Member Cassano made negative credibility findings against me. The decision in my refugee hearing was made [by] a Board Member who it appears has been terminated by the Board for reasons of incompetence. I believe that I have been denied natural justice. I believe that I should have a new hearing before the RPD with a different member.

[31] In his written submissions, the applicant argues that "where a refugee claimant's claim has been heard and refused by a Member found to be incompetent then natural justice dictates that claimant should be entitled to a *de novo* hearing."

[32] In my view, the applicant's complaint that he was denied natural justice before the RPD is without merit. I say this for three reasons.

[33] First, the applicant did not raise this issue before the RAD. If he or his counsel had a genuine concern about the fairness of his hearing before the RPD, it would have been raised as part of the appeal to the RAD. The applicant did not need to learn about other complaints about

Member Cassano or that Member Cassano had left the IRB before he could raise this issue in challenging the RPD's decision, if so advised. I note that either Mr. Berger or his associate, Ms. Chatterji, was counsel for the applicant at the RPD, the RAD, and on the present application.

[34] Second, with respect, the applicant overstates the evidence when he submits that Member Cassano was "found to be incompetent." At its highest, the evidence demonstrates that there were sufficient problems with how Member Cassano had conducted one hearing for her to be removed from that other matter. This is obviously concerning. However, there is no evidence that there was a specific finding of "incompetence" by anyone with authority to make such a finding. In particular, we do not know whether the member's alleged incompetence is why she left the IRB or not. More to the point, even if there were serious deficiencies in how the member conducted one hearing, it does not follow from this fact alone that the member also conducted the applicant's hearing in an equally deficient way.

[35] Third, there is insufficient evidence for me to make any determination about how the member actually conducted the applicant's hearing. A transcript of that proceeding could easily have been provided but this was not done. While a recording is available, it is not for me to go through it searching for issues in the absence of any specific direction from the applicant. I give the applicant's own impressions of how the hearing was conducted no weight. His affidavit is replete with opinion, argument and legal conclusions. This should not happen (*Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 at para 18, citing *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18). It was also not appropriate for Mr. Berger to feed information to the applicant for inclusion in the affidavit in an attempt to avoid the general rule

that a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal (*Federal Courts Rules*, rule 82; *Law Society of Ontario Rules of Professional Conduct*, rule 5.2-1). At the hearing of this application, Ms. Chatterji acknowledged that the evidence in support of this ground of review was thin. In my view, it is so thin as to be non-existent.

B. *Is the RAD decision unreasonable?*

[36] The applicant raises a number of objections to the RAD member's decision. For the most part, his objections are disagreements with how the member weighed the evidence and are invitations to have me re-weigh that evidence. This is not my role. While I do have concerns about some discrete aspects of the decision, overall it meets the requirements of reasonableness under *Dunsmuir*.

[37] For example, the applicant submits that the member ignored or unreasonably discounted relevant evidence in the country condition documentation when assessing the risk he would face in Pakistan both in general as a Shia Muslim and in particular as the (former) financial secretary of the Imam Bargah. Apart from a single exception, I do not agree. The RAD member conducted a careful review of the information relating to the risks to Shia Muslims in Pakistan. The member properly acknowledged that the evidence was "mixed." In my view, however, it was unreasonable for the member to discount the value of a report from the Middle East Media Research Institute stating that the situation for Shia Muslims in Pakistan is "extremely serious" because this organization "builds its reporting via 'media reports' which tend to dramatize the news." There is no basis for this cavalier dismissal of reporting based on media coverage of

relevant events. Nevertheless, there remained a reasonable basis in the information before the member for the conclusion that the applicant did not face more than a mere possibility of persecution in Pakistan simply by virtue of his status as a Shia Muslim. Similarly, it was reasonably open to the member to conclude that the applicant's personal profile did not make him more likely to be the target of an attack in the future.

[38] Turning to the absence of police reports, the applicant claimed to have made timely complaints to the police about the threatening phone calls he started receiving in April 2015 and then about the attack on him and his family on May 24, 2015. If the applicant could produce police reports confirming that he had made these complaints, this could rebut the suggestion that he had fabricated the incidents at some later date in order to support his claim for refugee protection in Canada. The applicant did not produce any such reports. It would have been an error for the RAD member to treat the absence of such evidence in and of itself as a reason to disbelieve the applicant. However, the member did not do so. Rather, the member drew an adverse conclusion about the applicant's credibility from the latter's evolving account of why he had not been able to produce police reports and his evasiveness when questioned about this by the RPD. This inference was reasonably open to the member. Moreover, the member did not place undue weight on this factor in assessing the applicant's overall credibility. It was simply one factor among several that led the member to reject the applicant's account.

[39] On the other hand, I do agree with the applicant that the RAD member made too much of what he found to be deficiencies with the letter from the pathology laboratory. The author of the letter states that the applicant suffered "superficial injuries" to his forehead and both legs and

that he was provided with first aid and bandage(s) were applied. The applicant has never suggested that his injuries were serious. In his BOC narrative, for example, he speaks of receiving "first aid" treatment after the incident. The letter from the pathology laboratory is consistent with this. Given the contents of the letter and the purpose for which it was tendered, it was unreasonable for the RAD member to criticize it for failing to provide "persuasive documentation to support the author's medical background and qualifications to compose a medical report concerning the Appellant's injuries or his suitability to diagnose and treat the Appellant's injuries." The author had observed "superficial injuries," administered first aid, and "applied bandage." Surely no "medical background and qualifications" were required to make these observations, provide this minimal level of care, and then write a letter about it.

[40] This, however, was not the only reason the RAD member found the letter problematic for the applicant's account. The member found it was part of the applicant's "evolving testimony" about the May 24, 2015, attack. On the one hand, the applicant had stated in his BOC narrative that he had taken "medical first aid from the local clinic" after the attack. On the other hand, it emerged in his testimony that it was actually his neighbour (who runs a pathology laboratory from his home) who assisted the applicant at the neighbour's home. This is a material discrepancy in the applicant's account for which he was unable to provide a plausible explanation. It was one among several examples of how the applicant's account had evolved over time and under the pressure of questioning at the RPD. It was reasonably open to the RAD member to find that it adversely affected the applicant's credibility.

[41] Finally, it was not unreasonable for the RAD member to conclude that the other supporting documents tendered by the applicant did little to advance his claim. The various statements made by other individuals were largely consistent with the applicant's account. The difficulty is that it was impossible to give them any value without knowing how the declarants learned the information they were providing and when. The value of the statements would be very different if the declarants had first-hand knowledge of the facts described than if they were simply repeating information the applicant himself had provided to them. Even if the information had come from the applicant, it could still have some probative value depending on when it was received (e.g. a timely report to a friend about the threats or the assault could rebut an allegation of recent fabrication in the same way as confirmation of timely complaints to the police could). Unfortunately for the applicant, apart from the statement from his wife (which is evidently based at least in part on first-hand knowledge), none of the other statements address these important issues. In such circumstances, it was reasonably open to the RAD member to give the statements little weight.

[42] Despite my reservations about the aspects of the RAD member's reasons I have discussed above, on the whole I am satisfied that he conducted a reasoned, independent analysis of the evidence and that he did not show unwarranted deference to the RPD's conclusions. The member's detailed reasons exhibit justification, transparency and intelligibility. The result, in my view, falls within the legally and factually defensible range of possible, acceptable outcomes. The standard of reasonableness is met (*Dunsmuir* at para 47). There is, therefore, no basis for interfering with the decision.

VIII. CONCLUSION

[43] For these reasons, the application for judicial review is dismissed.

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

JUDGMENT IN IMM-5125-17

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.
2. The application for judicial review is dismissed.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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