

Federal Court



Cour fédérale

Date: 20190821

Docket: IMM-2188-18

Citation: 2019 FC 1086

Ottawa, Ontario, August 21, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

HAMZA OMAR BAPI AGH

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “*IRPA*”), Mr. Hamza Omar Bapi Agh (the “Applicant”) brings an application for judicial review of his unsuccessful appeal to the Refugee Appeal Division (“RAD”). The Applicant claimed that Islamic fundamentalists in Iraq were extorting him. The RAD and the Refugee Protection Division (“RPD”) found him not credible due to inconsistencies in his narrative and questionable supporting documents.

I. **Background Facts from the Basis of Claim form**

[2] Since September 2009, the Applicant had worked as an “advanced accountant” at the Iraqi Ministry of Finance and Economy, where he “had the authority to write cheques”, disbursing funds for government projects in Erbil—where he lived and worked—and other towns in Iraq.

[3] On April 20, 2015, the Applicant was threatened by an individual purporting to be an old high school friend whom he agreed to meet at a coffee shop. The person said he was assisting Islamic fundamentalist groups in Iraq and the Applicant was to issue a cheque from the Ministry for \$500,000 (USD). When the Applicant refused, he was restrained and threatened with death if he did not comply. The Applicant was released when he said he would think about it and wait for instructions.

[4] The Applicant immediately went to the police station and made a report, including the telephone number used by the person who had called him. The police dispatched surveillance teams to the Applicant’s home and workplace to observe whether the person would appear. He did not.

[5] On June 19, 2015, while on a picnic with his family, the Applicant was kidnapped by masked men and put in the trunk of a car, which drove away. When the Applicant was taken out of the trunk, he was threatened for going to the police. He was then pushed to the ground and a sword was held to his neck. One of the kidnappers intervened to stop the Applicant from being

beheaded. Instead, he was beaten so severely that he was covered in blood and lost consciousness.

[6] The Applicant awoke in the hospital where he had been taken by a shepherd who found him at the side of the road. He had thirteen stitches to his forehead and six on his neck. The Applicant remained in the hospital for two weeks. In response to the beating, the police again dispatched surveillance teams to the Applicant's home and workplace but found nothing.

[7] On October 8, 2016, the Applicant received a threatening phone call and decided to leave Iraq. On October 18, 2016, he received a visa to the United States, moved his family to a different city to stay with his brother and then left for the United States.

[8] The Applicant did not make a refugee claim in the United States, he crossed into Canada without reporting and made an inland refugee claim.

[9] For the reasons that follow, this application is allowed.

II. **The RPD decision**

[10] The RPD found the determinative issue was the Applicant's credibility. The panel found there was sufficient evidence to support the Applicant's claim that he worked where he said he did, but it did not believe he was approached to give funds to anyone or was harmed as he alleged.

[11] The RPD found that the police report was likely false as it lacked certain details the RPD expected it should have contained and because it was an original document that was handwritten, in ink. The panel found that it was unlikely that the report would be re-written instead of being a photocopy of the original. The RPD said that there was no evidence that in a major city like Erbil the police force would lack something as basic as a photocopier.

[12] The RPD also found a medical report was unconvincing because there was only one report, by a “judicial physician” and no other records at all. The panel reasoned that given the Applicant spent two weeks in the hospital, there would be other medical records. In addition, the panel questioned a discrepancy between the judicial physician’s record saying what the Applicant was doing when he was kidnapped and the Applicant’s statement in his Basis of Claim [BOC] form because the details of where he was when he was kidnapped, thrown in the trunk, beaten and left for dead should be memorable and consistent.

[13] Two other discrepancies were found by the RPD. One was that the police only visited him once in hospital despite having twice provided surveillance to his home and workplace. The RPD found it bizarre that after such a brutal attack the police would only make one contact. The other was that in a letter from the Applicant’s brother he said that the Applicant moved his family on October 9th but in his BOC, the Applicant said he moved his family after applying for his visa on October 18th.

III. **The RAD decision**

[14] In reviewing the RPD decision, the RAD identified that it would apply the standard of correctness to all questions of fact, fact and law and law as set out by the Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

[15] The RAD confirmed the decision of the RPD and dismissed the Applicant's appeal.

[16] Before the RAD, the Applicant alleged that there had been serious errors of interpretation at the RPD which resulted in a breach of natural justice. The RAD was urged to find that the interpretation errors significantly affected the outcome at the RPD. However, the RAD found there was insufficient evidence that the interpretation was incorrect, as the one example that was provided by the Applicant was insignificant and would not have affected the outcome of the hearing.

[17] The RAD set out four other issues raised by the Applicant:

1. Did the RPD misconstrue the police protection evidence at the Applicant's home?
2. Did the RPD err in its treatment of the letter from the Applicant's brother?
3. Did the RPD err in assessing the police report and the medical/police report?
4. Was the RPD's overall assessment of the Applicant's credibility in error?

A. *Police Protection*

[18] After reviewing and dismissing the interpretation issue, the RAD dealt with the police protection at the Applicant's home. The thrust of the Applicant's submission to the RAD was

that the interpreter erred in translating the questions, causing him to provide answers that were inconsistent with his BOC form causing an improperly translated answer to be put on the record.

[19] The RAD had found there was insufficient evidence of poor translation and that was the only ground put forward by the Applicant on the question of police protection. The RAD concluded that as there was no evidence that any misinterpretation led to an incorrect credibility finding.

B. *The Brother's Letter*

[20] The brother's letter stated that the Applicant moved his family to the brother's house on October 9th but the Applicant said it was after he obtained his visa to the United States on October 18th.

[21] Before the RAD, the Applicant argued that the date was a minor inconsistency and it should not have affected the credibility of the Applicant's story about moving his family. The RAD agreed that if the inconsistency had been the only issue, it would not have adversely affected the Applicant's credibility. It then said that it was "far from the only credibility concern", and it weighed against the Applicant's overall credibility.

[22] The RAD concluded the analysis of the RPD decision without reviewing or mentioning the police and medical reports or acknowledging the Applicant's submissions concerning those reports.

[23] The RAD concluded the analysis with a one sentence summary. It said that the RPD had made “no significant errors” and, there was insufficient evidence of any serious interpretation errors.

IV. Standard of Review and Issues

[24] The standard of review when examining a RAD decision is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paragraph 35 [*Huruglica*].

[25] A decision is reasonable if the decision-making process is justified, transparent, and intelligible, resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[26] If the reasons, when read as a whole, “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, the Dunsmuir criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16 [*Nfld Nurses*].

[27] The issue for the reviewing court is whether the decision, when viewed as a whole in the context of the record, is reasonable: *Nfld Nurses* at paragraph 16.

V. **Analysis**

[28] It is now well known that the RAD does not conduct a reasonableness review; it reviews the RPD decision for correctness: *Huruglica* at paragraph 78.

A. *No Independent Review*

[29] The Applicant submits that the RAD based its decision on speculation and conjecture, as did the RPD. The Applicant further submits that both the RPD and the RAD also either misconstrued or ignored important evidence, including several documents that supported the Applicant's narrative.

[30] Overall, the Applicant submits that the RAD simply concurred with the RPD. It did not conduct a separate review of the record and did not make a determination on a balance of probabilities.

[31] The Respondent makes the point that the decision under review is that of the RAD, not the RPD. The RAD simply addressed the submissions it received from the Applicant, the majority of which dealt with the interpretation issue and it reasonably upheld the RPD determination.

[32] The Respondent also submits that just because the RAD comes to the same conclusion as the RPD, it does not mean that no independent review was conducted. The Respondent cites *Anel v Canada (Citizenship and Immigration)*, 2016 FC 759 at paragraph 26 [*Anel*] in support.

[33] I agree that if the RAD arrives at the same conclusion as the RPD it does not necessarily mean that no independent review was conducted. But that does not assist the Respondent in this instance. There are significant differences between how the RAD arrived at the decision in this matter and, for example, how the RAD in *Anel* made that decision.

[34] In *Anel* the RAD listened to the audiotape of the RPD hearing, and reviewed the record and the Applicant's submissions. The RAD then reviewed the RPD reasoning and expanded upon the RPD findings and the factual bases for its reasons.

[35] In other words, in *Anel* the RAD engaged with the RPD decision, considered the arguments and submissions it received and reviewed the contents of the record. It then explained why it agreed with the RPD and added detail as it found necessary.

[36] Virtually none of that process or analysis is apparent in the RAD's decision in this matter. There is no reference to the RAD listening to the audiotape, even though credibility findings were made by the RPD. There is scant review or analysis of the RPD reasons. Most surprisingly, two of the issues put forward by the Applicant – the police and medical reports – are listed by the RAD in paragraph 5 of the decision but are never addressed in the reasons.

[37] If the two overlooked issues had been minor ones, then failing to address them would not necessarily be a problem; they might have had no impact on the determination of the matter.

[38] The two issues were not minor ones.

B. *Impact of the RAD's Analysis*

[39] The RPD found that the police report was likely false. That was a critical finding as, if the police report describing the telephone call and meeting where someone demanded \$500,000 is found to be false, the premise for the subsequent kidnapping and beating as well as the overall risk to the Applicant has no foundation.

[40] The RPD gave two reasons for finding the report was likely false: (1) it lacked pertinent details and, (2) it was a handwritten original ink document, not a photocopy.

[41] Regarding a lack of details, the Applicant submitted to the RAD that the complaint contained a lot of detail: the name of the individual, and that he wanted the Applicant to take money and give him a bank cheque. The Applicant's refusal to issue the cheque caused the threats. The Applicant said that the only information missing from the police report was that the cheque would have been through the government.

[42] The Applicant also submitted to the RAD that the lack of detail in the police report was because of the "ferocity of the extremist groups in Iraq" which was why he did not go into all the details. He provided just enough to ensure his safety.

[43] With respect to the report being an original, the Applicant suggested to the RPD that it may have been that the police did not have a photocopier. The submissions to the RAD noted the RPD was speculating when it found that there would be a photocopier. The Applicant pointed to documentary evidence in the Iraq National Documentation Package (NDP) indicating that there

was a scarcity of resources and pressure on the infrastructure in the Kurdistan Region of Iraq, which was consistent with there being no photocopier.

[44] While it was open to the RAD not to be persuaded by these arguments, it was not an option for the RAD, remembering that it was conducting an appeal of the RPD decision for correctness, to: (1) ignore the RPD analysis of the police document and (2) not conduct its own analysis, given the Applicant's submissions as to why the RPD was wrong.

[45] In fact, the RAD failed to consider the police report at all other than to list it as one of the issues raised on appeal.

[46] The RAD repeated those same mistakes when considering the medical report.

[47] The RPD found the medical report to be unpersuasive because the physician stated the Applicant was kidnapped when he walked away from his family outside of Erbil, but in his BOC form the Applicant said he was picnicking by the side of the road. The RPD also found it unlikely that there would be no other medical records than the one prepared by the judicial physician.

[48] The submissions to the RAD were that the analysis of where the Applicant was standing when he was kidnapped was a microscopic one. What was important was that he was kidnapped and ended up in the hospital. If the RAD had considered that argument and agreed, the outcome may well have been different.

[49] By not coming to any conclusion on the police or medical reports, the RAD erred. It failed to perform a full appellate review as required by the *IRPA* and enunciated in *Huruglica* at paragraph 103.

[50] After reviewing the RPD's findings on police protection and the brother's letter, the RAD concluded the decision with a blanket statement that most, if not all, of the issues put forward by the Applicant were about poor interpretation. The RAD then simply said that it would not interfere with the RPD's credibility findings as each of them was a "reasonable finding".

[51] The RAD provided no analysis of the RPD's other credibility findings; nor did it identify those credibility findings other than to say earlier, when discussing the brother's letter, that "this inconsistency is far from the only credibility concern". Those other credibility concerns were not identified or discussed.

[52] The RAD did not find that the RPD held any particular or distinct advantage in assessing the credibility of the evidence that would justify deferring to the RPD: *Huruglica* at paragraph 70. By stating generically, without explanation, that the "credibility findings" were reasonable, the RAD erred.

[53] In addition to not reviewing the police and medical reports, the RAD did not specifically address the Applicant's overall credibility. The closest the RAD came to that was when it said it had considered "the only issues from the [Applicant], most, if not all, of which stem around poor interpretation, which I have dealt with, there is nothing else for me to analyze."

VI. **Conclusion**

[54] The RAD failed to conduct a fulsome review of the RPD decision. It seemed to take the approach that once it found the Applicant's arguments about poor translation were not proven, that was the end of the matter. This was incorrect. There were other issues before the RAD, mentioned above, that it ought to have reviewed and determined.

[55] By reviewing only two of the four issues before it, the decision does not enable the Applicant or the Court to understand why the RAD reached the outcome that it did. Nor is it possible to determine whether that outcome falls within the range of possible, acceptable outcomes that are defensible on the facts and law.

[56] The result is a decision that is not transparent, intelligible or justified. It is unreasonable and must be sent back for redetermination by another panel.

[57] There is no serious question of general importance arising on these facts.

JUDGMENT in IMM-2188-18

THIS COURT'S JUDGMENT is that:

1. The application is granted. The RAD decision is set aside and the matter is returned for redetermination by a differently constituted panel.
2. There is no question for certification.
3. No costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2188-18

STYLE OF CAUSE: HAMZA OMAR BAPI AGH v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 16, 2019

JUDGMENT AND REASONS: ELLIOTT J.

DATED: AUGUST 21, 2019

APPEARANCES:

Robert Gertler FOR THE APPLICANT

Modupe Oluyomi FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert Gertler Law Office FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario