Federal Court  Cour fédérale

Date: 20200115

Docket: IMM-3108-19

Citation: 2020 FC 49

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 15, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

AREZKI BOUARIF

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review is related to the decision of the Refugee Appeal Division (RAD) which, on April 5, 2019, upheld the decision of the Refugee Protection Division (RPD) rejecting the refugee protection claim made under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. Obviously, the application for judicial review is filed pursuant to section 72 of the Act. The only issue in this case is whether the

applicant's fear due to his religious beliefs in his country of origin, Algeria, was credible. Neither the RPD nor the RAD believed the applicant. To be successful in this judicial review, the applicant had to convince the Court that the RAD's decision was not reasonable. He did not succeed in doing so, and the application for judicial review must be dismissed.

I. Facts

[2] The facts of this case are simple. Mr. Bouarif is a resident of Algeria who stated that he gradually converted to Christianity starting in 2009. From his testimony, we note that from 2009 to 2014, there were only minor conflicts over his emerging religious practice, which he himself stated were not serious. It was in 2014, he stated, that things began to sour. It appears that November 2014 was the tipping point when lively discussions evolved into to a more difficult situation.

[3] Actually, the applicant did not even claim in his Basis of Claim (BOC) Form to have suffered the said difficulties caused by the Islamists, but rather that groups of young people attacked in November 2014, and specifically on November 15, 2014, the house of a person who apparently taught certain precepts of the Christian religion. These young people allegedly threw stones at the roof of the house and two young Christians were attacked upon leaving the house by those who had thrown the stones. In December 2014, this same group reportedly came to the same house (the meeting place for prayer) where they ransacked everything and stole objects. Later in 2014, the village committee reportedly decided to exclude young Christians from all the village's social activities. Finally, in January 2015, the authorities reportedly ordered the closure of the house. It was then that the group went to a large church in the city of Ouadhia.

[4] It was when that the applicant decided to leave his country because he felt excluded there. The applicant repeatedly stated during the hearing before the RPD that he was marginalized in his country. In a burst of transparency, he stated on page 32 of 110 that [TRANSLATION] "[m]y intention was to come here and stay here, and possibly ask the authorities here for their protection, asylum so that I could stay here because I was oppressed in my country". The administrative tribunals found that the applicant was neither a refugee nor a person in need of protection within the meaning of sections 96 and 97 of the Act.

II. The RAD Decision

[5] The only decision before this Court is the RAD decision. Essentially, the RAD follows the RPD's decision regarding the applicant's lack of credibility. The difficulties encountered by the applicant in convincing the RPD were numerous, as the two divisions noted. In paragraph 13 of its decision, the RAD reiterated the reasons why the RPD denied the refugee claim given the applicant's credibility:

> [TRANSLATION]
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> [13] In its decision, the RPD rejected the appellant's claim for the following reasons:
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> - The appellant gave a prepared and vague testimony regarding the problems he had allegedly experienced in Algeria;
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> - His testimony was vague as regards his knowledge of the Christian religion, testifying to a quasi-ignorance of it;
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> - The appellant testified during his testimony to a personal incident that took place in November 2014 where Islamists allegedly wanted to attack him physically, but he never mentioned it on his Basis of Claim Form (BOC Form);

> - The behaviour of the appellant, who took six months to apply for refugee protection once in Canada, is not that of a person fearful of returning to his country of origin.

It was the accumulation of these elements that undermined the applicant's credibility.

[6] In the reasons for its decision, the RAD took a more systematic look at some of the difficulties that made it necessary to maintain the finding of lack of credibility at its level, following its independent analysis conducted on the standard of correctness. His ignorance of a religion he claims to practise is striking. Besides Easter and Christmas, the applicant could not indicate any other religious holidays, explaining that he had been initiated recently. However, he himself declared having converted in 2009, eight years prior to his hearing before the RPD. In the opinion of the RAD, this is not an issue that requires expertise. One must agree. Likewise, it was rather striking that Mary, the mother of Christ, was presented as one of the twelve apostles. The attempt, later in the hearing, to refer to another Mary whom the applicant allegedly saw in a film did not improve matters since, in any case, the apostles were twelve men. Besides, the applicant seemed to confuse apostle and disciple. The RAD found that the applicant's knowledge of the religion he claimed to practise was meager, even erroneous (RAD Decision, para 26). Thus, the applicant did not satisfy his burden. What is more, the applicant was unable to identify a prayer, as specifically asked, simply saying, despite repeated questions, that he prayed often. The alleged frequency of his religious participation did not correspond to the most basic elements concerning it. The questions that were asked were general and in no way touched on the details.

[7] Citing *Gao v Canada (Citizenship and Immigration)*, 2015 FC 1139, the RAD accepted this passage from that decision:

> [26] . . . This can be a difficult task for the Board, as it is entitled to consider whether the claimant holds a level of religious knowledge that would be expected of someone in the claimant's position but should not reach an adverse conclusion based on minutiae or holding the claimant to an unreasonably high standard of religious knowledge.

In the opinion of the RAD, it was obviously this kind of general question that certainly did not require advanced religious knowledge. Anyone who claims to have adhered to a religion for which he was allegedly persecuted in his country of origin should know the most basic elements. The purpose is not to search hearts and minds, but rather to assess the credibility of the refugee claimant who claims to belong to a religion of which he does not know the basic precepts.

[8] Nor is it being picky to draw a negative inference about credibility from the fact that the applicant did not mention the only bullying incident in his BOC Form that directly implicated him, according to his version of the facts given at the hearing before the RPD. The RPD noted that, [TRANSLATION] "at the end of (November) 2014 while he was in his village, during a meeting, he was allegedly threatened and insulted and they wanted to hit him. This event affecting the applicant personally is not indicated anywhere in his account. When asked why, the applicant, to explain it, stated that he had forgotten to mention it" (RPD Decision, para 8). For the RPD, this was a significant omission. It remained unexplained. The RAD also found that this omission undermined the applicant's credibility (RAD Decision, para 44). The RAD noted that the wait of some six months before applying for refugee status in Canada affected the applicant's credibility with respect to a fear of persecution in connection with the practice of Christianity.

Here again, [TRANSLATION] "[t]he SPR did not err, it considered this point as one factor among others in order to dismiss the appellant's request" (RAD decision, para 53).

III. Arguments and analysis

[9] The applicant seeks to take up each of the points raised by the administrative tribunals and give them a different meaning. He does not demonstrate that the decision was unreasonable, but at most that he disagreed with the conclusions reached by the two administrative tribunals. There is no doubt that the standard of review in this area is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). In this recent decision, the Supreme Court again confirmed that the standard of reasonableness applies to administrative tribunals, with some exceptions. None of these exceptions were present or even invoked by the applicant. Here, the applicant pointed out what he considered to be three errors that taint the reasonableness of the decision:

(a) the analytical framework adopted was unreasonable and erroneous because it allowed questioning in religious matters;

(b) determinative factual errors marred the decision; and

(c) it was unreasonable to consider that the applicant's delay in filing his refugee claim was inappropriate.

[10] In the applicant's view, the questions posed by the RAD were aimed at imposing [TRANSLATION] "a biblical knowledge test" rather than examining the authenticity and genuineness of his faith. In my view, he who says that he is persecuted because of his religious beliefs to the point of having to go into exile must be familiar with the basic information relating to this religious belief. This is only common sense to me. Faith is difficult to measure in court,

but the authenticity of beliefs can be assessed. The state of the law in this regard seems to me to be well articulated in *Li v Canada (Citizenship and Immigration)*, 2015 FC 1273 [*Li*], at paragraph 15:

> [15] Ultimately, the RPD is tasked with determining if adherence to Falun Gong is motivated solely by a desire to support a refugee claim, in which case it is open to the RPD to find that the claimant's religious beliefs are not genuine, or if the claimant has developed faith to a point where he or she has become a true adherent to that religion, even if, initially, the adherence to that religion might have been motivated to support a refugee claim. This is not an easy task.

It is well established in law that it is open to the RPD to assess and consider a refugee protection claimant's motive for practising a religion, including the genuineness of those religious beliefs, and to rely on that motive in rejecting the refugee protection claim in cases such as this one where the essence of the refugee claim rests on the allegation that continuing a newly acquired religious practice in the country of origin might place the refugee claimant at risk (*Su v Citizenship and Immigration*, 2013 FC 518, at para 18) In so doing, the RPD is entitled to assess the refugee claimant's knowledge of the details of the religion, although such inquiry must be approached with caution given the highly subjective and personal nature of a person's religious beliefs (*Lin v Canada (Minister of Citizenship and Immigration*), 2012 FC 288, at para 61).

My colleague Justice LeBlanc continued in *Li* at paragraph 16 of his decision:

> [16] If the claimant is found not to be a genuine practitioner, then it is open to the RPD to hold that the claimant would not practice his or her claimed religion if returned to his or her country of origin and to determine, as a result, that the claimant faces no risk upon return (*Hou v Canada (Minister of Citizenship and Immigration*), 2012 FC 993, at para 62, 417 FTR 405 [*Hou*]). Findings that the claimant lacks credibility, that he or she has fabricated stories

> about practising the claimed religion in the country of origin and that his or her knowledge of the details of the claimed religion is lacking, have been held by this Court to reasonably support a conclusion that the sincerity of the claimant's religious beliefs is not genuine (*Hou*, at paras 54-55).

[11] The Court, in judicial review, must avoid substituting its opinion for that of the administrative decision maker in whom responsibility has been entrusted by Parliament. Madam Justice Gleason, then of this Court, articulated the role of the reviewing court as follows in *Hou v Canada (Citizenship and Immigration)*, 2012 FC 993, at paragraph 55:

> [55] Indeed, in all cases – and especially in cases like the present where the applicant's credibility is found to be wanting – the Court should not be too hasty to substitute its opinion for that of the RPD, which has developed expertise regarding the dictates of a number of religions. As Justice Near noted in *Wang* (cited above at para 8), assessing the genuineness of the claimant's religious beliefs is a difficult task and "this challenging job has been delegated to the Board as the finder of fact and this Court cannot, on judicial review, decide to, in effect, reweigh the results of what can look like a round of Bible trivia" (at para 18). In my view, in *Wang* at para 20, Justice Near set out the proper approach to be adopted by this Court in assessing the reasonableness of the RPD's assessment of the genuineness of a claimant's religious beliefs. After reviewing an awkward set of questions the Board had posed regarding what Jesus was like, he stated:
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> > … this line of questioning illustrates the difficulty of the assessment the Board is required to make. It does not represent an error for which the Board's decision should be over-turned. Absent a showing of disregard for the evidence, or a misapprehension of the facts, I am unwilling to disturb the Board's conclusion in this regard – again deference is warranted. The Board did not make the determination of the genuineness of the Applicant's faith based solely on the Applicant's inability to attribute some human characteristics to Jesus. Answers to other questions regarding the Pentecostal faith were vague and lacking in detail. As the Respondent submits, testimony lacking in

> detail that would reasonably be expected of a person in the claimant's position is a basis for rejecting claims as non-credible even if the Applicant was able to answer some other questions, and with great detail.
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> [Emphasis added.]

[12] In my opinion, not being able to answer such basic questions as naming religious holidays, or identifying Mary as one of the twelve apostles, or for the applicant to offer a nebulous testimony when questioned on the knowledge of prayers, or even the fact that he was not baptized in Algeria because he did not have the time (between 2009 and 2015) whereas he did it in Canada, clearly illustrates that the RAD had before it evidence on which to base its conclusion that the applicant did not demonstrate the genuineness of his religious practice. This finding is reasonable. We are nowhere near asking questions that are probing and that stem from a microscopic analysis of an area as sensitive as religious identification.

[13] One particular element deserves a closer look since the applicant insisted on it. I read the transcripts of the hearing before the RPD. It seems clear to me that when the applicant referred to Mary, he meant to refer to the mother of Christ. Before this Court, an attempt was made to reread these passages to suggest that he instead meant Mary Magdalene, one of the disciples of Christ according to the biblical account. When asked about a rather surprising answer that one of the apostles was Mary, the applicant then spoke of another Mary, without ever identifying her. The ambiguity arose from a film that the applicant saw. Not only do we know nothing about this other film, but it must be noted that none of the twelve apostles, according to the most basic reading of the Bible, was a woman. In addition, it was while he was attempting to change tack that he referred to a passage in a film in which a second Mary appeared. What is more, the

applicant made no reference at all to who this other Mary could have been, let alone that it might have been Mary Magdalene. Rather, it was the applicant's lawyer who very honestly confirmed that it was a conjecture on his part. In my opinion, this does not change the conclusion reached by the RAD (pages 83–85 of 110 of the transcript of the hearing of February 17, 2017, produced in the affidavit of Ketsia Dorceus). In fact, the knowledge of a religion based on a vague recollection of a film is in itself astonishing for one who claims to be of this religion.

[14] The omission in the BOC Form of a close call with a violent confrontation is also significant. It would be inappropriate to draw an unfavourable conclusion from a minor fact that was not noted in the BOC Form. The situation becomes more perilous if subsequent testimony mentions it. But the conclusion of the administrative tribunal seems to me unassailable when the missing reference is one that is important for the purpose of establishing the difficulties encountered in the country he left. The incidents to which the applicant referred in the BOC Form were all incidents not involving him. The only one that implicated him was that of November 2014, and he did not mention it in his BOC Form. We are then faced with an incident where he was purportedly threatened and insulted, and where an attempt was made to hit him during a meeting in his village in November 2014. That is significant. It is in fact the only event that potentially involves him directly and demonstrates a real danger to him. In *Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456, Justice Boivin, then of this Court, wrote at paragraphs 31 and 32 as follows:

> [31] This Court has confirmed on a number of occasions that all the important facts of a claim must appear in the PIF and that failing to mention them could affect the credibility of part or all of the testimony. Furthermore, the RPD is entitled to review the contents of the PIF before and after its amendment and may draw negative inferences about credibility if matters it considers

> important were added to the PIF by an amendment later (*Taheri v. Canada (Minister of Citizenship and Immigration*), 2001 FCT 886, [2001] F.C.J. No. 1252, at paragraphs 4 and 6; *Grinevich v. Canada (Minister of Citizenship and Immigration*), (1997) 70 A.C.W.S. (3d) 1059, [1997] F.C.J. No. 444).
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> [32] It was open to the panel to gauge the principal applicant's credibility and to draw negative inferences about the disparities between her statements in the original PIF, in the interview notes, in the amended narrative of the PIF and in the *viva voce* testimony, for which the principal applicant provided no satisfactory, plausible or credible explanation in the circumstances (*He v. Canada (Minister of Employment and Immigration*), (1994), 49 A.C.W.S. (3d) 562, [1994] F.C.J. No. 1107). In this case, and the Court agrees with counsel for the respondent, the evidence shows that the applicants' story and narrative changed over the last two years.
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> (See also *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363, at paragraph 6 and *Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856, at paragraph 17).

The effect of adding to the story is obvious. It is an attempt to embellish the story to include a more personal element to personalize the persecution. The other incidents reported did not have this element of personal persecution, although obviously the applicant was able to reflect on it since his refugee protection claim was made several months after arriving in Canada. It is difficult to see how this could be an oversight.

[15] The failure to claim refugee protection soon after his arrival in Canada is also puzzling, even if this fact is not determinative of the issues and its relative weight is not significant. In *Amrane v Canada (Citizenship and Immigration)*, 2013 FC 12, Justice Noël wrote:

> [31] The Federal Court of Appeal has recognized that the fact that a person does not seek asylum at the first opportunity is a factor that indicates that the person does not have a genuine subjective fear (*Huerta v Canada (Minister of Employment and Immigration)*, 157 NR 225 at para 4, 1993 CarswellNat 297 (FCA)).

Similarly, in *Pepaj v Canada (Citizenship and Immigration)*, 2014 FC 938, Justice Rennie, then of this Court, wrote:

> [15] The Board was entitled to impugn the applicants' credibility based on the applicants' delay in claiming refugee status, and their failure to claim at the first opportunity: *Toma* para 18; *Mahari v Canada (Citizenship and Immigration*), 2012 FC 999 at para 27. The applicants submit they have a reasonable explanation for the delay and failure to claim; however, the only explanation provided was that the applicants "wanted" to come to Canada for its "very good refugee protection". This is not an explanation that justifies the applicants' failure to claim in the numerous safe countries they travelled through. It was therefore reasonable for the Board to conclude that the applicants' behaviour was inconsistent with the fears alleged.

The respondent concedes that this difficulty alone would not have been sufficient to conclude that there was no credibility. I agree. It is also true that the delay was not outrageously long. This is simply one more element to be considered by the administrative tribunal in reaching its conclusion. In its decision in *Vavilov*, the Court did not abandon the deference owed to an administrative tribunal, but rather announced that the analysis should henceforth be centered on the reasonableness of the decision, which should be first and foremost the purpose of the analysis. Thus, we read in paragraph 93:

> [93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

Benefitting from the deference of the Court, I have come to the conclusion that the RAD's decision, since that is the one before the Court, cannot be characterized as unreasonable in light of the evidence in the case. The decision is justified. Its reasoning is inherently consistent and took into account the concerns of the applicant.

[16] The test continues to be one of reasonableness, not of the decision the Court would otherwise have made. A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the hallmarks of a reasonable decision are present—justification, transparency and intelligibility—"and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13" (*Vavilov*, para 99).

[17] It is important to remember that the Supreme Court confirmed the rule that there is a threshold for declaring a decision unreasonable. Not just any minor shortcoming can give rise to judicial review. In paragraph 100 of *Vavilov*, we read:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
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> [Emphasis added.]

This brings me to the last argument.

[18] The applicant made much of the error allegedly made by the RPD when it examined the baptismal certificate presented by the applicant. Since the RPD's decision is not before this Court, the applicant therefore complained that the RAD did not correct the error. In fact, the RAD said nothing about it.

[19] It is clear that the RPD was mistaken in seeing a typing error or a spelling error when there was none on the baptismal certificate presented in evidence before the RPD. As the applicant noted, it is simply a font that can be misleading until one compares the letter that had allegedly been mistakenly typed with other similar letters in the same text.

[20] However, the RAD made no mention of it since the RAD did not rely on what was obviously an RPD error; the complaint made to the RAD is that it did not specifically recognize the error made by the RPD. Some comments are called for here. First, the RPD made only peripheral use of what it believed to be a mistake. No conclusions were drawn: at best, the RPD pointed out that it could be a document of convenience. But the decision instead concludes that it is the lack of credibility, the poor quality of the testimony at the hearing, the omission from the BOC Form of the incident involving the applicant and the ignorance of the religion that the applicant claims to practise that are fatal (RPD Decision, paras 30–31). In the end, the RAD did not have to use the baptismal certificate because it was clearly satisfied that the other elements of analysis could not lead it to uphold the ultimate decision seeing that the applicant's version the lacked credibility, as did the RPD. I share that opinion. The RPD's error had no bearing on its

decision. In any event, it is the RAD's decision that concerns the Court, not that of the RPD. The complaint made to the RAD for not having reported the error has no bearing. There are no "serious shortcomings". If there was a shortcoming, it would have only been superficial and incidental. At most, we should say that the RPD's error, which was not expressly corrected by the RAD, is not one that warrants judicial review in the face of the other, much greater, difficulties of the applicant.

[21] The Court therefore concludes that the RAD's decision was reasonable in that it was justified, transparent and intelligible. There is no question to be certified under section 74 of the Act, as the parties agree.

JUDGMENT in IMM-3108-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed; and

2. No serious question of general importance is certified.

"Yvan Roy"
Judge

Certified true translation
This 29th day of January 2020.

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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