

Federal Court



Cour fédérale

Date: 20200127

Docket: IMM-1599-19

Citation: 2020 FC 139

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 27, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

MAJED KASSAB

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The applicant is seeking judicial review of a decision of the Refugee Protection Division [RPD] rejecting his claim for refugee protection filed in Canada. The RPD determined that the applicant was neither a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], nor a person in need of protection under subsection 97(1)

of the IRPA. In essence, the RPD determined that the applicant's fears with regard to the United States lacked credibility. The RPD did not consider it necessary to analyze the applicant's fears with respect to Syria. For the reasons that follow, I will allow the application.

II. Facts

[2] The applicant is a Syrian citizen of Arab origin and a practising Sunni Muslim. He was born in Aleppo, Syria on July 24, 1994, but had lived exclusively in Saudi Arabia since he was very young.

[3] His parents were temporary foreign workers in Saudi Arabia, where the applicant had status as an immigrant worker's child. That status expired when the applicant turned twenty-one, which was on July 24, 2015. Saudi law does not provide an opportunity to acquire Saudi citizenship to the children of immigrants who are temporary residents. Owing to the temporary nature of his residency in Saudi Arabia, he therefore decided to move to the United States in February 2013 on an M-1 student visa to study at a flight school.

[4] On October 23, 2013, the applicant applied for asylum in the United States, where he was staying to pursue his studies. In his asylum application, he stated that he feared being injured, tortured or killed if he were to return to Syria, because of his opposition to the Syrian regime and his Sunni Muslim faith. In a statement attached to the application, he provided a more detailed explanation of his fears with respect to Syria.

[5] At that stage, the applicant made no reference to a fear on the basis of his sexual orientation.

[6] On August 17, 2015, the application for asylum was rejected by the United States Citizenship and Immigration Services [USCIS] because of significant inconsistencies in his testimony. Given that his immigration status in Saudi Arabia had expired, the applicant challenged that decision. The hearing of his asylum application was postponed several times.

[7] On January 26, 2016, the applicant was summoned to a hearing that was scheduled for June 22, 2016. That hearing was postponed until February 9, 2017. In preparation for that hearing, the applicant made a supplementary statement stating that he is a gay man, and that he has multiple sclerosis. In the statement, the applicant indicated that he had failed to mention his orientation in order to avoid humiliation in front of the people around him.

[8] The hearing scheduled for February 9, 2017, was postponed until October 19, 2017. His counsel expressed their disappointment with this postponement, given the tightening up of the current U.S. administration's migration policies.

[9] Ultimately, there was no hearing or decision on the asylum application, because, on February 9, 2017 (two days after the postponement of the hearing in the United States), the applicant claimed refugee status in Canada.

[10] The applicant was able to enter Canada, as he has an uncle who is Canadian, thus benefitting from the exception granted to applicants who have family members in Canada, as set out in subsection 4(2) of the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* [Safe Third Country Agreement or STCA]. Upon arriving in Canada, the applicant claimed that he was a victim of islamophobia in the United States in light of the new U.S. president's troubling rhetoric towards Muslims and Syrians.

[11] On February 24, 2017, the applicant submitted a Canadian Basis of Claim Form [BOC Form]. In his BOC Form, the applicant stated that Syrian authorities were the source of his fear of persecution. In a written account attached to his BOC Form, the applicant had initially claimed to fear persecution in Syria (1) on the basis of his faith (being a Sunni Muslim), (2) on the basis that he would be called upon to serve in President Assad's army against his will and would thus be forced to commit crimes against his country's civilian population if he were to return to his country, and (3) on the basis of his political opinion and the perception of his opinion by the Syrian authorities.

[12] In his BOC Form, the applicant did not mention his fear based his sexual orientation. The applicant further claimed that he was a victim of islamophobia and that he was targeted by the tightening of U.S. immigration policies.

[13] Seven weeks later, on April 12, 2017, the applicant filed a supplementary statement with the RPD, in which he claimed a fear of persecution in Syria based on sexual orientation. He

explained that he had not mentioned this fear beforehand because he did not want to reveal his homosexuality to his uncle, who had been present at the first meeting for his refugee protection claim in Canada.

III. RPD decision

[14] In its decision dated February 13, 2019, the RPD determined that the applicant was neither a refugee nor a person in need of protection. In essence, the RPD found that the applicant had failed to meet his burden of proof and had not credibly established the facts that formed the basis of his refugee protection claim under 96 of the IRPA.

[15] The RPD did not analyze of his fear as it related to Syria and did not provide justification for that omission.

[16] In a brief decision, the RPD's analysis instead focused on the applicant's fear as it pertained to the United States. In that regard, the RPD expressed several doubts as to the credibility of the applicant given the fact that he left the United States before his hearing was held. The RPD also noted that the applicant had not received notification that he was likely to be deported from the United States. On the contrary, the applicant's fears with regard to the United States appeared to have been based on what his counsel had told him about the general tendencies expressed by a certain immigration judge and some tweets by the U.S. president.

[17] With respect to his sexual orientation, the RPD noted that the applicant had been living as an openly gay man in the United States before arriving in Canada and that he had amended his

BOC Form in order to indicate his fear on the basis of his sexual orientation. Based on its doubts as to the applicant's credibility, the RPD found that he had also failed to establish the facts in his claim under subsection 97(1) of the IRPA. The RPD was rather of the view that the applicant was asylum shopping because he had abandoned his claim for asylum in the United States and had thus failed to credibly establish the subjective element of his fear.

IV. Issue

[18] Before this Court, the applicant challenged the RPD's analysis on a number of points. Ultimately, this all boils down to one issue: was the RPD's decision reasonable?

V. Standard of review

[19] The standard of review that applies to the issue in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). To be reasonable, a decision must be based on an internally coherent reasoning and be justified in light of the legal and factual constraints that bear on the decision (*Vavilov* at paras 99–101).

VI. Discussion

[20] In his claim for refugee protection in Canada, the applicant expressed a number of fears of persecution. With respect to Syria, the applicant feared persecution on the basis of his faith, political opinion and sexual orientation. With respect to the United States, the applicant feared persecution on the basis of his religion and citizenship. In somewhat brief reasons, the RPD simply rejected his refugee protection claim.

[21] I am of the view that the RPD's findings were unreasonable for four reasons.

- (1) The finding as to the applicant's reasons for leaving the United States were unreasonable

[22] The central element of the RPD's analysis was the applicant's credibility with regard to his fear of persecution in the United States. The RPD pointed out that the applicant had indicated that his counsel had told him that the immigration judge that would be hearing his claim was a steadfast supporter of the Trump administration. The applicant further stated that his U.S. counsel had told him that with the current U.S. administration, it would be much harder to obtain asylum. The applicant stated that this was one of the factors he had taken into consideration when he decided to flee the United States, not wishing to wait for an outcome he believed to be inevitable.

[23] When asked how his counsel had arrived at this conclusion, the applicant was unable to provide any explanation. The RPD thus concluded that the applicant had embellished his narrative and that he had not been truthful.

[24] That was a legitimate question to ask the applicant; however, it was unreasonable to conclude that the applicant's explanation amounted to an embellishment or was not true simply because he had not provided evidence or justification for the opinion of his counsel. Such a conclusion strikes me as too hasty, especially given the fact that the applicant's statement was not contradicted by the evidence on the record. In fact, it rests on unreasonable aspersions cast on the ability to recount the thinking process of a third party who has expertise in U.S. immigration

law and a knowledge of the prevailing political climate with respect to immigration in that country.

[25] To the applicant's mind, his counsel's advice was a valid reason for abandoning his claim for asylum in the United States and clearly influenced his decision to leave the United States, but no consideration was given to these factors. The issue is whether, all things considered, the applicant's decision to abandon his claim and flee to Canada was reasonable.

[26] The fact that the applicant had not completed the asylum process in the United States does not justify the incomplete analysis of the file because refugee claimants are not required to seek asylum in the first country (*Papsouev v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8132 (FC)).

- (2) The finding with respect to the applicant's fear based on his sexual orientation was unreasonable

[27] As for the fear with respect to his sexual orientation, the RPD found that the applicant lacked credibility because he had not indicated such a fear beforehand in his claims for refugee protection in Canada and in the United States. It further noted that the applicant has stated that he had been living as an openly gay man in the United States, but that he had to hide this when he arrived in Canada; it considered this to reveal a lack of transparency.

[28] However, it does not appear that the RPD considered the fact that the applicant had not concealed his sexual orientation in his day-to-day existence, but had only done so in front of his uncle, who was likely to pass such information on to his family.

[29] Absent an explanation from the applicant, one would reasonably assume that he made the same mistake twice, in other words, that he needed an amendment to indicate his sexual orientation in the United States but did not correct this and did the same in Canada. The applicant is an educated person. He made his first mistake in the United States. Why in the circumstances would he make the same mistake in Canada? For the reason he explained.

[30] Growing up as a gay Muslim man, particularly in Saudi Arabia, is difficult, and one does not live openly as such. The RPD simply ruled out any consideration that this explanation could, in fact, be reasonable: thus the reason for not revealing that he was gay in his initial narrative.

[31] I am of the view that the RPD's finding does not reflect the social and cultural circumstances confronting sexual minorities, who often have to be less transparent towards certain friends or family members for good reason, such as the fear of being humiliated or marginalized (*Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501 at para 8; *Gergedava v Canada (Citizenship and Immigration)*, 2012 FC 957 at para 10; *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 42).

[32] In addition, the RPD does not appear to have considered the evidence on the record regarding his romantic relationship with another man. For example, the Certified Tribunal

Record contains four sets of romantic text messages between the applicant and a man named “Mohamad” in the months of December 2015, February 2016 and July 2016. Overlooking these was unreasonable (*Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at para 11; see also *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at paras 32–33).

[33] The respondent cites *Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456, in support of the argument that all material facts in a refugee protection claim must be included in the BOC Form and that any omission of these may undermine the applicant’s credibility, in whole or in part, and that the RPD may draw negative inferences about credibility if important matters were added by a later amendment.

[34] I accept this argument. However, in *Zeferino*, the amendment was made more than three years after the filing of the first BOC Form, and only after the initial claim had been rejected.

[35] In this case, the BOC Form was amended seven weeks after the filing of the first BOC Form, and before the rejection of his refugee protection claim. The applicant explained the delay in this manner:

[TRANSLATION]

. . . I am afraid because of my sexual orientation I did not disclose it earlier because, when I prepared my written account, I was meeting with my lawyer, accompanied by my Arab language interpreter. This interpreter knows members of my family personally (including my uncle here in Canada). I was afraid of disclosing my sexual orientation in front of him because I thought he would tell my uncle about it. That would have caused me big problems—no one in my family knows about my sexual

orientation, and I am afraid of what could happen if they should ever find out. . . .

[36] The RPD's argument appears to go too far and seems to be based on a far too superficial review of the evidence on the record.

(3) Lack of analysis of the climate of islamophobia in the United States

[37] In the written account attached to the BOC Form, the applicant described a fear based on the prevailing climate of islamophobia and policies that specifically targeted Muslims in the United States. In support of this assertion, the Certified Tribunal Record contains several documents that describe the U.S. immigration system as being ineffective (it is tainted by religious or racial divisions) and reveal that Syrians are often subjected to discrimination in the United States.

[38] In its decision, the RPD noted that the applicant had declared a fear based on the prevailing climate of islamophobia and on policies specifically targeting Muslims in the United States. Yet the RPD did not analyze the key components of this fear.

[39] The RPD did not express any doubts as to the credibility or veracity of this evidence. On the contrary, the RPD simply rejected the refugee claim on other grounds and focused solely on the applicant's fear based on his sexual orientation, to the detriment of the other elements of his refugee protection claim. It dismissed the explanations regarding the U.S. immigration system and concluded that the applicant was asylum shopping.

[40] The RPD failed to explain why it decided to overlook this basis of fear, which was nonetheless a crucial component of the claim for refugee protection. The sheer volume of documentary evidence should have resulted in a more thorough analysis of that fear. Such an omission was unreasonable (*Njeri v Canada (Citizenship and Immigration)*, 2009 FC 291 at paras 12–21).

[41] The respondent cites *George v Canada (Citizenship and Immigration)*, 2014 FC 535 [*George*], which establishes that a failure to seek asylum at the earliest opportunity is indicative of a lack of subjective fear.

[42] Here again, I accept this interpretation of the case law, but I fail to see how this helps the respondent. In *George*, the female applicant had spent a number of lengthy periods of time in Canada in the past, but had always returned to her country of origin in between stays. During her last visit, she arrived in Canada on August 8, 2010, while her claim for refugee protection, dated August 3, 2011, was made nearly one year later.

[43] In this case, the applicant filed his claim as soon as he arrived in Canada. I understand that a few weeks went by before the amendment regarding his sexual orientation was made, but that delay, under the circumstances, was understandable.

[44] Moreover, I fail to see how the following decisions are relevant: *Murugathas v Canada (Citizenship and Immigration)*, 2017 FC 469, and *Musthafa Samseen v Canada (Citizenship and Immigration)*, 2006 FC 542 [*Musthafa*].

[45] In this case, the RPD did not conclude that the fact that the applicant had abandoned his claim in the United States showed a lack of subjective fear of a possible return to Syria.

Furthermore, there was no failure to file a refugee protection claim, as was the case in *Musthafa*.

In the present case, the applicant duly filed a claim in the United States but, for the aforementioned reasons, decided to abandon it.

(4) Lack of analysis of the applicant's fear with respect to Syria

[46] The applicant had alleged his fear of being persecuted in Syria (1) on the basis of his faith (being a Sunni Muslim), (2) on the basis that he would be called upon to serve in President Assad's army against his will and would thus be forced to commit crimes against his country's civilian population if he were to return to his country, and (3) on the basis of his political opinion and the perception of his opinion by the Syrian authorities.

[47] The applicant had also adduced documentary evidence which confirmed the following elements: a number of incidents of war crimes in his hometown (Aleppo), the extent of the humanitarian crisis in Syria, the repressive attitude of the Syrian government towards LGBT people and the fact that the Syrian government prevents men of military age from leaving the country and forcibly recruits them into the Syrian army. These hundreds of pages of documents all attest to the risk he would face if he were to return to Syria.

[48] This fear was not analyzed by the RPD, and nothing in the evidence related to this fear was mentioned. In its decision, the RPD simply noted that a Syrian passport was sufficient to establish his identity and nationality. That statement makes the analysis of his situation with

respect to Syria all the more relevant, as it constitutes a connecting factor to that country. In contrast, the RPD limited its review to two elements of the claim, namely, his credibility in relation to his sexual orientation and his credibility with regard to his decision to abandon his claim in the United States. In addition, the RPD member asked him not to speak of his fear regarding Syria. Indeed, these are the RPD member's own words:

Okay, counsel the issues here are credibility which is always and [sic] issue and specifically the credibility, the claimant's testimony regarding sexual orientation and regarding the reasons why he left the United States, that's what I want you to address in submissions, I am not asking you to address Country conditions in Syria or Saudi Arabia.

[49] The RPD rejected the applicant's claim on the basis that he had failed to meet his burden of presenting credible evidence to establish his claim under section 96 of the IRPA. Relying on a finding of a lack of credibility as to the reasons for having abandoned his claim in the United States, the RPD concluded that the applicant had failed to meet his onus under section 97 of the IRPA.

[50] Once again, I am of the view that the RPD's credibility findings were not reasonable, and I note the lack of any analysis of the elements regarding the consequences if the applicant were to return to Syria.

VII. Conclusion

[51] Even in cases in which an the applicant may lack credibility, a panel is nonetheless required to examine the claim for refugee protection on the merits based on the separate criteria in sections 96 and 97 of the IRPA (*Li v Canada (Minister of Citizenship and Immigration)*, 2005

FCA 1 (CanLII) at paras 32–33; James C Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed, (Cambridge, UK: Cambridge University Press, 2014) at pages 182–86; *Wangchuk v Canada (Citizenship and Immigration)*, 2016 FC 160 at para 26).

[52] The lack of analysis of a number of essential components of a claim for refugee protection is a reviewable error (*Vavilov* at para 126; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 17; *Bains v Minister of Employment and Immigration* (1993), 63 FTR 312).

[53] The application for judicial review is therefore allowed. No question is certified for review by the Federal Court of Appeal.

JUDGMENT in IMM-1599-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. No question is certified.

“Peter G. Pamel”

Judge

Certified true translation
This 7th day of February 2020.

Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

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