

Federal Court



Cour fédérale

Date: 20200328

Docket: IMM-4767-19

Citation: 2020 FC 438

Ottawa, Ontario, March 28, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

MUHSIN KHAN

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Muhsin Khan, is a citizen of Pakistan. He challenges a decision issued in June 2019 by the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD], affirming the Refugee Protection Division [RPD]'s finding that he is neither a Convention refugee nor a person in need of protection [Decision].

[2] Mr. Khan had sought refugee protection alleging his fear of persecution by the Taliban, as well as persecution for his membership in the Awami National Party [ANP], a Pakistani political party opposed to the Taliban. He claimed that he fears returning to Pakistan because the Taliban allegedly want to forcibly recruit him because he failed to repay his neighbour for a loan which had apparently been funded by the Taliban. The RPD and the RAD rejected Mr. Khan's claim as they found that his fear of persecution and allegations were not credible, and that he had a viable internal flight alternative [IFA] available to him in Lahore, Pakistan.

[3] Mr. Khan contends that the RAD's Decision was unreasonable because it endorsed all of the RPD's credibility findings and its problematic approach to a psychological report, without convening an oral hearing. He further submits that the RAD failed to intervene where the RPD had erroneously omitted to allow him to respond to the RPD's credibility concerns. Mr. Khan also takes particular issue with the RAD's failure to give any weight to the new evidence he had submitted on appeal. Finally, Mr. Khan claims that the RAD erred in concluding to the presence of a viable IFA in Lahore. Mr. Khan asks this Court to set aside the Decision and to send his appeal back to the RAD for reconsideration by a differently constituted panel.

[4] For the following reasons, Mr. Khan's application for judicial review will be granted. Having considered the evidence before the RAD and the applicable law, I am not satisfied that the RAD's refusal of the new evidence brought forward by Mr. Khan meets the standard of reasonableness. In my view, the Decision does not explain how this is justified in light of the evidence, and the reasons do not allow me to understand the rational basis for the refusal of the new evidence. This is sufficient to justify the Court's intervention. I must therefore send the

matter back for redetermination. Given that conclusion, I do not have to deal with Mr. Khan's other arguments challenging the reasonableness of the Decision or raising procedural fairness issues.

II. Background

A. *The factual context*

[5] Mr. Khan is from the town of Haji Abad in Lower Dir, Pakistan, a region known as a Taliban stronghold. In 2008, he became a member of the ANP. His involvement with the party was allegedly limited to encouraging his friends and family to vote for the ANP during the elections.

[6] In 2008, Mr. Khan borrowed money from a neighbour because his brother became ill and required treatment. In January 2013, Mr. Khan's neighbour informed him that he had to enlist with the Taliban because the money he had borrowed came from them. As a member of the ANP, Mr. Khan refused to do so.

[7] In April 2013, Taliban members allegedly attacked Mr. Khan and threatened to kill him if he did not comply with their demands. Mr. Khan says that he filed a complaint with the police, but was then advised that no one could defy the Taliban. As a result, Mr. Khan went into hiding in Shirengal in Upper Dir for eight months, and then in Nowshera for 14 months. While he was in Nowshera, Mr. Khan's family received a letter from the Taliban threatening to kill him if he did not join their organization. In May 2015, Mr. Khan fled Pakistan. Mr. Khan initially travelled

to the United States to claim asylum, but later sought refugee protection in Canada because he had doubts on whether the United States would accept his claim.

[8] In August 2016, Mr. Khan's father was abducted, beaten and tortured by the Taliban, who wanted to know Mr. Khan's whereabouts. In February 2017, Mr. Khan's son was attacked while playing outside with friends in Pakistan, resulting in his hand being amputated. In March 2019, Mr. Khan's father was shot and murdered while taking Mr. Khan's mother to an unrelated hospital appointment. His mother was also shot in the leg on the same occasion.

[9] In January 2019, the RPD rejected Mr. Khan's refugee claim for lack of credibility. Mr. Khan was designated a vulnerable person at the RPD hearing. However, the RPD did not find the significant omissions in his Basis of Claim [BOC] to be attributable to his psychological state. The RPD noted several discrepancies and inconsistencies regarding his evidence and testimony. The RPD also did not believe that Mr. Khan had a profile of political activism in Pakistan or that he was a member of the ANP.

B. *The RAD Decision*

[10] Mr. Khan appealed the negative RPD decision to the RAD.

[11] In its June 2019 Decision, the RAD first considered the new evidence that Mr. Khan wished to adduce on appeal. In that regard, Mr. Khan had submitted: (1) an affidavit by him; (2) photos of his injured son; (3) hospital documents; (4) an attestation from a lawyer; (5) a certificate from a police station; (6) a death certificate explanation; and (7) information from a

law society. The RAD found the photos and the medical evidence to be irrelevant as there was no link between the evidence, the agent of persecution (i.e., the Taliban) and the events described in the RPD decision. The RAD also found that the photos were not substantiated beyond Mr. Khan's speculation, and that the medical documents were illegible. The RAD further considered that the death certificate explanation was suspicious and not credible because of a spelling mistake.

[12] The RAD concluded that the new evidence was not admissible as it did not meet the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the relevance, newness and credibility factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*].

[13] Mr. Khan had also submitted additional evidence which he claimed was not reasonably available prior to the date of perfection of his appeal. These included: (1) an affidavit by him; (2) an email indicating an interpreter read his affidavit prior to his signing; (3) a photo of his deceased father; (4) his father's death certificate; (5) a proof of his mother's injuries; and (6) medical exhibits. In considering the admissibility of that evidence, the RAD determined that the additional evidence was not probative or relevant to the appeal, and therefore refused to accept it. As such, the RAD concluded that there was no need to consider, and consequently convene, an oral hearing.

[14] Turning to his appeal of the RPD decision, Mr. Khan had made an argument that there was a breach in natural justice due to his level of representation before the RPD. However, the

RAD noted that Mr. Khan's representative was the same counsel who represented him before the RPD, and therefore found this argument to be without merit. The RAD also concluded that there was no denial of procedural fairness in the conduct of the RPD hearing as Mr. Khan had been found to be a vulnerable person and was appropriately accommodated.

[15] In its analysis of the merits of the RPD's decision, the RAD reviewed the RPD's credibility findings and endorsed all of them further to its own independent review of the evidence. The RAD first found that the RPD had made no errors in regards to its assessment of Mr. Khan's credibility. Whereas Mr. Khan argued that he was not provided with prior notice that the authenticity of his documents were at issue, the RAD noted that the RPD had notified Mr. Khan at the outset of the hearing that his credibility was an issue, and that logically, a credibility assessment included all of his evidence. Thus, the RAD found no error in the RPD making a determination about the authenticity of the documents provided by Mr. Khan without further notice to him.

[16] With respect to the contradiction between Mr. Khan's allegation that he was physically attacked by members of the Taliban, and the account in the police report referring only to an anonymous phone threat, the RAD determined that this contradiction was not satisfactorily explained at the RPD hearing. Consequently, the RAD gave little weight to the police report and to Mr. Khan's testimonial evidence in this regard. Concerning the authenticity of the police report, the RAD concurred with the RPD's reasoning that, given the objective evidence of fraudulent documents from Pakistan, the existence of a police report did not constitute evidence

that the alleged event actually occurred. The RAD made a similar finding on the medical report because its contents did not support Mr. Khan's allegation as to how the injury occurred.

[17] The RAD gave no weight to the brother's death certificate because the dates indicated in the certificate for his brother's illness were not consistent with Mr. Khan's testimony and his BOC narrative. Mr. Khan recognized that the death certificate was unreliable, and the RAD concluded that this further undermined his credibility regarding the sequence of events set out in his BOC.

[18] In addition, the RAD did not accept Mr. Khan's explanations with respect to the discrepancies in his BOC, since he had ample opportunity to review the document before the RPD hearing and it was open to his counsel to seek a brief postponement if Mr. Khan was facing time constraints. Ultimately, the RAD determined that the RPD's failure to raise certain discrepancies was not outweighed by other credibility problems in Mr. Khan's evidence. Further to its own review and determination, the RAD concurred with the RPD and found that Mr. Khan had not established that the Taliban had persecuted him or sought to persecute him on the basis of his political affiliations. The RAD further concluded that Mr. Khan had not provided consistent or reliable evidence that he had ever been a member or active supporter of the ANP.

[19] Furthermore, the RPD had noted that Mr. Khan failed to mention in his BOC narrative and his asylum claim in the United States that the letter sent to his father by the Taliban stated that they knew he had been hiding in two locations. Mr. Khan explained that he was under a lot

of pressure when completing his BOC and did not have a lawyer when he applied for asylum in the United States, but the RAD did not accept this explanation.

[20] With respect to the existence of a viable IFA, the RAD finally determined that there was a reasonable and viable IFA available to Mr. Khan in Lahore. The RAD cited a 2017 report from the United Kingdom Home Office, stating that “the security situation in Lahore remains better than many other places in Pakistan, with lower levels of generalized and sectarian violence than many other major population centers”. Furthermore, the RAD found that Mr. Khan could make his way to Lahore without undue hardship. The RAD concluded that there was insufficient evidence that Mr. Khan’s agents of persecution had connections throughout the country, and that if they did, they would be motivated or capable of finding Mr. Khan. As such, the RAD determined that it is not objectively unreasonable for Mr. Khan to seek refuge in Lahore.

C. *The standard of review*

[21] It is not disputed that the RAD’s credibility findings and its treatment of the evidence before it are reviewable on a standard of reasonableness. In *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], the Federal Court of Appeal clarified that, in reviewing a decision of the RAD, the Court applies the reasonableness standard with respect to the RAD’s determinations of factual issues, including credibility, and issues of mixed fact and law (*Huruglica* at paras 30-35). This includes determinations regarding the admissibility of new evidence and the RAD’s interpretation of subsection 110(4) of the IRPA (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 29; *Galamb v Canada (Citizenship and*

Immigration), 2016 FC 1230 at paras 10-11; *Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 [*Olowolaiyemo*] at para 10).

[22] The Supreme Court of Canada's recent decision in *Vavilov* confirms that the reasonableness standard applies to the judicial review of the RAD's Decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17, 23-25). In that judgment, the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of administrative decisions, holding that they should presumptively be reviewed on the reasonableness standard, unless either legislative intent or the rule of law requires otherwise (*Vavilov* at paras 10, 17). I am satisfied that neither of these two exceptions apply in the present case, and that there is no basis for derogating from the presumption that reasonableness is the applicable standard of review for the RAD's Decision.

[23] Regarding the actual content of the reasonableness standard, the *Vavilov* framework does not represent a marked departure from the Supreme Court's previous approach, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 and its progeny, which was based on the "hallmarks of reasonableness", namely justification, transparency and intelligibility (*Vavilov* at para 99). The reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome", to determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 83, 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31).

[24] *Vavilov*'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review (*Canada Post* at para 26). Where a decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84). The reasons must be read holistically and contextually in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94, 97). However, "it is not enough for the outcome of a decision to be *justifiable* [...] the decision must also be *justified*" (*Vavilov* at para 86).

[25] Before a decision can be set aside on the basis that it is unreasonable, 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" (*Vavilov* at para 100). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision-maker (*Vavilov* at paras 12-13). Reasonableness review is an approach meant to ensure that the reviewing court only intervenes in administrative matters "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). It is anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). In other words, the approach to be followed by the reviewing court is still one of deference, especially with respect to findings of facts and the weighing of evidence. Absent exceptional circumstances, such as when the decision maker has "fundamentally misapprehended or failed to account for the

evidence before it”, the reviewing court will not interfere with an administrative decision maker’s factual findings (*Vavilov* at paras 125-126).

III. Analysis

[26] As part of his arguments challenging the RAD’s Decision, Mr. Khan submits that the RAD unreasonably rejected various pieces of new evidence he had submitted, because they were not relevant and did not establish specific links to the events he had recounted. This new evidence found to be irrelevant included photographs of his son after the attack, hospital records and communication from his brother, his father’s death certificate, medical evidence, as well as photos corroborating incidents affecting family members. Mr. Khan argues that this refusal to admit his new evidence resulted in a complete failure by the RAD to consider the risks he faced. According to Mr. Khan, the RAD’s Decision is unreasonable as the test for the admissibility of new evidence based on relevance is whether the evidence is capable of proving any fact that is relevant to his claim for protection.

[27] I agree with Mr. Khan and find that the RAD’s treatment of his new evidence was unreasonable.

[28] To accept the new evidence provided by Mr. Khan, the RAD had to determine whether it was admissible under subsection 110(4) of the IRPA and the case law that has interpreted this provision. I do not dispute that an appeal before the RAD is not a second chance to submit evidence answering weaknesses identified by the RPD (*Singh* at paras 35, 51; *Eshetie v Canada (Citizenship and Immigration)*, 2019 FC 1036 at para 33). I also acknowledge that the role of the

Court is not to revisit the question of whether the new evidence should have been accepted, but to determine whether the RAD's finding that the new evidence did not meet the well-recognized *Raza* criteria is reasonable (*Akanniolu v Canada (Citizenship and Immigration)*, 2019 FC 311 at para 41). However, I am of the view that, in this case, the RAD misconceived the requirements set out in subsection 110(4) of the IRPA and unreasonably interpreted and applied the extended *Raza* factors in regard to relevance and credibility. This is sufficient to justify the Court's intervention and to return the matter to the RAD for redetermination.

[29] For new evidence to be admissible on appeal before the RAD, it must first fall into one of the three categories described in subsection 110(4) of the IRPA and contain (i) evidence that arose after the rejection of the refugee claim; (ii) evidence that was not reasonably available at the time of the rejection; or (iii) evidence that was reasonably available but that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection (*Singh* at para 34). Only new evidence that falls into any of these three categories is admissible (*Singh* at para 35). Given the use of the word "or" in subsection 110(4), the test is disjunctive, not conjunctive (*Olowolaiyemo* at para 19).

[30] In addition, in *Singh*, the Federal Court of Appeal determined that the admissibility criteria for new pre-removal risk assessment evidence are also applicable to the admissibility of new evidence under subsection 110(4) of the IRPA (*Singh* at paras 49, 64). These admissibility criteria were developed by the Federal Court of Appeal in *Raza*, and include the following elements: credibility, relevance, newness, materiality and express statutory conditions.

Paragraph 13 of *Raza* summarizes them as follows:

[. . .]

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
3. Newness: Is the evidence new in the sense that it is capable of:
 - (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
 - (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
 - (c) contradicting a finding of fact by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
5. Express statutory conditions:
 - (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
 - (b) If the evidence is capable of proving only an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[31] These criteria from *Raza* do not replace the three conditions mentioned in subsection 110(4) of the IRPA but add to them, since they are necessarily implied from the purpose of the provision. Thus, in deciding whether new evidence is admissible, the RAD must determine whether the criteria of credibility, relevance, newness and materiality set out in *Raza* are met (*Singh* at para 49). However, the criteria set out in *Raza* require some adaptations when applied to subsection 110(4): for example, the materiality test is less rigid since the RAD has a broader mandate and can accept new evidence that, while not determinative, has an impact on the overall assessment of the claim (*Singh* at para 47).

[32] The issue is therefore whether, in light of this case law, it was reasonable for the RAD to conclude that the new evidence submitted by Mr. Khan was not admissible. I am not persuaded that it was. True, the Decision analyzed the various documents submitted by Mr. Khan, and concluded that they did not meet some of the admissibility criteria of relevance, credibility and/or newness. These are determinations that demand deference from the reviewing court but, in the circumstances of this case, I am not persuaded that the RAD's conclusion to refuse to admit this new evidence is a rational and logical analysis in respect of the facts and law.

[33] As set out in *Raza*, the test regarding the relevance of new evidence is whether the evidence is "capable of proving or disproving a fact that is relevant to the claim for protection". In this case, the RAD's reasons do not explain or justify how the proposed new evidence regarding Mr. Khan's father's shooting death or the brutal attack on his son that lead to the amputation of his hand – in a region where the Taliban are known to be perpetrators of such acts – can be found not to be relevant to Mr. Khan's claim for protection.

[34] These documents were related to allegations that constituted central elements of Mr. Khan's refugee claim, and I fail to see how they could be reasonably rejected by the RAD for lack of relevance. The RAD's reasons solely focus on the alleged absence of link between the new evidence (such as the photos or the medical documents) and the Taliban or the events described by Mr. Khan, but they do not explain or justify how the new evidence would be incapable of proving or disproving Mr. Khan's alleged fear of persecution from the Taliban. This, in my view, constitutes an error significant enough to set aside the Decision as allowing this new evidence could have had a material impact on the RAD's ultimate findings. In *Singh*, the Federal Court of Appeal observed that a generous approach must be taken to the notions of materiality, stating that "although the new evidence is not determinative in and of itself, it may have an impact on the RAD's overall assessment of the RPD's decision" (*Singh* at para 47). On appeal of RPD's decisions, the RAD has a broad mandate and may intervene to correct any error of fact, of law, or of mixed fact and law, and the approach to new evidence should reflect that. It does not mean that the new evidence will necessarily lead to a successful appeal, but it certainly requires the RAD to properly explain why new evidence directly related to central elements of a refugee claim cannot be accepted.

[35] Mr. Khan had provided reasons for his belief that the attacks on his parents and son are a result of his conflict with the Taliban. If the RAD did not believe Mr. Khan's new evidence, or if it required corroborating evidence to do so, it was incumbent upon it to convene an oral hearing to assess the credibility of his evidence (*Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at para 25).

[36] I recognize that the written reasons given by an administrative body must not be assessed against a standard of perfection (*Vavilov* at para 91). An administrative decision maker's reasons do not need to be comprehensive or perfect. However, they need to be comprehensible and justified. The failure to meaningfully grapple with key issues or central arguments raised by a party may call into question whether the decision maker was actually alert and sensitive to matters before it and whether the decision exhibits the required degree of justification, transparency and intelligibility (*Vavilov* at paras 127-128). Here, we have a situation where, in my view, the RAD's shortcomings or flaws on the acceptability of Mr. Khan's new evidence are sufficiently central or significant to render the Decision unreasonable (*Vavilov* at paras 96-97, 100). In other words, there are sufficiently serious shortcomings in the Decision such that it cannot be said that it exhibits the requisite degree of justification, intelligibility and transparency. In my opinion, the reasons provided by the RAD are unable to demonstrate that the Decision on the issue of Mr. Khan's proposed new evidence was based on an internally coherent and rational chain of analysis and that it conforms to the relevant legal and factual constraints that bear on the RAD and the issue at hand (*Canada Post* at para 30; *Vavilov* at paras 105-107).

[37] An administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). A decision will not be reasonable if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103). This is especially true where a decision has particularly harsh consequences for the affected individual, such as "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood" (*Vavilov* at para 133). Here, the

consequences of refusing the new evidence are particularly severe and harsh for Mr. Khan and his refugee claim, and such a situation called for the RAD to “explain why [his] decision best reflects the legislature’s intention” and the case law on the relevance factor (*Vavilov* at para 133). I find that, in the particular circumstances of this case, the RAD has not done so. To echo the language of the Supreme Court in *Vavilov*, the omitted aspects of the analysis on the refusal of Mr. Khan’s new evidence causes me “to lose confidence in the outcome reached” by the RAD (*Vavilov* at para 122; *Canada Post* at paras 52-53).

[38] Given my conclusion on the RAD’s treatment of the new evidence, it is not necessary to address the other arguments put forward by Mr. Khan to challenge the RAD’s Decision.

IV. Conclusion

[39] For the reasons stated above, Mr. Khan’s application for judicial review is granted. I am not persuaded that the refusal of Mr. Khan’s new evidence is a reasonable outcome in the circumstances. On a reasonableness standard, the reasons detailed in the Decision had to demonstrate that the RAD’s conclusion was based on an internally coherent and rational chain of analysis and that it is justified in relation to the facts and law that constrain the decision maker. This is not the case here. Therefore, I must allow Mr. Khan’s application for judicial review and return it to the RAD for redetermination by a differently constituted panel.

[40] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-4767-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.
2. The June 28, 2019 decision of the Refugee Appeal Division rejecting the appeal of Mr. Khan is set aside.
3. The matter is referred back to the Refugee Appeal Division for redetermination by a differently constituted panel.
4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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