Federal Court  Cour fédérale

Date: 20200428

Docket: IMM-6184-18

Citation: 2020 FC 563

Ottawa, Ontario, April 28, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

FERD KEQAJ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ferd Keqaj, is a citizen of Albania. The Applicant seeks judicial review of a decision made on November 14, 2018 by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, in which it found that he was not a Convention refugee or a person in need of protection [Decision].

[2] For the reasons that follow, this judicial review is denied.

II. **Background**

[3] The Applicant's cousin, Florjan and his wife Silvane, faced persecution in Albania from Silvane's family because of cultural and religious differences between the two families. Silvane's family is Muslim while the Applicant and Florjan are Catholic.

[4] The Applicant tried to resolve the differences between the two families. When this failed, he provided assistance to Florjan and Silvane while they were in hiding from Silvane's family. The Applicant claims that in response to his assistance, Silvane's family beat him and made an attempt on his life.

[5] The Applicant came to Canada in May 2016 and made a claim for refugee protection.

[6] In his refugee claim, the Applicant alleged that in November 2015, he and Florjan were attacked and beaten by three men who called them "filthy Catholics." The Applicant stated that he was hospitalized for two days after this attack, and he provided a medical report from Lezhe Regional Hospital dated June 7, 2016.

[7] The Immigration and Refugee Board's Specific Information Research Unit [SIRU] investigated the medical report. As a result it received information from Lezhe Regional Hospital that the Applicant was not listed in the hospital's patient registry for the period of November 2015. The RCMP also conducted an assessment of the medical report and found that the

document was printed on an ink-jet printer, and that it contained manual alterations including hand-drawn red lines and handwritten text added to the circular seal.

[8] The Applicant alleged that in March 2016, a gunman fired shots at his vehicle as he drove by. The Applicant also alleged that his mother in Albania had been threatened and injured by Silvane's family. The Applicant provided a police report from Shkoder, dated April 22, 2016, in support of his claim. The RCMP assessed the police report and noted that the police logo and the seal at the bottom of the page were printed on an ink-jet printer.

[9] On November 1, 2017, the Refugee Protection Division [RPD] found that the Applicant was not a Convention refugee or a person in need of protection. It concluded that the Applicant was not credible and that his use of fraudulent documents undermined essential elements of his claim.

III. **Issues**

[10] The Applicant submits that the RAD erred in fact and law in its application of the standard of correctness to the decision made by the RPD.

[11] The Applicant points to what he says are four significant errors made by the RAD when it upheld the RPD. Those alleged errors were with respect to (1) how and when he obtained the Police Report; (2) finding that two hospital reports and two police reports were fraudulent based on forensic reports; (3) not addressing whether the Applicant had been denied his right to procedural fairness when the RPD did not put its concerns to the Applicant as to whether he had

been admitted to the hospital; and (4) sustaining the RPD's dismissal of all of the supporting documentation he tendered.

IV. **Standard of Review**

[12] The RAD reviews the RPD decision on a standard of correctness. The Federal Court of Appeal set out in some detail the nature of the role of the RAD in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] at paragraphs 78 and 79:

> [78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*.
>
> [79] I also conclude that an appeal before the RAD is not a true *de novo* proceeding. Recognizing that there may be different views and definitions, I need to clarify what I mean by "true *de novo proceeding*". It is a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects. When the appeal is a true *de novo* proceeding, standard of review is not an issue. This is clearly not what is contemplated where the RAD proceeds without a hearing.

[13] Reasonableness is the standard of review to be applied by this Court to a decision of the RAD: *Huruglica* at paragraphs 30 and 35.

[14] A high degree of deference is required when the impugned findings relate to the credibility and plausibility of a refugee claimant's story, given the RPD and the RAD's expertise

in that regard and their role as the trier of fact: *Vall v Canada (Citizenship and Immigration)*, 2019 FC 1057 at paragraph 15.

[15] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions, none of which apply on these facts: *Vavilov* at paragraph 23.

[16] 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*].

[17] Citing *Dunsmuir*, it was also confirmed in *Vavilov* that a reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at paragraph 15.

[18] As this application was argued on the basis that the standard of review is reasonableness, I find it is not necessary to receive further submissions from the parties. The result in this matter would be the same under the pre-*Vavilov* framework established in *Dunsmuir* and its progeny.

V. **Analysis of the Decision Under Review**

[19] The Applicant neither submitted new evidence nor requested an oral hearing before the RAD. The determinative issue on appeal was credibility.

[20] The RAD upheld the RPD finding that the Applicant was not credible.

A. *The Police Report*

[21] The Applicant submitted that the RPD made an inference making the determination as to when he received the police report. He says that the conclusion of the RAD that affirmed the RPD finding is unreasonable because there is no evidence that the Applicant personally obtained the Police Report in April or that he travelled to Shkoder, Albania to obtain it. There is only evidence that he received the police report in April.

[22] The Applicant argues that in some cases there may be room in the RAD's correctness assessment to determine whether the RPD was right when it made an inference, such as that he personally obtained the police report. The Applicant states that the appropriate question in this case is whether the RAD's assessment of the RPD finding that the Applicant personally received the police report was correct.

[23] The Applicant says he did get the police report, but the RPD did not question him about it. He says that he never said how he got the report. According to the Applicant, the evidence before the RPD was unclear, therefore the RPD must have made an inference that he obtained the report. The Applicant says that the RPD is entitled to make an inference but, in order to

arrive at the same finding, the RAD had to be satisfied that the RPD was correct. With there being no evidence that the Applicant personally obtained the report or travelled to Shkoder to obtain it, the RAD's finding was an error of fact and law.

[24] The Respondent submits that his statement that there is "no evidence" he personally acquired the police report was a matter he could easily have clarified himself by stating in his written submissions that he did not personally obtain the report from the police.

[25] The Respondent also points out that the Applicant never stated that he did not personally obtain the police report, he only said that there was no evidence that he personally acquired it. The Applicant's reply is that it was not his fault that the RPD failed to question him about it. I find that it is not necessary to resolve this aspect of the issue. As stated below, the RAD relied on other evidence in the record to arrive at the conclusion it did.

[26] The RAD did not simply accept the RPD analysis of this issue. The RAD listened to the audio recording of the RPD hearing. The RAD indicated that it had paid specific attention to the discussion of this issue. The RAD found that the RPD had erred about when the Applicant received the report because he had clarified that he was unsure of the date he received it.

[27] The RAD then turned to the Applicant's argument that the RPD made inconsistent findings that he was in hiding between March and May but that in April he travelled over one hour to the police station to obtain the report. The Applicant said that he did not testify to having personally left his hiding spot to obtain the report therefore there was no actual inconsistency.

[28] From listening to the audio recording, the RAD noted the Applicant's use of the word "I" when he was describing that he got the report from the police the night of the incident and his later testimony that he was unsure of the actual date that he got the report from the police. The RAD concluded from those statements that, regardless of the date the Applicant got the report, he obtained it from the police.

[29] The RAD found that the RPD did not err in finding an inconsistency in the Applicant's testimony about how he obtained the police report. The RAD found that the Applicant testified that he personally obtained the report from police, and that if he obtained the report in April, this was inconsistent with the Applicant's testimony that he was in hiding at the time.

[30] When the RAD can listen to a recording of the hearing or read a transcript of the testimony in the underlying record then the RPD will not enjoy a meaningful advantage over the RAD in assessing credibility: *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paragraphs 90-91. In such an instance the RAD is free to make a fresh decision on the issue of credibility.

[31] The record that was before the RPD together with the transcript of the hearing and the audio recording formed the underlying record before the RAD. I am satisfied on review of the underlying record that it reasonably supports the finding by the RAD that the Applicant personally obtained the police report.

B. *Fraudulent Documents*

[32] The RCMP forensically examined two police reports and two medical reports provided by the Applicant.

[33] The Applicant was notified by letter on August 15, 2016 that the reports were being sent for forensic analysis. On November 30, 2016 he was provided with the RCMP report.

[34] In each case the forensic report concluded that there were issues such as:

- handwritten red lines on the documents;
- ink jet seals rather than wet seals applied by a rubber stamp;
- handwritten text added to a seal applied by a rubber stamp;
- printed signatures rather than handwritten ones;
- the presence of a hand drawn simulation of a stamp;

[35] As there were no genuine specimens available for comparison to the documents being reviewed, the RCMP report found that the authenticity of each document was “inconclusive”.

[36] The RPD found the documents to be fraudulent, on a balance of probabilities, and not trustworthy. In addition to the contents of the forensic report, the RPD reviewed newly signed and dated duplicates of the medical and police reports by the Applicant. He testified that they were signed by the same officials but the RPD noted that the signatures were clearly different.

[37] The RAD examined the evidence and forensic reports after which it reached its own conclusions that, on a balance of probabilities, the documents were fraudulent. The RAD found

that “the report clearly referenced a number of issues with these documents, each on its own sufficient cause to suspect that there was something wrong with each document”

[38] The Applicant argued that because the forensic testing results were inconclusive the RPD erred in finding the documents were fraudulent. The RAD stated that the term “inconclusive” was generally used when there was not 100% proof of something. The RAD noted that it was not bound by legal or technical rules of evidence and was entitled to receive and base a decision on evidence that it considered credible or trustworthy in the circumstances. It found that, given the less vigorous standard that it could apply to assess evidence, it was not necessary to apply a standard of “conclusive”.

[39] Accordingly, the RAD found on a balance of probabilities that the documents were fraudulent and the RPD made no error in assigning them the little weight.

[40] The Applicant relies on *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 288 [*Lin*] to state that the RAD did not properly apply the evidentiary rule because it is inherently unreasonable to treat as conclusive, a document which has been assessed by a forensic expert and determined not to be so.

[41] The Respondent submits that the RAD did not claim that the RCMP had specialized knowledge regarding Albanian police reports. However, the RAD did acknowledge the RCMP could not state conclusively that the documents were fraudulent.

[42] The RAD did not solely rely on the forensic report to find the documents were fraudulent. It specifically referred to having examined the evidence, including forensic report.

[43] The RCMP made findings regarding the documents; those findings informed the RAD's decision. The RPD decision also noted that duplicate reports submitted by the Applicant, in response to the RCMP forensic report, were suspect. The Applicant had testified before the RPD that the signature on the duplicate Lezhe police report was new but made by the same official. The RPD noted that the two signatures on the original and duplicate reports were clearly different in that the last letter of the signature and the flourishes underneath the signature were not the same as between the two documents.

[44] The forensic report clearly states there are alterations to the documents that were examined. The report includes graphic representations pinpointing those alteration and additions. The Board is entitled to take note of and give no weight to documents found to contain alterations. Where an alteration appears on the face of the evidence, the Board is entitled to give no weight to the document and need not seek further expertise before doing so: *Diarra v Canada (Citizenship and Immigration)*, 2014 FC 123 at paragraph 24; *Saleem v Canada (Citizenship and Immigration)*, 2008 FC 389 at paragraph 37.

[45] Considering the underlying record and given the foregoing, it was reasonable for the RAD to conclude on a balance of probabilities that the documents in question were fraudulent.

C. *The Hospital Record*

[46] The Applicant admits that "the most damning evidence" pertaining to his credibility is that he said he was hospitalized in November 2015 but a hospital representative claimed the patient registry failed to list him.

[47] The Applicant submits that as he was never questioned regarding his alleged omission from the hospital patient registry, he was unable to proffer an explanation to address the RPD's concern. The Applicant submits the RPD breached procedural fairness in drawing an adverse inference without questioning him; and the RAD failed to apply the correctness standard to this issue.

[48] The RAD considered the Applicant's argument that he had not been given the opportunity to explain why the hospital had no record of him, but also noted that the Applicant did not provide an explanation.

[49] It appears that the RPD gave the Applicant an opportunity to explain the hospital record problem. The Application Record contains the transcript of the RPD hearing. At the bottom of page 251, page 46 of the transcript for that day, it indicates that the RPD directly raised the issue of the Applicant not appearing in the patient record for the hospital:

> PRESIDING MEMBER: Counsel, on that point, I would just ask you to -- if you could provide me with submissions with respect to the SIRU response regarding the hospital record?

[50] A discussion ensues between counsel and the RPD in order to locate the document in question. The RPD then refers to a letter dated November 17, 2016 to counsel which said “Copy of Medical Report from SIRU”. Once they were *ad idem* regarding the document in question, the date of the letter was found to be November 15, 2016. Counsel then proceeds to make a variety of submissions regarding the authenticity of the documents.

[51] On this basis, it appears that the Applicant was treated fairly by the RPD. He was specifically asked for submissions about the duplicate hospital record obtained by his uncle that had also been identified by a forensic report as having issues.

[52] However, even if that discussion is not taken into account, the fact remains that counsel had the opportunity at the end of the RPD hearing to make submissions on all the evidence by which time the Applicant had received the response to SIRU that he did not appear to have been a patient at the hospital.

[53] Faced with the fraudulent medical reports and the information that the Applicant had not been a patient in the hospital the RAD concluded that there was “only one reasonable conclusion” which was that the Applicant never attended the hospital as alleged.

[54] That is a reasonable analysis which meets the criteria of being justifiable, transparent and intelligible. The underlying record supports this outcome which falls within the range of possible, acceptable outcomes on the facts and law.

D. *Supporting Documents*

[55] The Applicant provided other corroborating documents to which the RPD assigned no weight. The RPD reasons for doing so are found at paragraphs 2829 of the decision:

> [28] The claimant provided supporting documents from his mother and cousins in respect of the issues that the claimant alleged he went through, including going into hiding after the alleged March 2, 2016 shooting incident and that the Hoxha's were upset that they had not succeed in killing the claimant in March 2016. Given that the panel has found that the claimant has supported his claim with at least four fraudulent documents, the panel finds that it cannot trust or place any weight on the remaining supporting documents or statements/declarations to establish the claimant's allegations concerning being attacked on two occasions by members of the Hoxha family.
>
> [29] The claimant also provided a medical report and supporting letter from the claimant's mother, Luce Keqaj that alleges that members of the Hoxha family had attacked and injured her after demanding information from her about the claimant. The panel finds that it cannot place any weight on the claimant's mother's statement or medical report, given the reliability of documents issues (*sic*) that are at play in this claim. The panel would require an opportunity to examine Luce Keqaj as a witness before it could place any weight on her statement or medical report. Further, as the panel has found that one of the claimant's family members, Luigj Keqaj, has already provided false documents and an unreliable declaration, the panel cannot accept statements from the claimant's family members at face value. Given the panel's concerns the panel finds on a balance of probabilities that Luce Keqaj's statement is self-serving and unreliable such that it can place no weight upon it.
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> [Footnotes removed]

[56] The Applicant submits it was not open to the RPD to impugn the credibility of his mother and cousins and dismiss the other evidence without considering it. He says that the RPD's blanket-type inference concerning evidence of the Applicant's family members is unreasonable. Each document was to be rationally analyzed with respect to the weight to be attributed.

[57] The Applicant submits that the failure to consider documentary evidence in this context has been found to be dispositive because in *Voytik v Canada (Minister of Citizenship and Immigration)*, 2004 FC 66, Mr. Justice O'Keefe said at paragraphs 20–21:

> [20] … even if the Board considers an applicant not to be credible, it must still consider the documentary evidence. Here, the Board erred in using its negative credibility finding as reason to place no weight on potentially crucial documentary evidence, given the nature of the applicant's claim and testimony.
>
> [21] I do not propose to deal with the applicant's other arguments as I am of the view that my disposition of the issue of the Board's treatment of the applicant's medical reports disposes of this application.

[58] The Respondent submits it was not an error for the RAD to place little weight on the documentary evidence submitted by the Applicant. In *Rahman v Canada (Minister of Citizenship and Immigration)*, 2019 FC 71, Mr. Justice Boswell held at paragraph 28 that a general finding of lack of credibility can affect the other evidence submitted by an applicant:

> [28] I also agree with the Respondent that a general finding of lack of credibility can affect all relevant evidence submitted by an applicant, including documentary evidence, and ultimately cause a claim to be rejected (see: *Nijjer v Canada (Citizenship & Immigration)*, 2009 FC 1259 at para 26, 184 ACWS (3d) 196; *Yasik v Canada (Citizenship and Immigration)*, 2014 FC 760 at para 55, 242 ACWS (3d) 917; and *Zhu v Canada (Citizenship and Immigration)*, 2013 FC 1139 at para 49, 442 FTR 237).

[59] The RAD considered and agreed with the Applicant's statement that each separate piece of evidence had to be analyzed and considered on its own merit, but found that "[g]iven the propensity of the [Applicant] to provide false documents and to lie to the Board, it is totally reasonable for the panel to have dismissed any and all documents presented by [the Applicant]."

[60] The RAD discussed the RPD's treatment of the other supporting evidence. In addition to mentioning that the Applicant had tendered at least four fraudulent documents the RPD relied on the fact that when the Board checked his allegation about staying in the hospital the information received was that he had not been the patient there.

[61] The RPD did not say that it did not consider the evidence. It considered the supporting documents but decided not to give weight to them saying that it: "cannot trust or place any weight on the remaining supporting documents or statements/declarations to establish the claimant's allegations concerning being attacked on two occasions by members of the Hoxha family." That is not the same as not considering the evidence.

[62] The RAD agreed that it was appropriate for the RPD to give no weight to supporting letters from the Applicant's mother and cousins based on the fact that the Applicant had tendered at least four fraudulent documents.

[63] In the factual circumstances of this case, that finding by the RAD is reasonable.

VI. **Conclusion**

[64] In conducting this reasonableness review I am required to give deference to the RAD provided that there is an internally coherent and rational chain of analysis that is justified in relation to the facts and law: *Vavilov* at paragraph 83.

[65] The RAD clearly explained each finding it made, with reference to the evidence in the record and the relevant law. When it found that the RPD had erred it said so. When it agreed, after conducting an independent review of the evidence, it explained why it agreed with the RPD finding. Sometimes it agreed for the same reasons; other times it provided different reasons.

[66] In this case, the RAD also had the advantage of listening to the audio recording of the RPD hearing, and a transcript of the evidence before the RPD was in the record. On that basis, the RAD was in the same or, given its expertise, perhaps even a better position than the RPD to carefully consider the Applicant's evidence.

[67] The Federal Court of Appeal recently had occasion to consider again the role and powers of the RAD. The Court of Appeal stated that the RAD has "robust powers of error-correction consistent with its statutory purpose" and that it was important to note that "the standard of review by which the Federal Court reviews RPD and RAD decisions does not preclude consideration of the merits or factual findings of either tribunal [. . .]. Adverse findings of fact and conclusions or inferences with respect to credibility must find their justification in the evidence before the RPD and their expression in the reasons of the RPD": *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 [*Kreishan*] at paragraphs 42 and 46.

[68] There is no requirement that the RAD show deference to the RPD findings of fact or of mixed fact and law. The only requirement is that the RAD determine whether the decision of the RPD is wrong in law, in fact or in mixed fact and law. Whether the RAD should refrain from substituting its own determination is to be addressed on a case – by – case basis in which the

RAD is to determine whether the RPD benefited from hearing the oral evidence and, if it did, then the RAD is to consider whether it could make a final decision on the claim : *Huruglica* at paragraphs 59, 65 and 70. These statements are all consistent with the stated purpose for creating the RAD as being to ensure the correct decision is made with respect to the claim and that by giving it the ability to fix mistakes, fewer cases will arrive in this Court: *Huruglica* at paragraph 87.

[69] The Supreme Court has also stated very clearly that when conducting judicial review a Court is to refrain from deciding the issue afresh. I am to consider only whether the Decision, including the rationale for it and the outcome to which it led, is unreasonable: *Vavilov* at para 83.

[70] The RAD reasons allow the parties to understand how and why it found that the RPD did not err in finding that the Applicant was not a Convention refugee or a person in need of protection. The rationale is clear and it is supported by the underlying record.

[71] For all the foregoing reasons, I find that the RAD reasonably concluded that the RPD decision should stand and that the RPD had made no significant errors.

[72] The application is dismissed, without costs

[73] Neither party suggested a serious question of general importance for certification.

JUDGMENT in IMM-6184-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed, without costs.

2. There is no question for certification

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

H.J. YEHUDA LEVINSON	FOR THE APPLICANT
MICHAEL BUTTERFIELD	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levinson & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT