

Federal Court



Cour fédérale

Date: 20201104

Docket: IMM-5355-19

Citation: 2020 FC 1033

Ottawa, Ontario, November 4, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**AREEB-UN-NISA
SAAD AHMED
HAMZA AHMED
AYESHA AHMED
FATIMA AHMED**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT & REASONS

I. Overview

[1] This application for judicial review concerns a decision of the Refugee Protection Division (“RPD”), dated July 24, 2019, finding that Ms. Areeb-Un-Nisa (the “Principal

Applicant”) and her four children (the “Minor Applicants”) are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 (“IRPA”)*. The RPD denied the Applicants’ claim for refugee protection because it found that the identities of Saad and Hamza (the “Minor Male Applicants”) were not established, and that the Applicants were not credible.

[2] The RPD took issue with the Minor Male Applicants’ identities because the Applicants submitted two sets of passports and two sets of birth certificates for the Minor Male Applicants, each containing different names and dates of birth. The Applicants submit that it was unreasonable for the RPD to find that the identities of the Minor Male Applicants were not established because the Principal Applicant adequately explained why the Minor Male Applicants possess these differing sets of identity documents.

[3] The Applicants further submit that it was unreasonable for the RPD to find that the Applicants were not credible for three reasons. First, the RPD unreasonably impugned the Applicants’ credibility without assessing the credibility of the main incident of persecution that caused the Applicants to seek refugee protection. Second, the RPD unreasonably relied on discrepancies between the Applicants’ statements at the Port of Entry (“POE”) and in their Basis of Claim (“BOC”) forms. And third, the RPD unreasonably found that the Applicants did not submit documentary evidence corroborating the death of the Principal Applicant’s brother-in-law, Mr. Tahir Hussain.

[4] For the reasons that follow, I find that the RPD's decision is unreasonable. This application for judicial review is therefore allowed.

II. Facts

A. The Applicants

[5] The Applicants are citizens of Pakistan. The Minor Applicants include two sons, Saad (16 years old) and Hamza (14 years old), and two twin daughters, Fatima and Ayesha (the "Minor Female Applicants"), both 10 years old.

[6] The Principal Applicant is married to Zulfiqar Ahmed, who is the father of all the Minor Applicants. Mr. Ahmed is a Canadian citizen and lives in Canada.

[7] Mr. Ahmed immigrated to Canada as a permanent resident ("PR") on June 10, 2005. In his PR application, Mr. Ahmed did not disclose that he was married to the Principal Applicant or was the father of Saad — the couple's only child at the time.

[8] In September 2006, Mr. Ahmed applied to sponsor the Principal Applicant and the Minor Male Applicants (the "First Sponsorship Application"). The First Sponsorship Application was denied because of Mr. Ahmed's failure to disclose the Principal Applicant and Saad as family members in his PR application. In November 2015, Mr. Ahmed again applied to sponsor his family (the "Second Sponsorship Application"), this time listing all the Applicants as family members. The Second Sponsorship Application was denied in February 2017.

[9] On May 1, 2016, the Applicants travelled to the United States to meet Mr. Ahmed. On May 22, 2016, the Applicants applied for temporary resident visas to visit Canada (the “TRV Application”). On June 14, 2016, the TRV Application was denied because the visa officer was not satisfied that the Applicants would leave Canada.

[10] On July 17, 2016, the Applicants made a claim for refugee protection at the port-of-entry (“POE”) in Fort Erie, Ontario. At the POE, the Applicants claimed that they feared returning to Pakistan because “In February, [the Principal Applicant’s brother-in-law] was kidnapped and murdered” and that “Something like that could happen to [them].”

(1) Fear of Persecution

[11] On October 5, 2015, Mr. Tahir Hussain — the husband of Ms. Zunaira Anees, the Principal Applicant’s sister — went missing at his workplace. When the police refused to investigate Mr. Hussain’s disappearance, the Principal Applicant and her family contacted local non-governmental organizations (“NGOs”) and the media regarding the incident. The Principal Applicant, Ms. Anees and their father, Mr. Muhammed Anees, all subsequently received threatening phone calls from unknown persons telling them to stop contacting those organizations. When Ms. Anees and Mr. Anees asked the police for details concerning Mr. Hussain’s death, the police threatened to harm the family if they made any further inquiries.

[12] On March 3, 2016, armed “Rangers” raided Mr. Anees’ house, where the Applicants were staying at the time (the “March 3 Incident”). The Rangers beat Mr. Anees and threatened

to kill the family if they spoke to the media about Mr. Hussain's death any further. The Applicants then decided they would leave Pakistan to seek refugee protection in Canada.

(2) Previous Misrepresentations

[13] The Minor Male Applicants currently use the names as listed on their new identity documents, not their birth names as listed on their original identity documents. The new passports made the following changes to the Minor Male Applicants' identities: Saad, whose original name is Muhammed and whose true date of birth is October 14, 2004, changed his name to Saad and his date of birth to August 17, 2006. Hamza, whose original name is Saad and whose true date of birth is August 17, 2006, changed his name to Hamza and his date of birth to October 14, 2007.

[14] The Applicants used the new passports in the Second Sponsorship Application, the TRV Application, and at the POE. In the First Sponsorship Application, the Applicants used Saad and Hamza's birth names and true dates of birth, but the Principal Applicant and Mr. Ahmed falsely claimed that they were married in 2006, not in 2003.

[15] In the Second Sponsorship Application, the Applicants provided written submissions that explained the changes made to the Minor Male Applicants' passports. The Applicants therefore disclosed the changes to the Minor Male Applicants' identities prior to making any applications under those identities.

[16] On September 9, 2016, the Minister intervened in the Applicant's claim before the RPD. The Minister provided written submissions to the RPD that outlined the Applicants' previous misrepresentations and questioned the Applicants' credibility based on these misrepresentations. On August 24, 2018, the Applicants submitted DNA tests to the RPD proving that the Principal Applicant and Mr. Ahmed are the parents of the Minor Applicants.

(3) Country Conditions

[17] Country condition evidence on the record states that the Superintendent of Police in the Malir district of Karachi (the "Superintendent") killed 444 people extra-judicially from 2011 to 2018. Local news sources submitted by the Applicants report that the Superintendent killed a Mr. Tahir Hussain in February 2016, along with 11 other "militants". Of the 745 encounters that the Superintendent was involved in during this time, no police officers were injured and no inquiries into the deaths were undertaken. Some of the Superintendent's killings targeted innocent civilians and resulted in criminal proceedings against him.

B. Decision Under Review

[18] The RPD found that the Applicants were neither Convention refugees nor persons in need of protection for two reasons: (1) the identities of the Minor Male Applicants were not established; and (2) the Applicants were not credible. Each of these reasons shall be addressed respectively.

(1) Identity

[19] The RPD relied on section 106 of *IRPA* for the authority that establishing identity is central to establishing credibility. Section 106 states:

The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.

La Section de la protection des réfugiés prend en compte, s’agissant de crédibilité, le fait que, n’étant pas muni de papiers d’identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n’a pas pris les mesures voulues pour s’en procurer.

[20] The RPD found that the Principal Applicant’s statements in her BOC form “appear to minimise the importance of conflicting evidence” regarding the Minor Male Applicants’ identities and “further impugn [her] credibility by their disingenuousness.” The RPD held that the Applicants’ misrepresentations were intentional and deliberate, and that the Principal Applicant’s explanations for the new passports “falls far short of reasonable in light of the extensiveness of the misrepresentations.” The RPD further found that the reference made in the Applicants’ BOCs to “other errors” made by Mr. Ahmed after submitting his PR application “far from adequately explained” the Applicants’ previous misrepresentations.

[21] Given the above, the RPD found that the Minor Male Applicants’ identities were not established. However, in the absence of any further conflicting evidence, the RPD accepted the identities of the Principal Applicant and the Minor Female Applicants.

(2) Credibility

[22] Along with the conflicting evidence regarding the new passports, the RPD found the Applicants were not credible for three reasons.

[23] First, the RPD found that the Applicants omitted “any reference to the threats” made by state authorities in Pakistan at their POE interview. The Principal Applicant explained that she did not disclose those threats at the POE because she feared state authorities in Pakistan might learn of her claim. The RPD rejected this explanation and concluded that the addition of such threats to the Applicants’ BOC was “likely an embellishment to bolster the claim.”

[24] Second, the RPD found that the discrepancies among the documents regarding Mr. Hussain undermined the Applicants’ credibility. The RPD noted numerous discrepancies in the Principal Applicant’s testimony and the documentary evidence concerning the age of Mr. Hussain at the time of his death. The RPD admitted that these discrepancies alone are “not major” but given the other conflicting evidence regarding the Minor Male Applicants’ identities, they contributed to the overall unreliability of the Applicants’ supporting documents.

[25] Third, the RPD found that the Applicants failed to submit documentary evidence that corroborated the Principal Applicant’s inquiries to the media and NGOs regarding Mr. Hussain’s death. The RPD noted that it was the public nature of the Principal Applicant’s inquiries that caused the Applicants to receive threats from state authorities. The RPD found that because the Applicants failed to submit documents corroborating these inquiries, which would likely be available if such inquiries were made, the Principal Applicant’s testimony on this issue was not credible.

III. Issues & Standard of Review

[26] The issue on this application for judicial review is whether the RPD's decision is reasonable, and in particular:

- A. *Was it unreasonable for the RPD to find that the identities of the Minor Male Applicants were not established?*
- B. *Was it unreasonable for the RPD to fail to address the incident of persecution?*
- C. *Was it unreasonable for the RPD to rely on the Applicants' testimony at the POE?*
- D. *Was it unreasonable for the RPD to find that the Applicants provided no documents corroborating the claim that Mr. Hussain's death was reported to the media?*

[27] The parties do not dispute that the applicable standard of review for the RPD's decision is reasonableness. I agree (*Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at para 21, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 16-17).

[28] A reasonable decision is one that is justified, transparent and intelligible — it must be “based on an internally coherent and rational chain of analysis” and “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at paras 85, 99). Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and

cannot be inferred from the record, the decision will generally be unreasonable (*Vavilov* at para 98).

[29] That being said, a reviewing court should refrain from reweighing or reassessing the evidence that was before the decision maker, and should not interfere with factual findings absent of exceptional circumstances (*Vavilov* at para 125). This caution is especially relevant to credibility findings, which are entitled to considerable deference upon judicial review.

Credibility findings “lie within the heartland of the discretion of triers of fact [...] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence” (*Yan v Canada (Citizenship and Immigration)*, 2017 FC 146 [*Yan*] at para 18, citing *Siad v Canada (Secretary of State)*, [1996] FCJ No 1575, [1997] 1 FC 608 (FCA) at para 24).

IV. Analysis

A. *Was it unreasonable for the RPD to find that the identities of the Minor Male Applicants were not established?*

[30] The Applicants submit that it was unreasonable for the RPD not to accept the Principal Applicant’s explanations for the discrepancies in the Minor Male Applicants’ passports. The Applicants assert that the credibility of the Principal Applicant’s explanations are bolstered by the DNA tests, which established that the Principal Applicant is the mother of the Minor Male Applicants. The Applicants assert that the RPD committed a “fatal error” in not discussing the DNA tests.

[31] The Respondent submits that the RPD did not doubt the relationship between the Applicants, but rather found that the DNA tests did not establish their identities. The Respondent notes that the “key components of identity” consist of dates of birth and surnames, which the DNA tests did not establish (*Canada (Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 23).

[32] In my view, it was reasonable for the RPD to find that the identities of the Minor Male Applicants were not established. Before the RPD were two sets of passports and birth certificates — both of which were seemingly valid on their face, but one of which was false. In light of these factual constraints, the RPD’s finding is transparent, intelligible, and justified (*Vavilov* at para 99). By asking this Court to give primacy to the Principal Applicant’s testimony over the conflicting documentary evidence, the Applicant is asking this Court to reweigh the evidence before the RPD. I find that the RPD’s determination on this issue is not so “exceptional” that it warrants this Court reweighing the evidence before it (*Vavilov* at para 125, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64).

[33] I also find that it was reasonable for the RPD not to explicitly address the DNA tests. When the RPD’s decision is read in light of the history and context of the proceedings, it is clear that the RPD considered this evidence (*Vavilov* at para 94). Before the DNA tests were submitted, the RPD took issue with the relationship between the Applicants. At the hearing, which occurred after the DNA tests were submitted, the RPD accepted that the Principal Applicant was the parent of the Minor Male Applicants. The RPD’s change in position on this issue displays its consideration of the DNA tests.

B. *Was it unreasonable for the RPD to fail to address the incident of persecution?*

[34] The Applicants submit that the RPD cannot dismiss a claim for credibility concerns without determining the credibility of the main incident of persecution — in this case, the March 3 Incident (*Rasiah v Canada (Citizenship and Immigration)*, 2019 FC 408 [*Rasiah*] at paras 21-27; *Feboke v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 855 [*Feboke*] at paras 3-4).

[35] The Applicants assert that by attacking the lack of corroborative evidence without focusing on the crux of the Applicants' claim, the RPD undermined the "Maldonado principle", which presumes that a refugee claimant's sworn testimony is true unless there is reason to doubt their truthfulness (*Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at para 19, citing *Maldonado v Canada (Minister of Employment & Immigration)*, [1979] FCJ No 248, [1980] 2 FC 302 (FCA) [*Maldonado*] at para 5).

[36] The Respondent submits that the RPD assessed the March 3 Incident and reasonably found it not to be credible due to the lack of corroborating evidence. The Respondent submits that indicative of this assessment is the RPD's finding that Mr. Anees' house "was raided by Rangers who also threatened the family." The Respondent further submits that the RPD's assessment of the March 3 Incident is evident in its finding that:

The principal claimant, and her family, in their supporting statement, allege that it was the public nature of the family's inquiries which caused them to receive threats from state authorities in Pakistan. The lack of documents leads the panel to find that, even if the principal claimant's brother-in-law had died,

the allegation of the family's public inquiries and resulting threats is not credible. [emphasis added]

[37] The Respondent asserts that the RPD may dispose of a claim by finding that the claimant lacks credibility unless there is documentary evidence in the record capable of supporting a positive disposition of the claim (*Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 [Sellan] at para 3).

[38] The Respondent submits that when the RPD's decision is read in light of the Applicants' submissions, it was reasonable for the RPD to find that the Applicants failed to submit documentary evidence that is capable of supporting their claim (*Vavilov* at para 94). The Respondent notes that the Applicants' previous counsel informed the RPD that the documentary evidence submitted did not "corroborate specifically the claim." Given this statement, the Respondent argues it was reasonable for the RPD to hold that no such evidence was submitted.

[39] The Respondent also asserts that the case at hand is analogous to *Alonge Okito v Canada (Citizenship and Immigration)*, 2010 FC 843 [Okito]. In that case, Justice Mactavish of this Court (as she then was) held the RPD may reasonably require supporting documentation to confirm the applicant's testimony if the principle in *Maldonado* is rebutted and there is reason to doubt the truthfulness of the applicant's evidence (*Okito* at para 13).

[40] In my view, the RPD's decision is unreasonable because the RPD's rationale for impugning the credibility of the March 3 Incident, which is an essential element of the Applicants' claim, is not addressed in its reasons and cannot be inferred from the record (*Vavilov*

at para 98). By not determining the credibility of the March 3 Incident, the RPD's determination as to why the incident of persecution did not occur and why the Applicants are not Convention refugees or persons in need of protection lacks justification, transparency and intelligibility (*Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 [*Oria-Arebun*] at para 58, citing *Rasiah* at para 27). Determinative of this conclusion are *Rasiah*, *Oria-Arebun*, and *Feboke*.

[41] In *Rasiah*, the claimant sought refugee protection in Canada after the police attacked him in his home in Sri Lanka. The RPD summarized that incident "in passing" and rejected the applicant's claim for refugee protection by making a number of adverse credibility findings, none of which related directly to the incident of persecution or its aftermath (*Rasiah* at para 21). Justice Norris held that it was unreasonable for the RPD to deny the applicant's claim without making any "express findings whatsoever" with respect to the credibility of the incident of persecution because that incident was the principal reason for why the applicant was seeking refugee protection (*Rasiah* at paras 22-23).

[42] Similarly, in *Oria-Arebun*, the Refugee Appeal Division ("RAD") made only a "passing reference" to the applicant's incident of persecution, in which she was attacked by a mob for being bisexual, and made "no finding" on whether the applicant was credible on that point (at paras 55-56). Justice Fuhrer held that it was unreasonable for the RAD not to address the incident of persecution, which was a "central pillar" to the applicant's claim, on the basis that the RAD "believed other credibility concerns in her testimony rendered her whole testimony unbelievable" (*Oria-Arebun* at para 57). Justice Fuhrer also rejected the argument that the RAD

discharged its obligation to assess the credibility of the incident of persecution by making a credibility finding concerning the applicant's relationship with another woman on the basis that it was "inextricably tied to the alleged mob incident" (*Oria-Arebun* at para 58).

[43] Finally, in *Feboke*, Justice Campbell found that the RPD's decision to reject the applicants' claim for refugee protection was unreasonable because it relied upon "general negative credibility on evidentiary features ancillary to the substance of the claim: use of and production of the Applicants' Nigerian passports; BOC error; BOC amendment; BOC deficiency; and perceived supporting witness affidavit irregularities" (at para 3). Justice Campbell found that the above issues did not go to the "core of the claim", and that the RPD therefore failed to discharge its obligation to consider the applicant's sworn testimony on the substance of the claim (*Feboke* at para 4).

[44] The case at hand is analogous to *Rasiah*, *Oria-Arebun*, and *Feboke*, in that the RPD only referred to the March 3 Incident in passing and did not assess its credibility. Instead, the RPD relied on a myriad of other credibility concerns — the Minor Male Applicants' identities; the Applicants' statements at the POE; the Applicants' lack of corroborating evidence — none of which relate directly to the March 3 Incident, which is the core of their claim. The problem with this approach is that it presumes that if the Applicants lied about one aspect of their claim, the Applicants' testimony regarding the March 3 Incident also cannot be true, even if the two are not connected (*Oria-Arebun* at para 57, citing *Guney v Canada (Citizenship and Immigration)*, 2008 FC 1134 at para 17; *Feboke* at para 4).

[45] I am not persuaded by the Respondent's argument that *Okito* is analogous to the case at hand. In *Okito*, the RPD took issue with the applicant's failure to submit a press release that he claimed to have signed and that was "at the heart of his claim" (at paras 8, 12). Justice Mactavish therefore found that it was reasonable for the RPD to impugn the applicant's credibility on the lack of corroborating evidence, especially given a variety of other credibility concerns in the applicant's narrative (*Okito* at paras 12-14).

[46] In the case at hand, the RPD's credibility concerns are not sufficiently connected to the March 3 Incident to allow the RPD to obviate its requirement to assess the credibility of that incident. The Applicants submitted a newspaper article reporting that a Mr. Tahir Hussain was killed by the Superintendent, and an affidavit affirmed by Mr. Anees to this effect — both of which are vital to their claim and which the RPD failed to assess in a manner that is transparent and intelligible.

[47] In my view, the above conclusion does not displace the principle in *Sellan*. While adverse credibility findings are sufficient to dispose of a claim, this does not entail that the RPD can impugn a claimant's credibility without addressing the credibility of the incident of persecution, as was done in the case at hand. The RPD is still required to address the credibility of the incident of persecution if the RPD is to find that a claim for refugee protection is not credible.

[48] Furthermore, I find that the RPD was required to determine the credibility of the March 3 Incident despite that the identities of the Minor Male Applicants were not established. While

section 106 of *IRPA* stands for the authority that establishing identity is central to establishing credibility, the RPD accepted the identities of the Principal Applicant and the Minor Female Applicants. Given that finding, the RPD cannot rely on the issues concerning the Minor Male Applicants' identities alone to impugn the credibility of the March 3 Incident.

[49] Finally, I am not persuaded by the Respondent's argument that at the RPD hearing, the Applicants' previous counsel stated that the Applicants did not submit corroborating evidence for their claim. When this statement is read contextually, it is clear that counsel was referring to a lack of country condition evidence that supports the Applicants' claim.

[50] In light of the above determination, I find that it is not necessary to address the remaining issues raised by the Applicants.

V. Conclusion

[51] No questions for certification were raised, and I agree that none arise.

[52] I find that the RPD's decision is unreasonable and therefore allow this application for judicial review.

JUDGMENT IN IMM-5355-19

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter returned back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5355-19

STYLE OF CAUSE: AREEB-UN-NISA, SAAD AHMED, HAMZA AHMED,
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PLACE OF HEARING: OTTAWA, ONTARIO

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DATED: NOVEMBER 4, 2020

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