

Federal Court



Cour fédérale

Date: 20211007

Docket: IMM-3686-20

Citation: 2021 FC 1046

Ottawa, Ontario, October 7, 2021

PRESENT: Madam Justice Walker

BETWEEN:

MAHESH POUDEL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] Mr. Poudel is a citizen of Nepal. He entered Canada in June 2017 and sought refugee protection shortly thereafter. Mr. Poudel fears persecution and harm in Nepal from the Biplab faction of the Communist Party of Nepal-Maoist (CPN-M) because of his membership and participation in the Nepali Congress Party (NCP), his status as a businessman who has refused to join the Biplab faction and his involvement in social activities. He alleges that he was subject to

mistreatment in Nepal from Maoist organizations, in the form of harassment, extortion, threats and physical assaults. Mr. Poudel states that he was abducted and assaulted by Biplab members in December 2016. His abductors demanded he quit the NCP, join their party and provide financial support. He was released the next day after payment of the amount demanded. In April 2017, Mr. Poudel states that he received a letter from the same Biplab group demanding he join their party and make a substantial donation. He did not comply and was again physically attacked. The April 2017 events led Mr. Poudel to leave Nepal and seek refuge in Canada.

[2] The Refugee Protection Division (RPD) heard Mr. Poudel's refugee claim on July 12, 2018 and dismissed the claim on August 24, 2018. The determinative issue for the RPD was credibility. The RPD found that:

- a) Mr. Poudel had not established his alleged political affiliation because he displayed very little knowledge regarding important aspects of the NCP;
- b) Mr. Poudel had not made efforts to obtain reasonably available corroborative evidence contrary to Section 11 of the *Refugee Protection Division Rules*, SOR/2012-256. He also failed to provide documentation regarding the 2016 ransom payment;
- c) The letter Mr. Poudel provided from the Human Rights Organization of Nepal (HURON) (the 2017 HURON Letter) was fraudulent. The basis of the RPD's adverse finding was a misspelling of the author's name, who was purportedly HURON's General Secretary;
- d) Mr. Poudel's delay in leaving Nepal seriously undermined his credibility and subjective fear; and
- e) The content of the documents filed in support of Mr. Poudel's claim were insufficient to establish the truth of his central allegations and to overcome the RPD's cumulative credibility concerns regarding his testimony and evidence.

[3] Mr. Poudel appealed the RPD decision to the Refugee Appeal Division (RAD). In his appeal submissions, he contested the RPD's finding that the 2017 HURON Letter was fraudulent and argued that the RPD erred by dismissing his corroborative documents simply due to its adverse credibility finding. Mr. Poudel also submitted new evidence for consideration by the RAD.

[4] In a decision dated July 28, 2020 (the Decision), the RAD confirmed the RPD's refusal of Mr. Poudel's refugee claim and dismissed his appeal. The RAD found that Mr. Poudel had not established he is at risk from Biplab Maoists in Nepal and concluded that he is neither a Convention refugee nor a person in need of protection.

[5] The RAD refused to admit Mr. Poudel's new evidence on the basis of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) and, in respect of one document, on the basis that the evidence was neither credible nor probative (citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, confirmed in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96).

[6] As was the case for the RPD, the determinative issue for the RAD was credibility. The RAD summarized the RPD's adverse credibility findings, none of which were challenged by Mr. Poudel on appeal. In the absence of any such challenge, the RAD confirmed the RPD's credibility findings.

[7] The Decision focuses on Mr. Poudel's documentary evidence. The RAD confirmed the RPD's finding that the 2017 HURON Letter is fraudulent based on the misspelling of the General Secretary's name and the availability of fraudulent documents in Nepal. The panel buttressed its conclusion that the letter is not genuine with reference to Mr. Poudel's vague testimony about how he obtained the letter and the fact that it contained no details regarding dates, places or other specifics about the alleged April 2017 incident.

[8] The RAD addressed at length Mr. Poudel's submission that the RPD erred by giving his other documentary evidence little or no weight. The panel undertook its own assessment of the individual documents and the relevant documents in the National Documentation Package for Nepal. The RAD found that the documents in question were either not authentic or not probative of central elements of Mr. Poudel's claim.

II. Issues and standard of review

[9] Mr. Poudel raises the following issues in this application:

1. Was the RAD's refusal to admit Mr. Poudel's new evidence reasonable?
2. Did the RAD reasonably assess the documentary evidence before it?
3. Did the RAD breach its duty of procedural fairness to Mr. Poudel by failing to provide him an opportunity to address its concerns regarding the documentary evidence?

[10] The RAD's refusal of Mr. Poudel's new evidence and the merits of its Decision are subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Kanawati v Canada (Citizenship and*

Immigration), 2020 FC 12 at para 9; *Okunowo v Canada (Citizenship and Immigration)*, 2020 FC 175 at paras 27–28). Where the applicable standard is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and 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 para 85).

[11] The third issue, that of procedural fairness, must be reviewed for correctness (*Alkhoury v Canada (Citizenship and Immigration)*, 2020 FC 153 at para 10). The Federal Court of Appeal recently confirmed that the review does not involve a standard of review but assesses “whether or not procedural fairness has been met” (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35:

[35] [...] In fact, it is not at all clear to me why we keep assessing procedural fairness within the framework of judicial review, considering that it goes to the manner in which a decision is made rather than to the substance of the decision, as Justice Binnie aptly observed in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 102. What matters, at the end of the day, is whether or not procedural fairness has been met.

III. Analysis

1. *Was the RAD’s refusal to admit Mr. Poudel’s new evidence reasonable?*

[12] On appeal to the RAD, Mr. Poudel submitted three documents as new evidence, all directed to clarifying the spelling of the name of HURON’s General Secretary:

1. A copy of a letter dated September 28, 2018 from HURON (the 2018 HURON Letter);
2. An Amnesty International report published May 25, 2005 (the Amnesty Report); and

3. A copy of an online article dated September 28, 2018 from the Himalayan Times (the HT Article).

[13] The 2017 HURON letter describes the physical punishment and extortion suffered by Mr. Poudel at the hands of the Biplab faction and was signed by “Mahamuni Acharya”, General Secretary. The RPD found the 2017 letter to be fraudulent because the spelling of the General Secretary’s name on the letter differed from that set out on HURON’s website, “Mahamuniswor Acharya”. The 2018 Huron Letter states that “Mahamunishwor Acharya” and “Mahamuni Acharya” are one and the same person. The Amnesty Report refers to “Mahamuniswor Acharya”, a human rights observer with HURON.

[14] The RAD refused to admit the 2018 HURON Letter and Amnesty Report because Mr. Poudel could reasonably have been expected to present the two documents to the RPD before its decision rejecting his claim. The panel emphasized that the reference date in subsection 110(4) of the IRPA for its assessment of whether new evidence may be admitted is not the date of the RPD hearing but rather the date of the RPD decision. The RAD found that the RPD brought the discrepancy in the names to Mr. Poudel’s attention at the hearing and gave him an opportunity to respond. Therefore, he was aware of the RPD’s concerns about the author’s identity and had 42 days post-hearing to submit the 2018 HURON Letter and Amnesty Report before the RPD decision was released. Mr. Poudel failed to do so despite being represented by experienced counsel.

[15] I have reviewed the transcript of the hearing to confirm that the RPD raised the two spellings of the HURON General Secretary’s name and provided Mr. Poudel the opportunity to

explain the inconsistent spellings. Mr. Poudel's response was that he did not communicate in person regarding the letter so he did not know why the name was spelled differently. In my opinion, Mr. Poudel was on notice that the apparent misspelling undermined the authenticity of the 2017 HURON Letter. Taking into account the length of time between the RPD hearing and its decision, together with the fact that Mr. Poudel was represented by counsel, I find no reviewable error in the RAD's refusal to admit the 2018 HURON Letter and the Amnesty Report.

[16] The HT Article was published after the RPD's decision and so met the requirements of subsection 110(4). The RAD acknowledged that the article was offered as new evidence because it refers to a telephone conversation between a representative of the newspaper and the HURON General Secretary, who is identified as "Mahamuniswor Acharya". The RAD found that the fact that an unidentified representative of the newspaper spelled the General Secretary's name in this way was not credible or probative evidence.

[17] In this, I disagree with the Respondent that the RAD's finding was reasonable. First, while the author of the HT Article itself is not identified, the RAD misspoke in finding that an unidentified representative of the newspaper was responsible for the spelling of the name of the General Secretary. The article states only that, "[t]alking to *THT* over the phone, HURON General Secretary Mahamuniswor Acharya said, [...]" [Emphasis in original.]. The RAD undertook no assessment of the Himalayan Times itself or its reputation as a credible newspaper. The panel failed to explain why the spelling of the General Secretary's name in a newspaper

article that, on its face, is well-written, diminished either the relevance or probative value of the HT Article.

[18] The HT Article is relevant to a central issue in both the RPD and RAD Decisions. The absence of a rational chain of reasoning discounting its probative value is a significant error in the Decision. The article provides an objective indication from what appears to be a reputable source that the General Secretary's name is spelled in a number of ways. The purported misspelling of the name in the 2017 HURON Letter led the RPD and RAD to find the letter to be fraudulent. This finding resulted in the RAD placing no weight on the 2017 HURON Letter and drawing a negative inference regarding Mr. Poudel's credibility as it related to the central allegations of his refugee claim. Therefore, the RAD's error in its analysis of the admissibility of the HT Article is a significant error and warrants the intervention of the Court.

2. *Did the RAD reasonably assess the documentary evidence before it?*

[19] The RAD's treatment of Mr. Poudel's proposed new evidence is the determinative issue in this application because it is directly relevant to the panel's consideration of the central issue of Mr. Poudel's credibility regarding his fear of return to Nepal. If on reconsideration the HT Article is admitted, its admission may affect the RAD's finding that the 2017 HURON Letter is fraudulent. I acknowledge that the RAD's Decision does not rest only on its assessment of the 2017 HURON Letter. However, it is not possible for the Court to gauge the effect on the RAD's analysis of any finding that the letter is not fraudulent and is due some weight as objective confirmation of Mr. Poudel's narrative.

3. *Did the RAD breach its duty of procedural fairness to Mr. Poudel by failing to provide him an opportunity to address its concerns regarding the documentary evidence?*

[20] The RPD found Mr. Poudel not to be credible and, in making its credibility finding, considered the contents of his documents. The panel undertook no analysis of the individual documents but found that they were insufficient to establish the truth of the central allegations of the refugee claim. On appeal, Mr. Poudel argued that the RPD erred in summarily dismissing his corroborative evidence and the RAD agreed. The RAD assessed each document and provided reasons for its conclusions as to no weight or little weight that are logically supported and intelligibly explained.

[21] Mr. Poudel submits that the principles of procedural fairness required the RAD to provide him an opportunity to address the concerns raised in its detailed analysis of his evidence in light of the RPD's very rudimentary review. He submits that the RAD's analysis was entirely new and that he could not have anticipated the RAD panel would conduct an entirely fresh analysis and raise a number of new credibility findings. I do not find these submissions persuasive.

[22] The RAD did not raise a new issue that would, in fairness, require an opportunity for Mr. Poudel to respond (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at para 30). Mr. Poudel was on notice that his credibility was at issue and that there were concerns regarding his documentary evidence. I agree with the Respondent that an applicant cannot claim to be taken by surprise when the RAD carries out the very analysis they complained was missing from the RPD's decision. I find no breach of the RAD's duty of procedural fairness.

IV. Conclusion

[23] The application is granted in light of the RAD's significant error in its consideration of Mr. Poudel's new evidence.

[24] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-3686-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3686-20

STYLE OF CAUSE: MAHESH POUDEL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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