Federal Court  Cour fédérale

Date: 20220211

Docket: IMM-1987-21

Citation: 2022 FC 188

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 11, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

SALIMA KHELILI
LYDIA HASSAINE

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The principal applicant, Salima Khelili, is a citizen of Algeria. She is seeking judicial review of a decision of the Refugee Appeal Division [RAD] rendered on March 1, 2021 [Decision], in which the RAD upheld a decision of the Refugee Protection Division [RPD]

rejecting Ms. Khelili's claim for refugee protection and denying her Convention refugee or person in need of protection status under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In her refugee protection claim, Ms. Khelili was also acting as the representative of her minor daughter, Lydia Hassaine, the co-applicant in this case. The RAD and the RPD both named Ms. Khelili's lack of credibility as the main reason for rejecting her refugee protection claim.

[2] Ms. Khelili submits that the RAD made three errors in its Decision: (i) in its interpretation of the requirements of subsection 110(4) of the IRPA for new evidence that may be presented; (ii) in its assessment of her credibility; and (iii) in its application of section 97 of the IRPA in respect of her fear of returning to Algeria. Ms. Khelili is asking the Court to set aside the Decision and to refer the matter back to the RAD for redetermination by a differently constituted panel.

[3] Having examined the RAD's reasons, the evidence before it and the applicable law, I see no reason to set the RAD's Decision aside. The RAD's reasons on the assessment of the evidence on the record, developed over nearly one hundred paragraphs, all have the qualities that make the RAD's reasoning logical and coherent in relation to the relevant legal and factual constraints. There are no grounds to justify the Court's intervention, and I therefore have to dismiss Ms. Khelili's application for judicial review.

II. Background

A. *Facts*

[4] In November 2017, Ms. Khelili's husband, Mohamed Hassaine, left Algeria to visit Canada. A month after he arrived in Canada, Mr. Hassaine asked Ms. Khelili to come and join him with their daughter. Mr. Hassaine claimed that he did not want to leave Canada and that he hoped not to have to raise his daughter in Algeria. The family therefore joined him in Canada.

[5] While she was in Canada, Ms. Khelili learned that her husband had started converting to Judaism. The couple was originally Muslim, in terms of their faith and cultural traditions. Ms. Khelili therefore also embarked on the process of converting to Judaism.

[6] Ms. Khelili and her daughter returned to Algeria in January 2018. They flew to Canada and back a second time, in summer/autumn 2018. Ms. Khelili alleges that when she was back in Algeria, she became the target of threats from her family-in-law because of her conversion to Judaism. These threats led her to hide at a hotel before her return to Canada in November 2018. On February 9, 2019, Ms. Khelili and her daughter claimed refugee protection in Canada.

[7] Ms. Khelili says that she does not wish to return to Algeria. She fears being persecuted there, by the Algerian state and her in-laws. Ms. Khelili further alleges that her brother-in-law, a certain Medhi, was [TRANSLATION] "tortured" by his own family because he was mistakenly accused of also having converted to Judaism.

[8] The hearing before the RPD took place in January 2020. On February 28, 2020, the RPD rejected the refugee protection claims of Ms. Khelili and her daughter, on the ground that they had failed to establish a serious possibility of persecution because of their religion. The RPD further determined that Ms. Khelili and her daughter had failed to establish that they would be personally exposed to a danger of torture, a risk to their lives or a risk of cruel and usual treatment or punishment.

[9] Ms. Khelili appealed this decision before the RAD.

B. *The RAD's Decision*

[10] After setting out the facts of the case and breaking down the details of the RPD's decision, the RAD started its review by considering the admissibility of the new evidence presented to it by Ms. Khelili. In light of the criteria established in subsection 110(4) of the IRPA and in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], the RAD held that the new evidence was not admissible, concluding that it consisted of general articles from the internet that had been published and been available, for the most part, before Ms. Khelili's hearing date before the RPD. For some of the evidence, the RAD also found that Ms. Khelili was simply trying to correct and supplement the incomplete evidence she had filed with the RPD.

[11] The RAD then concluded that Ms. Khelili was right to claim that the RPD had erred in stating that Ms. Khelili's claim concerned only section 97 of the IRPA. However, the RAD found that this error was not fatal given that a separate analysis of sections 96 and 97 of the IRPA is not always necessary and depends on the circumstances of each case. In this case,

Ms. Khelili had raised her religion as the only reason for being persecuted and for her reasonable fear that she would be exposed to one of the dangers or risks set out in paragraphs 97(1)(a) and 97(1)(b). An analysis under section 97 therefore had to start with determining whether, on a balance of probabilities, Ms. Khelili had truly converted to Judaism, something she failed to demonstrate according to the RPD's analysis under section 96 of the IRPA. The RAD therefore concluded that Ms. Khelili did not qualify for the protection offered by section 97.

[12] The RAD continued its analysis by looking at the manner in which the RPD had concluded that Ms. Khelili lacked credibility. Ms. Khelili alleges that the RPD assessed her knowledge of Judaism and reviewed her religious practice against too high a standard of proof. The RAD found on the contrary that the RPD had performed a fair assessment of Ms. Khelili's knowledge and that it had been right to find that her knowledge was lacking. The RAD noted, for example, that Ms. Khelili did not know more than any educated person who had researched Judaism with the help of Google.

[13] Like the RPD before it, the RAD noted that Ms. Khelili's testimony on the steps she took to convert to Judaism had been vague and contradictory. For example, Ms. Khelili mixed up the dates of the meetings she had with a rabbi during the conversion process. Also, Ms. Khelili was unable to comment on her husband's conversion process or to provide the name of the rabbi she had met with or the name of the synagogue where she purportedly converted. The RAD further notes that the RPD was right not to give any weight to the testimonial letters from friends of her husband describing her steps to convert since these letters were not signed and were accompanied by illegible identity cards. Lastly, the RAD found that Ms. Khelili's behaviour was

not consistent with that of a person fearing for their life given that she returned to Algeria twice after her conversion and that she even lived with her in-laws until 10 days before her final departure to Canada.

C. *Standard of review*

[14] Since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the framework for the judicial review of the merits of administrative decisions has been based on the presumption that the applicable standard of review in all cases is now that of reasonableness (*Vavilov* at para 16). The parties do not dispute that this standard applies here, especially in respect of the admissibility of new evidence before the RAD under subsection 110(4) of the IRPA.

[15] When the applicable standard is that of reasonableness, the reviewing court's role is to examine the reasons given by the administrative decision maker and 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 para 85). In conducting a reasonableness review, a court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). To make this determination, the reviewing court asks "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74, and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13).

III. Analysis

A. *Did the RAD err in its interpretation of the requirements of subsection 110(4) of the IRPA and the factors applicable in respect of new evidence that may be presented?*

[16] It is undisputed that to be admitted on appeal before the RAD, any new evidence presented by a claimant has to meet the requirements of subsection 110(4) of the IRPA and of the Federal Court of Appeal's decisions in *Raza* and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] (*Dugarte de Lopez v Canada (Citizenship and Immigration)*, 2020 FC 707 [*Dugarte de Lopez*] at paras 16–21). Subsection 110(4) establishes that a party may present only evidence (i) that arose after the rejection of the party's claim; (ii) that was not reasonably available; or (iii) that the party could not reasonably have been expected in the circumstances to have presented at the time of rejection (*Singh* at para 34). *Raza* sheds light on the requirements of subsection 110(4) by setting out five criteria to help in determining whether new evidence is admissible: credibility, relevance, newness, materiality and express statutory conditions (*Raza* at para 13). These five criteria add to the factors used to analyze whether new evidence is admissible (*Dugarte de Lopez* at para 19). *Singh*, in turn, slightly alters the way in which the criteria are assessed under subsection 110(4). According to *Singh*, newness is redundant before the RAD, while the materiality of the evidence does not have to be considered by the RAD given the RAD's broad power under section 67 of the IRPA to intervene in the RPD's decisions.

[17] Ms. Khelili submits that the RAD's interpretation of the admissibility requirements for the new evidence was rigid and unreasonable. She alleges that the sole purpose of her new evidence

was to address the concerns raised in the RPD's decision. She further alleges that the RAD's refusal to admit objective evidence, such as the articles from the internet she submitted, prevented her from establishing the credibility of her conversion to Judaism.

[18] I do not agree with Ms. Khelili's claims.

[19] At issue is whether, in light of the applicable case law and the documents presented by Ms. Khelili, it was reasonable for the RAD to conclude that the new evidence was not admissible. I believe it was. In its broad, comprehensive reasons, the RAD analyzed each of the six documents or bundles of documents presented by Ms. Khelili and concluded that they did not satisfy the requirements of subsection 110(4) of the IRPA or the implicit admissibility criteria, namely, credibility, relevance and newness. These conclusions call for deference, and, in the circumstances, I am not satisfied that the RAD's determination to refuse to admit the new evidence was incorrect.

[20] First, a number of the documents submitted by Ms. Khelili existed when Ms. Khelili's refugee protection claim was rejected by the RPD. Second, there was nothing new in the documents she presented. Given that Ms. Khelili's refugee protection claim was based solely on the fact that she had converted to Judaism, Ms. Khelili should have expected having to prove this claim at her hearing before the RPD. As noted by the Minister, Ms. Khelili's new evidence was merely an attempt to complete a deficient record, which is clearly not an acceptable reason under subsection 110(4) of the IRPA and *Singh* (*Singh* at para 54; *Digaf v Canada (Citizenship and*

Immigration), 2019 FC 1255 at para 25; *Khan v Canada (Citizenship and Immigration*), 2016 FC 855 at para 44; *Abdullahi v Canada (Citizenship and Immigration*), 2016 FC 260 at para 15).

[21] In short, I am not persuaded that it was unreasonable for the RAD to conclude that Ms. Khelili's documents were not "new" within the meaning of subsection 110(4) of the IRPA. The RAD's reasoning in respect of the admissibility of the new evidence is fully justified, transparent and intelligent, and the Court should not interfere in this conclusion. It was entirely open to the RAD to determine that the new evidence Ms. Khelili sought to file could have and should have been presented as evidence before the RPD and not on appeal.

B. ***Did the RAD err in its assessment of Ms. Khelili's credibility?***

[22] Ms. Khelili also submits that the RAD was unreasonable in its analysis of the evidence regarding the credibility of her conversion. Ms. Khelili maintains that when assessing a claimant's alleged religious conversion, the RAD must proceed "with caution given the highly subjective and personal nature of a person's religious beliefs" (*Bouarif v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 49 at para 10, citing *Lin v Canada (Citizenship and Immigration*), 2012 FC 288 at para 61). According to Ms. Khelili, several excerpts from the Decision show that the RAD rendered an unfounded decision. She points to (i) the conclusion requiring a higher standard of proof for the conversion of a person of Muslim heritage; (ii) the disregard for her answers about certain Jewish rites, which are corroborated by the evidence; (iii) the need for a formal path leading to the conversion to Judaism; and (iv) the failure to give sufficient weight to the testimonial letters supporting her conversion to Judaism.

[23] I do not share Ms. Khelili's opinion.

[24] To begin with, it must be remembered that applicants face an elusive burden of proof when challenging a decision maker's assessment of their credibility (*Singh Gill v Canada (Citizenship and Immigration)*, 2011 FC 447 at para 8; *Nijjer v Canada (Citizenship and Immigration)*, 2009 FC 1259 at para 14). In *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*], I summarized the principles governing the manner in which an administrative decision maker like the RAD must assess the credibility of refugee protection claimants (*Lawani* at paras 20–26). Having applied these principles, I conclude that the RAD's Decision is reasonable in every aspect. In the case of Ms. Khelili, the gaps in the evidence she presented and the accumulation of contradictions and inconsistencies regarding crucial elements of her refugee protection claim amply support the adverse finding the RAD made regarding her credibility (*Lawani* at para 22). I would add that the lack-of-credibility findings were not based on minor contradictions that were secondary or peripheral to Ms. Khelili's claim; the inconsistencies go to the core of Ms. Khelili's account, namely, the circumstances surrounding her conversion to Judaism.

[25] Once again, the RAD provided comprehensive, carefully considered reasons explaining why it did not find Ms. Khelili to be credible. The reasonableness standard dictates that the reviewing court must start from the decision and the decision maker's reasons, while recognizing that the administrative decision maker has the primary responsibility to make the factual determinations. It is well established that the Court owes significant deference to assessments of refugee protection claimants' credibility made by the RPD and the RAD since questions of credibility are at the

very heart of their jurisdiction. In her arguments Ms. Khelili is simply expressing her disagreement with the RAD's assessment of the evidence and is asking the Court to prefer her opinion and her reading over that of the RAD. That is not the role of this Court on judicial review.

[26] I note that the issue before the Court is not whether the interpretations proposed by Ms. Khelili might be defendable, acceptable or reasonable. Rather, the Court has to look at this issue in respect of the interpretation made by the RAD. The fact that there may be other reasonable interpretations of the facts does not in itself mean that the RAD's interpretation was unreasonable. Doing so would amount to indirectly applying the correctness standard, which *Vavilov* expressly instructed reviewing courts not to do.

C. *Did the RAD err in respect of the requirements of subsection 97(1) of the IRPA in its assessment of Ms. Khelili's fear of returning to Algeria?*

[27] For the purposes of the section 97 analysis, administrative decision makers have to determine whether removing a refugee protection claimant could expose the claimant personally to the risks and dangers listed therein. Ms. Khelili submits that the RAD made an unreasonable decision because the fears she has in relation to returning to Algeria are corroborated by the testimonial evidence and supported by the documentary evidence in the National Documentation Package on Algeria.

[28] I am not persuaded by Ms. Khelili's arguments.

[29] Once again, the RAD enjoys broad discretion in assessing the evidence before it. In addition, it is assumed to have reviewed all the evidence before it (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). Here, the RAD determined that it was not necessary to perform the section 97 analysis because the section 96 analysis had failed to establish that Ms. Khelili had truly converted to Judaism. In short, her fear of persecution on the ground of her religion was unfounded. The only basis for Ms. Khelili's refugee protection claim under section 97 was her fear of returning to Algeria for religious reasons as a result of her alleged conversion to Judaism. Since, according to the RAD, this conversion lacked any credibility, it was entirely reasonable for the RAD to conclude as it did in respect of the fear raised under section 97. Indeed, this chain of reasoning in the Decision has been repeatedly upheld in the case law of this Court (*Plancher v Canada (Citizenship and Immigration)*, 2007 FC 1283 at para 16; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1710 at para 16; *Soleimanian v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1660 at para 22; *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at para 17).

[30] It is also well known that the elements required to establish the merits of a claim under section 97 of the Act differ from those provided for in section 96. For the purposes of section 97, the decision maker must consider whether the applicant's removal could expose the applicant personally to the risks and threats specified in the section. Risk must be personalized and must be determined on a balance of probabilities. It is prospective and has no subjective component (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 33; *Alcantara Moradel v*

Canada (Immigration, Refugees and Citizenship), 2019 FC 404 at paras 22–23).

Section 97 requires that the risk be to the refugee protection claimant and that the claimant establish a nexus with the claimant's personal circumstances. In this case there was no evidence, be it documentary or testimonial, to establish a nexus with Ms. Khelili's personal circumstances, or how Ms. Khelili would be exposed to a risk or danger should she return to Algeria.

IV. Conclusion

[31] For all of these reasons, Ms. Khelili's application for judicial review is dismissed. I have not seen anything irrational in the decision-making process followed by the RAD or in its conclusions. I find rather that the extremely comprehensive analysis performed by the RAD has all the required hallmarks—transparency, justifiability and intelligibility—and that there is no reviewable error in the Decision. When reviewed against reasonableness, it is enough for a decision to be based on an internally coherent and rational chain of analysis and be justified in relations to the facts and law that constrain the decision maker. That is obviously the case here.

[32] No question of general importance was proposed for certification, and I agree that none arises here.

JUDGMENT in IMM-1987-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

2. There is no serious question of general importance to be certified.

"Denis Gascon"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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