Federal Court  Cour fédérale

Date: 20220222

Docket: IMM-1702-20

Citation: 2022 FC 237

Ottawa, Ontario, February 22, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ALI KARIM SAID RAHIMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant, Mr. Rahimi [Applicant], applies for judicial review of an officer's [Officer] February 20, 2020 decision refusing his application for a permanent resident visa in Canada [Decision]. The Applicant applied as a member of the Convention Refugee Abroad Class or, alternatively, as a member of the Humanitarian Protected Persons Abroad Designated Class.

[2] The application for judicial review is allowed.

II. Background Facts

[3] The Applicant is Kurdish and self-declared as “stateless” on his application form. The Applicant’s family is originally from Iran, but in 1979 (at the beginning of the Iran-Iraq war), his family fled to northern Iraq. In 1984, the Applicant was born in the Al-Tash refugee camp [Al-Tash Camp] in southern Iraq. The Applicant’s parents and some of his siblings left the Al-Tash Camp and returned to Iran in 2000. He does not have a birth certificate and the Applicant’s parents never told the Iranian authorities about the Applicant’s birth. The Applicant lived in the Al-Tash Camp with his grandparents until 2006 and continued living in Iraq until October 2015, when he fled to Denmark. He left behind his wife and daughter in Iraq because they considered the trip too dangerous. They planned to reunite once he settled in Canada.

[4] Upon arrival in Denmark, the Applicant claimed refugee status. His Danish refugee claim was rejected on June 26, 2018. The Danish court advised him that he should be eligible for Iranian citizenship. Danish authorities told the Applicant he could leave Denmark voluntarily by July 4, 2018 but he failed to do so. As a result, on July 18, 2018, Danish authorities advised him that he would be sent to a country of their choosing, using the necessary police force. The Danish report by Departure Control identifies that country as possibly being Iran. The Applicant agreed to cooperate with the Danish police moving forward.

[5] While in Denmark, the Applicant inquired about obtaining Iraqi citizenship but the Iraqi embassy told him that he is ineligible. In his Canadian refugee application, the Applicant states

that he does not want to apply for Iranian citizenship and fears returning to Iran. He explains that many young Kurdish men from Iraq (and from the Al-Tash Camp specifically) are suspected of joining Kurdish opposition parties. Those men are harassed and sometimes imprisoned without a fair trial. The Applicant states that this persecution would occur as soon as he lands in Iran.

[6] On June 10, 2019, the Applicant, without legal counsel, filed an application for refugee protection in Canada and a sponsorship agreement. In these documents, the Applicant declares that he is stateless, he was born in Iraq, and he is a habitual resident of Iraq. Furthermore, he does not believe that he will be able to become a citizen of Iran because "…I was not born there, have never lived there and I don't have citizenship there." However, the Applicant does identify Iran as his "home country" and his "country of origin." He also indicates that his father was a citizen of Iran.

[7] On February 14, 2020, the Applicant was interviewed by the Officer at the Canadian embassy in Copenhagen, Denmark.

III. The Decision

[8] The Officer rejected the Applicant's application on February 20, 2020. The Officer did not determine whether the Applicant was a national of Iran or Iraq but focused on whether the Applicant had a well-founded fear of persecution in Iraq. There was no assessment of the Applicant's fear of persecution in Iran. The Officer's reasons make it clear that the Officer was guided by section 96(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[9] The Officer concluded that the Applicant did not have a well-founded fear of persecution in Iraq. Rather, by his own admission, the Applicant left Iraq for the prospect of a better economic future. The Officer noted that the Applicant said it was safer for his wife and daughter to stay in Iraq than to travel to Europe with him. Further, when asked if he had ever experienced problems with Kurdish or Iraqi authorities or faced discrimination or harassment, the Applicant answered that he had not. The Officer also noted that, while the area the Applicant had lived in was generally unsafe in 2009, the Applicant was never personally affected by violence and had never witnessed any violence or combat.

[10] The Officer found that the Applicant was not a Convention refugee or a person in need of protection.

IV. Relevant Legislative Provisions

[11] Section 96 of *IRPA* states:

> **Convention refugee**
>
> 96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
>
> (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.
>
> [Emphasis added.]

V. Issue

[12] The only issue is whether it was reasonable for the Officer to assess the Applicant's fear of persecution in Iraq, rather than Iran.

VI. Standard of Review

[13] The parties have different positions on the appropriate standard of review. The Applicant submits that the Decision should be reviewed on the standard of correctness because it involves questions of law and the interpretation of international law. The Applicant relies on case law that pre-dates *Canada (Minister and Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Questions of law are no longer reviewable on the standard of correctness simply because they are questions of law. *Vavilov* has created a presumption of reasonableness and clearly sets out the circumstances where courts shall depart from that presumption (at paras 16-17). Absent one of these circumstances, a question of law shall be assessed on the standard of reasonableness (*Vavilov* at para 115). None of those exceptions are applicable to this case. Furthermore, I disagree with the Applicant that this case involves an interpretation of international law. This case requires an interpretation of section 96 of the *IRPA*. A decision maker's interpretation of their home statute is subject to a reasonableness review (*Vavilov* at para 25).

[14] A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification and whether the decision "is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). If the reasons of the decision maker allow a reviewing Court to understand why the decision was made, and

determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 (SCC) at para 47). In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87).

VII. Parties' Positions

A. *Was it reasonable for the Officer to assess the Applicant's fear of persecution in Iraq, rather than Iran?*

(1) Applicant's Position

(a) *The Officer was obligated to determine the Applicant's nationality*

[15] Although the Applicant declared he was stateless, the Applicant's country of nationality is Iran.

[16] The Officer was under a duty to determine the Applicant's nationality (*Bouianova v Canada (Minister of Employment and Immigration)*, [1993] 67 FTR 74, at para 12 [*Bouianova*]). An officer may not accept an applicant's assertion that they are not a national of a specific country when the evidence indicates otherwise (*Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 at paras 21-23, 27 [*Williams*]). This principle also applies when applicants claim that they are stateless (*Petrov v Canada (Citizenship and Immigration)*, 2014 FC 658 at paras 24-25 [*Petrov*]). The Applicant acknowledges that the rules in *Williams* and *Petrov* are derived from facts that are different from the case at hand. Despite these differences,

Williams and *Petrov* apply to this case because "the operation of the law should not depend on whether it works to the benefit or detriment of refugee claimants." The Applicant was ignorant of the law and declared that he was stateless because he was born in Iraq and lacks an Iranian nationality document. For someone like the Applicant, this was a reasonable conclusion. In comparison, the Officer has a duty to apply the law.

(b) *The Officer failed to consider relevant evidence*

[17] When an officer makes a decision without knowledge of country condition documents this constitutes a valid reason to overturn the decision (*Saifee v Canada (Citizenship and Immigration)*, 2010 FC 589 at para 30). In this case, the national documentation packages [NDPs] contained Iranian and Iraqi nationality laws. The Iranian law proves that the Applicant is a national of Iran since his father is an Iranian citizen (*National Documentation Package the Immigration and Refugee Board March 29, 2018 item 3.1*; *National Documentation Package for Iraq October 31 2019 item 3.6*).

[18] The Applicant does not ask this Court to determine the Applicant's nationality but he takes issue with the Officer's failure to make this determination when the relevant laws were within the NDPs.

(c) *It was an error to assess the Applicant's risk in Iraq*

[19] The appropriate test for determining if someone is a national is whether the person concerned has control over the acquisition of nationality. If the person were to genuinely

endeavour to acquire citizenship and the reasonable foreseeable outcome would be success, that person must be considered a citizen of that country for the purpose of the application of the Convention refugee definition (*Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175 at para 36 [*Tretsetsang*]).

[20] The Officer was aware that the Applicant was not a citizen of Iraq because the Iraqi embassy and the Iraqi nationality laws confirmed as much. In comparison, the Applicant indicated that his father was an Iranian citizen and according to the Iranian nationality laws, the Applicant is presumptively an Iranian national. The Applicant faces no legal obstacle to the acquisition of Iranian citizenship, only an evidentiary obstacle because his parents did not declare his birth. The Decision is unreasonable because the Officer never turned their mind to whether the Applicant was an Iranian national.

[21] Additionally, the Officer should have considered the Applicant's risk in Iran because the Applicant identified deportation to Iran as his primary fear and basis for refugee claim.

(d) *It was unreasonable to accept the Applicant's assertion that he was stateless when he was unrepresented*

[22] The Officer should not have relied on the Applicant's assertion that he was stateless when he was unrepresented. Failure to consider that the Applicant was unrepresented renders the decision unreasonable (*Rogers v Canada (Citizenship and Immigration)*, 2009 FC 26 at para 43 [*Rogers*]).

(2) Respondent's Position

(a) *The Officer was not obligated to determine the Applicant's nationality*

[23] The Applicant specifically declared that he was stateless, was not an Iranian citizen, had never lived in Iran, and believed he could not obtain Iranian citizenship. No authority supports the Applicant's position that the Officer was obliged to assess his risk in respect of Iran on the speculative assumption that he might be able to become an Iranian citizen in the future. If the Applicant now wishes to claim that he is Iranian, the Applicant should have submitted an affidavit to that effect. Because he did not provide an affidavit, the Respondent is prejudiced by not being able to test the Applicant's evidence.

[24] The Applicant relies on *Bouianova, Williams, Petrov,* and *Tretsetsang* in support of his position that the Officer had an obligation to determine his nationality. These cases are distinguishable. In these cases, the applicants did not claim to be stateless and the officer did not accept such an assertion. These cases do not impose a positive obligation on an officer to assess claimed statelessness.

(b) *The Officer did not fail to consider relevant evidence*

[25] It is well established that a refugee claimant has the burden, on the balance of probabilities, to establish the facts they rely on. The Applicant cannot fault the Officer for failing to review a specific Iranian statute when he did not ask that it be considered (*Montalvo v Canada (Citizenship and Immigration)*, 2018 FC 402 at para 16 [*Montalvo*]). The Officer's obligation to

be generally aware of the country conditions does not extend to considering specific documents on issues that the Applicant did not draw to the Officer's attention. This is particularly so where the Applicant's position before the Officer was that he could not become Iranian.

[26] The Applicant did not lead any evidence to suggest that he is eligible for Iranian citizenship. At best, the single Iranian statute shows that the Applicant *might* be eligible for citizenship. The Applicant leads no evidence to prove that he would be able to overcome various hurdles, such as the fact that his parents never declared his birth. Such impediments are directly relevant to whether the applicant may be eligible for Iranian citizenship (*Tretsetsang* at para 72), particularly since the Applicant himself stated that those impediments will be fatal to his claim.

(c) *It was not an error to assess the Applicant's risk in Iraq*

[27] The Officer properly assessed whether the Applicant could safely return to Iraq because the Applicant declared himself stateless and a former habitual resident of Iraq. It was therefore reasonable to conduct an analysis only under section 96(b) of the *IRPA* in relation to Iraq.

[28] The Applicant stated that he left Iraq for economic reasons, not fear of persecution (*Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21 (FCA) at para 30). The Applicant is now asking the Court to ignore the fact that he can safely return to Iraq. Refugee protection is only available when one cannot safely reside in any of their countries of nationality or former habitual residence.

(d) *It was reasonable to accept the Applicant's assertion that he was stateless when he was unrepresented*

[29] The Officer acted reasonably in accepting the Applicant's statement that he was stateless because the Applicant asked the Officer to find that he was stateless. Moreover, he was not self-represented. He appointed Ms. Bergen as his representative, who is the signing authority from the Mennonite Central Committee (Migration and Resettlement Program), a non-governmental organization with significant experience in applying for resettlement of refugees in Canada. The Applicant's relative in Canada also helped the Applicant fill out the forms.

VIII. Analysis

A. *Was it reasonable for the Officer to assess the Applicant's fear of persecution in Iraq, rather than Iran?*

[30] The Decision was unreasonable because it was not justified in light of the relevant factual and legal constraints and the Officer "fundamentally misapprehended or failed to account for the evidence" (*Vavilov* at paras 105, 126). Specifically, the Officer failed to account for the fact that Danish authorities intended to remove the Applicant to Iran. Nothing in the Officer's reasons indicate that the Officer turned their mind to this.

[31] It is true that an Officer only has a duty to be generally aware of country condition documents (*Montalvo* at para 16; *Jean-Baptiste v Canada (Citizenship and Immigration)*, 2018 FC 285 at paras 19-20 [*Jean-Baptiste*]). In *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14, Justice Grammond summarized the law on this point at paragraph 79:

> It is common practice for the RPD and RAD, as well as for PRRA officers, to rely on documents found in the NDP even when the claimant did not refer to them. It may be that, in some circumstances, they even have a duty to go beyond the documents mentioned by the claimants in their arguments (*Sivapathasuntharam v Canada (Citizenship and Immigration)*, 2012 FC 486 at para 22; *Umuhoza v Canada (Citizenship and Immigration)*, 2012 FC 689; *Ramirez Chagoya v Canada (Citizenship and Immigration)*, 2008 FC 721; *Canada (Citizenship and Immigration) v Kaur*, 2013 FC 189 at para 30). However, this does not translate into a wide-ranging obligation "to comb through every document listed in the National Document Package" (*Jean-Baptiste v Canada (Citizenship and Immigration)*, 2018 FC 285 at para 19).

[32] Flowing from this principle, it is not reasonable to expect an Officer to look for a single piece of evidence that supports the Applicant's claim nor is an officer "required to mention every document in evidence" (*Jean-Baptiste* at paras 19-20). Under typical circumstances, the Officer would not have a *prima facie* duty to look for the Iranian statute and assess whether the Applicant is a national of Iran when he claimed to be stateless. However, the current matter did not involve typical circumstances.

[33] I find that it was incumbent on the Officer to consider the circumstances of this case and the facts, which are particularly unique (*Vavilov* at para 126). The Danish documents deporting the Applicant to Iran were before the Officer. Moreover, the Applicant's Canadian application clearly states that he feared persecution in Iran. Therefore, it was unreasonable for the Officer to assess the Applicant's risk solely in Iraq. In light of the Danish deportation documents, the only reasonable course of action is to assess the Applicant's risk in Iran and whether the Applicant might be eligible for Iranian citizenship.

[34] The most salient legal constraint on a decision maker is the statutory scheme (*Vavilov* at para 108). Section 96 of the *IRPA* required the Officer to consider if the Applicant was (a) a national of a specific country or multiple countries; or (b) stateless. In the absence of the materials from the Danish authorities, it would have been entirely reasonable for the Officer to restrict his analysis to section 96(b), because the Applicant self-declared as stateless. Here, however, there was information in the record from the Danish authorities that the Officer should have considered before restricting his analysis to section 96(b).

[35] A decision must also "comply 'with the rationale and purview of the statutory scheme under which it is adopted'" (*Vavilov* at para 108). Section 3 of the *IRPA* sets out the objectives of the refugee provisions. These include: saving lives and offering protection to the displaced and persecuted; fulfilling Canada's commitment to international efforts to provide assistance to those in need to resettlement; granting fair consideration to those claiming persecution; and offering safe haven to persons with a well-founded fear of persecution.

[36] Section 96(b) of the *IRPA* operates on the assumption that a stateless person will be deported to their habitual residence. In this case, however, the Danish authorities ordered the Applicant deported to Iran – not Iraq. I find that it goes against the purpose of the refugee provisions in the *IRPA* for an Officer to assess the risk of an Applicant in a country other than the country they are being deported to. The Officer should have considered that the Applicant was being sent to Iran and whether the Applicant, for the purpose of assessing risk, was an Iranian national. Instead, the Officer narrowly applied section 96(b) of the *IRPA* without looking to the factual context surrounding the application. In these specific circumstances, it would have

been reasonable for the Officer to consider section 96(a) and to seek out the Iranian nationality laws in the NDP.

[37] The forgoing analysis is enough to find that the Decision was unreasonable. However, I also agree with the Applicant that the Officer should have accounted for the fact that the Applicant was unrepresented. The Applicant relies on *Rogers* for this proposition. I note, however, that subsequent decisions of this Court have framed the issue as a question of procedural fairness (*Clarke v Canada (Citizenship and Immigration)*, 2018 FC 267 at paras 9-10; *Thompson v Canada (Public Safety and Emergency Preparedness*, 2015 FC 808 at para 12).

[38] In my view, if the Applicant was represented by competent counsel, counsel would have advised him about the implications of identifying as stateless. That is, identifying as stateless would result in a risk assessment against Iraq under 96(b) and identifying as Iranian would result in a risk assessment against Iran under section 96(a).

[39] The Respondent points out that the Applicant had assistance from his Canadian relative and Ms. Bergen of the Mennonite Central Committee, the Applicant's "representative." However, the role of a "representative" is to "conduct business on behalf of [the Applicant]." This is different from the role of a "designated representative" at the Immigration and Refugee Board, which is a person who ensures that an applicant understands the nature of the proceedings. I am not convinced that his Canadian relative or Ms. Bergen would have been able to advise the Applicant of the implications of self-declaring as stateless on his application form.

[40] In *Rogers*, the Court concluded that the applicant's "age, education and work history" were relevant in determining the applicant's "abilities" (at para 44). Respectfully, the Applicant in this case appears to be more vulnerable than Mr. Rogers. The Applicant has lived the vast majority of his life in refugee camps. He obtained a grade four education and has been employed in a restaurant and as someone that builds homes. At the time he applied for refugee status in Canada, he was living in a Danish refugee camp. He cannot communicate in English or French. It is reasonable that he is not the sort of person to appreciate the legal implications of self-declaring as stateless versus Iranian or as being forthright in stating that he wished a better life for his family. Although he identified as stateless, it is evident from his application that he viewed Iran as his "home country" and "country of origin."

[41] In light of the fact that the Applicant was unrepresented, I find that the Officer unreasonably accepted the Applicant's assertion that he was stateless without making further inquiries as to whether he was eligible for Iranian citizenship. As can be seen from the Officer's notes and the decision letter, the Officer relied significantly on the statements of seeking a better life with more opportunities. In my view, there was more reliance on those statements than on the Applicant's fear of being returned to Iran.

IX. Certified Questions

[42] On the day prior to the hearing, the Applicant submitted four questions for certification:

> 1. What is the standard of review, in the review of a refugee protection claim or application decision, for determination of the question whether a person is stateless?
>
> 2. Does the principle that general questions of international law have to be decided on a standard of review of correctness have an

> exception where the relevant international law is enacted in a home statute of the tribunal subject to review?
>
> 3. Is the standard of review, for review of a refugee protection claim or application decision, for determination of the question whether a person or does not have or does not have citizenship in any particular country correctness or reasonableness?
>
> 4. If the answer to the previous question is that the standard of review is reasonableness, is it reasonable for a determination to accept the assertion of statelessness of an applicant or claimant for refugee protection without consideration of relevant nationality laws?

[43] The Respondent objected to the Applicant's proposed questions because the Applicant failed to provide the questions within the five-day deadline established by the Court (Practice Guidelines For Citizenship, Immigration, and Refugee Law Proceedings – November 5, 2018).

[44] The Federal Court of Appeal re-affirmed the requirements for a certified question in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46:

> This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[45] The Respondent submits that the first three questions have been answered by the Supreme Court of Canada in *Vavilov* in that the presumptive standard of review is reasonableness (at para 114). The fourth question has been answered by *Tretsetsang*. In addition, all four proposed questions are fact-specific and therefore fail to raise questions of broad significance or general importance.

[46] I agree with the Respondent that the Applicant failed to give sufficient notice as required by this Court's Practice Direction. Nevertheless, after reviewing the questions, I also refuse to certify them. I agree with the Respondent that the first three questions have already been answered by *Vavilov* and the fourth question has already been answered by *Tretsetsang*. Furthermore, in my opinion, none of the issues are dispositive of an appeal nor do they transcend the interests of the parties and raise an issue of broad significance or general importance. All of the proposed questions relate to the particular circumstances of this matter.

X. Conclusion

[47] The application for judicial review is allowed. There is no question for certification.

JUDGMENT in IMM-1702-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to another officer for re-determination.
2. There is no question for certification.
3. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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