

Federal Court



Cour fédérale

Date: 20220616

Docket: IMM-6370-20

Citation: 2022 FC 897

Ottawa, Ontario, June 16, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

ABDUL JALIL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Abdul Jalil, seeks judicial review of the decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board, dismissing his appeal from the decision of the Refugee Protection Division (RPD) that rejected his claim for refugee protection.

[2] The application for judicial review rests on three grounds, namely that:

1. the RAD erred in finding that his departure from Pakistan using his own passport was a reason to question his credibility;
2. the RAD erred by discounting corroborative evidence because of unexplained concerns regarding the authenticity of the sworn affidavits and also because the witnesses were not called to testify; and
3. the Applicant was denied procedural fairness because the RAD failed to alert him to some of its key concerns to which he therefore had no opportunity to respond.

[3] Based on these arguments, the Applicant contends that the RAD's finding that he had a viable Internal Flight Alternative (IFA) in Pakistan was unreasonable.

[4] For the reasons that follow, this application will be granted. The RAD's assessment of the Applicant's departure from Pakistan is speculative and not grounded in the evidence; in addition, the RAD's treatment of the corroborative evidence is unreasonable. These errors are sufficiently central to the issues in this case to make the entire decision unreasonable.

II. Background

[5] The Applicant, a citizen of Pakistan, was born a Sunni Muslim but converted to Shia Islam in September 2018. He says that his conversion angered some family members, and this resulted in a confrontation with a cousin who accused him of blasphemy. Upon hearing this, the Applicant immediately went into hiding. His son says that the day after the accusation, police

came to the Applicant's house, stating that his cousin had filed a First Information Report (FIR) against him. In December 2018, the Applicant fled to Canada where he claimed refugee status.

[6] The RPD refused the Applicant's claim, based on credibility concerns. The RPD questioned how he had been able to leave Pakistan using his own passport, after being accused of blasphemy and having a FIR and an arrest warrant issued against him. The RPD also found that he would have an IFA in Hyderabad, Pakistan, and that state protection would be available to him if he returned.

[7] The RAD dismissed the Applicant's appeal. The RAD found that the RPD had committed certain errors, but these were not sufficient to undermine its central findings relating to the Applicant's credibility, and that he had a viable IFA.

[8] The RAD noted that the Applicant's passport had been stamped by Pakistani authorities upon his departure in December 2018; it also observed that Pakistan had a system of exit controls which are "intended to prevent persons with pending criminal cases from travelling abroad" (RAD Decision at para 11). Noting the documentary evidence that one component of this system, the exit control list, was reserved for the most serious offences, the RAD concluded that while the evidence was inconclusive and "insufficient to form an implausibility finding, it does suggest to me that it is unlikely that the [Applicant] was wanted by the police...". Based on this, the RAD agreed with the RPD that "the Applicant's allegations are partially undermined and are deserving of further scrutiny" (RAD Decision at para 11).

[9] Next, the RAD found that the Applicant had failed to produce reasonably available documentary evidence, namely “the arrest warrant he testified his son saw in Pakistan when the police came to [his] house” plus the FIR that was issued at the cousin’s instigation (RAD Decision at para 12). The RAD found that while the evidence on the availability of the FIR was mixed, the documentary record indicated that there were avenues open to the Applicant to try to obtain it. Despite the fact that the Applicant maintained contact with his large extended family still in Pakistan, he had not filed any evidence showing any efforts to obtain such documentation, and the RAD found that this diminished his credibility.

[10] Turning to the other documentary evidence the Applicant had filed, the RAD found that the RPD had erred in failing to consider this evidence. The RAD discounted the affidavit of the Applicant’s son, not because of inconsistencies or omissions in its narrative, but rather “because it contains no particular security features and the [Applicant’s] son was never called to provide testimony on its veracity” (RAD Decision at para 20). The RAD also discounted other documentary evidence on similar grounds, including that the authors were not called as witnesses.

[11] Based on this analysis, the RAD agreed with the RPD’s overall conclusion that the presumption of truthfulness had been rebutted and the Applicant “lacks credibility with regard to his allegations that he has been the subject of an FIR and that he has ever been wanted by the police in Pakistan” (RAD Decision at para 21).

[12] Finally, the RAD found that the Applicant had a viable IFA in Pakistan, since the risk he faced was from a non-state actor, and there was no evidence that the cousin who accused him of

blasphemy had the means or motivation to search for him throughout the country. The RAD observed that none of the Applicant's family members who remained in Pakistan had been approached by the cousin, and there was no evidence that his accuser had any ties to any organizations or authorities who would have the means to find him. The RAD found that it would be reasonable for the Applicant to relocate to the IFA, given his personal and professional background. Therefore, the RAD upheld the RPD's finding that the Applicant had a viable IFA in Hyderabad.

[13] The Applicant seeks judicial review of the RAD decision.

III. Issues and Standard of Review

[14] The determinative issues in this case concern the reasonableness of the RAD's assessment of the Applicant's credibility, including the treatment of his departure from Pakistan and assessment of his corroborative evidence.

[15] The Applicant also raised an issue of procedural fairness, but in light of my finding that the RAD's credibility assessment is unreasonable, it is not necessary to deal with this.

[16] The standard of review that applies to the RAD's assessment of credibility is reasonableness in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67

[*Canada Post*] at para 2). The burden is on the applicant to satisfy the Court “that any shortcomings or flaws relied on... are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

IV. Analysis

[17] There are two key flaws in the RAD’s decision, and because these go to central issues in the Applicant’s case, they are sufficient to make the decision unreasonable (*Vavilov* at para 100).

[18] First, the RAD agreed with the RPD that the Applicant’s departure from Pakistan using his own passport despite the existence of the exit control system was a reason to call his credibility into question. As noted previously, the RAD did not find that this was enough to support a finding that the Applicant’s entire claim was implausible; instead, the decision states “it does suggest to me that it is unlikely that [the Applicant] was wanted by the police at the time he departed Pakistan” and it found that “the [Applicant’s] allegations are partially undermined and are deserving of further scrutiny.” (RAD Decision at para 11).

[19] The RAD relied on the documentary evidence in the record to support this conclusion, noting that the exit control list is intended to prevent persons with pending criminal cases from travelling abroad. It can reasonably be inferred that the RAD drew this conclusion based on the finding that the Applicant had testified that his son said the police had an arrest warrant and that the cousin had filed a FIR against him. The problem with this finding is that there is no testimony or evidence in the record relating to an arrest warrant; instead, the sole focus of the evidence is on the son’s statement that the police had come looking for the Applicant and said that the cousin had filed a FIR against him.

[20] This is significant because the evidence does not suggest that the mere existence of a FIR, even for a very serious offence, would be sufficient to result in a listing on the exit control list. Instead, the evidence cited by the RAD suggests that the list is aimed at preventing those charged with the most serious crimes, including terrorism and state security, from leaving Pakistan. In addition, the evidence shows that a FIR can be filed relatively easily, and may or may not be followed by formal criminal charges or an arrest warrant.

[21] The Decision contains no analysis of this evidence, or an explanation about why the cousin's filing of a FIR against the Applicant based on an allegation of blasphemy would support a conclusion on a balance of probabilities that his name would likely be included on the exit control list. As a result, the RAD's reliance on the Applicant's ability to leave Pakistan using his passport as a basis to doubt his credibility cannot stand, based on the analysis in the decision. If the conclusion was explained based on a fair reading of the evidence in the record, the finding might be reasonable; as it is, however, this aspect of the decision is unreasonable.

[22] The second major flaw in the RAD's reasoning relates to the treatment of the corroborative evidence the Applicant submitted in support of his claim. As noted above, the RAD discounted this evidence because the affidavits were lacking in certain unspecified security features, and the affiants were not called to testify. Both findings are unreasonable.

[23] First, a review of the affidavits in the record shows them to be formal documents, bearing the affiants' signatures, a stamp and signature indicating they were notarized by a notary public, and other official stamps. The RAD does not specify what "security features" are lacking, and no such gaps are evident on the face of the documents.

[24] Furthermore, the RAD gave the sworn statements less weight because their authors were not called to testify. This Court has recently found such reasoning to be in error, noting that refugee law does not require evidence to be presented *viva voce*, and that the RPD is not bound by any legal or technical rules of evidence (*Immigration and Refugee Protection Act*, S.C. 2001, c 27, ss 170 (g)-(h)); see *Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at paras 51–52, followed recently in *Jiang v Canada (Citizenship and Immigration)*, 2021 FC 44 at paras 11-14). Both of these decisions note that the Court of Appeal has found that it is unreasonable to discount evidence based solely on the unavailability of a witness for cross-examination in this context, since “[i]t is not for the Refugee Division to impose on itself or claimants evidentiary fetters of which Parliament has freed them” (*Fajardo v Canada (Minister of Employment & Immigration)*, [1993] FCJ No. 915, 157 N.R. 392 (CA) at para 4).

[25] I find that the RAD committed exactly this error in this case. The failure to call the affiants, in particular when the RPD did not signal that this was an issue, is not, on its own, a reason to give affidavit evidence less weight. This error, combined with the RAD’s failure to explain what security features were lacking in the affidavits, is sufficient to makes the RAD’s conclusion that this corroborative evidence should be given less weight unreasonable.

[26] This finding also undermines the RAD’s conclusion on the viability of the IFA, because that was based on the determination that the Applicant was facing a risk from a non-state actor. The RAD’s conclusion that the Applicant was not wanted by the authorities based on the cousin’s complaint that he had committed the offence of blasphemy is undermined by its treatment of the FIR, its faulty assumption that the Applicant had said an arrest warrant had been issued, and its unreasonable discounting of the affidavit evidence. On this last point, it should be

noted that the affidavits corroborate the key elements of the Applicant's narrative, namely that the police had been searching for him and a FIR had been filed against him by the cousin because of his religious conversion.

V. Conclusion

[27] For all of these reasons, I find the RAD's decision to be unreasonable. The RAD did not explain why the Applicant's departure from Pakistan using his own passport was a basis to cast doubt on his credibility, given the specific evidence that was in the record. In addition, the RAD's failure to explain what security features were lacking in the affidavits, and its discounting of that evidence because the affiants were not called as witnesses, are also unreasonable.

[28] Having reached this conclusion, I should emphasize that my findings on these specific points should not be understood to indicate my agreement with the Applicant's argument that the RAD acted unreasonably by finding that the Applicant's credibility was diminished because he failed to show that he had made reasonable efforts to obtain the FIR or other reasonably available evidence. I make no comment on that argument, and it will be up to the next decision-maker to weigh the evidence on this and other points that may be submitted by the parties.

[29] The Application for judicial review is allowed. The matter will be remitted back to a different panel of the RAD for reconsideration.

[30] There is no question of general importance for certification.

JUDGMENT in IMM-6370-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is remitted back to a different panel of the Refugee Appeal Division for redetermination.
3. There is no question of general importance for certification.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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