

Federal Court



Cour fédérale

Date: 20221110

Docket: IMM-53-22

Citation: 2022 FC 1535

Ottawa, Ontario, November 10, 2022

PRESENT: Madam Justice Walker

BETWEEN:

RAJWINDER SINGH

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of India. He sought refugee protection in Canada on the basis of his political opinion as a member of the Aam Adami Party (AAP). According to the Applicant, he campaigned for the AAP in Punjab's state assembly elections in 2016-2017. After the rival Indian National Congress (INC) won the election, it began taking revenge against the AAP and the Applicant alleges that he was arrested, tortured and fingerprinted by the Punjab police on March 15, 2017. He was released from custody following payment of a bribe. Fearing

for his life, the Applicant left his village and travelled to Mumbai from where he left for Canada in September 2017.

[2] The substance of the Applicant's claim was heard by the RPD on February 3 and 26, 2021. A scheduled February 1 hearing was adjourned after a short proceeding to permit documentary disclosure and a February 10 hearing date was adjourned due to the Applicant's ill health.

[3] The RPD rejected the Applicant's refugee claim on March 17, 2021, concluding that several significant and central credibility issues undermined the claim as a whole.

[4] The RAD dismissed the Applicant's appeal in a decision dated December 13, 2021 and confirmed the RPD's decision that he had not credibly established his claim. The Applicant now seeks judicial review of the RAD's decision.

[5] In this Court, the Applicant argues that the RAD breached his right to procedural fairness by rejecting his appeal on the basis of negative credibility findings without the benefit of the complete recordings and transcripts of the RPD hearings.

I. Analysis

[6] The role of the Court in reviewing allegations of breach of procedural fairness is to determine whether the procedure in question is fair having regard to all the circumstances

(*Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56; *Pardo Quitian v Canada (Citizenship and Immigration)*, 2020 FC 846 at para 18 (*Pardo Quitian*)).

[7] The RAD addressed the missing parts of the audio recording of the RPD hearings in its decision as follows:

[13] I note that the very beginning of the February 3 hearing appears to be missing from the audio recording and a portion of the Appellant’s representative’s questions and submissions are missing from the audio recording of the February 26 hearing. Following the recent direction of the Federal Court, I find that the missing information is not determinative in resolving the issues central to the claim and I am able to properly determine the claim.

[8] The RAD’s reference to “the recent direction of the Federal Court” is to Justice Grammond’s decision in *Ait Elhocine v Canada (Citizenship and Immigration)*, 2020 FC 1068 at paras 28-30 (*Ait Elhocine*).

[9] The principles relevant to the Applicant’s argument are not in dispute.

[10] The RPD is not required to record refugee claim hearings, although its practice is to do so (*Ait Elhocine* at para 28). As Justice Norris stated in *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804 (*Patel*):

[31] [. . .] In cases where there is no statutory right to a recording, “courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice” (*Canadian Union of Public Employees, Local 301 v Montréal (City)*, [1997] 1 SCR 793 at para 81). On the other hand, if the court cannot dispose of an application before it because of the absence of a transcript, this will violate the rules of natural justice.

[11] The RPD's recording need not be perfect. The onus rests on an applicant to raise an issue that "affects the outcome of the case that can only be determined on the basis of a record of what was said at the hearing such that the absence of a transcript prevents the Court from addressing the issue properly" (*Patel* at para 32, citing *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 at para 34). The lack of a complete recording is of particular concern in cases where, as here, credibility is a central issue (*Patel* at para 33).

[12] In support of his argument that the RAD breached his right to procedural fairness, the Applicant emphasizes that: (1) credibility was the central issue for the RPD and the RAD in refusing his claim; and (2) the RAD acknowledged that the missing portions of the RPD recordings include a portion of counsel's questions and the Applicant's responses to those questions, and the beginning of counsel's submissions to the RPD. The Applicant argues that these two facts, which the Respondent does not contest, prevent the Court from determining whether or not the RAD's decision is reasonable (*Patel* at para 55).

[13] I agree with the Applicant that the Court must be vigilant in assessing the impact of the incomplete RPD recordings because the determinative issue for both the RPD and the RAD was the Applicant's lack of credibility. However, his statement that some of the questions put to him by counsel, his responses, and a portion of counsel's closing submissions are missing does not mean that the RAD's decision-making process was unfair.

[14] The jurisprudence requires an applicant who relies on gaps in the recording of a hearing to show a serious possibility that the gaps have denied them a means of appeal (*Ait Elhocine* at

para 30). In *Pardo Quitian* (at paras 27-29), the Court noted that the applicants had been unable to identify how the absence of a recording or transcript denied them an opportunity to address the grounds of judicial review that lay at the heart of their claim. In *Kaur v Canada (Citizenship and Immigration)*, 2021 FC 1219, the Chief Justice stated:

[14] I will simply add in passing that the Applicants have not only failed to *demonstrate* that any information that was relevant to the IFA issue was not before the RAD; they have also failed to even *identify* any such information. (Emphasis in original.)

[15] In this case, the Applicant has not identified the questions, answers and submissions missing from the RPD recording, how the missing information may have affected the RAD's analysis of the core elements of his claim, or how that information may affect or contradict the RAD's negative credibility conclusions.

[16] In contrast, the parties in *Patel* filed a number of affidavits to demonstrate the scope and content of the defects in the recording of the IAD hearing in question and to explain the relevance of the missing information to the issues before the Court. Justice Norris admitted as new evidence: a further affidavit from the applicant for the limited purpose of demonstrating the content of what was omitted from the recording; two affidavits from her counsel regarding the extent of the defects; and, an affidavit from the CBSA officer in attendance at the hearing that attached as exhibits a copy of his handwritten notes of the applicant's testimony. I do not suggest that in every case in which an incomplete recording is at issue, an applicant must file extensive affidavit evidence in order to establish a breach of procedural fairness. However, the applicant cannot simply rely on the fact there are defects in the recording and/or transcripts of the hearing(s) in question, even in cases involving critical credibility findings.

[17] In the present case, the recordings of the RPD hearings of the February 3 and 26 proceedings exceed six hours in total. The recordings contain the Applicant's testimony in response to questions from the RPD member, notably questions regarding the material elements of the Applicant's narrative of the events that precipitated his departure from India. The recordings also include a long series of questions and answers between counsel and the Applicant that respond to the issues raised by the RPD. In addition, the February 26 transcript refers to the interruption of the recording near the completion of counsel's questions and beginning of closing submissions, and continues from the interruption for approximately 35-40 minutes.

[18] The RAD's decision in turn is detailed and coherent. The RAD explained each of its adverse credibility findings, citing extensively from the Applicant's testimony. The RAD identified significant inconsistencies and contradictions between the Applicant's Basis of Claim narrative and his testimony that ultimately resulted in its conclusion that the Applicant had not credibly established his refugee claim: (1) his fear of a number of political parties and the Punjab police, their "gangsters and their own personal gangs"; (2) the Applicant's affiliation with the AAP, the cornerstone of his claim; (3) inconsistencies in the Applicant's testimony regarding the connection between his arrest and the INC, and what led him to believe that the police were acting under order of the INC; and, (4) contradictions in the Applicant's testimony about the alleged police torture he suffered in custody.

[19] In summary, the Applicant has not identified the substance of the information missing from the recordings, nor has he explained why the missing information is critical to addressing

an issue central to his claim and to the Court's ability to properly review the RAD's decision. As a result, his allegation of breach of procedural fairness fails and this application for judicial review will be dismissed.

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

JUDGMENT IN IMM-53-22

THIS COURT'S JUDGMENT is that:

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

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-53-22

STYLE OF CAUSE: RAJWINDER SINGH v MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 2, 2022

JUDGMENT AND REASONS: WALKER J.

DATED: NOVEMBER 10, 2022

APPEARANCES:

Me Mark J. Gruszczynski FOR THE APPLICANT

Me Simone Truong FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Immigration Team FOR THE APPLICANT
Barristers and Solicitors
Westmount, Quebec

Attorney General of Canada FOR THE RESPONDENT
Montréal, Quebec