

Federal Court



Cour fédérale

Date: 20221220

Docket: IMM-3568-20

Citation: 2022 FC 1772

Ottawa, Ontario, December 20, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

MUBASHAR HAYAT

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application is brought by the Minister of Citizenship and Immigration [Minister] who seeks to set aside the July 28, 2020 decision of the Refugee Appeal Division [RAD].

[2] The RAD allowed the Respondent's appeal from a decision of the Refugee Protection Division [RPD] that was made on March 22, 2019 [Decision].

[3] The Minister submits the RAD acted *ultra vires* when, without having identified an error, it decided to remit the matter for redetermination to the RPD based on unfairness to the Respondent.

[4] For the reasons that follow, this application is allowed.

II. **Background facts**

[5] The Respondent is a citizen of Pakistan. He came to Canada in December 2017 and sought refugee protection on the basis that he faces persecution from religious extremists, the state and his ex-partner's relatives because of his sexual orientation as a bisexual man.

[6] The RPD found the determinative issue was the Respondent's lack of credibility, which arose from the inconsistencies and omissions between his basis of claim and his testimony.

[7] After considering the Respondent's repeated inability to answer direct questions about his confusing testimony, the RPD concluded the Respondent was "not a gay man."

[8] Before the RAD the Respondent alleged, in a new narrative, that he was influenced by people to fabricate the original story that he was bisexual. He said his entire refugee claim, including his sexual orientation, documentary evidence and BOC narrative were lies he regrets.

[9] The Respondent claimed in the new narrative that he was employed as a “media reporter and production manager for a local TV A+ Channel” and because of his work, “some political elements from Pakistan people party and especially MQM do not like me at all”.

III. The Decision

[10] The Respondent submitted ten photographs to the RAD without dates or any explanation. The RAD did not accept the photographs as evidence. It found the Respondent had not met the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act, SC 2001 c 27 (IRPA)* for the admission of new evidence.

[11] The RAD accepted the Respondent’s evidence that he was influenced by people to fabricate his original story of being bisexual.

[12] The RAD found the Respondent’s submissions as to why he was not originally forthcoming were vague. He did not identify who led him astray and there was insufficient evidence to conclude he had made a complaint to the Law Society although the RAD considered that someone else may have advised him to misrepresent his claim.

[13] Regarding possible harm from the MQM, the RAD reviewed the documentary evidence for Pakistan. It found there was evidence that journalists have been targeted by MQM.

[14] The Respondent submitted that by claiming refugee status he would face charges upon return to Pakistan. The RAD found the documentary evidence from 2003, stated that failed

refugee claimants would not face consequences for returning unless they were handed over to authorities.

[15] Finding that the law might have changed in the last 17 years, the RAD stated “it is fair to give the Appellant a full opportunity to present his appeal.”

[16] The RAD noted the Respondent had raised two arguable bases for his claim. Mindful that the Respondent was self-represented, the RAD found the circumstances were unique.

[17] The RAD considered that in keeping with the principles of the UNHCR Handbook they would give the Respondent the benefit of the doubt. They also decided that in the interest of fairness he would have an opportunity to present fully his claim so he would have a full and fair hearing and could present fully his documentary evidence.

[18] After noting various issues that could arise, including credibility, internal flight alternative and state protection, the RAD stated “in this case and in these circumstances, the Appellant should be given the opportunity to fully present his evidence. I find that he should be given the benefit of the doubt.”

[19] After considering the UNHCR Handbook, the RAD decided to send the matter back to the RPD for redetermination by a different panel pursuant to paragraph 111(1)(c) of the *IRPA*.

IV. **Issue**

[20] The parties agree the only issue is whether the Decision is reasonable.

[21] The determinative issue in that respect is whether the RAD, without identifying an error, acted *ultra vires* in deciding to remit the matter to the RPD for redetermination based on fairness.

V. **Standard of Review**

[22] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness:

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*] at para 23.

While this presumption is rebuttable, no exception to the presumption is present here.

[23] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and at least as a general rule, to refrain from deciding the issue themselves: *Vavilov* at para 83.

[24] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[25] To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

VI. Analysis

[26] To meet the legislative requirements to refer a matter to the RPD for redetermination, the RAD must first determine, as provided in subsection 111(2) of the *IRPA*, that the decision by the RPD was wrong in law, in fact or in mixed law and fact.

[27] No such finding was made by the RAD.

[28] The Minister submits the Decision was *ultra vires* the RAD's jurisdiction because subsection 111(2) of the *IRPA* did not apply.

[29] I agree.

[30] The RAD said it was sending the matter back to the RPD for redetermination by a different panel pursuant to paragraph 111(1)(c) of the *IRPA*. However, it failed to take into account the mandatory condition found in subsection 111(2).

[31] Subsection 111(2) clearly specifies the RAD may make a referral to the RPD "only if it is of the opinion that (a) the decision of the RPD was wrong in law, in fact or in mixed law and

fact; and (b) it cannot make a decision under paragraphs 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.” (my emphasis)

[32] The RAD made no finding under paragraphs 111(2) (a) and (b).

[33] By not making any such finding, the RAD failed to consider, and did not apply, the law constraining it from referring the RPD decision for redetermination. Therefore, the Decision is not reasonable: *Vavilov* at para 85.

VII. Conclusion

[34] For the foregoing reasons this application is granted.

[35] The Decision is set aside and the appeal is referred back to the Refugee Appeal Division for re-determination by a different member.

[36] No serious question of general importance was posed by the parties nor does one exist on these facts.

JUDGMENT in IMM-3568-20

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The Decision is set aside and the appeal is referred back to the Refugee Appeal Division for re-determination by a different member.
3. There is no question for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3568-20

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v MUBASHAR HAYAT

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