

Federal Court



Cour fédérale

Date: 20230404

Docket: IMM-6379-21

Citation: 2023 FC 479

Vancouver, British Columbia, April 4, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

KENNETH BAIDU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kenneth Baidu (“Mr. Baidu”), made a refugee claim in Canada, withdrew it, and then applied to the Refugee Protection Division [RPD] to reinstate his claim. The RPD denied his application to reinstate. Mr. Baidu challenges the RPD’s denial in this judicial review.

[2] I agree with Mr. Baidu that the RPD's decision fails to grapple with the key issue it was required to consider under Rule 60(3) of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules], namely, whether it was "otherwise in the interests of the justice" to allow Mr. Baidu's application to reinstate his claim. The RPD's conclusion that it was not in the interests of justice is not justified nor transparent. In particular, the RPD's finding that Mr. Baidu made a "strategic" decision to withdraw his refugee claim is not explained. Given the interests at stake, the RPD had to do more to explain its decision to Mr. Baidu. The matter must be sent back to be redetermined.

[3] Based on the reasons below, I allow the application for judicial review.

II. Background

[4] Mr. Baidu is a citizen of Ghana. On January 18, 2018, he arrived in Canada and made a refugee claim in March 2019. His refugee claim was based on his fear of being forced by his relatives and community to be a fetish priest of the Old Tafo.

[5] Mr. Baidu's refugee claim was scheduled to be heard by the RPD on March 2, 2020. On February 17, 2020, the Minister of Citizenship and Immigration served a notice of intent to intervene on credibility and program integrity.

[6] On December 22, 2020, Mr. Baidu withdrew his refugee claim because a relative informed him that he was no longer at risk. Mr. Baidu was represented by an immigration

consultant at this time. The RPD confirmed that Mr. Baidu withdrew his claim the following day and his RPD file was closed.

[7] Approximately four months later, Mr. Baidu's former counsel wrote to the RPD requesting his identity documents that had been seized during the refugee claim process, so that Mr. Baidu could return to Ghana.

[8] In August 2021, Mr. Baidu spoke with a friend in Ghana and learned that his relatives had misled him and that he in fact continued to be at risk. Based on this new information, on August 20, 2021, Mr. Baidu asked the RPD to reinstate his refugee claim. The application to reinstate consisted of a short letter from his former counsel asking that the claim be reinstated and a statutory declaration from Mr. Baidu that explained the reasons he withdrew his refugee claim and the new information that led him to seek a reinstatement.

[9] On September 7, 2021, the RPD refused Mr. Baidu's request to reinstate. The RPD found that there was no breach of natural justice because Mr. Baidu made the decision to withdraw of his own volition and without constraint. The RPD found that it was not in the interests of justice to allow Mr. Baidu to reinstate his claim because he "knew the consequences of his decision to withdraw his claim and made a strategic decision that he now doubts." Further, the RPD found that "RPD Rule 60 is not designed to protect applicants from the consequences of their freely chosen course of conduct even where they have made a decision or taken a step which did not result as intended."

III. Issue and Standard of Review

[10] The only issue on this judicial review is in relation to the RPD's determination that it was not in the interests of justice to reinstate the refugee claim. The Applicant argued in oral submissions that the inadequacy of the RPD's reasons was a procedural fairness issue. I do not agree. The RPD provided reasons for its determination that it was not in the interests of justice to reinstate Mr. Baidu's refugee claim. It is those reasons that I will review in considering whether the RPD's determination was a reasonable one. In the context of that assessment, I have to consider whether the outcome has been justified by the RPD by way of its reasons to Mr. Baidu. This analysis of the adequacy of the justification offered by the RPD is part of the reasonableness review I will undertake (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 84-87 [*Vavilov*]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 21).

IV. Analysis

[11] There are two circumstances provided for in Rule 60(3) of the *RPD Rules* where an RPD member can reinstate a withdrawn refugee claim: i) where it is "established that there was a failure to observe a principle of natural justice" or ii) "it is otherwise in the interests of justice to allow the application [to reinstate]." Mr. Baidu did not argue that there was a breach of natural justice. On judicial review, his arguments focused on the RPD's assessment of whether it was in the interests of justice to allow the reinstatement application.

[12] Justice Gascon recently reviewed the RPD's ability to reinstate a withdrawn refugee claim on the ground of interests of justice. Justice Gascon described the nature of this analysis as a "flexible approach aimed at protecting the interest of a just, fair and efficient resolution of an application for reinstatement, while remaining alert and sensitive to the particular factual circumstances of each case" (*Rajput v Canada (Minister of Citizenship and Immigration)*, 2022 FC 65 at para 24 [*Rajput*]). Justice Gascon further noted that the interests of justice analysis requires "decision makers to consider basic notions of fairness and common sense, and to have a general concern and interest that justice be done" (*Rajput* at para 24).

[13] As I will describe below, the RPD's brief analysis is not demonstrative of an approach that was alert and sensitive to the particular circumstances of Mr. Baidu, nor do the reasons exhibit a general concern and interest that justice be done. Instead, the RPD took an unduly narrow view of the relevant circumstances to be considered and failed to justify the rationale for its central finding.

[14] In the statutory declaration he submitted with his reinstatement application, Mr. Baidu described the circumstances that led him to withdraw his claim and the circumstances that caused him to ask for it to be reinstated. There were no submissions elaborating on how the RPD should consider the interests of justice in the case. The Respondent, at several points in its submissions, relied on the failure of Mr. Baidu to articulate an argument based on the interests of justice to the RPD.

[15] In my view, regardless of whether Mr. Baidu made a specific submission on the interests of justice, the RPD had an obligation to consider, as it purported to, whether the interests of justice favoured allowing the reinstatement. As noted by Justice Gascon in *Rajput*, there is a distinction in the wording of Rule 60(3) between the “breach of natural justice” ground and the “interests of justice” ground (*Rajput* at para 22). The former requires the applicant “to establish” a breach while the latter requires the RPD to consider whether it was “otherwise in the interests of justice” to allow the reinstatement application. Justice Gascon found that the “different wording used by Parliament in the provision vests the RPD with a specific obligation to consider, on its own and in light of the particular circumstances of each case, the ‘interests of justice’ at stake, whether or not specific submissions on the issue have been made by an applicant” (*Rajput* at para 22). I agree.

[16] The RPD’s analysis of the interests of justice ground is limited to one short paragraph. Much of the paragraph is general statements taken from this Court’s decision in *Ohanyan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078 [*Ohanyan*]. I take no issue with these statements, such as that reinstatement is an “exception to the norm” and that “the panel must consider all the circumstances and not just those from the claimant’s perspective.” Repeating these statements is not, however, an analysis. The RPD’s analysis as it applies to Mr. Baidu is limited to two sentences:

In the current circumstances, the applicant withdrew his claim based on information he received from a family member indicating that he was no longer at risk of persecution. That he later received information from a friend which suggested that he may still be at risk does not negate the fact that the applicant knew the consequences of his decision to withdraw his claim and made a strategic decision which he now doubts.

[17] Mr. Baidu argued that there is no explanation for the RPD's finding that the decision he made was a "strategic" one. The Respondent's view is that the explanation provided was the RPD's finding that Mr. Baidu knew the consequences of his decision to withdraw. In my view, this does not explain how the decision was a "strategic" one.

[18] Mr. Baidu withdrew his claim when he no longer believed that he had a basis for a claim because those who had been seeking him out were no longer interested in making him a fetish priest of the Old Tafo. It is true that Mr. Baidu does not argue that he misunderstood the consequences of his decision to withdraw. I do not understand why this needs to be "negated," in the RPD's words, in order to allow the application for reinstatement. The RPD's analysis suggests that it cannot be in the interests of justice to allow reinstatement unless an applicant can demonstrate that they did not understand the consequences of their decision to withdraw. This is an unduly narrow approach to the broad concept of "interests of justice."

[19] Applicant's counsel asked at the judicial review hearing: What else was Mr. Baidu to do in these circumstances? Was he to proceed with the refugee hearing even though he no longer believed that he had a basis to make a claim? This is really the key issue and one that the RPD had to grapple with, instead of declaring that Mr. Baidu made a "strategic decision" without explanation.

[20] The RPD's reasons do not allow me to understand how it determined that Mr. Baidu's decision was a strategic one. Nor do I have confidence that the RPD considered all the relevant circumstances in this case. Instead, the decision seems only focused on the fact that Mr. Baidu

made the initial decision to withdraw without constraint. Given the serious consequences of the RPD's decision, which deprives Mr. Baidu of having the RPD hear his claim for refugee protection on the merits, there is a heightened obligation to provide responsive reasons that justify the RPD's decision. The reasons provided do not reflect the consequences that are at stake (*Vavilov* at para 133; *Rajput* at para 34; *Akbari v Canada (Minister of Citizenship and Immigration)*, 2023 FC 53 at para 34).

[21] The Respondent pointed to the similarities between Mr. Baidu's circumstances and those of the applicant in *Ohanyan*. In effect, the Respondent argued that the RPD could not have been unreasonable here given it was following the jurisprudence in *Ohanyan* and that the facts in Mr. Baidu's case are similar. I have carefully considered this argument. There are similarities between the two cases: a withdrawal due to the claimant's belief that they are no longer at risk followed by a request for reinstatement based on new information that puts in doubt the initial information. The Applicant argued the cases were distinct because Mr. Baidu was misled by his family member when he initially withdrew and there was no evidence of being misled in *Ohanyan*.

[22] Given the sort of problems I have identified in the RPD's reasoning, I do not find the Respondent's argument persuasive. *Ohanyan* was issued sixteen years ago. It contains a limited description of the factual circumstances and a limited analysis of the interests of justice ground for reinstatement. Since *Ohanyan* was issued, as described above, there have been further elaborations from this Court on the nature of the analysis required when considering the interests of justice in an application to reinstate a withdrawn refugee claim (*Rajput* at paras 21-24; *Akbari*

at paras 36-41). Moreover, since *Ohanyan*, the Supreme Court of Canada issued *Vavilov*, where it emphasized the heightened obligation to provide responsive reasons where the impact of the decision is severe.

[23] I have to consider the RPD's reasons that are before me based on the record that was before the RPD. As I have set out above, the RPD failed to justify its determination or consider the relevant circumstances in conducting its analysis of the interests of justice. This is a sufficient basis for the application to be re-determined.

[24] The application for judicial review is allowed. Neither party raised a question for certification and I agree that none arises.

JUDGMENT in IMM-6379-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is sent back to a different decision maker at the RPD to be redetermined; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6379-21

STYLE OF CAUSE: KENNETH BAIDU v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

Me Richard Odeleye FOR THE APPLICANT

Me Kevin Spykerman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Odeleye Law Firm FOR THE APPLICANT

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario