Federal Court Cour fédérale

Date: 20231122

Docket: IMM-9071-22

Citation: 2023 FC 1543

Ottawa, Ontario, November 22, 2023

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

OMAR MAHMOUD AHMAD TAWALBEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

UPON application for judicial review to set aside a decision of the Refugee Appeal Division (RAD) dated August 24, 2022, which rejected the appeal of the Applicant, Mr. Omar Mahmoud Ahmad Tawalbeh, citizen of Jordan, and confirmed the decision of the Refugee Protection Division [RPD], in which decision the RPD determined that the Applicant was not a Convention refugee, pursuant to s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), or person in need of protection, pursuant to s. 97 of *IRPA*;

AND UPON considering that the Applicant came to Canada in December 2019 on a student visa, alleging he is being sought by a Bedouin Tribe who wants to kill him because, after two altercations with a Bedouin tour operator, he brought police attention to their tourist dealing in the Wadi Rum region of Jordan, restricting their ability to conduct their tourist business;

AND UPON considering that the RPD rejected the Applicant's claim based on negative credibility findings due to significant omissions, inconsistencies, and discrepancies between his Basis of Claim (BOC) form, his BOC Amendment, Schedule A and his oral testimony;

AND UPON considering that the main negative credibility findings were:

(1) The omission by the Applicant to indicate in his original BOC form his alleged fear of harm by the Bedouin tribe and all the surrounding information including the bloodshed certificate being issued against the Applicant demanding his death (instead, his original BOC form indicated he faced racism and discrimination in Jordan because he was from the north and he was conducting his tourism business in the south);

(2) The Applicant's return from the United Arab Emirates to Jordan, and in particular his home community and family home, where he stayed for 10 months, at a time when he testified he feared for his life;

(3) The inconsistency regarding the length of time it took the Applicant to decide to come to Canada, which was indicative that the Applicant carefully took time to plan his departure to Canada for reasons unrelated to his alleged fear for his life;

AND UPON reading the Applicant's Memorandum of Argument, the Respondent's Memorandum of Argument, the Applicant's Reply (all at the leave stage) and hearing the oral submissions of the counsel of the parties;

AND UPON reviewing the Certified Tribunal Record;

AND UPON determining that this application should be dismissed for the following reasons:

[1] The Applicant alleges the RAD erred in assessing the Applicant's credibility and made the following errors, all of which relate to the overarching issue of whether the Board erred in concluding that the Applicant was not a Convention refugee or a person in need of protection:

A. Erred in unreasonably failing to understand that the amended BOC narrative contained elaborative details of the Applicant's fears;

B. Erred in unreasonably impugning a greater degree of sophistication on the Applicant over and above what he actually has, especially as it relates to his ability to navigate the Canadian refugee system;

C. Erred in making findings with respect to credibility, by exaggerating inconsistencies, ignoring that some testimony was elaborative in detail and permitted and in finding omissions, all, not supported by the evidence before the Member;

D. Erred in ignoring and/or misconstruing the evidence.

[2] The errors alleged to have been committed by the RAD are reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23). Reasonableness is concerned with the existence of justification, transparency, and intelligibility in the reasoning process of the decision maker (*Vavilov* at para 99). A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision-maker. It does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision-maker, conduct a *de novo* analysis, or seek to determine the "correct" solution to the alleged issue (*Vavilov* at para 83).

[3] The Applicant points to *Ferrier v Canada (Attorney General)*, 2020 FCA 25 at paragraphs 12 to 14 [*Ferrier*] to suggest that *Vavilov* imposes a higher standard for intelligibility and justification, and therefore the Court does not need to apply a presumption that the RAD was aware of all materials before it. The Applicant's excerpt from *Ferrier* is taken out of context, implying the Court must expect perfection from administrative decision-makers. Paragraphs 12 to 14 of *Ferrier* reaches beyond to restate the point made in *Vavilov* at paragraph 91, that we must not assess reasons from an administrative body "against a standard of perfection" and "reasons given [that] do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside".

[4] At the hearing, both parties agree that this case is fact-driven and turns on the findings of credibility.

[5] The ability to amend a BOC does not insulate a claimant from a credibility assessment in respect of inconsistencies or omissions arising from an amendment (*Aragon v Canada (Citizenship and Immigration),* 2008 FC 144 at para 19).

[6] The Applicant contends that "[d]espite the recent cases, such as *Dunsmuir* and *Khosa*," deference to administrative decision-makers does not allow for reasons which are erroneous, based on a lack of or improper consideration of evidence, or based on incorrect legal principles. While this is generally correct, this is not "despite the recent cases" but because of them and others such as *Vavilov,* which sculpt the boundaries of deference. In particular, *Vavilov* reinforces that reviewing courts "must refrain from reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). The Applicant's characterization of "improper consideration or a lack of consideration" is more accurately described in *Vavilov* as "where the decision maker has fundamentally misapprehended or failed to account for the evidence" (*Vavilov* at para 126).

[7] This Court has held previously that the Board is entitled to a significant degree of deference in such matters as it is well-recognized as being in the best position to gauge the credibility of an applicant and draw, where appropriate, necessary negative inferences. The case of *Divsalar v Canada (Minister of Citizenship and Immigration),* 2002 FCT 653 [*Divsalar*], relied upon by the Applicant, clearly states such inferences may be drawn "so long as the inferences drawn are not so unreasonable as to warrant intervention" (*Divsalar* at para 22, citing *Aguebor v Minister of Employment and Immigration* (1993), 160 NR 315, pp 316-317 at para 4).

[8] This Court has also previously held that the Board is entitled to make adverse credibility findings when significant and important aspects going to the heart of the Applicant's refugee claim have been omitted from the original BOC and arises for the first time at the hearing and for which a reasonable explanation for the omission has not been provided (*Aragon v Canada (MCI)*, 2008 FC 144 at paras 21-22; *Chapeton Rodriguez v Canada (MCI)*, 2021 FC 1320 at para 22).

[9] I agree with the Respondent that the RAD's findings, and in particular their negative inferences with respect to credibility findings, were not unreasonable. It bears repeating that it is not the role of this Court, on judicial review, to reweigh or reassess the evidence before the decision-maker. In their reply submissions, the Applicant attempts to clarify that they are not seeking a re-weighing "of the Member's findings" but that "the Member ignored and/or misconstrued the documentation", which the Applicant alleges to prove there is no analysis tying the facts to the decision. While such an allegation, if proven, would be a reviewable error, the Applicant has offered nothing in their submissions other than bald assertions that the decision-maker was generally wrong or ignorant. They have failed to meet their onus, and I find no reviewable error in the decision-maker's assessment and analysis of the evidence.

[10] With respect to the credibility finding relating to the discrepancy between the original BOC narrative and the amended BOC narrative, the question is whether it is an omission or an elaboration. Had there been even a passing mention in the original BOC of the Applicant fearing harm from a Bedouin tourist guide/tribe or fearing a blood feud, then the Amended BOC narrative could arguably be an expansion of that. However, as the Board and the Respondent

reasonably note, here there is absolutely nothing in the original BOC about that alleged fear of harm from a Bedouin tourist guide/tribe or a blood feud, which are at the core of his amended claim. In the original BOC, the Applicant mentions generalized racism towards peoples from the north by those peoples in the south, while in the Amended BOC, the Applicant mentions fear from Bedouin agents trying to kill him given his working in their territory and reporting them to police after their threats and attacks on him. The Applicant submits that the fear of racism and the fear for their life are the same, just further details provided as to the specific events leading to the fear. I disagree; nothing in the materials nor submissions suggests they are remotely related.

[11] Similar to the case of *Garcia Corrales v Canada (MCI)*, 2022 FC 956, the underpinning of the fear of persecution shifted from how generalised racism in Jordan is difficult for the Applicant who is a person from the north of Jordan working in the south to the Applicant being personally threated by actual Bedouin agents on account of his tourism business in the south on their territory. Like the Honourable Mr. Justice Pamel, I can hardly describe this shift as "a simple expansion along the same theme or as an extension [or elaboration] of an original narrative" (*Garcia* at para 17). As mentioned in *Garcia* at paragraph 19:

> Where a refugee claimant fails to mention important facts in his or her BOC, this may legitimately be considered to be an omission that goes to lack of credibility.
> [Citations omitted]

[12] The Applicant submits that the RAD erred in finding inconsistencies between his BOC and Amended BOC because the Applicant was not represented by counsel when he filed his original BOC. They also allege the RAD erred in unreasonably impugning a great degree of sophistication to the Applicant who is not knowledgeable of the Canadian refugee system. At

paragraph 17 of its Reasons and Decision, the RAD concedes that the Applicant was not familiar with the refugee system in Canada, that there was some confusion and did not have the assistance of counsel. However, in the same paragraph, the RAD notes the Applicant is a university graduate, CEO of his own tourism company that has employed others for at least four years. The RAD also notes he successfully applied for visas to the United Arab Emirates and Canada, he completed his refugee claim forms, medical and work permits thoroughly and with many details without counsel, and yet completely leaves out from his original BOC narrative the sole ground of his refugee claim that goes directly to the heart of his claim. My reading of paragraph 17 of its Reasons and Decision is that it is reasonable in the circumstances.

[13] A refugee claimant's reavailment to the jurisdiction in which they fear persecution or a type of harm contemplated by s. 97 of the *IRPA* seriously undermines allegations of subjective fear, particularly in the absence of a compelling reason for reavailment (*Obozuwa v Canada (MCI)*, 2019 FC 1007 para 25). With respect to the credibility finding relating to the Applicant's reavailment to Jordan, and in particular staying for ten months in his home community and family home, at a time when he testified he was afraid for his life. When questioned, the Applicant merely testified that he had no choice, could not have stayed in a different house or different part of Jordan, and could not stay in a house on his own. Having reviewed the Applicant's explanation during his testimony for returning to his family home where his alleged agent of persecution could find him, the Applicant has not persuaded me that the RAD erred in this credibility assessment.

[14] With respect to the inconsistency regarding the length of time it took the Applicant to decide to come to Canada, which the RAD concluded was indicative that the Applicant carefully taking time to plan his departure to Canada for reasons unrelated to his alleged fear for his life, the Applicant does not offer any explanation or error by the RAD. The Applicant suggests that, while they were "perhaps not as clear as the Applicant should have been" in explaining the excessive delay, it does not reduce their fear. There are only two possibilities for this delay. Either the Applicant's "fear" was not so great that they had to flee to Canada until they had done sufficient research as to whether their chances of refugee status were greater in Canada or Australia, or their "fear" was not well-founded such that it would make the Applicant a Convention refugee.

[15] While I agree the RAD erred in stating certain dates in the decision, these errors are neither material to nor determinative of the matter.

[16] I do not find anything unreasonable in the RAD's analysis and in its assessment of the evidence. For the above-mentioned reasons, I dismiss the application for judicial review.

THIS COURT ORDERS THAT:

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

"Ekaterina Tsimberis"
Judge