

Federal Court



Cour fédérale

Date: 20240227

Docket: IMM-720-22

Citation: 2024 FC 318

Ottawa, Ontario, February 27, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

**ARSHIA NAVEED
ALIYA ZAINAB
HAFIZ NAVEED AHMAD
AYAAN AHMAD**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Arshia Naveed [Principal Applicant], her husband Aliyha Zainab [Adult Male Applicant], their adult daughter Ayaan Ahmad [Adult Female Applicant] and their son Hafiz Naveed Ahmad [Minor Male Applicant] are citizens of Pakistan. The Applicants seek

judicial review of a January 5, 2022 decision [Decision] of the Refugee Appeal Division [RAD] confirming the refusal of their refugee claim by the Refugee Protection Division [RPD]. The determinative issue for the RAD (and RPD before it) was credibility.

[2] The Applicants fear persecution from two politically connected individuals who want more of their farmland and who filed a false police claim in December 2011 against the Adult Male Applicant, who, was then arrested, tortured, and released from detention after paying a bribe. In 2016, the Applicants reconciled with the two individuals by offering them a portion of their farmland. In 2018, the individuals wanted more land and arranged to have the Adult Male Applicant re-arrested. Learning of her husband's arrest, on March 15, 2018, the Principal Applicant returned from a trip in the United States where, upon confronting the police on her husband's arrest and after asking them to release him, she was locked in a separate room at the police station and was physically abused and sexually assaulted. The couple was released on March 16, 2018, in exchange for bribes and undertakings to present themselves to the station monthly.

[3] On October 14, 2018, the two politically connected individuals contacted the Adult Male Applicant, after their political contact rose to the rank of a federal minister in July 2018 and, under threat of murder, requested the transfer of the remaining land to them. With the police refusing to act on his complaint, the Adult Male Applicant filed a petition with the Court against the police. The police was summoned by the Court to appear on October 23, 2018, but did not. After the issuance of the second summons for October 29, 2018, two plain-clothed police officers attended at his house on October 23, 2018, urging him under threat to withdraw his

complaint. Fearing repercussions from these October 2018 incidents, the Applicants fled Pakistan on October 26, 2018, with the help of an agent, leaving three sons behind with their grandparents. Targeted by police as a means of attracting the Applicants to return, their three sons experienced difficulties in school because of drugs and depression.

[4] The RAD found that the events of October 2018 that led to their flight from Pakistan were key allegations of their risk of harm omitted from both the original Basis of Claim [BOC] narrative and the amended BOC narrative drafted fifteen months apart and only included in amendments in the last BOC narrative made nine months later. When confronted with this, the Principal Applicant explained that their first immigration consultant had left the October 2018 events off their narrative despite them telling him about it. The RAD agreed that the reason given explained why the Applicants had filed their first amendment, but was unsatisfied by this explanation given that it did not explain why the October 2018 events were equally omitted in the amended BOC narrative by their subsequent counsel, which led to the RAD drawing its negative credibility finding. The RAD found that the omission of these key events was paramount and the remaining evidence submitted by the Applicants was not enough to overcome this determinative credibility finding.

[5] In its Decision, the RAD found the RPD was correct in finding that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[6] For the reasons that follow, the application for judicial review is dismissed.

II. Issues

[7] I frame the issues raised by the Applicants in this case as follows:

- (1) Is the RAD's finding to reject the Applicants' refugee claim on the basis of credibility unreasonable?
- (2) Is the RAD's analysis of the Principal Applicant's March 2018 sexual assault by police unreasonable?
- (3) Is the RAD's finding that the documentary and testimonial evidence do not substantiate the allegation that the Principal Applicant's son was targeted and used by the police to sell drugs unreasonable?

III. Analysis

A. *Standard of Review*

[8] Both parties agree that the standard of review is reasonableness that requires a reviewing court defer to a decision that is based on "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 85 and 99). In assessing whether the RAD's Decision is reasonable, the Court will assess whether the Decision is appropriately justified, transparent and intelligible.

[9] A Court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is "an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting

point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers” (*Vavilov* at para 13).

B. *Credibility*

[10] In the present matter, the determinative issue is credibility. As far as the RPD and the RAD's assessment of the Applicants' credibility and the evidence is concerned, case law has already determined that the reasonableness standard applies (see *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 13 [*Lawani*]; see also *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 at para 24).

[11] Credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should only be overturned “in the clearest of cases” (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12).

[12] Concerning credibility questions, a reviewing Court can neither substitute its own view of preferable outcome, nor can it reweigh the evidence. The Court must not intervene with the RAD's Decision, so long as the panel came to a conclusion that is transparent, justifiable, intelligible and within the range of possible acceptable outcomes that are defensible in respect of the facts and the law (*Lawani* at para 16).

[13] This Court has previously held that reviewable errors surrounding a negative finding of credibility should be based on whether the finding was drawn “from a clear evidentiary basis” (*Aliserro v Canada (Citizenship and Immigration)*, 2022 FC 412 [*Aliserro*] at para 30).

C. *Issue #1 - Is the RAD's finding to reject the Applicants' refugee claim on the basis of credibility unreasonable?*

[14] The Applicants submit that the RAD’s credibility findings were unreasonable, namely by:

- (1) rejecting and ignoring the Principal Applicant’s testimony explaining the omissions in their original and amended narratives; and
- (2) recycling the RPD's erroneous conflation of credibility with the probative value of the supporting documents to which it gave no or low probative weight.

(a) *RAD’s treatment of omissions in original and amended narratives*

[15] It was reasonably open to the RAD to consider the record and decide that the omission of the October 2018 events (see Overview above - the reason for the Applicants’ fleeing Pakistan) from the Applicants’ BOC narratives on two separate occasions by two different legal counsel was not credible and not believable:

[10] Confronted on the amendments, the Appellant blamed her previous counsel for omitting from the narrative elements mentioned to him. The RPD concluded the nature of the elements which had been included in the last amendment were of sufficient importance to have played a determinative role in their decision to depart Pakistan. Being key allegations of their risk of harm, it further notes the elements mentioned in the second amendment were done with the assistance of a different counsel, circumventing whatever obstacles the original counsel might have posed in their file. It draws from these facts an adverse inference of the Appellant's credibility as it relates to the October 2018 events and the additional events included in the amendments.

[13] Different interventions by numerous professionals indicate reviews of the file. Ignorance of the first counsel's failure to adequately document the narrative allegedly told to him prior to the amended narrative submitted in November 2020 is not suitably explained. The fact additional amendments were brought forward on two subsequent occasions indicates review and exchange on the file with the mandated counsel. The failure to have raised these omissions whilst having had the opportunity of addressing other issues of lesser importance prior to the last amendment cannot be simply explained by the incompetency of previous counsel. As such, the adverse credibility conclusions drawn by the RPD from such important omissions after having submitted two other amendments are correct.

[16] This Court has 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 narrative 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).

[17] I agree with the Respondent that the RAD's negative inferences with respect to its above-mentioned credibility findings were not unreasonable. It bears repeating that it is not the role of the Court, on judicial review, to reweigh and reassess the evidence before the decision-maker.

[18] In their submissions, the Applicants cite the Federal Court of Appeal in *Owusu-Ansah v Canada (MEI)*, 1989 FCA 442 [*Owusu*] that a tribunal must have regard for the totality of the evidence before it when assessing the credibility of a refugee claimant. The Applicants argue the RAD rejected the Applicants' statements without explaining why they did not accept their other explanation for the omissions. However, I note that the Federal Court of Appeal in *Owusu* at para 16 indicates:

[16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.)). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources.

[19] The Applicants also argue that the tribunal cannot make an adverse credibility finding while ignoring evidence provided by the claimant explaining apparent inconsistencies. The Applicants have not offered anything in their submissions to show this credibility finding of the RAD ignored any evidence and is unreasonable. While the Applicants argue the RAD's finding is unreasonable because they provided the RAD with other evidence in support of their claim, the Applicants' argument is a disagreement with the RAD's weighing of the evidence, which I find is not a reviewable error in the circumstances and to which this Court owes high deference. I must agree with the Respondent that the Applicants have failed to meet their onus.

(b) *RAD's treatment of supporting documents and lack of documentation for the land transfer to agents of persecution*

[20] Given the Applicants' supporting affidavits and documentation were found to have probative value, the Applicants argue that the RAD was unreasonable in completely disregarding them as they supported their testimony. The Applicants point to cases where the Federal Court held that the RAD erred in applying a global negative credibility assessment without taking the entirety of the evidence into account and, for example, using that assessment to find that corroborative documents were inauthentic: *Marku v Canada (Minister of Citizenship and*

Immigration), 2021 FC 1096, at para 22; *Ruiz v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1339 at para 9; *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1219. I have reviewed the RAD's findings at pages 6 and 7 of its Decision and the evidence referenced therein and in the Applicants' submissions. The RAD reversed a number of incorrect findings of the RPD that held that certain exhibits and testimony were not given any probative value or weight. However, as argued by the Respondent and demonstrated through the use of a number of examples reproduced from paragraphs 14 through 16 of the Respondent's Memorandum of Argument, the RAD found that this evidence does not address its determinative credibility findings regarding the BOC amendments:

14. None of the supporting evidence that the Applicants allege the RAD ignored addresses the tribunal's determinative findings regarding their BOC amendments. For example, the RAD found that the petition that the Male Adult Applicant filed against the police only indicated that a petition was filed, and sheds no insight on why this important detail was omitted from the Applicants' first two BOC narratives.

15. Similarly, although it was an error for the RPD to assign no weight to the affidavits sworn by the Applicants' family members, this did not warrant sending their claim back for redetermination. This is because the contents of the affidavits were insufficient to offset the determinative credibility regarding the Applicants' BOCs. The Applicants point to nothing specific contained in the supporting evidence that contradicts this finding.

16. Lastly, the RAD did not conflate the credibility concerns stemming from the Applicants' BOC omissions with the credibility concerns stemming from the lack of documentation to show that the Applicants transferred some of their land to their agents of persecution. Rather, the RAD held that although the Applicant's father's affidavit provided evidence of the land transfer, this evidence was insufficient to overcome the credibility concerns regarding the BOC omissions.

[21] The RAD's negative finding of credibility is drawn "from a clear evidentiary basis" (*Alisarro* at para 30) to which I am unable to find any reviewable errors.

D. *Issue #2 - Is the RAD's analysis of the Principal Applicant's March 2018 sexual assault by police unreasonable?*

[22] The Applicants submit that the Decision was unreasonable in that, having accepted that the Principal Applicant was sexually assaulted by the police, the RAD failed to apply the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-based Persecution*

[*Chairperson Guidelines 4*] reproduced hereinafter:

11.2.6 If the evidence suggests a risk of gender-based persecution, the member must assess this risk even if it is not explicitly alleged.

[...]

11.3.8 Even where credibility concerns arise from certain aspects of a claim, the claim may nonetheless be accepted if the claimant faces a risk due to the claimant's profile. For example, a claim may succeed if the claimant faces a risk based on gender-based violence despite the lack of credibility in respect of the allegations based on another ground.

and dismissed this event as being a result of her actions in confronting the police, rather than in her being a woman.

[23] Before the RAD, the Applicants made similar arguments that the RPD lacked sensitivity regarding the allegations of sexual assault and failed to apply the *Chairperson Guidelines 4*. The RAD acknowledged these arguments referencing them specifically in its Decision at para 26.

The RAD conducted its own analysis and reversed the RPD's conclusion that the Principal Applicant failed to demonstrate the alleged rape of March 2018, which it deemed erroneous, and

held that the rape of March 2018 was credible. However, the RAD considered the absence of similar issues from police faced by the Principal Applicant until she fled Pakistan and concluded that the treatment the Principal Applicant suffered at the hands of police in March 2018 was a result of her actions in confronting the police on her husband's arrest rather than in her being a woman:

[27] The RPD derives a lot of the credibility findings from the extent of information contained in the amended narratives. The March 2018 event involving the Appellant is not part of these amendments and is mentioned from the very onset. Furthermore, the event is also mentioned in her parents' affidavits. Concluding that an event mentioned in the original narrative, further referenced in written testimony from two parents, is not credible based on other unrelated elements is erroneous. I find that on a balance of probabilities, the Appellant's allegation of having been a victim of sexual assault in March 2018 is credible. However, considering the absence of issues faced by her until her departure in October, I find on a balance of probabilities, that the treatment suffered at the hands of police in March 2018 was a result of her actions in confronting police about her husband's detention rather than in her being a woman.

[24] The fact that the police's March 2018 sexual assault of the Principal Applicant resulted from her confronting the police about her husband's detention is in the original BOC narrative and is undisputed. The RAD considered same and concluded that the police assaulted the Principal Applicant because her husband was detained and not because of her gender. The Applicants argue the sexual assault was not a consequence of her actions but rather the fact that she is a woman who was subject to gender-based violence. The Applicants argue it is very unlikely she would have been raped if she had been a man, which is evident given her husband, who was in police custody, was not sexually assaulted by police.

[25] The Respondent argues that the sexual assault was not connected to a Convention ground and did not form the basis of a refugee claim and cites Justice Snider's decision in *Mancia v Canada (Citizenship and Immigration)*, 2011 FC 949 (CanLII) [*Mancia*]. There are similarities between the facts of both cases. In *Mancia*, the female applicant was victimized by the MS-18 gang because of her brother's perceived wealth. I agree with the Respondent's written and oral submissions of the reasonability of the RAD's assessment and conclusion that the Principal Applicant's sexual assault was not because of her gender, was not gender-based persecution and was not connected to a Convention ground, but was rather a crime. The RAD's conclusion was based on its analysis of the facts and evidence and was not, in my view, unreasonable for much the same reasons elaborated by Justice Snider in *Mancia*:

[6] With respect to the Applicant's claim for protection as a refugee under s. 96 of the Act, the Board found that

The claimant has been a victim at the hands of the MS-18 gang, whose members act in a criminal manner. **Her victimization is as a consequence of the MS-18, having pursued her brother because of his perceived wealth. She is, therefore, a victim of crime,** which does not provide her with a nexus to one of the Convention refugee grounds.

[7] **The first submission of the Applicant is that the Board failed to understand that her claim was gender-based.** There is no doubt that the Applicant bears the burden in establishing that she requires the protection offered by the Convention and the Act. **In general terms, a claimant's burden is to satisfy the Board that she was targeted as a woman. Stated differently, a claimant needs to demonstrate that she would not have been attacked but for the fact that she was a woman. For example, if a claimant's attackers robbed and attacked her, she would have to satisfy the Board that the robbery was not the motive. Otherwise, a man in her situation (even if he, too, had been raped) would not receive protection but would face the same risk of attack.**

[8] The Applicant is challenging the Board's finding of fact that this was something other than a gender-related claim. The Board's

finding was based on a review of all the evidence before the Board, and is not, in my view, unreasonable. **While there may have been aspects of her allegations that relate to Convention grounds – such as her gender or family history – that does not automatically mean that there is a nexus to a Convention ground. There was no evidence that MS-18 systematically targets women.**

[Our emphasis]

[26] Similarly, in this case and in my view, the Applicants did not satisfy its burden to demonstrate to the RAD that the police systematically target women and that the Principal Applicant was targeted in March 2018 because she was a woman. As such, it was not incumbent on the RAD to conduct such a risk assessment of gender-based persecution as elaborated in the Applicants' submissions.

[27] There is also no merit to the Applicants' argument that the RAD *blamed* the Principal Applicant for being raped. As argued by the Respondent, a plain reading of the RAD Decision shows no indication that the RAD held the Principal Applicant responsible for her assault and cannot be considered unreasonable on that basis:

However, considering the absence of issues faced by her until her departure in October, I find on a balance of probabilities, that the treatment suffered at the hands of police in March 2018 was a result of her actions in confronting police about her husband's detention rather than in her being a woman.

E. *Issue #3 - Is the RAD's finding that the documentary and testimonial evidence do not substantiate the allegation that the Principal Applicant's son was targeted and used by the police to sell drugs unreasonable?*

[28] The RAD upheld the RPD's finding that the Applicants failed to establish that the police are forcing their minor son still living in Pakistan to deal drugs on their behalf:

[28] The RPD found the Appellants had failed to establish that police are using their youngest son to peddle drugs for them. Evidence submitted in the form of a picture and a medical report were correctly not given any probative value. An affidavit by the eldest brother mentions his younger brother's drug problems but fails to indicate the role of police. The lack of probative value of the document is correct. Lastly, an affidavit by the Appellant's mother also speaks of a grandson addicted to drugs provided by the police. However, the RPD correctly found that the failure, on a balance of probabilities, to establish the allegation is insufficient to alleviate the concerns that go to the heart of the claim and establish allegations of police targeting one of their sons for illegal purposes.

[29] The Applicants argue that the RAD failed to consider the evidence and testimony in conjunction with each other in order to make a determination on whether the police were targeting the Principal Applicant's son for illegal purposes. The Applicants argue that the RAD rejected the testimony because the affidavits provided do not unequivocally establish that the police were targeting their son and because the RAD rolled unrelated credibility findings on separate issues.

[30] The evidence the Principal Applicant provided in support of the allegation that her son was being forced by Pakistani police to deal drugs for them was a picture, a medical report, and affidavits from their older son and their son's grandmother who lives in Pakistan. This evidence was evaluated by the RAD to have no probative value because it did not substantiate the Principal Applicant's claim that the police is forcing the youngest son to peddle drugs for them. For example, the medical report demonstrated the existence of a drug problem but did not mention the role of police. As for the older brother's affidavit, it mentions the younger brother

being close to being an addict and under the influence of the police that are providing him drugs and influencing him to hate their parents but fails to substantiate the Applicants' allegation. Similarly, the grandmother's affidavit states that the drug-addicted grandson obtains drugs through the police but does not speak to him dealing drugs for them. The RAD considered and weighed the evidence and found it to be insufficient to substantiate the Applicants' allegation. The Applicants disagree with the RAD's finding and are rearguing the same before this Court. The Applicant's disagreement about the manner in which the RAD weighed this evidence does not afford a basis for judicial review before this Court (*VMA v Canada (Minister of Employment and Immigration)*, 2009 FC 604, at para 21).

[31] For all the reasons mentioned above, the Court finds the RAD's Decision is not unreasonable.

JUDGMENT in IMM-720-22

THIS COURT'S JUDGMENT is that:

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

"Ekaterina Tsimberis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-720-22

STYLE OF CAUSE: ARSHIA NAVEED, ALIYA ZAINAB, HAFIZ
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