Federal Court  Cour fédérale

Date: 20240814

Docket: IMM-12791-22

Citation: 2024 FC 1259

Ottawa, Ontario, August 14, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

MANJIT SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Manjit Singh [Applicant], is a citizen of India. The Applicant makes this application for judicial review of the November 22, 2022 decision of the Refugee Appeal Board [RAD] confirming the refusal of their refugee claim by the Refugee Protection Division [RPD], for other reasons. The RAD rejected the Applicant's refugee claim on the basis of adverse credibility findings and concluded that the Applicant is neither a Convention refugee under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], nor a person in need of protection under s. 97 of the IRPA.

[2] In this application for judicial review, the Applicant submits that the RAD committed the following reviewable errors: (a) the RAD's credibility findings are undermined because the Applicant's overall credibility was accepted by the RPD panel's conclusion to refuse the Applicant's claim based on an IFA as the determinative issue; (b) the RAD did not have jurisdiction to seek additional information that was available at the time of the RPD panel's decision; (c) the RAD's adverse credibility findings were made in a perverse and capricious manner, on irrelevant considerations, or without regard to the totality of the evidence before it.

[3] For the reasons that follow, the application for judicial review is dismissed. The RAD reasonably assessed the Applicant's credibility based on the evidence, including several omissions and inconsistencies, in the record before them, and reasonably determined that the Applicant had not satisfied their concerns as to his credibility and the sufficiency of his evidence.

II. Issues

[4] The Applicant only frames one issue: did the RAD err "by making adverse findings of credibility in a perverse and capricious manner, on irrelevant considerations, or without regard to the totality of the evidence before it?"

III. Standard of Review

[5] Having reviewed the record, I agree with the parties that the issues raised by the Applicant are reviewable on a standard of reasonableness (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawan*i] at para 13; *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 [*Huang*] at para 24; *Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*] at paras 10, 25). To avoid intervention on judicial review, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision-maker misapprehended the evidence before it (*Vavilov* at paras 125-126).

[6] The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the party challenging the decision must satisfy the court 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" and that the alleged flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100). The reviewing court must ultimately be satisfied that the decision-maker's reasoning "adds up" (*Vavilov* at para 104).

IV. Analysis

A. *Credibility findings*

[7] Credibility findings are part of the fact-finding process of the decision-maker and are afforded significant deference upon judicial review (*Onwuasoanya v Canada (Citizenship and Immigration)*, 2022 FC 1765 at paras 7-8, 10 citing *Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 [*Fageir*] at para 29, *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 [*Tran*] at para 35, and *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). Credibility determinations have been described as lying within "the heartland of the discretion of triers of fact […] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence" (*Fageir* at para 29; *Tran* at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22, citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[8] A reviewing court can neither substitute its own view of preferable outcome to credibility and plausibility questions, nor can it reweigh the evidence, and must not intervene with the RPD's or 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).

[9] The default presumption of the decision-maker should be that a refugee claimant's testimony is truthful unless there is a reason to doubt it (*Akinola v Canada (Citizenship and Immigration)*, 2019 FC 1308 at para 39). This presumption is rebuttable when an omission in the original recounting (such as in a Basis of Claim form) or subsequent testimony of an event, or an inconsistency between them, gives sufficient reason to require some corroborating evidence as long as the decision-maker is able to articulate why they are suspicious of the claim (*Maldonado v Canada (Minister of Employment and Immigration)*, 1979 CanLII 4098 (FCA), [1980] 2 FC 302 (FCA)).

[10] Generally, a claim cannot be rejected based on lack of corroborative evidence if the applicant's credibility is not in question (*Dayebga v Canada (Citizenship and*

Immigration), 2013 FC 842 [*Dayebga*] at para 26, citing *Ahortor v Canada (Minister of Employment and Immigration)*, (1993), 65 FTR 137 (Fed TD) at para 45). However, if the decision-maker has raised a credibility concern and the facts suggest it is appropriate, corroborative evidence can reasonably be expected to be available to the applicants, and a failure to produce such evidence makes drawing a negative inference reasonable (*Dayebga* at para 30, citing *Mendez Lopera v Canada (Minister of Citizenship and Immigration)*, 2011 FC 653 [*Lopera*] at para 31).

B. *Application to the Decision under Review*

[11] First, the Applicant submits that the RAD's credibility findings are undermined because the RPD panel's conclusion to refuse the Applicant's claim was based on an IFA as the determinative issue, which implies that the Applicant's overall credibility was accepted, despite the RPD's credibility concerns. I disagree with the Applicant given a clear reading of the RPD's findings at paragraph 20 that "(t)he Panel had several credibility concerns during the hearing. The panel observed, at different times during the hearing, that the claimant's testimony was inconsistent and confusing, he failed to provide straightforward answers, and he was non-responsive to the questions asked." While not determinative before the RPD, the RPD had several concerns about the Applicant's credibility.

[12] Second, the Applicant challenges the RAD's jurisdiction to seek new evidence or explanations and make their own credibility findings, arguing that *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] limits the RAD's powers as an appeal board. In contrast, the Respondent rightly highlights that the RAD's standard of review is akin to correctness, and the RAD's role is to appreciate the record independently and make its own

determinations. In *Islam v Canada (Citizenship and Immigration)*, 2024 FC 320 [*Islam*], Justice Régimbald discussed substantially this same argument and found that "the RAD is entitled to seek such explanation and is required, as it did, to provide notice in accordance with the principle of procedural fairness" (*Islam* at para 35, citing *Daodu v Canada (Citizenship and Immigration)*, 2021 FC 316 at paras 15–16 and *Ali v Canada (Citizenship and Immigration)*, 2022 FC 1207 at para 14):

> [35] I also respectfully dismiss the Applicants' argument that the RAD acted beyond its jurisdiction by asking the PA for additional explanations on the inconsistent evidence. In my view, the RAD is entitled to seek such explanation and is required, as it did, to provide notice in accordance with the principle of procedural fairness (*Daodu v Canada (Citizenship and Immigration)*, 2021 FC 316 at paras 15–16; *Ali v Canada (Citizenship and Immigration)*, 2022 FC 1207 at para 14). Contrary to what the Applicants submit, the RAD is not obligated to send the matter back to the RPD for redetermination.

[13] I agree with the analysis in *Islam*; the RAD cannot play their role in the appeal process unless they are able to wholly appreciate the record before them and reach their own conclusions on review. The RAD gave the Applicant notice that they were considering credibility as the determinative issue and asked the Applicant to respond to credibility concerns apparent from their evidence to the RPD. The Applicant had a chance to and did respond.

[14] It is a little difficult to understand the Applicant's position that the RAD was acting beyond their authority in performing the role the Applicant asked them to perform, especially in light of the jurisprudence submitted by the Respondent and the circumstances of this case. In my view, the Respondent rightly submitted the RAD can raise new credibility issues in appeal before it and make new credibility findings based on the record before the RPD *(Gedara v Canada (Citizenship and Immigration)*, 2021 FC 1023 [*Gedara*] at paras 33-38), and if those issues were

not raised by the RPD, the RAD can provide the Applicant an opportunity to respond to these concerns (*Gedara* at paras 35-38; *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637 [*Alazar*] at paras 67-73). I follow Justice Norris in *Alazar*:

> [70] Additionally, this interpretation is consistent with the now well-established view that paragraph 111(1)(a) of the IRPA permits the RAD to "confirm the determination of the Refugee Protection Division" (emphasis added) even if it finds that the RPD erred on a question of law, of fact or of mixed fact and law. As the Federal Court of Appeal explained in *Huruglica*, at paragraph 78 (emphasis added):
>
> > … the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into the application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the IRPA.
>
> Further, at paragraph 103 (emphasis added):
>
> > I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.
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> > [71] As reflected in the foregoing *dicta*, the only *jurisdictional* constraint on the RAD's power to dispose of an appeal is found in subsection 111(2) of the IRPA, which provides that two conditions must be

> satisfied before the RAD may refer a matter back to the RPD under paragraph 111(1)(c) instead of determining the claim itself. They are, first, that the RAD is of the opinion that the decision of the RPD is wrong in law, in fact or in mixed fact and law and, second, that the RAD is of the opinion that it cannot determine whether to confirm the RPD's determination or to set it aside and substitute the determination that, in its opinion, should have been made, without hearing the evidence that was presented to the RPD. If these conditions are not satisfied, the RAD is required to determine the claim itself. There is no suggestion in *Huruglica* that the RAD cannot, as a matter of jurisdiction, substitute its own determination of the merits of the refugee claim on a basis that was not addressed by the RPD in its decision.
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> (*Alazar* at paras 70 and 71, citing *Huruglica*)

[15] The RAD held that "the RPD erred in assuming without deciding that the definition [of Convention refugee] was met in this case. The RPD also erred in finding that the [Applicant] was not credible without providing clear reasons for this finding. In my view, I can correct this error by conducting an independent analysis of the [Applicant]'s evidence including the [Applicant]'s latest submissions on credibility." As mentioned above, credibility was an issue before the RPD with the RPD noting that there were several credibility concerns and that the Applicant had not presented sufficient credible evidence that the police would have interest in him, which impacted the RPD's findings that an IFA was available. It was open to the RAD to review the whole record, and if the RAD considered that it was possible to make credibility findings without referring the matter back to the RPD, then the RAD could make its own findings (*Alazar* at para 69). The RAD was entitled to raise and consider credibility concerns and, as the Applicant was aware credibility was at issue given their direct submissions on the issue to the RAD, it was reasonable for the RAD to expect the Applicant would provide corroborative evidence to assuage their credibility concerns (*Dayebga* at para 30, citing *Lopera* at para 31).

[16] Third, the Applicant submits that the RAD's adverse credibility findings were made in a perverse and capricious manner, rendering the decision unreasonable. They argue that the RAD did not truly analyze contradictions in the evidence, and held omissions and inconsistencies against the Applicant in a manner that was overzealous and essentially unwilling to engage with contrary views.

[17] The Respondent submits that the RAD reasonably concluded that that there were numerous significant omissions, contradictions and inconsistencies in the Applicant's statements at the port of entry, at the hearing and in his Basis of Claim form, some of which were inconsistent with the supporting affidavits presented, which went to the core of his allegations of political activism and police pursuit and which meant the Applicant was not credible as a refugee claimant. The Respondent also submits that the RAD reasonably concluded that the Applicant did not present sufficient credible evidence to establish his political activities and that the police have an interest in him. The Respondent submits that this justified the rejection of his refugee protection claim and his appeal before the RAD.

[18] I agree with the Respondent, which canvasses some of the numerous omissions, contradictions, inconsistencies in its Memorandum of Argument and which was raised in the RAD's decision. Based on the evidentiary record before the RAD, including the Applicant's testimony, I find the RAD's assessment of the Applicant's credibility to be reasonable.

[19] The difficulty with this application is that the Applicant's submissions are oriented to re-litigate the credibility issues in a *de novo* fashion. The decision and the RAD's findings attract a high degree of deference by this Court (*Islam* at para 33, citing *Noël v Canada (Citizenship and*

Immigration), 2020 FC 281 at para 16 and *Zhao v Canada (Citizenship and Immigration)*, 2019 FC 1593 at para 33). This Court should not disabuse itself of the deference owed to these credibility findings on the Applicant's mere insistence to the contrary (see for example *Ali v Canada (Citizenship and Immigration)*, 2022 FC 1207 at para 26). In my opinion, the Applicant is asking the Court to reweigh the evidence and come to a different conclusion than the RAD. That is not the role of the Court on judicial review.

[20] In its assessment, the RAD recognized that the issue of whether the Applicant was indeed eligible for refugee protection under IRPA was obscured by concerns of credibility that could have been determinative of the matter. The RAD meaningfully considered the Applicant's submissions and evidence, considered the Applicant's submissions on credibility issues, undertook their own credibility analysis, and reasonably explained why they were satisfied on the basis of the numerous omissions and inconsistencies that the Applicant had failed to meet their onus of establishing that they were a politically active member or supporter of the political party in question, and that they were being sought by the police. The RAD considered the documents in support of the Applicant's claim and determined that they were unable to overcome the referenced credibility concerns. As such, on this issue, the decision is reasonable.

V. Conclusion

[21] For the foregoing reasons set forth above, this application for judicial review is dismissed. No question for certification was proposed by the parties, and I agree that none arise.

JUDGMENT in IMM-12791-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance to be certified.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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