Federal Court  Cour fédérale

Date: 20240905

Docket: IMM-6420-22

Citation: 2024 FC 1384

Ottawa, Ontario, September 5, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

HANAN SAMEED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Hanan Sameed [Applicant] is a citizen of Pakistan. The Applicant makes this application for judicial review of the May 27, 2022 decision of the Refugee Appeal Division [RAD] confirming the refusal of his refugee claim by the Refugee Protection Division [RPD] based on credibility. The RAD rejected the Applicant's refugee claim concluding that the RPD was correct in determining that (1) the Applicant's actions contradicted the behaviour expected

of someone genuinely fearing persecution or risk or danger and undermined his subjective fear and his general credibility, (2) there was insufficient credible evidence that the telefilm with anti-TTP content the Applicant acted in was ever aired, (3) there was insufficient credible evidence to support the assassination attempt on the Applicant, and the RAD found (4) the psychotherapy report does not overcome the credibility concerns. The RAD 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 [Decision].

[2] For the reasons that follow, this application for judicial review is dismissed. The Decision was not procedurally unfair, and the RAD reasonably assessed the evidence before them without embarking on an exercise to do the Applicant's job of perfecting his claim for protection.

II. Background

[3] The Applicant is a television and film actor and model in Pakistan. He featured in the television series "Nigehbaan" from December 2014 to June 2015, portraying a military officer fighting against the Tehrik-e-Taliban [TTP]. His role attracted criticism from conservative individuals. In 2018, the Applicant acted in a telefilm entitled "Tujhay Jannat mein Kaisay Bhajoon," (translated "how to send you to heaven") depicting a man misguided by the Taliban who participates in a suicide bombing. The telefilm allegedly aired in March, April, and May 2018. Following the telefilm's broadcast, the Applicant allegedly received death threats from individuals claiming to be members of the Lashkar-e-Jhangvi [LeJ] and TTP.

[4] On June 11, 2018, the Applicant reported the threats to the police and was advised to file a First Information Report [FIR]. On his way to the police station, the Applicant alleges his car was fired upon by unknown armed assailants. The Applicant allegedly managed to escape but lost control of the vehicle, resulting in a crash and subsequent injuries. He was hospitalized, and the police registered an FIR for the automobile crash. After being discharged on June 13, 2018, the Applicant relocated first to Lahore and then to Karachi, where he received another threatening call on July 20, 2018, from a TTP member who said he knew his whereabouts.

[5] Back in April 2018, the Applicant had applied for a visa to Canada to attend the "HUM TV Awards" ceremony where he had been nominated for an award. Although his visa application was initially rejected, it was reconsidered and issued on June 7, 2018. He traveled to Canada on July 26, 2018, and made a refugee protection claim on October 1, 2018. While in Canada, the Applicant alleges that his wife and children were targeted and went into hiding in Pakistan.

III. Decision under Review

[6] The Minister of Immigration, Refugees and Citizenship Canada intervened in the Applicant's claim, questioning his credibility and the lack of corroborating evidence regarding the threats. The RPD rejected the Applicant's claim on October 20, 2021, primarily based on credibility issues. The Applicant appealed the decision to the RAD, asserting the RPD breached procedural fairness and erred in its credibility assessment, and asserting the incompetence of his former counsel. The Applicant also provided new evidence to the RAD, including a video of the telefilm and a retranslated news article, to support his claim.

[7] The RAD found that the Applicant's actions undermined his claimed subjective fear and general credibility. Specifically, the RAD noted that the Applicant actively used social media despite claiming to fear for his life, as he was being tracked and targeted online, which contradicted the behavior expected of someone genuinely fearing persecution. Additionally, the RAD highlighted that the Applicant initially traveled to Canada to attend the HUM TV awards ceremony, not to seek refugee protection, further questioning the genuineness of his fear.

[8] The RAD also addressed procedural fairness, noting that the RPD erred by not reviewing the video of the telefilm that the Applicant claimed led to the threats against him. However, the RAD remedied this breach by admitting the video of the telefilm into evidence but found that it did not conclusively establish that the telefilm was aired in Pakistan nor did it substantiate the Applicant’s claims of targeted persecution. Moreover, the RAD found inconsistencies in the evidence regarding the alleged “assassination” attempt on June 11, 2018, including discrepancies in the number of attackers reported and the lack of corroborating evidence such as witness statements or damage to the Applicant's car.

[9] The RAD admitted some of the Applicant’s new evidence, including the video of the telefilm and a retranslated news article, but found that these did not substantiate the Applicant's claims. The psychotherapy report detailing the Applicant's severe depressive disorder was also admitted into evidence as credible and new, but it was deemed insufficient to overcome the credibility concerns. The RAD concluded that there was insufficient credible evidence to establish, on a balance of probabilities, that the Applicant faced a genuine risk of persecution, leading to the dismissal of his appeal.

IV. Issues

[10] The Applicant states there are two principal issues in this matter:

A. The Decision was procedurally unfair because the Applicant was denied an oral hearing despite the RAD calling into question his credibility; and,

B. The RAD erred in their assessment of the evidence such that its Decision is unreasonable.

V. Standard of Review

[11] The presumptive standard of review is reasonableness (*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). The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at paras 125-126).

[12] 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).

[13] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54). The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the non-exhaustive list of factors referenced in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paragraphs 22-23 (*Vavilov* at para 77). In sum, the focus of the reviewing court is whether the process was fair. In the words of the Federal Court of Appeal, the ultimate or fundamental questions are:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains **whether the applicant knew the case to meet and had a full and fair chance to respond**. It would be problematic if an a priori decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice**—was the party given a right to be heard and the opportunity to know the case against them?** Procedural fairness is not sacrificed on the altar of deference.
>
> (*Canadian Pacific* at para 56, emphasis added)

A. *Credibility*

[14] As far as the assessment of the Applicant's credibility and the evidence is concerned, the reasonableness standard applies (see *Lawani v Canada (Citizenship and Immigration),* 2018 FC 924 at para 13 [*Lawan*i]; see also *Huang v Canada (Citizenship and Immigration),* 2017 FC 762 at 24 [*Huang*]).

[15] Concerning credibility and plausibility questions, a reviewing court can neither substitute its own view of preferable outcome, nor can it reweigh the evidence and the court 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).

[16] To begin an analysis, the default presumption 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)).

[17] Generally, a claim cannot be rejected on the basis of a 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).

VI. Analysis

A. *Did the RAD violate the Applicant's right to procedural fairness?*

[18] In the context of hearings under the IRPA, section 110(6) states:

> **Hearing**
>
> **(6)** The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)
>
> > **(a)** that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
> >
> > **(b)** that is central to the decision with respect to the refugee protection claim; and
> >
> > **(c)** that, if accepted, would justify allowing or rejecting the refugee protection claim.

[19] The Applicant argues that the Decision was procedurally unfair because the RAD questioned the Applicant's credibility and that of the new evidence, and so an oral hearing was required for them to respond to these concerns. I disagree.

[20] The RAD considered section 110(6) of the IRPA and was clear that, as the new evidence admitted on appeal would not justify allowing or rejecting the refugee protection claim, no oral hearing can be held. While the RAD had concerns about the credibility and usefulness of the new evidence submitted, it did not raise a serious question in respect of the Applicant's credibility, nor would it justify, if accepted, allowing or rejecting the Applicant's claim. The RAD found that some of the newly admitted evidence was either insufficient or only circumstantial evidence that did not corroborate the Applicant's claims of persecution or danger or risk in Pakistan:

A. The video of the telefilm was admitted as proof that it was produced, that the Applicant was in it, and the nature of the telefilm, contrary to the RPD's ambiguous concern, but held that the mere existence of the telefilm does not establish that it was aired, which does not suggest its acceptance would justify allowing or rejecting the Applicant's claim;

B. The retranslated news article was admitted as relevant and credible to correct an improper translation of the same news article, which the Applicant claims led to the article not being considered, but the RAD noted the retranslated news article does not specify when the reported incident occurred, the article did not list an author, and the RAD found the article "to be incoherent at times and difficult to understand" and so assigned it no weight;

C. The affidavit of Sohail Iftikhar Khan, director of the telefilm, [Khan Affidavit] was not admitted because it was reasonable to expect the Applicant to have brought this affidavit to the RPD for their consideration, and the Applicant first testified that he did not ask for an affidavit or letter because he did not believe

> they would be willing to provide an affidavit and later testified instead that he did not want to disclose that he was making a refugee claim, which the RAD did not accept as a reasonable explanation for omitting this evidence prior to the RPD hearings.

[21] While the RAD identified procedural fairness errors committed by the RPD both generally and in relation to some of the aforementioned evidence, the RAD corrected these errors by assessing the evidence, admitting some of it, and analyzing it properly. Upon properly analyzing the evidence, the RAD found the newly provided evidence did not satisfy the section 110(6) criteria.

[22] Since the RAD reasonably found the new documentary evidence did not meet the three criteria required by section 110(6) reproduced above, the RAD had no discretion to grant an oral hearing even if they wanted to. I cannot agree with the Applicant that it was procedurally unfair for the Applicant to be denied an oral hearing to which they were not entitled, and which the RAD had no authority to grant.

[23] I also agree with the Respondent that when a claimant's credibility is central to an RPD decision and the grounds of appeal before the RAD, as was the case here, the RAD is entitled to make independent findings regarding credibility without questioning the claimant or providing an additional opportunity to make submissions (*Fabunmi v Canada (Citizenship and Immigration)*, 2020 FC 1009 at para 7; *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 at para 13).

[24] In light of this, I find the Decision was not procedurally unfair.

B. *Did the RAD err in their assessment of the evidence such that its Decision is unreasonable?*

[25] Credibility was clearly at issue and thus it was reasonable for the RAD to require corroborative evidence (*Dayebga* at para 30, citing *Lopera* at para 31). Firstly, the RAD did not reject the psychotherapist's report as the Applicant submits; the RAD found it was admissible pursuant to section 110(4) of the IRPA and new, relevant and credible for purposes of admissibility. Rather, the RAD found the Applicant simply failed to explain how the psychotherapist's report was related to the credibility concerns (based on my review, I likewise do not understand this). Secondly, the RAD did reject the Khan Affidavit, and they were required to do so because the RAD found that the evidence contained therein was available prior to the RPD's hearings and it was therefore reasonable to expect the Applicant to at least attempt to acquire and proffer that evidence before the RPD. Even aside from that reasonable expectation, the RAD reasonably did not accept as a sufficient explanation the mere fact that the Applicant "did not think [the Affidavit] would be provided" or that "he did not want to disclose he was seeking asylum", finding these arguments did not justify the Applicant not even attempting to acquire or submit the evidence contained therein to the RPD prior to their decision.

[26] In respect of the hospital report following the automobile crash, the Applicant alleges the details of his injuries are empirical evidence that someone attempted to assassinate him, and the RAD wholly failed to ascertain the nature of this evidence. With respect, all the hospital report empirically reflects is that the Applicant was injured, as the medical staff taking that report had

no way of witnessing or proffering evidence on the alleged assassination attempt. As such, it was reasonable for the RAD to qualify the information in the hospital report about how the Applicant was injured as hearsay. This was reasonable because, as the medical staff had no way of knowing or assessing an "assassination attempt" themselves; it stands to reason that they simply asked (as they oftentimes do) how the Applicant was injured, he gave them his response, and they wrote it down in the hospital report.

[27] The Applicant faces a somewhat similar issue in respect of the FIR from the police following the alleged assassination attempt, as this was a contemporaneous note from a law enforcement officer of the Applicant's report. The FIR only documents an automobile crash and the Applicant's resulting injury, with no mention of any alleged gunshots or assassination attempts upon the Applicant. The Applicant pleads that this was, in fact, a complete error on the part of the Pakistani police, but between the hospital report and the FIR, there is no reliable documentary evidence to corroborate any attempt on the Applicant's life. As such, it was entirely reasonable for the RAD to assess that the hospital report should be given little weight.

[28] The RAD did not ignore the Applicant's response regarding the damaged car, but could not accept the submission that the Applicant's former counsel had failed to ask him to get evidence of the damage to his car. The RAD found that the Applicant had not rebutted the strong presumption that its former counsel's conduct fell within the wide range of reasonable professional assistance. Despite the Applicant being made aware of the relevance of this information by his former counsel and being represented by different counsel on appeal, no

evidence of the damaged car was provided to the RAD despite the RPD's decision mentioning that it would have expected the Applicant to provide, for example, a repair bill for the car.

[29] In light of these evidentiary issues as a whole, it was reasonable on the evidence for the RAD to conclude that the Applicant had not submitted sufficient credible evidence to support the basis of their claim. I find no reviewable error in the RAD's assessment of the evidence, and the balance of the Applicant's remaining arguments on this issue amount to an effort to have this Court reweigh the evidence in the Applicant's favour on their unsupported insistence that their interpretation of the evidence is the correct interpretation. Without any evidence or justification in law to support that contention, this Court cannot embark on an exercise to do the Applicant's job of perfecting their claim for protection when they failed to meet their burden of proof. I agree with the Respondent that the comments of Justice Kane in *Barros Barros v Canada (Citizenship and Immigration)*, 2022 FC 9 at para 50 are particularly relevant in the circumstances:

> [50] Relying on the presumption of truthfulness of a sworn statement does not avoid the need to provide sufficient evidence to support the key elements of a claim for protection. The RPD did not need to doubt the truthfulness of Mr. Barros' testimony to conclude that this testimony was insufficient to establish his claim that he continued to be pursued by Los Urabeños. As noted in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 34, "[d]eciding whether the evidence is sufficient is a practical judgment made on a case-by-case basis." In addition, evidence may be found insufficient if it has little probative value, is uncorroborated, or lacks detail (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 26–28; *Azzam v Canada (Citizenship and Immigration)*, 2019 FC 549 at para 33).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).

[30] 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.

VII. Conclusion

[31] For the reasons set forth above, this application for judicial review is dismissed. I find that the Decision was not procedurally unfair, and the RAD reasonably assessed the evidence and made intelligible, rational, and justified findings based on the record before them.

[32] No question for certification was proposed by the parties and I agree that none arise.

JUDGMENT in IMM-6420-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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