

Federal Court



Cour fédérale

Date: 20170119

Docket: IMM-2165-16

Citation: 2017 FC 64

Toronto, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**AALIBEYGOM BADIHI
ALI KAMALI SARVESTANI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Aalibeygom Badihi, Ms. Badihi's husband and their dependent son, Ali Kamali Sarvestani, are nationals of Iran who arrived in Canada in 2013. Ms. Badihi's husband unexpectedly passed away in January 2015. Ms. Badihi and Ali sought protection in June 2015

on the basis that Ms. Badihi had been discriminated against, threatened and detained by Iranian authorities because of her religious and political views.

[2] Prior to their arrival in Canada the applicants first travelled to the Netherlands where they remained for three months with Ms. Badihi's daughter who lives there. They then travelled to the United Kingdom [UK] and stayed with one of Ms. Badihi's sons for five months. It was only after this that the applicants arrived in Canada at the invitation of another of Ms. Badihi's sons. They did not claim refugee status in the Netherlands or the UK.

[3] In considering the claim, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] drew a negative inference with respect to the applicants' credibility and subjective fear based on the delay in making the claim for protection. The RPD also noted inconsistencies in the evidence that led it to attribute little weight to some documentary evidence and draw further negative credibility inferences. The claim was rejected. The negative decision was appealed to the Refugee Appeal Division [RAD]. The appeal was dismissed with the RAD concluding that the applicants were generally lacking in credibility.

[4] The applicants argue that the RAD failed to understand the circumstances relating to the delayed claim and submit that the negative subjective fear and credibility inferences were unreasonable. They further argue that the RAD unreasonably applied a Canadian worldview to some evidence, and focused on minor technical issues in assigning little weight to documentary evidence. They also submit there was a breach of procedural fairness arising out of the conduct of their representatives before the RPD and the RAD.

[5] The application raises the following issues:

- A. Did the RAD render an unreasonable decision?
- B. Was there a breach of procedural fairness as a result of the alleged incompetence and negligence of their former legal representatives?

[6] Having considered the applicants' written and oral submissions, I am unable to conclude that the RAD's decision was unreasonable or that there has been a breach of procedural fairness. I am therefore dismissing the application for judicial review.

II. Standard of Review

[7] The standard of review applied when reviewing a decision of the RAD is reasonableness (*Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]). The correctness standard of review applies when considering whether there was a procedural fairness breach arising out of the allegations of incompetent or negligent representation (*Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250 at para 27 [*Galyas*]).

[8] Deference is to be accorded to the outcome reached by the decision maker based on the evidence. If the decision maker's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the Court will not intervene (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

III. Analysis

A. *Did the RAD render an unreasonable decision?*

[9] The applicants argue that the RAD's reliance on their delayed departure from Iran, their failure to claim protection in the Netherlands or the UK, and their delay in claiming protection upon their arrival in Canada to draw negative inferences in respect of subjective fear and credibility is a misapprehension of their evidence. Further, Ms. Badihi argues that the RAD unreasonably relied on her ability to obtain a new Iranian passport after her arrival in Canada to conclude that she was not being sought by Iranian authorities. She further argues that the RAD unreasonably concluded that there was no credible evidence upon which to accept her claim to be an atheist and that the RAD relied on minor inconsistencies and technical issues to conclude that her documentary evidence was not credible. I am not convinced by any of these arguments.

[10] The RAD clearly recognized that its role was to carefully consider the RPD's decision, carry out its own analysis of the record and determine whether the RPD erred. It noted that it was to review the RPD's findings of mixed fact and law applying a standard of correctness. However, it also recognized that where the RPD enjoyed a meaningful advantage over the RAD in areas involving the assessment of credibility or weight to be given to oral evidence, the RAD may recognize and respect the RPD's conclusions in these areas. This description of the RAD's role is in accord with the Federal Court of Appeal's decision in *Huruglica* at para 70.

[11] The RAD then proceeded to consider the RPD's findings and each of the alleged errors advanced by the applicants.

[12] On the issue of subjective fear, the RAD noted that the applicants' explanation for the delay in leaving Iran was inconsistent with the information contained in their visa application. The RAD also addressed the reasons advanced for failing to claim protection in the Netherlands and the United Kingdom including the reluctance of Ms. Badihi's late husband to seek protection as a refugee. The RAD concluded that those who fear for their lives do not fail to seek protection based on climate or a belief that a better opportunity exists elsewhere. In considering the delay upon arrival in Canada, the RAD accepted that the death of Ms. Badihi's husband would have resulted in some delay but it did not explain the full period of delay. I am satisfied that the conclusion that the applicants were lacking subjective fear was reasonably available to the RAD.

[13] In considering the passport renewal question, again it was not unreasonable for the RAD to conclude that Ms. Badihi's ability to renew her Iranian passport without any difficulty was inconsistent with the claim that she was being actively sought by Iranian authorities. While the applicants argue the RAD's conclusion reflects the adoption of a Canadian view of Iranian practices and procedures, I disagree. The RAD reached its conclusion after its review and consideration of all of the evidence. Ms. Badihi's view that the evidence should have been considered or weighed differently does not render the RAD decision unreasonable.

[14] This is also the case in regard to the RAD's finding that Ms. Badihi had advanced no credible evidence to support her claim to be an atheist. The RAD acknowledged the RPD finding that Ms. Badihi had established she was an atheist but found this conclusion to be problematic. The RAD noted that the numerous evidentiary deficiencies identified by the RPD demonstrated that the applicants were generally lacking in credibility and that the RPD had failed to explain

why it chose to believe this particular aspect of the claim. In canvassing Ms. Badihi's many credibility problems the RAD concluded that she suffered from a general lack of credibility and that the presumption of truth "...had been resoundingly rebutted." This conclusion was reasonably open to the RAD.

[15] With respect to documentary evidence, Ms. Badihi characterizes the inconsistencies cited by the RAD relating to a doctor's letter evidencing her heart condition as minor technical issues or mistakes. However, the RAD noted that the letter was inconsistent with her evidence relating to the timing of her heart attacks, that it was undated and prepared by an endocrinologist at an obesity treatment centre. It was reasonably open to the RAD to conclude that these inconsistencies were neither minor, nor technical, and to assign no probative value to the document.

[16] The RAD's treatment of the evidence and credibility findings based on the evidence before it were within the range of possible, acceptable outcomes and are defensible in respect of the facts and law.

B. *Was there a breach of procedural fairness as a result of the incompetence and negligence of their former legal representatives?*

[17] Justice James Russell set out the test for addressing allegations of ineffective or incompetent assistance of counsel in *Galyas*, where he stated at paragraph 84:

[84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:

- a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;
- b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
- c. Establish that the outcome would have been different but for the incompetence. [Sources omitted]

[18] The burden is on the applicants to establish the performance and the prejudice components of the test to demonstrate a breach of procedural fairness. The parties agree that the threshold is very high. As noted by Justice Richard Mosley in *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paragraph 9:

[9] [...] The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different."

[19] The Supreme Court of Canada has stated the following in *R. v G.D.B.*, 2000 SCC 22 at paragraph 29:

[29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland v Washington*, 466 U.S. 668 (1984)) at p. 697."

[20] In this case, I am not convinced that the prejudice component of the test has been established.

[21] It is true that the RAD expressed concern with the quality of the written submissions on the appeal and noted that the alleged errors were not entirely clear. The RAD nonetheless "...attempt[ed] to address the issues referred to [in the appeal Memorandum]." The applicants have not argued on this judicial review that the RAD's decision failed to address an issue that should have been raised on appeal or that it failed to appreciate a ground of appeal due to the quality of the written representations.

[22] The determinative issue before both the RPD and the RAD was credibility. The key credibility findings were in turn based on the applicants' own evidence. The inconstancies between Ms. Badihi's evidence justifying the delay in departing Iran, the information contained in the Canadian visa application, her evidence relating to the reasons for not claiming protection in the Netherlands and the UK, the explanation for the delay in making a claim for protection after their arrival in Canada, the evidence relating to the passport renewal and her evolving explanation for not obtaining corroborative documentation from her former lawyer in Iran are all examples of evidence that lead to negative credibility findings and, in turn, a finding of a "general lack of credibility". These credibility findings were unrelated to the nature or quality of the representation provided and were sufficient to support the RAD's conclusion that the applicants are neither Convention refugees nor persons in need of protection.

[23] The applicants argue that they were prejudiced by the failure of their counsel to submit an application to the RPD designating them as vulnerable persons and to place video evidence before the RPD. In advancing these arguments, the applicants have not placed independent and credible evidence before the Court indicating that a vulnerable person designation would have been appropriate or how the video evidence might have impacted upon the negative credibility findings.

[24] Having concluded that the applicants have not satisfied the prejudice component of the test, I need not consider the performance component. In this regard, I note the applicants have initiated complaints with the Law Society of Upper Canada, the appropriate body to assess the complaints in accordance with the applicable rules of professional conduct.

IV. Conclusion

[25] The RAD's decision is reasonable and the applicants have failed to establish that the outcome would have been different but for the incompetence of their representatives. The application is dismissed.

[26] The parties have not identified a question of general importance, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2165-16

STYLE OF CAUSE: AALIBEYGOM BADIHI ALI KAMALI SARVESTANI v
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