

Federal Court



Cour fédérale

**Date: 20180808**

**Docket: IMM-4417-17**

**Citation: 2018 FC 819**

**Ottawa, Ontario, August 8, 2018**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**BABAK ISAPOURKHORAMDEHI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of the decision of the Refugee Appeal Division (“RAD”) of the Immigration and Refugee Board of Canada, dated September 26, 2017, confirming the decision of the Refugee Protection Division (“RPD”) which found that the Applicant is not a Convention refugee or person in need of protection as defined in the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

## **Background**

[2] The Applicant is a citizen of Iran. He claims that in 2012 his sister-in-law, Ezat, began a relationship but that her boyfriend's father, Darush, objected to the couple's intended marriage because he believed Ezat was not religious enough. Darush began threatening the Applicant and his family in an attempt to end the relationship. As a result of these threats, the Applicant sought medical treatment for depression. On the advice of his physician he travelled to ease his depression, including visiting the United States and Europe in 2014 with his wife and children.

[3] The Applicant also claims that in August 2015, he was introduced to Christianity by his friend Parviz. On December 23, 2015 the Applicant dreamed he saw Jesus and felt he had been selected by him. He told Parviz about this dream and was given a bible. He began to regularly attend Christian gatherings in December 2015. The Applicant travelled to Canada on May 25, 2016 for a vacation. On June 14, 2016, he learned from his mother-in-law that his home and clinic had been raided, his wife taken into custody by the Basij Force, and that he was wanted as an apostate and for being anti-revolution and anti-Islam. The Applicant also learned that Parviz had been arrested and that the Basij Force was searching for the rest of his Christian group. The Applicant's wife was released after she signed an undertaking to report to the local Basij Centre every two weeks. There were later additional raids, and he was told by his family not to return to Iran.

[4] The Applicant claims he fears for his life at the hands of Darush, and because he is a Christian, should he return to Iran.

[5] The Applicant's hearing before the RPD took place on November 23, 2016. The RPD dismissed his claim on December 13, 2016, based on its multiple negative credibility findings and a finding of a lack of subjective fear stemming from the Applicant's travel to the United States. The RAD dismissed his appeal on September 26, 2017. That is the decision now under review.

### **Decision under review**

[6] As to the allegations against Darush, the RAD found that during the hearing before the RPD the Applicant provided a number of contradictory statements. In particular, whether Darush blamed him for Ezat's lack of interest in religion, and his failure to mention how the relationship between Ezat and her boyfriend ended. The RAD noted that after a break in the hearing before the RPD the Applicant stated he was no longer at risk from Darush as the relationship between Ezat and her boyfriend had ended two months previously. The RAD found it was only after being confronted with contradictions in his evidence at the hearing that the Applicant sought to amend his basis of claim to state he was no longer at risk in this regard. The RAD concluded that the allegations against Darush were fabricated by the Applicant in order to embellish his refugee claim.

[7] With respect to his conversion to Christianity, the RAD noted that the Applicant alleged he converted in December of 2015. And, while the RPD had made a number of credibility findings relating to the Applicant's Christianity, the RAD stated it would concentrate only on two, his motivation for conversion and his religious activities in Canada. The RAD stated the Applicant provided two reasons for his conversion, a dream about Jesus and his introduction to

Christianity by his friend Parviz. As to whether the Applicant did in fact have a dream that Jesus chose him, although the Applicant did not mention what Jesus had chosen him for, the RAD stated this was a matter of psychological analysis beyond its competence. The RAD then found that when he was asked why Christianity was important to him, the Applicant failed to mention the impact of his dream, and centered his reply only on the psychological impact Christianity had on him, not on how Christianity impacted his spirituality or how it impacted his overall religious feelings and outlook on the present or afterlife.

[8] The RAD also took issue with the lack of a baptismal certificate, noting that the Applicant's explanation for why he had not yet been baptized was not supported by the letter from the Pastor of his church, which also contradicted his testimony that the church was not able to hold classes for him to prepare him for baptism. The RAD concluded that the evidence produced by the Applicant did not refer to a conversion-type experience or to a spiritual motivation for participation in church activities. Given its credibility concerns, it doubted the veracity of the Applicant's conversion to Christianity.

[9] Additionally, the RAD noted that the RPD had asked the Applicant why he had not claimed refugee protection when he travelled to the United States in 2014. The RAD found that it was reasonable to expect that an individual who was aware of the physical and legal consequences of converting to Christianity in his country would seek refugee protection in a country such as the United States and that his failure to do so demonstrated a lack of subjective fear of persecution as the RPD had found.

[10] Given these findings, the RAD found that it was not necessary to analyse any other issues.

### **Issues and standard of review**

Two issues are raised in this matter:

1. Did the RAD breach its duty of procedural fairness; and
2. Was its decision reasonable?

[11] Issues of procedural fairness are reviewable on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The appropriate standard of review of the RAD's decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

### **Issue 1: Did the RAD breach its duty of procedural fairness?**

[12] The Applicant submits his right to procedural fairness was breached in two ways. The RAD raised new issues on appeal without notice to him, and it upheld the RPD's findings without assessing his submissions.

[13] The Applicant submits the RAD raised new credibility issues that were not raised in the RPD's decision, were not part of his appeal and did so without giving him notice of its intention to do so and an opportunity to respond. First, the RAD made a negative credibility finding based on the Applicant's lack of a baptismal certificate. The Applicant notes that while this was raised in his RPD hearing, the RPD made no finding on the issue in its decision. Second, the RAD drew a negative credibility inference from its finding that the letter from the Applicant's Pastor

contradicted the Applicant's testimony, an issue the Applicant submits had never previously been raised. He submits these findings are particularly troubling as the RPD was in a superior position to assess the Applicant's credibility and made no adverse credibility findings on these issues.

[14] The Respondent submits that the RAD did not raise new issues, but rather engaged in an analysis of the Applicant's credibility, the very ground on which his RPD application was denied. The Respondent submits the RPD did address the Applicant's lack of a baptismal certificate, and thus it was not a new issue. Further, the RAD's credibility assessment did not rely on the lack of a baptismal certificate, but rather on the implausibility of the Applicant's explanation to the RPD for why he had yet to be baptised in Canada. Nor was the RAD's analysis of the Pastor's letter a new issue, as it was a credibility finding based on evidence in the record. The RAD only noted that the letter did not support the Applicant's explanation for why he had not yet been baptized.

[15] As a starting point, I note that in *Kwakwa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 600, Justice Gascon summarized the jurisprudence concerning procedural fairness in the context of new issues raised by the RAD:

[24] In *Ching v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 (F.C.), the Court concluded that, when a new question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them. In that case, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision. This amounted to a "new question" on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions. Similarly, in *Ojarikre v. Canada (Minister of*

*Citizenship and Immigration*), 2015 FC 896 (F.C.) 896 at para 20 and *Yang v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 (F.C.) at para 12, the RAD had raised in its decision questions which had not been reviewed or relied on by the RPD or advanced by the applicant. These situations can be distinguished from *Sary c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2016 FC 178 (F.C.) at para 31, in which I found that the RAD did not examine any "new questions" but rather referred to evidence in the record which supported the conclusions reached by the RPD. A "new question" is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

[16] Also see *Ugbekile v Canada (Citizenship and Immigration)*, 2016 FC 1397 at paras 21-22; *Ismail v Canada (Citizenship and Immigration)*, 2017 FC 503; *Abdullahia v Canada (Citizenship and Immigration)*, 2017 FC 99 at paras 8-9; *Fu v Canada (Citizenship and Immigration)*, 2017 FC 1074 at paras 12-15; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 paras 30-49).

[17] In my view, in this matter the RAD did breach the duty of procedural fairness by raising new credibility issues not raised in the RPD's decision. Although at the hearing the RPD asked the Applicant why he had not been baptized in Canada, in its decision the RPD did not discuss the Applicant's failure to be baptized and it made no credibility or other finding concerning that issue. In its decision, the RAD excerpted the portion of the transcript of the RPD hearing wherein the RPD asked the Applicant why he had not been baptised in Canada and his answer. It stated that it had difficulty with the Applicant's lack of a baptismal certificate and, of more concern, with the reason the Applicant provided to the RPD as to why he had not been baptized. The RAD concluded that this credibility concern, as well as the Applicant's evidence as to his

motivation for conversion, caused it to doubt the veracity of the Applicant's conversion to Christianity.

[18] Given that the RPD did not make an adverse credibility finding based on the lack of a baptismal certificate or the explanation given for this, in my view, procedural fairness required that the Applicant be afforded an opportunity to provide submissions on the issue if the RAD sought, as it did, to make and rely on credibility findings concerning that evidence.

[19] Regarding the Pastor's letter, the RPD did discuss this in its decision. It stated that while church attendance is an indicator of interest in a church, it did not find that mere attendance at a church or bible study meant that the Applicant was a genuine Christian or Christian convert, particularly when considered in the context of the numerous credibility issues which it had outlined in its decision. In my view, it is clear that the RPD did not make any credibility assessment based on this letter, but rather afforded the letter little weight and found that it did not overcome the existing credibility issues the RPD had already outlined. Accordingly, it was also procedurally unfair for the RAD to base a negative credibility finding on the content of the letter without giving notice to the Applicant and providing him with an opportunity to respond.

[20] Given these findings, it is not necessary for me to address the Applicant's further submission that the RAD's decision was also procedurally unfair as it upheld the RPD's findings without assessing the Applicant's submissions, however, I do not agree with that assertion. The RAD provided its own analysis of each issue it relied on in reaching its decision. And, in any event, as stated by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union*



*v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16, if the decision-maker's reasons allow the reviewing court to understand why a decision-maker made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the criteria set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 will have been met. Thus, the issue is not one of procedural fairness, but of reasonableness.

[21] Similarly, because the decision was procedurally unfair, I need not address the Applicant's submissions as to the unreasonableness of the RAD's decision. However, in my view, several of the RAD's findings were unreasonable. These include its finding that there were contradictions in the Applicant's allegations relating to Darush, which finding was based on the RAD's misconstruing of the Applicant's testimony, and its treatment of the Applicant's explanation of his motivation for conversion to Christianity. In particular, it was unreasonable to require that the Applicant express this in terms of spirituality, rather than the RAD engaging with the terminology the Applicant did utilize to express what motivated his alleged conversion.

[22] In conclusion, the RPD made numerous detailed negative credibility findings. While it may have been open to the RAD to limit its analysis to those credibility findings which it considered to be determinative, in this matter it essentially restricted its review to two findings. The difficulty with that approach is that the Applicant's failure to be baptized and the alleged discrepancy between the Pastor's letter and the Applicant's testimony were not the basis of negative credibility findings in the RPD's decision. Accordingly, although the Applicant was certainly aware that his credibility was at issue, he did not address these points, as such, in his submissions to the RAD. Because these were new grounds or reasoning which the RAD raised

and relied on in making its decision, without affording the Applicant an opportunity to respond to them, it breached the duty of fairness owed to the Applicant. Accordingly, this application must be allowed and the matter returned to the RAD to be determined by a different panel.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed.
2. There shall be no order as to costs.
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4417-17

**STYLE OF CAUSE:** BABAK ISAPOURKHORAMDEHI v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 24, 2018

**REASONS FOR JUDGMENT  
AND JUDGMENT:** STRICKLAND J.

**DATED:** AUGUST 8, 2018

**APPEARANCES:**

Elyse Korman FOR THE APPLICANT

Judy Michaely FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

ELYSE KORMAN FOR THE APPLICANT  
Barrister and Solicitor

Deputy Attorney General of FOR THE RESPONDENT  
Canada