

Federal Court



Cour fédérale

Date: 20200217

Docket: IMM-3269-19

Citation: 2020 FC 258

Ottawa, Ontario, February 17, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BABAK DALIRANI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This applicant, Mr. Babak Dalirani, is an Iranian national who claims that he is a refugee from his country of nationality, Iran, because he has converted to Christianity. His claim, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the *Act*], was denied by the Refugee Protection Division (RPD) and that decision was confirmed by the Refugee Appeal Division (RAD). The judicial review application from the RAD decision is brought in accordance with section 72 of the *Act*.

I. The facts

[2] The applicant details the many difficulties he faced in Iran. From 1995 to 2012, he claims these included multiple arrests, threats from his former wife for being “anti-regime and anti-Islamic”, a failed attempt to escape to Turkey and Thailand with his son, and a divorce from his former wife. From 2013 to 2014, these difficulties intensified. The applicant claims he remarried and started attending Christian meetings. In November 2013, he claims that he converted to Christianity. In April 2014, he claims to have learned that a member of this church had been arrested and that his brother had been informed by government agents that he was considered to be an apostate.

[3] In July 2014, the applicant claims he fled Iran through Turkey with the assistance of a smuggler. That episode is quite remarkable, in and of itself. According to the RPD decision, the applicant travelled to Turkey in July 2014 where he waited for several months. He eventually arrived in Canada on December 17, 2014. In the meantime, he travelled to Brazil, the Dominican Republic, Costa Rica, Turks and Caicos (where he was detained and then deported), and Panama. As for his travels in 2011 for the purpose of establishing himself outside of Iran, this time the applicant travelled east to Malaysia and South Korea where, according to his amended Basis of Claim (BOC), he was arrested or detained and returned to Iran via Thailand. It appears that the applicant has used on a number of occasions false travel documents as well as a false identity. Both the RPD and the RAD had significant concerns about the applicant’s credibility, on a number of fronts. Hence, the RPD found at paragraph 9 of its decision of December 28, 2017 that, “(o)verall, I found that, on a balance of probabilities, the Claimant’s evidence is not

credible or trustworthy and, therefore, I do not accept his allegations as true”. Furthermore, the RPD found at paragraph 11 of its decision that “the Claimant has omitted and/or tried to hide important information and provided information that is false and/or misleading; and the Claimant has provided evasive, non-responsive, inconsistent, and/or misleading evidence, which undermines his credibility and the basis for this claim, as explained herein”.

[4] The RAD focussed initially on the genuineness of the alleged conversion to Christianity. The RAD then considered the omissions, amendments, false and misleading information offered to immigration officials, which have the effect of undermining the overall credibility of this applicant. The RAD states at paragraph 36 of the decision under review:

[36] Based on the cumulative credibility findings above, I find, on a balance of probabilities, that the Appellant is not a credible witness. The numerous credibility concerns examined above about his conversion and interest in Christianity in Iran, as well as his ability to mislead and provide false information to Canadian immigration officials are central to the core of the claim, and they cause me to doubt the veracity of all of the Appellant’s evidence.

It remains that the finding concerning whether the applicant is a genuine practitioner of the Christian faith was an important consideration in the decision reached by the RAD. It was especially important in view of the *sur place* claim made in this case. It concludes at paragraph 49 of its decision:

[49] After conducting my own assessment of the record, I find that the Appellant has not established, on a balance of probabilities, that he is a genuine practitioner of the Christian faith. I also find that he has not established that his church activities in Canada have been brought to the attention of Iranian authorities, or that they may be brought to the attention of Iranian authorities. There is no persuasive evidence in the record that his attendance at a Christian church has come to the attention of the Iranian authorities, and refugee claims before the Immigration and

Refugee Board are confidential. I further find that the likelihood that he would practice the Christian faith on his return to Iran is minimal, given the finding that he is not a genuine practitioner.

It follows that the *sur place* claim was also dismissed.

[5] Given the basis on which the Court concludes that this matter ought to be sent back to the RAD for a redetermination, it will not be necessary to delve into the reasons of the RAD for concluding on the credibility of this applicant. Suffice it to say that the concerns of the RAD, as well as those of the RPD, appeared to be based on significant facts. However, on this judicial review application, the Court does not reach those issues because the hearing before the RAD did not meet the requirements of procedural fairness. Whatever may be the merits of the refugee claim, it must be that the process used to reach a conclusion is fair and that the participatory rights of an applicant have not been violated.

II. Grounds for the judicial review application

[6] The applicant raises five issues before this Court. They are:

1. Section 14 of the *Charter (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11)* and the principle of natural justice were violated due to deficient and erroneous interpretation at the RPD that seriously prejudiced the applicant;
2. The RAD violated the principles of natural justice in making numerous novel credibility findings without notice to the applicant;

3. The RAD's credibility findings are unreasonable;
4. The RAD erred in its treatment of the documentary evidence;
5. The RAD erred in its assessment of the applicant's *sur place* claim.

[7] As previously indicated, grounds 3 to 5 do not need to be addressed in view of the conclusion reached by this Court with respect to the first two grounds. In a nutshell, the RAD affirmed the RPD's finding. First, the RAD member noted that the applicant presented a number of inconsistent, evasive and vague answers when questioned about his religious beliefs, conversion date, and interest in Christianity, undermining the credibility of his claims about his religious practices. Second, the RAD affirmed that the applicant's various submissions and misleading statements undermined his overall credibility. These included his explanations for omitting information and providing misleading statements after the Canada Border Services Agency (CBSA) challenged his BOC Information with contradictory evidence. In addition, the RAD member affirmed the RPD's finding that the applicant's testimony was evolving over time. The RAD member found that the applicant was not a credible witness and it therefore doubted "the veracity of all the Appellant's evidence" (RAD decision, para 36).

[8] The applicant's other claims did not withstand scrutiny. The RAD then reviewed the applicant's evidence about his conversion to Christianity in Iran, eventually finding that his allegations were not credible. As a result, he would not be wanted by Iranian authorities. The RAD found that the *sur place* claim was not established based on his activities in Canada; he only joined a church in Canada to establish his refugee claim, and he was not a genuine adherent

of Christianity. The RAD dismissed other documents as well, including supporting letters from the applicant's Canadian pastor and Canadian Centre for Victims of Torture.

III. Standard of review

[9] No one disputes that the standard of review for alleged breaches of procedural fairness principles continues to be, after *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], correctness. (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43).

[10] Had the Court have to reach the three other grounds raised by the applicant, it is clear since *Vavilov* that the standard of review would have been reasonableness, as suggested by the applicant.

IV. Analysis

[11] The arguments concerning procedural fairness will dispose of the judicial review analysis. First, there is the issue of the adequacy of the interpretation. I will then address the credibility findings made by the RAD that went beyond the findings made by the RPD.

[12] There is binding authority on this Court on the issue of interpretation. In *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 FC 85 [*Mohammadian*], the Federal Court of Appeal confirmed that the interpretation provided to

applicants must be continuous, precise, competent, impartial and contemporaneous (para 4). Furthermore, no proof of prejudice is needed; I add however that it does not mean that proof of prejudice is irrelevant. Surely if there is prejudice because deficient interpretation has influenced a decision unduly, that is something to be considered when an argument is made that we do not require “perfection” of interpretation. As the Supreme Court stated in *R. v Tran*, [1994] 2 SCR 951 [*Tran*], at page 987, “interpretation is an inherently human endeavour which often takes place in less than ideal circumstances”; that is certainly the case here. As we shall see, the imperfect interpretation made the RPD and the RAD conclude wrongly on what the applicant said before the RPD, and this mistake may have become a not insignificant feature of the reason why the two decision makers concluded as they did about the credibility of the applicant.

[13] Before considering the quality of the interpretation, the issue of timeliness must be addressed. The quality of the interpretation at the hearing before the RPD was not raised before the RPD or the RAD. It is before this Court that the matter is raised for the first time. That, says the Crown, runs afoul of the rule requiring that the matter be raised at the first opportunity.

[14] There is much to be said for that proposition. The respondent relied on paragraphs 18 and 19 of *Mohammadian* which read:

18 As Pelletier J. observed, if the appellant's argument is correct a claimant experiencing difficulty with the quality of the interpretation at a hearing could do nothing throughout the entire hearing and yet be able to successfully attack the determination at some later date. Indeed, where a claimant chooses to do nothing despite his or her concern with the quality of the interpretation, the Refugee Division would itself have no way of knowing that the interpretation was in any respect deficient. The claimant is always in the best position to know whether the interpretation is accurate and to make any concern with respect to accuracy known to the

Refugee Division during the course of the hearing, unless there are exceptional circumstances for not doing so.

19 As I have indicated, in light of his experience at the very first sitting of the Refugee Division the appellant appears to have been well aware of his right to the assistance of a qualified interpreter. When his conduct during the whole of the third sitting and for some time afterward is weighed with his undoubted knowledge of his right, it is difficult to construe that conduct as other than a clear indication that the quality of interpretation was satisfactory to him during the hearing itself. In my view, therefore, Pelletier J. did not err in determining that the appellant had waived his right under s. 14 of the *Charter* by failing to object to the quality of the interpretation at the first opportunity during the hearing into his claim for refugee status.

[15] However, the applicant argues that, first, the applicant must know that the interpretation was deficient. In his affidavit of December 2, 2019, the applicant states that he did not know the source of the error until he reviewed the affidavit of another translator who concluded that there was a significant error in the interpretation before the RPD. That affidavit is dated June 20, 2019, close to two months after the RAD decision (April 29, 2019).

[16] Neither the affidavit of the translator nor the affidavit of the applicant was challenged as inadmissible; similarly there was no cross-examination on these affidavits such that there is no evidence on this record to contradict them. In effect, the two affidavits stand. Furthermore, counsel for the respondent confirmed at the hearing of this case that the alleged error in the interpretation is not challenged: in other words, the respondent agrees that the interpretation was wrong. What is that error?

[17] Both the RPD and the RAD took issue with the testimony by the applicant that he did not attend a Lutheran church in spite of what appeared to be clear indications in his evidence to the

contrary. At paragraphs 31 and 32 of the RPD decision, it stressed what could be regarded as a fundamental contradiction. Here are those two paragraphs:

[31] The Claimant testified that he has been practicing Christianity for approximately four years, since 2013, that he follows Protestantism and no specific branch of Protestantism, and that he goes to church in Canada every Sunday. Furthermore, when asked about the most recent sermon he had heard in church, the Claimant testified about a sermon focused on Martin Luther, whom he had allegedly known about beforehand. However, the Claimant provided a document in support of his claim indicating that he attends a Lutheran church. This is highly irregular and confusing.

[32] Moreover, the Claimant maintained in his testimony, that the church he belongs to is Protestant and that it is not a Lutheran church. Given that the Claimant is alleging that he has been practicing Christianity for several years, that he is familiar with Martin Luther, and that he attends the “Church of St. Luke - Lutheran” from which the Claimant has provided supporting documentation, it is reasonable to expect that the Claimant would and/or ought to know that the church he belongs to is a Lutheran church and that he is a follower of Lutheranism. That the Claimant did not know this and testified to the contrary is unreasonable, confusing, and highly irregular and undermines the Claimant’s credibility and the basis for this claim.

[Emphasis in original.]

[18] The RAD dedicated 5 paragraphs to the issue. The applicant argued his case before the RAD on the basis that the issue of attendance at a Lutheran church was microscopic and should not affect the credibility of the applicant (para 10). That was not the RAD’s view. After reviewing the evidence before the RPD and the numerous occasions where reference is made to the Lutheran church (including a baptismal course and Bible studies at a Lutheran church, and a baptism certificate from the “Church of St. Luke - Lutheran”), the RAD concludes:

[15] I also reject the Appellant’s argument that his command of the English language and the stress of the hearing explains his inability to respond that he belonged to the Lutheran church. I have reviewed the RPD hearing and note that the Appellant had an interpreter, and no issues with the interpretation are alleged. Nor

does this explanation make sense, considering the Appellant distinctly stated that he does not belong to a Lutheran church, and the Appellant does not deny saying this in his testimony. For these reasons, I find his failure to identify with Lutheranism is not explained by his command of the English language and the pressures of the hearing.

[My emphasis.]

The fact of the matter is that the translation is now challenged. And for good reasons.

[19] The RPD, and the RAD, operated on the basis of interpretation that was deficient, yet they gave significant weight to the interpretation given at the hearing. I reproduce the extract of the English version of the hearing. The transcription was done by a transcriber hired by the applicant. The respondent did not contest the transcription before the RPD:

Panel: So, here's another thing that confuses me about what you've said. You've told us about your practice of Christianity for a number of years.

Claimant: Yes.

Panel: And attending church and being baptized in Canada.

Claimant: Yes.

Panel: And I asked you about the denomination of Christianity that you follow and you've told us about Protestantism, you also told us about learning about Martin Luther in Iran and then again last Sunday.

Claimant: Yes.

Panel: Now, you've also provided us with a document from your church, from your baptism, so baptismal certificate.

Claimant: Yes.

Panel: Yeah, the church that you belong to, according to the documents you provided is a Lutheran Church.

Claimant: It's, it's St. Luke's, perhaps that question is better to be asked for, to the pastor.

Panel: Now, so I'll clarify for you cause this a question that I'm asking you, yeah, the church that you belong to according to the document you provided is a Lutheran Church and according to what you've just said, you're not familiar with that even. Sorry, let me finish, and it sounds like you've had minimal exposure or involvement with Martin Luther and Lutheranism and yet you belong to a Lutheran Church and so, I am confused. When I ask you what denomination of Christianity you, you follow and you provided a certificate, a baptismal certificate from a Lutheran Church, it's reasonable to expect that your answer would be Lutheranism and it's confusing to me that last Sunday or the Sunday before if you missed last Sunday, is the first time in Canada that you've been told about Martin Luther given that you're representing to us that you belong to a Lutheran Church. Maybe you can explain that.

Claimant: That was my first time I heard anything about Martin Luther in that church, in the church that we're talking, and even, and it was the, it was the first time they were talking about Martin Luther, previous to that they didn't talk about this and however, I know, I know that this church that I go to, they are Protestant and not Lutheran.

Panel: Okay, so maybe let's stop there, it's 11:45 and let's set a date to resume this hearing. We'll just go off the record for a moment.

[My emphasis.]

[20] The respondent concedes now the applicant did not distinctly state that he does not belong to the Lutheran church. In fact, the two translations appear to be quite different. The one now offered by the applicant seems more precise and is much more a "blow-by-blow" translation than the interpretation that seems to have been received by the RPD. For our purposes, it suffices to say that the evidence now accepted by the respondent is that the applicant did not state he did

not attend a Lutheran church. The applicant offers in evidence the translation of the claimant's testimony as given before the RPD, and not as erroneously interpreted at the hearing, and the translation into English of what the interpreter at the hearing said to the claimant in Farsi:

02:38:15 Board member:

And I asked you about the denomination of Christianity that you follow.

02:28:32 [sic] Interpreter (in Farsi):

We asked you about Christianity faith, which one, which branch did you get?

02:38:31 Board member:

You told us about Protestantism,

02:38:34 Interpreter (in Farsi):

Which you said Protestant.

02:38:37 Board member:

You also told us about learning about Martin Luther in Iran and again last Sunday

02:38:48 Interpreter (in Farsi):

And you said you heard about Luther, Learned some contents and on last Sunday in her you heard again.

02:38:57 Claimant:

Yes.

02:38:58 Interpreter (in English):

Yes.

02:39:07 Board member:

Now you also provided us with a document from your church, from your baptism, so baptismal certificate.

02:39:17 Interpreter (in Farsi):

In here you have given us your baptism certificate from the church.

02:39:22 Claimant:

Yes.

02:39:23 Interpreter (in English):

Yes.

02:39:24 Board member:

The church that you have belong [*sic*] to according to the documents you provided is a Lutheran Church.

02:39:20 Interpreter (in Farsi):

This document that you gave us in here church, the church that it shows is Lutheran Church.

02:39:40 Claimant:

It is St. Luke. It is St. Luke.

02:39:41 Interpreter (in English):

St. Lukes.

02:39:49 Claimant:

This has to be asked from Pastor, why, I do not know.

02:39:54 Interpreter (in English):

That has to be asked [*inaudible*] for to the Pastor.

02:40:01 Board member:

So I clarify for you, because this is a question I have to ask from you

02:40:07 Interpreter (in Farsi):

He asks the question again, this question is related to you

02:40:09 Board member:

The church that. you belong to according to the document you provided is a Lutheran Church.

02:40:15 Interpreter (in Farsi):

The church that attend and you have provided this document to us on this document is written Lutheran Church.

02:40:24 Board member:

And according you just said, you are not familiar with that either.

02:40:27 Interpreter (in Farsi):

And apparently now you said you have no information about this case.

02:40:34 Claimant:

Well, I... [*board member cuts off the claimant*]

02:40:35 Board member:

Let me finish.

02:40:36 Interpreter (in Farsi):

Allow one moment.

02:40:38 Board member:

And it sounds like you had minimal exposure or involvement with Martin Luther and Lutheranism and yet you belong to a Lutheran Church.

02:40:50 Interpreter (in Farsi):

And it comes to the attention that your information about Lutherism, Martin Luther is very very little and you do not know at all the the church you go to is related to Lutheran Church.

02:41:09 Board member:

And so I am confused when I asked you which denomination of Christianity you, you follow and you provided a certificate, baptismal certificate from a Lutheran church and it is reasonable to expect your answer would be Lutheranism.

02:41:24 Interpreter (in Farsi):

The question we asked you that which faith of Christianity do you follow, he says he expected you to say, that I am Lutheran.

02:42:36 Board member:

And it is confusing to me that last Sunday or the Sunday before if you missed last Sunday, is the first time in Canada that you've been told about Martin Luther.

02:41:49 Interpreter (in Farsi):

And this is a little strange that you say last Saturday, not the last Sunday, the Sunday before that you had attended it was the first time ever that about Martin Luther was spoken at the church.

02:42:03 Board member:

Given that you represented to us that you belong to a Lutheran Church.

02:42:08 Interpreter (in Farsi):

Considering the document you provided to us in here shows that you are attending a Lutheran Church.

02:42:17 Board member:

Maybe you can explain that.

02:42:20 Claimant:

It was first time I saw it was spoken about Martin Luther in there.

02:42:27 Interpreter (in English):

It was my first time I heard about Martin Luther in that Church.

02:42:33 Claimant:

And before that [*Interpreter interrupts...*] and before that I did not hear any talk about Martin Luther but [*inaudible... The interpreter attempts to cut of [sic] the client after any short sentence...*] [*Client inaudible...*] I knew in here they are Protestant and is not Catholic, that church is not Catholic.

02:42:52 Interpreter (in English):

And it was first time they were talking about Martin Luth, Luther and previous to that they did not talk about this and however I know, I, I know that this church that I go to they are Protestant and not Lutheran.

02:43:29 Board member:

Ok, so maybe I stop there, it is 11:45 and let's set a date to reserve this hearing.

[Italics in original.]
(Applicant's record, pp. 207-210)

[21] Evidently, the most significant mistake was that the interpretation heard states that the applicant was testifying that he was not Lutheran when the new translation is rather that the applicant states that he is not Catholic.

[22] The respondent argued that there must be a "real and significant translation error" (*Mah v Canada (Citizenship and Immigration)*, 2013 FC 853, at para 26). I agree it was. The underlying principle is that of linguistic understanding (*Tran, supra*, p. 977) but the principle implies the same opportunity to understand and be understood, but it should be at a level as high as if the person is conversant in English or French. We seek to obtain a "level and fair playing field" (*Tran, supra*, p. 978). But there cannot be that kind of playing field if the interpretation proves to be inaccurate, especially if the inaccuracy is on something that turns out to be considered

important by the decision maker. As the Supreme Court said in *Tran*, “interpretation must be of a high enough quality to ensure that justice is done and seen to be done” (p. 988).

[23] There is clearly a mistake in the interpretation. The applicant stated the opposite of what was reported by the interpreter as being his answer. The applicant did not state that he did not attend a Lutheran church which was, to say the least, weird, in view of the evidence. He simply said that he did not attend a Catholic church.

[24] Here, the mistake is egregious in the context of the interrogation taking place and, unfortunately, both the RPD and the RAD, on the basis of an interpretation error, found that to be significant in their assessment of the applicant’s credibility. One is clearly left with the impression that the RAD saw such an egregious statement as confirming the lack of credibility of the applicant’s story. In effect, such a lie would permeate through the whole narrative and confirm a finding of dubious credibility.

[25] The importance put on the averment of the applicant that his church was not Lutheran is such that the matter should be returned for a redetermination. That is because it is unknown and unknowable, on the facts in this record, what impact that had on the overall credibility of the applicant. To be sure, there are many contradictions and inadequacies in the applicant’s evidence. Nevertheless, it is as if that contradiction, about not adhering to the Lutheran church when the evidence points in a completely different direction, seems to cap off various possible contradictions and implausibilities and appears to carry very significant weight. The conclusion must be that this applicant cannot be believed if he claims he does not attend the Lutheran

church. As the RAD states at paragraph 15 of its decision, “(n)or does this explanation make sense, considering the Appellant distinctly stated that he does not belong to a Lutheran church, and the Appellant does not deny saying this in his testimony”. We now know the applicant never said that. In my view, it is safer to return the matter for a redetermination.

[26] There was another matter that is also deserving of attention which relates to procedural fairness. The RAD chose to make its own credibility findings, over and above the RPD’s, but without giving any notice to the applicant for the purpose of allowing submissions. In other words, the RAD did not allow the applicant to fully participate in his own case. Contrary to what the respondent argued, the issue is not whether the RAD is restricted to remaking only the same specific findings already made by the RPD - because it is not so restrictive - but rather notice ought to be given before reaching such conclusion.

[27] The Crown relied exclusively on the case of *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 and argued that only issues that are “legally and factually distinct from the issues raised on the appeal” are novel issues. Counsel did not offer how that general principle appears in this case. With great respect, to say that a novel issue is what is legally and factually distinct from the issues raised on the appeal does not advance the proposition very much. In fact it may be said that the reasoning is rather circular if it does not have the benefit of some illustration. The phrase, which appears to come from *R. v Mian*, 2014 SCC 54, [2014] 2 SCR 689, at paragraph 30, requires an elaboration that never came in this case.

[28] From the review of the case law of this Court, it appears that a consensus emerges that there is a breach of the duty of procedural fairness where new credibility issues not raised in the RPD decision are brought up by the RAD. Recently, in *Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819, one reads:

[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.

In *Palliyaralalage v Canada (Citizenship and Immigration)*, 2019 FC 596, the Court concludes that “the RAD breached procedural fairness by making new credibility findings without providing him notice and an opportunity to respond” (para 9). In *Laag v Canada (Citizenship and Immigration)*, 2019 FC 890, it is at paragraphs 20 and 23 where the Court finds that the new credibility findings made by the RAD give rise to a violation of the principles of procedural fairness:

[20] While the RAD’s rejection of some of the documentary evidence may have been reasonable, its rejection of the testimony provided by Mr. Gamadid was not. Furthermore, the RAD made new adverse findings of credibility without affording Mr. Laag an adequate opportunity to respond.

...

[23] These negative credibility findings were new, and distinct from those that formed the basis for the RPD’s decision. It was therefore incumbent on the RAD to apprise Mr. Laag of its potential adverse findings, and give him a reasonable opportunity to respond (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10). The RAD failed to do so, and the resulting decision was both unreasonable and procedurally unfair.

Finally, in *He v Canada (Citizenship and Immigration)*, 2019 FC 1316, our Court summarizes the analysis conducted in the leading case of *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] in the following fashion:

[79] I find that given the extraordinary difference between the analysis conducted by the RAD and, in light of the lack of analysis conducted by the RPD, this case fits comfortably with the analysis conducted by Mr. Justice Gascon in *Kwakwa* that produced the following principles:

- the RAD cannot give further reasons based on its own review of the record, if the refugee claimant has not had the chance to address them: para 22;
- credibility conclusions not raised by the applicant on appeal of the RPD decision 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: para 25;
- when additional comments regarding the documents submitted by an applicant in support of [a critical element of their claim], were not raised or addressed specifically by the RPD, the applicant should at least have been given an opportunity to respond to those arguments and statements made by the RAD before the decision was issued: para 26;

[29] In the case at bar, there is little doubt that the credibility findings made by the RAD were new. That was not contested by the respondent. The novel credibility findings were helpfully summarized at paragraph 43 of the applicant’s Further Memorandum of Fact and Law:

- The RAD found that the Applicant wrote that he was "detained in the airport in South Korea", but later testified orally that he was "in a detention center". The RAD considered that this was inconsistent testimony.⁷⁵ The RPD did not make such a finding.
- The RAD found that the Applicant testified that he was arrested and taken to a detention center in Turks and Caicos in 2014, but stated in his immigration forms that he was "stopped

by authorities" in Turks and Caicos who then returned him to the Dominican Republic. The RAD considered that this was also inconsistent testimony.⁷⁶ The RPD did not make such a finding.

- The RAD found that the Applicant's date of conversion to Christianity was inconsistent between his BOC and his testimony. The RAD found that this timeline was inconsistent and undermined the Applicant's credibility.⁷⁷ The RPD did not make such a finding and the Applicant had no opportunity to explain himself.
- The RAD found that the Applicant's omission of his depression in testimony, although it was mentioned in his BOC, and its link to his decision to convert to Christianity undermined the Applicant's credibility.⁷⁸ The RPD did not make such a finding.

[Footnotes omitted.]

[30] The respondent did not seek to distinguish the case law offered by the applicant. The RAD seems to have relied on the case of *Al-Abayechi v Canada (Citizenship and Immigration)*, 2018 FC 360, at paragraph 35, which did not refer to *Kwakwa (supra)*, which has become the leading case on which other cases find support. It is clear that the RAD found those credibility issues significant in upholding the RPD decision by adding those credibility findings. The description of a "new question", as being "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" (*Kwakwa*, para 25), fits nicely the new reasons given for finding fault with the applicant's credibility. It says, if the grounds of the RPD do not suffice, here are others. As Justice Hughes colorfully said in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684, "if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions" (para 10).

[31] That, it seems to me, is especially so with respect to the credibility of witnesses not even seen by the RAD. Prudence calls for circumspection. In refugee cases, where the stakes are high, providing an opportunity to offer submissions constitutes the measure of procedural fairness required by this Court. The factors considered in assessing the content of the required fairness duty were summarized in one paragraph in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650:

5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

The participation of someone who seeks refugee status would suggest that he be notified when new ground or reasoning emerges. That in my view is the rationale as expressed by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817:

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their

views and evidence fully and have them considered by the decision-maker.

[My emphasis.]

[32] Accordingly, the decision of the RAD must be set aside and the appeal from the RPD has to be sent back to a differently constituted RAD panel for redetermination. In view of the Court's decision on the procedural fairness issues, there is no need to reach the other issues raised by the applicant which deal with the reasonableness of the RAD's credibility findings, its treatment of the documentary evidence and its assessment of the *sur place* claim.

[33] The parties agree that there is no question to be certified on this record and the Court concurs.

JUDGMENT in IMM-3269-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted. There is no question to be certified.
2. The matter is sent back to a differently constituted RAD panel for redetermination.

“Yvan Roy”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3269-19

STYLE OF CAUSE: BABAK DALIRANI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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