Federal Court  Cour fédérale

Date: 20200304

Docket: IMM-1690-19

Citation: 2020 FC 336

Calgary, Alberta, March 4, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ABDULMOULLA S. ABDULMOULLA ALGAZAL

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Appeal Division ("RAD") to allow an appeal of the Refugee Protection Division's ("RPD") decision. The RPD had found that the Respondent was excluded from refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), and Article 1F(c) of the *United Nations Convention Relating to the Status of the Refugees* (the "*Convention*"). Specifically, the RPD

excluded the Respondent based on his history of domestic violence perpetrated against two women in Canada. In allowing the appeal, the RAD concluded that Article 1F(c) of the *Convention* did not exclude the Respondent and confirmed the Respondent's Convention refugee status.

[2] The Respondent is a citizen of Libya. The Respondent's family was perceived to be pro-Ghaddafi, as the Respondent's father worked for a national oil company for forty years in Libya. In September 2015, the Respondent made a claim for refugee protection on the basis that he would face persecution and targeting by the militias if he returned to Libya.

[3] By decision dated May 7, 2018, the RPD refused the Respondent's refugee claim. The Respondent appealed this decision to the RAD. By decision dated February 18, 2019, the RAD allowed the appeal.

[4] On March 12, 2019, the Minister of Citizenship and Immigration (the "Applicant") applied for judicial review of the RAD decision before this Court. The Applicant submits that the RAD erred in overturning the RPD's finding that the Respondent is excluded from refugee protection due to his history of violence against women. The Applicant also argues that the RAD erred in granting Convention refugee status to the Respondent.

[5] For the reasons that follow, this application for judicial review is granted.

II. Facts

A. *The Respondent*

[6] Abdulmoulla S. Abdulmoulla Algazal (the "Respondent") is a 33-year-old citizen of Libya. The Respondent came to Canada in 2009 to attend flight training school. The Respondent did not experience any problems in Libya. He returned to Libya only once and left for the last time in September 2010. The Respondent has not been back to Libya since the overthrow of Muammar al-Ghaddafi in February 2011.

[7] As noted above, the Respondent's family was perceived to be pro-Ghaddafi due to the Respondent's father's employment in a national oil company in Libya for forty years. When the militias targeted one of the Respondent's brothers on this basis, the Respondent's family members left for Canada and received refugee protection in March 2015.

[8] On or about April 2015, the Respondent was diagnosed with a brain tumour. In May 2015, the Respondent underwent his first surgery for the brain tumour.

[9] In September 2015, the Respondent applied for refugee protection in Canada. However, the Respondent's claim was referred to the Immigration Division ("ID") for an admissibility hearing under section 34(1)(e) of the *IRPA* for alleged incidents of domestic violence that the Respondent had committed between 2011 and 2013. The ID found that the Respondent was not inadmissible under this section, and the case was referred back to the RPD. At the RPD hearing,

the Applicant argued that the incidents of domestic violence committed by the Respondent excluded him from refugee protection under section 98 of the *IRPA* and Article 1F(c) of the *Convention*.

[10] Before the RPD and the RAD, the Respondent presented evidence and submitted that both the tumour and the surgery had "adversely affected his memory".

B. *The RPD Decision*

[11] The RPD hearing was held on November 9, 2017. By decision dated May 7, 2018, the RPD found that the Respondent was excluded from refugee protection pursuant to section 98 of the *IRPA*, on the basis of Article 1F(c) of the *Convention*. Although the charges of domestic violence against the Respondent's two former girlfriends were stayed, the evidence led the RPD to conclude, on a balance of probabilities that the violent attacks against the two women had occurred. The RPD also concluded that the Respondent held the requisite *mens rea* in committing the acts of domestic violence, since the medical evidence did not support a finding that the Respondent's behaviour was directly affected by the tumour.

[12] In considering whether the violent acts committed by the Respondent were "contrary to the principles and purposes of the United Nations for the purposes of exclusion," the RPD relied on *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982 ("*Pushpanathan"*) and on various Declarations of the United Nations (the "UN"). The RPD's conclusion reads as follows:

> As I will outline below, this consideration leads me to conclude that the acts of which the claimant is guilty constitute such a systemic violation of human rights that takes place against women on a global basis, and that the particular of the [Respondent's] behaviour against two women over the course of two years was also serious, sustained, and systemic, and would therefore constitute persecution.

[13] The RPD further concluded that the mistreatment in which the Respondent engaged was systematic since his violent behaviour followed a similar pattern. The RPD referred to Pushpanathan to note that "the benefits of refugee protection should not be conferred on those who are themselves responsible for persecution." Finally, the RPD found that it was not necessary to consider inclusion when exclusion had been determined.

[14] The RPD decision was appealed to the RAD.

C. *The RAD Decision*

[15] By decision dated February 18, 2019, the RAD allowed the Respondent's appeal. Before the RAD, the parties did not dispute the RPD's fact-finding and conclusions of domestic violence committed by the Respondent. The RAD noted that the determinative issue in the appeal was whether the RPD member correctly found that the domestic violence perpetrated within a time frame of two years is a conduct that falls under the scope of Article 1F(c) of the *Convention*. After reviewing the *Pushpanathan* case, the RAD ultimately concluded that Article 1F(c) did not exclude the Respondent from refugee protection.

[16] First, the RAD found that the RPD misinterpreted and misapplied the phrase "serious, sustained and systemic", notably by interchanging the words "systematic" and "systemic". The RAD agreed that in the international community, domestic violence may be a component of systemic discrimination against women. However, the RAD concluded that there was insufficient evidence to conclude that the Respondent's systematic conduct in Canada originated from a larger systemic structure of gender violence. On that matter, the RAD's reasons read as follows:

> Is it that a person who abuses women systematically does so because he is a product of a global structure of gender-based violence? Is it that a global structure of gender-based violence results from individuals like the [Respondent] who systematically abuse women? Regardless of those other possibilities, a cause and effect relationship or correlation is not established from the evidence or proper analysis of this case.

[17] In addition, the RAD disagreed on how the term "sustained" was used by the RPD member when she found that the violent behaviour committed by the Respondent was "sustained" since it extended over two years against two different women. The RAD was rather of the opinion that the Supreme Court in *Pushpanathan* used the term "sustained" "in the context of a principle whose purpose is to ensure that persecutors, i.e. those who create refugees, are not afforded the protection of refugee status." The RAD noted that the nature and extent of violence perpetrated by the Respondent against these two women in Canada "is not the logical way for assessing if conduct was 'sustained' as that term was used by the SCC."

[18] The RAD stated that Article 1F of the *Convention* is part of a larger scheme for refugee protection and that other processes can be used to ensure safety and security of the Canadian

population. The RAD pointed to paragraph 34(1)(e) of the *IRPA* that concerns the inadmissibility of individuals who present a threat to Canadian society. The RAD recalled that the Applicant had referred the Respondent's case before the ID for an admissibility hearing pursuant to paragraph 34(1)(e) of the *IRPA*, and noted that the ID did not find the Respondent to be inadmissible. The RAD concluded that although an exclusion from refugee protection is not equivalent to being found inadmissible to Canada, the RPD erred in failing to address the relationship between the admissibility process and Article 1F(c).

[19] Finally, the RAD found that the Respondent's refugee claim was similar to that of his family members who received refugee status in Canada. Since the RPD concluded that the evidence provided was satisfactory in establishing fear of targeting and persecution in Libya, the RAD confirmed that the Respondent is a Convention refugee.

III. Relevant Provisions

[20] Sections 33, 34 and 98 of the *IRPA* read as follows:

***Immigration and Refugee Protection Act*, SC 2001, c 27, ss. 34(1)(e) and 98**

Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	**a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

Exclusion — Refugee Convention

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

Exclusion par application de la Convention sur les réfugiés

98 La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[21] Article 1F(c) of the *Convention* reads as follows:

Article 1

Definition of the term "refugee"

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to

Article premier.

Définition du terme "réfugié"

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

(a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

(b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil

his admission to that country as a refugee;	avant d'y être admises comme réfugiés;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.	(c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

IV. Issues and Standard of Review

[22] The issue on this application for judicial review is whether the RAD decision is reasonable, and in particular:

1. Did the RAD err in finding that the Respondent is a Convention refugee?
2. Did the RAD err in overturning the RPD's finding that the Respondent is excluded from refugee protection due to his history of violence against women?

[23] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of a RAD's determination of factual issues and issues of mixed fact and law: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII) at paras 30, 34-35; *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 (CanLII) at para 24; and *Idahosa v Canada (Citizenship and Immigration)*, 2019 FC 384 (CanLII) at para 10. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[24] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied 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," (*Vavilov* at para 100).

V. Analysis

A. *Did the RAD err in finding that the Respondent is a Convention Refugee?*

[25] The Applicant submits that the RAD erred by finding that the Respondent is a Convention refugee without an individualized assessment of the Respondent's risk of persecution in Libya. The Applicant submits that if the RAD did not err in finding that the Respondent was not excluded, the RAD should have remitted the matter back to the RPD for an individualized assessment of risk, since the RPD decision had focused on the Respondent's exclusion under Article 1F(c) of the *Convention*.

[26] The Applicant relies on *Canada (Citizenship and Immigration) v Kaler*, 2019 FC 883 (CanLII) at paras 14-19 for the proposition that the RAD is required to conduct a full assessment of all the relevant issues concerning the claimant's refugee claim as if it were the RPD. However, as the RAD did not conduct a full, individualized assessment of the risk of persecution faced by the Respondent, the Applicant submits that the RAD erred in conferring refugee protection upon the Respondent.

[27] The Respondent submits that the RPD conducted an individualized assessment of risk. Furthermore, the Respondent submits that the Applicant cannot argue on judicial review that the RAD erred by failing to consider the possibility that the RPD's assessment had been incorrect, since the Applicant did not argue before the RAD that the RPD had erred in this assessment.

[28] In my view, the RAD erred by failing to conduct a full, individualized assessment of the Respondent's risk of persecution, and it was unreasonable for the RAD to grant Convention refugee status on the Respondent. The RAD simply noted that the Respondent's claim was similar to that of his family members who had been granted refugee status, and that the RPD had found no reasons to believe that the evidence presented in the family's claims were not credible, in finding that Respondent was a Convention refugee.

[29] However, I note that the RPD did not conclude that the Respondent would be determined a Convention refugee in the inclusion analysis. Instead, the RPD had concluded that "in the claimant's particular circumstances, the assessment of [the Respondent's] inclusion claim would likely be based on an analysis and application of country conditions to his profile." Given that the RPD did not provide such an analysis and application of country conditions to the Respondent's profile, it was an error for the RAD to conclude that the Respondent was a Convention refugee based on the claims of the Respondent's family members. Contrary to the RAD's conclusion that "the RPD member offered that the [Respondent's] particular circumstances and the assessment of his inclusion claim…would generate a positive outcome for finding that he is a Convention refugee," the RPD made no such findings. The RAD erred in relying on findings and analyses that did not exist.

[30] The RAD was obligated to conduct a full assessment of the relevant issues concerning the Respondent's refugee claim to come to its conclusions—but failed to do so. As a result, I find that the RAD decision is unreasonable.

B. *Did the RAD err in overturning the RPD's finding that the Respondent is excluded from refugee protection due to his history of violence against women?*

[31] Given that I find the RAD decision is unreasonable, I do not find it necessary to consider the second issue.

VI. Certified Question

[32] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. Conclusion

[33] The RAD decision is unreasonable. This application for judicial review is allowed.

JUDGMENT in IMM-1690-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1690-19
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v ABDULMOULLA S. ABDULMOULLA ALGAZAL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 18, 2019
JUDGMENT AND REASONS:	AHMED J.
DATED:	MARCH 4, 2020

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