

Federal Court



Cour fédérale

Date: 20230828

Docket: IMM-8787-22

Citation: 2023 FC 1158

Toronto, Ontario, August 28, 2023

PRESENT: Madam Justice Go

BETWEEN:

AHSAN GHAYYUR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ahsan Ghayyur, is a Shia Muslim citizen of Pakistan. He alleges fear of persecution from the Sipah-e-Sahaba [SSP], the Pakistani police, and the Pakistan Federal Investigation Agency [FIA] because of alleged false allegations made about him by his ex-fiancée's family following their break-up in May 2015.

[2] The Refugee Protection Division [RPD] rejected the Applicant's claim in October 2021 on credibility grounds and on the basis of a viable Internal Flight Alternative. In a decision dated August 19, 2022, the Refugee Appeal Division [RAD] upheld the RPD's credibility findings overall as determinative and confirmed that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] [Decision].

[3] The Applicant seeks judicial review of the Decision. I grant the application as I find the RAD failed to reasonably consider whether to hold an oral hearing based on credibility concerns arising from its assessment of the new evidence.

II. Background

[4] According to the Applicant's Basis of Claim [BOC] narrative, he went to the United States [US] in February 2015 to be sponsored by his ex-fiancée, whom he met online. The plan fell apart after the ex-fiancée's Sunni family found out about the Applicant's Shia faith. He remained in the US for three years without status. The Applicant claims that he intended to return to Pakistan in May 2018, but learned from his family that they received threats by the SSP in June 2018 and that the police and FIA were in search of him. Specifically, he alleges that the FIA raided his home in Pakistan.

[5] The Applicant claims that the ex-fiancée's family informed Sunni fanatics about his arrival to Pakistan and accused him of trying to convert a Sunni girl to become Shia. The

Applicant also alleges that these false accusations evolved to claims that he distributed anti-Sunni documents and sent them to Pakistan.

[6] In an amendment to his narrative via sworn affidavit, the Applicant indicated that the ex-fiancée's family also informed the FIA that he was involved in human trafficking by creating false documents for people to travel abroad. The Applicant claimed that the FIA visited his sister and brother-in-law regarding this allegation, in addition to the raid on his parents' home.

[7] After his refugee claim was refused, the Applicant appealed to the RAD, arguing that the RPD erred in its credibility findings. By letter from the RAD dated June 10, 2022, the Applicant was invited to make submissions on the following issues:

- A. Discrepancies between his narrative, amended narrative, and testimony, as to whether the FIA made one or more visit to his family in Pakistan;
- B. The lack of mention of police and FIA threats in an affidavit from Mr. Saeed, the Applicant's friend, who mentioned the SSP and who allegedly was advised about such threats according to the affidavit of Mr. Mughal, the Applicant's brother-in-law; and
- C. The fact that Mr. Mughal's affidavit referred to only one visit by the FIA and no mention of the human trafficking allegations.

[8] The Applicant, through his then-counsel, submitted a response on June 22, 2022. The Applicant provided an affidavit explaining that his initial narrative only mentioned one FIA visit because it was written in 2018, and the second visit took place in 2020. The Applicant also stated

that Mr. Mughal did not mention the human trafficking allegations out of fear of the impact due to social stigma it would have on his family if the information were leaked. Finally, the affidavit explained that Mr. Saeed was caring for his sick wife when he drafted his statement and inadvertently omitted details. The Applicant also provided statements from Mr. Saeed and Mr. Mughal confirming the above.

[9] In dismissing the Applicant's appeal, the RAD agreed with the Applicant that some of the RPD's credibility findings were incorrect, and admitted the new evidence submitted by the Applicant in response to the June 2022 letter. The RAD determined that no oral hearing was required under subsection 110(6) of the *IRPA*, however, and upheld the RPD's overall assessment of credibility.

III. Issues and Standard of Review

[10] The Applicant raises two primary issues before this Court:

- A. Did the RAD unreasonably assess whether it ought to hold an oral hearing?
- B. Did the RAD err in its credibility assessments?

[11] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[12] 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. The onus is on the Applicants to demonstrate that the Decision is

unreasonable: *Vavilov* at para 100. To set aside a decision on this basis, “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.

IV. Analysis

[13] The determinative issue is with respect to the RAD’s decision not to hold an oral hearing.

[14] The relevant provisions are set out in subsection 110(6) of the *IRPA*, which provide an exception to the general rule in subsection 110(3) that the RAD must proceed without a hearing.

[15] In essence, pursuant to subsection 110(6) of the *IRPA*, where new evidence is admitted, the RAD “may hold a hearing” if the evidence (a) raises a serious issue with respect to credibility, (b) is central to the decision with respect to the refugee claim, and (c) if accepted, would justify allowing or rejecting the refugee claim, pursuant to subsection 110(6) of the *IRPA*.

[16] The Applicant asserts that the RAD’s assessment of the new evidence raised issues of credibility, and that these findings were central to the RAD’s conclusion that the Applicant was not credible. As such, the Applicant asserts that the RAD was obliged to canvass its obligation to hold an oral hearing.

[17] The Respondent does not seem to contest that the RAD made credibility findings based on its assessment of the new evidence. However, the Respondent asserts that it is clear that the

RAD had credibility concerns from the outset, based on its inquiry to the Applicant for further submissions. The Respondent further asserts that the RAD merely found that its existing credibility concerns persisted once the new evidence was reviewed, and since the new evidence did not alleviate the RAD's pre-existing concerns, it was thus not determinative. Accordingly, the Respondent maintains that the RAD reasonably determined that an oral hearing was unnecessary because the new evidence was not determinative of the claim.

[18] I agree with the Applicant and reject the Respondent's arguments for the following reasons.

[19] To start, while the legislation gives the RAD the discretion to decide whether to hold a hearing, an oral hearing will generally be required when the statutory criteria have been satisfied and the onus rests with the RAD to consider and apply the statutory criteria reasonably: *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 911 at paras 9, 11.

[20] *Bukul v Canada (Citizenship and Immigration)*, 2022 FC 118 [*Bukul*] and *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 [*Tchangoue*] confirm that in exercising this discretion reasonably, the RAD must assess whether the criteria in subsection 110(6) of the *IRPA* have been met, and if so, whether it should exercise its discretion to hold a hearing: at paras 21 and 12, respectively.

[21] In *Bukul*, the Court found that the RAD's mere conclusory statement that the new evidence did not raise a serious issue regarding the applicant's credibility was unreasonable, as it

failed to address the remaining criteria set out in subsection 110(6). As the Court explained at para 23:

[23] While I recognize that the decision to hold an oral hearing is discretionary, in my view, the RAD committed a reviewable error in failing to conduct a proper analysis of whether the criteria for holding an oral hearing set out in subsection 110(6) of the *IRPA* were met and if so, whether it should exercise its discretion and grant an oral hearing. With the exception of the RAD's conclusory statement that the new evidence does not raise a serious issue with respect to the Applicant's credibility, the decision is silent on the application of the remaining criteria set out in subsection 110(6) of the *IRPA* and the exercise of discretion.

Emphasis added

[22] In *Tchangoue*, an analogous error was committed in which the RAD concluded that no oral hearing was required given the little weight assigned to the new evidence, but was silent as to application of the criteria in subsection 110(6): at para 18.

[23] More recently, in *Gnanasekaran v Canada (Citizenship and Immigration)*, 2023 FC 79, Justice Walker found that the RAD's conclusion, without explanation, that a hearing was not required was unreasonable: paras 11-13.

[24] In this case, the RAD provided a one-line explanation for not holding an oral hearing when it stated at paragraph 3:

There is no need for an oral hearing as the evidence is not determinative of the claim.

[25] The "evidence" in question referred to the new evidence submitted by the Applicant. Yet contrary to its own conclusory statement, the RAD went on to make a number of credibility

findings relying in part on the new evidence, and found these credibility concerns to be “central” to the Applicant’s claim. To wit:

- a. The RAD compared newly admitted evidence to earlier evidence to find “additional discrepancies and inconsistencies.” For instance, the RAD relied on the Applicant’s late disclosure affidavit to question the Applicant’s testimony and earlier affidavit concerning when the FIA disclosed the human trafficking allegation, and how many times the FIA visited his family home. The RAD noted the inconsistent evidence regarding the number of visits by the FIA to the family home, coupled with discrepancies of when the FIA alleged human trafficking activities to support the RPD’s negative credibility finding.
- b. The RAD rejected Mr. Mughal’s explanation of why his affidavit did not refer to the two subsequent visits by the FIA and drew a negative inference from Mr. Mughal’s affidavit. The RAD then relied upon its negative finding concerning Mr. Mughal’s affidavit to raise further credibility concerns about the alleged human trafficking investigation and the alleged number of visits by the FIA.
- c. Similarly, in assessing Mr. Saeed’s new affidavit, the RAD noted that he previously never mentioned a second visit from the FIA, and did not provide an explanation as to why he was only raising it in the latest letter. The RAD then went on to agree with the RPD’s decision to give Mr. Saeed’s affidavit little weight.

[26] In all of the above-cited instances, the RAD relied in part on the new evidence to find the Applicant not credible. These findings were central to the Decision to refuse the Applicant’s appeal, as the RAD noted at para 26 of the Decision:

The record demonstrates several material inconsistencies, discrepancies, and omissions which raises serious credibility concerns regarding the [Applicant's] allegations and fear of persecution. The key ones include: the fact that the police did not indicate that it was EX who made the accusations to them, that the [Applicant] could only speculate that it was EX who made the false allegations or notified the police, the FIA or the Sunni community about him, and the discrepancy between the BOC, affidavits, and late disclosure with respect to the number of visits by the FIA and the alleged human trafficking investigation, which are central elements of the [Applicant's] refugee claim.

Emphasis added

[27] Thus, contrary to the explanation offered by the RAD to not hold a hearing because the new evidence “is not determinative of the claim”, the RAD’s own analysis appeared to suggest otherwise. The RAD further compounded its error by failing to conduct an analysis of whether the criteria for holding an oral hearing as set out in subsection 110(6) of the *IRPA* was met and if so, whether it should exercise its discretion and grant an oral hearing, contrary to this Court’s teaching: *Tchangoue*, at para 18.

[28] As to the Respondent’s arguments that the Applicant was aware that credibility was an issue for the RAD, had an opportunity to address the RAD’s credibility concerns, and the RAD had considered the new evidence that the Applicant provided, I reject these arguments as those were not the reasons provided by the RAD for not holding an oral hearing. I cannot read into the Decision any additional rationale the Respondent is now seeking to supplement.

[29] Besides, I agree with the Applicant that while the RAD did provide an opportunity to the Applicant to respond to its concerns, that alone would not negate the requirement for the RAD to

assess whether it should hold an oral hearing, although it may well have been a factor for the RAD to consider.

[30] Given the importance of its findings to the Applicant, the RAD was obliged to reasonably canvass its obligation to hold an oral hearing. Its failure to do so rendered the Decision unreasonable.

[31] As the RAD's error in failing to adequately consider whether to hold an oral hearing is determinative of the application, I need not address the remainder of the Applicant's arguments.

V. Conclusion

[32] The application for judicial review is allowed.

[33] There is no question to certify.

JUDGMENT in IMM-8787-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8787-22

STYLE OF CAUSE: AHSAN GHAYYUR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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JUDGMENT AND REASONS: GO J.

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