Federal Court  Cour fédérale

Date: 20230905

Docket: IMM-767-21

Citation: 2023 FC 1196

Ottawa, Ontario, September 5, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

AA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of the Republic of South Korea. He sought refugee protection in Canada on the basis of what he alleges is his well-founded fear of persecution and a likelihood of harm within the meaning of sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) because he is the son of a high-ranking bank executive who was perceived as anti-state and because he is a conscientious objector to military service.

The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the claim because the applicant had not established that his fear of persecution was well-founded. The applicant appealed this decision to the Refugee Appeal Division (RAD) of the IRB. In a decision dated January 11, 2021, the RAD agreed with the RPD's conclusions and dismissed the applicant's appeal.

[2] The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *IRPA*. He submits that the RAD breached the requirements of procedural fairness by making adverse credibility findings without first giving him an opportunity to address the panel's concerns. He also submits that the RAD's conclusion that he had not established an objective basis for his claim is unreasonable.

[3] As I will explain in the reasons that follow, I am not persuaded that the RAD erred in either of the ways the applicant alleges. This application for judicial review will, therefore, be dismissed.

II. BACKGROUND

[4] The applicant was born in South Korea in 1986. In 2005, he received a medical exemption from mandatory military service. He left South Korea to study in Australia from March 2008 until July 2010. After returning to South Korea briefly, the applicant left to study in the United Kingdom. He obtained employment and remained in the United Kingdom until November 2013, when he moved to Latvia. In 2014, the applicant moved to Germany,

remaining there until early 2017. The applicant arrived in Canada on February 1, 2017. He made a claim for refugee protection a short time later.

[5] The claim for protection was based on the allegation that, in March 2013, the applicant's father, who was a senior banker, had drawn the ire of the South Korean government because he had refused to fund a government-sponsored anti-communist film. Months of harassment by government authorities followed. In August 2013, the applicant's father was found dead in the garden of the family's residence. Although the death was ruled a suicide, the applicant believes that his father was killed because of his perceived opposition to the party in power at the time.

[6] The applicant also believes that, as part of the campaign of harassment against his father, South Korean authorities were re-examining his exemption from military service with a view to revoking it. In July 2013, the applicant returned to South Korea briefly. He met with a lawyer who had been retained to deal with the issue of his medical exemption. Three notices (dated July 15, July 23, and August 1, 2013) were sent to the applicant directing him to attend the Military Manpower Administration office, failing which (without a valid excuse) he would be arrested. The applicant did not attend as directed; instead, he returned to the United Kingdom. There is no evidence of any other directions to attend being sent to the applicant.

[7] The applicant fears that, if he were to return to South Korea now, his medical exemption would be revoked, he would be forced to complete military service (which he is unwilling to do because he is a conscientious objector), and that he would be subjected to other mistreatment as well because of his father's perceived political opinion.

[8] The determinative issue for the RPD was whether the risk alleged by the applicant is well-founded. The RPD found that the applicant's fear that his medical exemption would be revoked was speculative. If, as the applicant alleged, the government's motivation to re-open the issue of his medical exemption was to damage his father's reputation, with his father's death, that motivation is now gone. While three notices were sent to the applicant in 2013, he has heard nothing since then. The applicant's fear that South Korean authorities would cancel his passport was not borne out given that he was able to use his passport without incident for four years before he came to Canada. Since the applicant had not established on a balance of probabilities that his medical exemption has been withdrawn and that he would be required to perform his compulsory military service, the RPD found that it was not necessary to examine the applicant's profile as a conscientious objector. The RPD therefore concluded that the applicant is neither a Convention refugee nor a person in need of protection.

III. DECISION UNDER REVIEW

[9] The RAD found that the RPD did not err in concluding that the applicant had not established that the risk he alleged is well-founded.

[10] The applicant argued on appeal that the RPD had erred in its assessment of the 2013 directions to attend, an email from the applicant's lawyer following his father's death, text messages between the applicant's father and officials at the Military Manpower Administration, and the applicant's father's call logs from shortly before his death. The applicant submitted that this evidence was more than sufficient to establish a well-founded risk.

[11] The RAD disagreed. It reviewed each item in detail. The 2013 directions to attend do not say why the applicant was being asked to appear for questioning, nor do they say that the applicant had been charged with any offence. The applicant himself did not make any inquiries into why the notices had been sent to him. The RAD found that the applicant's concerns arising from the notices – that the government intends to revoke his exemption or intends to harm him in some other way – were speculative. The email from the applicant's lawyer (dated August 20, 2013) was too vague to warrant much weight as credibly establishing either a risk related to a Convention ground or a probability of harm. The same was true of the text messages between the applicant's father and officials at the Military Manpower Administration. The RAD found that the call logs could be given no weight because there was no way to tell why the applicant's father was in touch with any of the people listed in the logs.

[12] In sum, the RAD found that the applicant received a valid medical exemption in 2005, there was no evidence that it had been revoked, and there was insufficient evidence to conclude that it would be revoked in the future for any of the reasons suggested by the applicant. Given this, the RAD was satisfied that the RPD did not err in concluding that it was not necessary to examine any risk flowing from the applicant's profile as a conscientious objector.

[13] The RAD admitted as new evidence some news articles suggesting that prosecutors in South Korea are not independent or politically neutral but found that the circumstances described in the articles were distinguishable from the applicant's. The RAD declined to admit other items as new evidence but, since the applicant does not challenge that determination, there is no need to summarize this evidence.

IV. STANDARD OF REVIEW

[14] As noted, the applicant challenges both the fairness of the procedure followed by the RAD and the substance of the RAD's decision. There is no dispute about the standard of review that applies to each of these issues.

[15] To determine whether the requirements of procedural fairness were met, the reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; and *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para. 14. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The ultimate question "is whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific Railway Co* at para 56). The burden is on the applicant to demonstrate that the requirements of procedural fairness were not met.

[16] On the other hand, the substance of the RAD's decision is reviewed on a reasonableness standard. Reasonableness review, which is "methodologically distinct" from correctness review, is "informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court" (*Canada (Citizenship*

and Immigration) v Vavilov, 2019 SCC 65 at para 12). Accordingly, in reviewing the reasonableness of a decision, it is not the court's role to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[17] Reasonableness review is concerned with both the decision maker's reasoning process (as reflected in the reasons given for the decision) and the outcome (*Vavilov* at paras 83-86). 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). Thus, to determine whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[18] The burden is on the applicant to demonstrate that the RAD's decision is unreasonable. 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). See also *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 12-13.

V. ANALYSIS

A. *Did the RAD Breach the Requirements of Procedural Fairness?*

[19] The RPD did not question the applicant's credibility. It accepted that the applicant is genuinely fearful of persecution in South Korea and that he genuinely believes he would be at risk of other harms there. The determinative issue was whether there was an objective basis for the applicant's fears. In view of this background, the applicant contends that it was a breach of the requirements of procedural fairness for the RAD to make veiled adverse credibility findings. This is because, given how the issues were framed in the RPD's decision and in the applicant's appeal, credibility was a new issue that the applicant did not have the opportunity to address before the RAD made its decision.

[20] I am unable to agree. In particular, I do not agree that the RAD made any adverse credibility findings (whether veiled or not). Rather, I am satisfied that its assessment of the evidence on which the applicant relied turned entirely on its finding that the evidence was insufficient to establish that the applicant's fears are well-founded. A decision maker's finding that evidence is insufficient may be justified independent of any assessment of the credibility of the evidence (*Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 26). I find this to be the case here. The applicant's father's text messages and phone logs as well as the lawyer's email demonstrate that in June and July 2013, the Military Manpower Administration was looking into something connected to the applicant. The RAD determined that the difficulty with this evidence is that it does not state what exactly was being looked into or why and, as a result, was entitled to little weight.

[21] The applicant had no direct knowledge of the intentions of his alleged agents of persecution. RAD concluded that the evidence the applicant relied on to establish this was insufficient to support the inferences the applicant was asking the RAD to draw. This determination concerns the quality of the evidence; it has nothing to do with the applicant's credibility.

B. *Is the Decision Unreasonable?*

[22] The applicant submits that the RAD's determination that the evidence he relied on was insufficient to establish that his fears are well-founded is unreasonable. Once again, I am unable to agree. In my view, the RAD assessed the applicant's evidence reasonably. In a justified, transparent and intelligible fashion, the RAD engaged with all the issues raised in the applicant's appeal and explained why it agreed with the RPD's determinations.

[23] The applicant submits that the RAD misstates the evidence when it notes that he testified that he was last in South Korea in 2017. It is unclear whether this is a misstatement of the evidence at all. In a transcript of the RPD hearing the applicant submitted to the RAD, the applicant answers "July 2013" when asked when he was last in South Korea; however, in the transcript of the hearing prepared by the RPD the answer is "July 2017." Given that the applicant consistently maintained that he was last in South Korea in July 2013, it appears that either he misspoke in his testimony or there was an error in the RPD's transcription.

[24] In any event, this detail played only a small part in the RAD's decision. The RAD's main finding in this regard – that there is no indication of a continuing interest in the applicant on

the part of South Korean authorities since 2013 – is well-supported by other evidence. As the RAD explains, the applicant had adduced no evidence that the alleged agents of persecution he fears have sought him out in the meantime or taken any other action against him. The RAD also observed that, when the appeal was heard (in January 2021), the applicant was "far beyond the age at which South Korean citizens are typically conscripted into military service."

[25] It was open to the RAD to reach the conclusions that it did. It is possible to trace the RAD's reasoning without encountering any fatal flaws in its overarching logic (*Vavilov* at para 102). As well, the RAD explains in detail why it was not persuaded that the applicant's evidence was sufficient to establish that his fears are well-founded. As noted above, it is not my role to reweigh the evidence considered by the RAD. The applicant obviously disagrees with the RAD's assessment of that evidence but he has not been able to point to any fundamental flaws in the RAD's decision that call the reasonableness of the decision into question.

VI. REQUEST FOR ANONYMITY ORDER

[26] Finally, the applicant requests that his name be anonymized in the style of cause in any document the Court makes available to the public. While this would be a limitation on the open court principle, applying the test in *Sherman Estate v Donovan*, 2021 SCC 25 at para 38, I am satisfied that it is warranted here given the serious allegations the applicant makes against the government of South Korea and its officials. An anonymity order is a proportionate measure to protect the applicant from a risk of reprisal.

[27] Accordingly, a term directing the anonymization of the applicant's identity in the style of cause in any document the Court makes available to the public will be included in the order disposing of this application.

VII. CONCLUSION

[28] For these reasons, the application for judicial review will be dismissed.

[29] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-767-21

THIS COURT'S JUDGMENT is that

1. The applicant's name shall be anonymized as "AA" in the style of cause in any document the Court makes available to the public.
2. The application for judicial review is dismissed.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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