Federal Court  Cour fédérale

Date: 20250618

Docket: IMM-12960-24

Citation: 2025 FC 1102

Toronto, Ontario, June 18, 2025

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

JELALUDEEN HANEEFA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicant is a citizen of India, who made a claim for refugee protection in Canada, based on his alleged fear of the Bharatiya Janata Party [BJP]. His claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. Mr. Haneefa appealed this decision to the Refugee Appeal Division [RAD] of the Board, which dismissed his

appeal. The determinative issue in both proceedings was the credibility of the Applicant's allegations.

[2] This application raises a narrow question of law. I have concluded that the application must be granted because the RAD's approach to this question was unreasonable. My reasons follow.

II. BACKGROUND

A. *Facts*

[3] The Applicant, Jelaludeen Haneefa, is a citizen of India, and a Muslim. He alleges a serious possibility of persecution or personalized risk from two Hindu nationalist groups, the Bharatiya Janatha Party [BJP] and the Rashtriya Swayamsewak Sangh [RSS]. Mr. Haneefa claims that, as an active member of his mosque committee, he was involved in providing financial support to social welfare activities in his community for people of all faiths. Starting in 2015, he claims that BJP extremists targeted him, accusing him of trying to convert Hindus to Islam. Mr. Haneefa then shifted his charitable work to focus primarily on the Muslim community, but he continued to be targeted and accused of Islamic extremist activity. He claims to have been arrested and mistreated on multiple occasions, related to these allegations.

[4] Mr. Haneefa first came to Canada in January 2020 but returned to India in January 2021. He attempted to enter Canada again in September 2021 but was denied at the border and voluntarily returned to India. He alleges at that point he was stopped at the airport in India on suspicions of Islamic extremism, and was released only upon payment of a bribe; and was later

detained, interrogated, and beaten by police for the same reason. As a result, the Applicant returned to Canada in February 2022 and initiated his claim for refugee protection.

[5] In rejecting the Applicant's claim, the RPD provided various reasons for doubting the credibility of his allegations.

[6] One of those concerns related to a letter that the Applicant produced from his wife, which purported to confirm several key aspects of his claim. For reasons that will become clear, the RPD's treatment of this letter is central to this application for judicial review, and so I will explain it in some detail.

[7] The RPD's concern with the document was that it was "nearly identical" to the Applicant's Basis of Claim [BOC] narrative. This included one passage in which the Applicant's wife referred, in the first person, to an arrest that had involved the Applicant, and not his wife. The RPD confronted the Applicant with this concern, in response to which he stated that he had not provided his BOC to his wife, but that they had discussed it verbally. He further stated that if his wife's letter did refer to the incident in the first person, it must have been a mistake. Later in the hearing, then counsel for the Applicant indicated that "perhaps" he would have an interpreter look at the letter following the hearing to see if there was simply a translation error in the use of the word "I" instead of "he".

[8] No subsequent clarification of this issue was provided by the Applicant, and the RPD went on to reject his claim. On the question of the wife's letter, the RPD stated:

> The panel also has concerns with his wife's support letter being written in the first person in various sections. It gives the

> impression that this letter was not written from his wife's perspective about things that she witnessed and can independently corroborate. As the claimant testified, he told her these things verbally. This significantly reduces the weight the panel places on this letter in corroborating the claimants' allegations.

B. *Decision under Review*

[9] In support of the Applicant's appeal before the RAD, his new lawyer sought to admit a new translation of the wife's letter, and a clarification from the translator, indicating that it had been her own error, and that the original text of the letter used the word "he" and not "I". In the application to admit the new translation, the Applicant's counsel also provided correspondence with former counsel establishing that the new translation had been obtained prior to the RPD decision, but that he could not confirm whether the document was sent to the RPD. From the Record, however, it appears that it was not sent to the RPD.

[10] As noted above, the RAD refused the Applicant's appeal. At the outset of its reasons, it refused to admit the new translation of the wife's letter, and the other supporting documents that accompanied it. The RAD found that the corrected translation did not meet the criteria under s.110(4) of the *Immigration and Refugee Protection Act* [IRPA]. More specifically, the RAD found that the evidence did not arise after the RPD decision, and there was nothing to suggest that the documents were not available or could not have been reasonably expected to be available prior to the RPD decision. In arriving at this conclusion, the RAD found that the Applicant was essentially blaming his former counsel for not having submitted the letter, but had not put the former counsel on notice pursuant to *IRB's Practice Notice on Allegations Against Former*

Counsel [the Practice Notice]. The RAD then rejected the Applicant's request to apply s.110(4) flexibly, finding that the provision was to be interpreted strictly, and with no discretion.

[11] Having rejected the new evidence, the RAD went on to confirm the RPD's credibility findings, and its conclusion that that the Applicant is neither a Convention refugee nor a person in need of protection.

III. ISSUES and STANDARD OF REVIEW

[12] The Applicant makes only one submission on judicial review, which is that the RAD erred in refusing to accept the new evidence that was submitted. This refusal, the Applicant argues, was both unreasonable and breached his procedural fairness rights.

[13] At the outset, I will state that I do not see merit in the Applicant's allegations of procedural unfairness. In my view, the argument that the RAD erred in failing to admit the new evidence is, at root, a question of statutory and jurisprudential interpretation. As a result, I agree with the Respondent that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 23, 25; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 29.

IV. ANALYSIS

A. *Category Error: The RAD's interpretation of s.110(4) of the IRPA*

[14] As noted above, the RAD rejected the new evidence, because it found that it did not meet the "strict" statutory criteria set out at s.110(4) of the IRPA, which limits the new evidence that may be submitted on appeal to the following:

- Evidence that arose after the rejection of the claim at the RPD;
- Evidence that was not reasonably available to the individual prior to the rejection of the claim; **or**
- Evidence that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[15] The RAD noted that the corrected version of the translated letter arose before the rejection of the claim, as it had been sent to previous counsel in December 2023, while the RPD decision was issued in January 2024. As such, the evidence could not be admitted under the first of the above categories. As for the second and third categories, the RAD stated: "There is nothing to suggest that the documents were not reasonably available or could not reasonably be expected to have been available prior to the RPD decision."

[16] The RAD then stated that the Applicant was "implying" that the documents were not provided to the RPD due to counsel incompetence, but further noted that the Applicant had not put former counsel on notice pursuant to the *Practice Notice*.

[17] In rejecting the new evidence, the RAD then concluded, as follows:

> The Appellant argues that I have the freedom to apply subsection 110(4) with more or less flexibility depending on the circumstances of the case. The Federal Court has consistently found that the requirements of subsection 110(4) are to be strictly interpreted and leave no room for discretion. The counsel that represented the Appellant at the RPD received the new evidence in plenty of time to submit it to the RPD. He informs that he cannot confirm whether the corrected translation was ever sent to the RPD. I find that I have no discretion to deviate from the strict criteria set out in subsection 110(4) and reject the new evidence.

[18] In rejecting the new evidence, the RAD appropriately referred to the decision of the Federal Court of Appeal in *Singh*, which is the leading authority on the consideration of new evidence under subsection 110(4) of the IRPA. However, in my view, the above passage from the RAD's reasons clearly reveals a misunderstanding of the Court's holding in *Singh*.

[19] It is true that the Court in *Singh* found that the RAD must strictly limit its assessment of the admissibility of new evidence to the factors set out at subsection 110(4). This appears to have been in response to various arguments offered by Mr. Singh and an intervener that, taking *Charter* values into consideration, certain circumstances could require the RAD to admit evidence, even if it did not meet the explicit requirements of subsection 110(4). The Court rejected these arguments, finding (at para 63) that subsection 110(4) is unambiguous and does not grant any discretion to the RAD to disregard the conditions set out therein. It was therefore the initial question of *which* criteria to apply that the Court found had to be interpreted strictly, and with no discretion.

[20] However, it is important to note that the lack of discretion in determining *which* criteria to apply does not necessarily dictate *how* those criteria must be interpreted. This distinction, in my view, is where the RAD went wrong. In seeking the admission of the new evidence, the Applicant was not asking the RAD to go beyond the s.110(4) criteria, but was instead requesting that those very criteria be interpreted with flexibility. This request was not conjured from thin air, but came directly from *Singh*, which specifically recognized that the RAD may need to apply the mandatory s.110(4) factors flexibly:

> It goes without saying that the RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case.

[21] This flexibility in the application of s.110(4) makes sense, given the broad and loosely structured language used to describe at least the latter two criteria. Indeed, determining whether a claimant could, or could not, reasonably have been expected to provide a particular document prior to their RPD rejection is a necessarily contextual assessment that may frequently require a flexible approach, based on the circumstances.

[22] With this in mind, I return to the RAD's reasons for rejecting the new evidence. As noted above, the RAD rejected this evidence based on its lack of discretion to "deviate from the strict criteria set out in subsection 110(4)." As noted above, however, the Applicant was not asking the RAD to deviate from the s.110(4) criteria, but to apply those criteria flexibly, given the circumstances. To this extent, the RAD's reasons appear to have been based on both a misreading of the Applicant's submission and a misunderstanding of the *Singh* decision. It also represents a clear category error in the RAD's reasoning, in that it applied the language of strictness from *Singh* to the wrong assessment. That is to say, it was an error for the RAD to

express rigidity on the question of *how* to apply the s.110(4) criteria (when such questions may require flexibility), rather than applying this strict approach to the question of *whether* to go beyond the express requirements set out by those criteria.

[23] The Minister argues that the RAD did not err, as alleged, and that this Court has repeatedly found that the s.110(4) statutory criteria are strict and leave no room for discretion.

[24] Respectfully, however, the Minister replicates the same error as the RAD. In support of this assertion, the Minister relies on the decisions of this Court in *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 35; *Ifogah v Canada (Citizenship and Immigration)*, 2020 FC 1139 at paras 43, 45-46 [*Ifogah*]; *Li v Canada (Citizenship and Immigration)*, 2021 FC 956 at para 13 [*Li*]; *Kanu v Canada (Citizenship and Immigration)*, 2022 FC 674 at paras 16-20 [*Kanu*]. In my view, each of these decisions is compatible with the above interpretation of *Singh* and is incompatible with the approach taken by the RAD in this case.

[25] For example, in *Kanu*, the Court rejected the applicants' argument that the RAD ought to have admitted the proposed new evidence because of its significance, and because it specifically rebutted a finding of the RPD. The Court rejected this argument because it was based on a request that the RAD admit evidence that specifically did not meet the s.110(4) criteria. Beyond this, the case is distinguishable on its face, as in *Kanu*, the applicants "provided no explanation whatsoever as to why the evidence was not provided sooner." This is not the situation that arises on this matter.

[26] Similarly, in *Ifogah*, the Court upheld the RAD's refusal to admit new evidence, noting (at para 49) that "new evidence must fall into one of the three categories in subs. 110(4) to be admissible. The RAD had no discretion to deviate from the strict criteria in the statute." Once again, the Applicant in this matter was not asking for a deviation from the statute, but for a flexible approach to the interpretation of the statutory criteria, as per *Singh*.

[27] Finally, in *Li*, the Court paraphrased from *Singh* to make precisely the point I have made above, noting (at para 13) "The section 110(4) conditions are inescapable and leave no room for discretion on the part of the RAD, although the RAD has the freedom to apply them with more or less flexibility, depending on the circumstances…"

[28] Given the above, I am satisfied that the RAD's rejection of the new evidence was based on a misinterpretation of the *Singh* decision, representing a fatal flaw in its overarching logic. The rejection of the new evidence was therefore unreasonable: *Vavilov* at para 102.

B. *The IRB Practice Notice*

[29] As noted above, in rejecting the new evidence, the RAD mentioned that the Applicant had not formally complied with the IRB's *Practice Notice*. The Respondent, on judicial review, argues that, because the Applicant had not followed the protocol, it was reasonable for the RAD to find that the Applicant had not met his burden in establishing the admissibility of the new evidence.

[30] I have three concerns with this argument. The first is that it is far from clear to me that the RAD expressly relied on this failure to follow the protocol, to reject the new evidence. While

the failure is mentioned, it is done so generally, following which the RAD considered the former counsel's explanation as to what happened with the new evidence. In finding that this explanation was inadequate, the RAD stated that it had no discretion to deviate from the strict criteria set out at s.110(4). Respectfully, and for the reasons expressed above, this is not a reasonable consideration of the s.110(4) criteria.

[31] Second, the Respondent's argument appears, at least to some extent, to elevate form over substance. While it is certainly true that the Applicant did not formally comply with the *Practice Notice,* it is equally clear that the Applicant adhered to at least two of its crucial elements, which are: 1) notice to the former counsel of a possible concern with prior representation; and 2) an opportunity (indeed, in this case, a request) to respond to this concern. The RAD had before it the correspondence in which the concern and the response were provided. To this extent, the situation in this case is different from other cases in which the RAD has reasonably declined to consider allegations of counsel error (see for example, *Singh,* at paras 66-68).

[32] Third, to the extent that the RAD may have relied on the Applicant's failure to formally follow the *Practice Notice*, it ought to have considered paragraph 17 of the Notice, which states:

> A Member of the Division may give directions or make orders changing the requirements of this Practice Notice in any proceeding, in order to make the proceeding fairer or more efficient.

[33] Given that, in substance, the Applicant's former counsel had been duly notified of his alleged error and had been given an opportunity to reply, it was important in this case for the RAD to consider whether it was appropriate to change the requirements of the *Practice Notice*.

To be clear, I am not suggesting that the RAD must, in every case, specifically comment on the application of paragraph 17 of the *Practice Notice*. My findings above are restricted to the particular facts that arise in this case.

[34] Despite the above, I would also underscore the importance for counsel to comply with the *Practice Notice* in **any** case where they intend to rely on allegations of professional incompetence, negligence, or other improper conduct on the part of prior counsel. I can understand the hesitation in following the *Practice Notice* in cases that do not involve allegations of egregious breaches of professional standards. Prior counsel may be colleagues, or even friends with current counsel, and it can be awkward to make formal allegations of professional shortcomings.

[35] That said, the *Practice Notice's* definition of "inadequate representation" is broad, and encompasses many situations, ranging from serious allegations of incompetence to more minor errors that may nevertheless be material to the outcome of a case. The *Practice Notice* provides a fair and open process for raising concerns about such shortcomings, and an opportunity for former counsel to either take accountability for those shortcomings, or to dispute that they have, in fact occurred. In the tension between offending former counsel and protecting a client's rights, in my view, it is generally better to err on the side of the latter approach.

C. *Remedy*

[36] This brings us to the question of the appropriate remedy in this case. As noted above, I have found that the RAD's rejection of the new evidence was unreasonable. This was the only

issue raised by the Applicant on judicial review. In my view, the significance of the RAD's error in respect of the new evidence is quite limited. There are two reasons for this.

[37] First, both the RAD, and the RPD before it, provided numerous reasons for doubting the credibility of the Applicant's claim for refugee protection. The RAD summarized the RPD's findings, as follows:

> The RPD found the Appellant provided inconsistent evidence about his reavailment to India in 2021. It also found that he provided inconsistent evidence about what made him leave India the second time, omitted a key incident from his testimony and delayed in returning to Canada. The RPD drew a negative credibility inference from the Appellant's vague testimony about ongoing threats in India, and ultimately found that the Appellant did not adequately establish his allegations. Finally, the RPD considered the Appellant's residual profile as a Muslim man and found insufficient evidence that he faces a serious possibility of persecution in India.

[38] Following this summary, the RAD provided detailed reasons for confirming the RPD's findings. For example, the Applicant stated in his BOC narrative that the event which led him to leave India for good was an alleged arrest in December 2021. However, at the RPD hearing, when the Applicant was asked about the incidents he experienced in India, he neglected to mention this arrest. The RAD reviewed this testimony and the RPD findings, and concluded that the Applicant's inconsistent testimony impugned the credibility of his allegations related to arrests in December 2021 and in February 2022. The Applicant has made no argument that this important finding was unreasonable.

[39] The same can be said of the Applicant's testimony regarding the ongoing threats that he fears. The RPD found this testimony to be vague and lacking in expected detail, despite the

wife's letter and a follow-up letter that she later provided. The RAD provided reasons for coming to the same conclusion and, once again, the Applicant has not argued that the RAD erred in its assessment of this testimony.

[40] The RAD also provided a reasonable explanation as to why it agreed with the RPD on the Applicant's identity as a Muslim man. Both the RPD and the RAD found that there was insufficient evidence that the Applicant would face a serious possibility of persecution on account of his Muslim identity and, once again, this finding has not been challenged on judicial review.

[41] The second reason why I do not view the RAD's erroneous assessment of the new evidence to be particularly significant is because it effectively dealt with the issue raised by the new evidence, even if the evidence was not formally admitted. Recall that the corrected version of the wife's letter was submitted to assuage concerns as to whether the first version of that letter had been copied from the Applicant's BOC. The correction to the letter involved a single sentence in that letter. As noted above, in addition to the corrected letter submitted on appeal, the wife had also produced a second letter which added detail to the first letter. The RAD assessed these letters, and the impact of any clarifications to the first letter, as follows:

> The Appellant argues the RPD erred in drawing a negative inference from the first letter from his wife. He submits that 'the infelicities of that letter are cured by the second letter' and that it should be afforded substantial weight regarding the problems since his last departure from India. The RPD, however, was not only concerned about one sentence which appears to be lifted from the BOC narrative as submitted. A review of the letter shows that it reads very similar to his BOC narrative. When this was put to the Appellant, he responded by testifying that 'I've told her all that verbally.' The RPD was correctly concerned that the letter was not written from the wife's perspective about things that she witnessed

> and can independently corroborate. I afford the letter no weight in establishing the Appellant's allegations.
>
> [Emphasis added.]

[42] The Applicant has not specifically contested the RAD's findings with respect to the larger concerns with the wife's letter. Cumulatively, these uncontested findings have led me to consider whether there is a purpose to be served in remitting this matter to the RAD, notwithstanding its error on the new evidence question.

[43] In *Vavilov*, the Supreme Court of Canada noted that a reviewing court may decline to remit a matter to the decision-maker where it is evident that "a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": *Vavilov* at para 142. Put somewhat differently, I have considered whether the redetermination of this matter would amount to a "foregone conclusion," rendering a redetermination by a different decision-maker unnecessary: *Canada (Attorney General) v Duval*, 2019 FCA 290 at para 38; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 100*; Abdul v Canada (Attorney General)*, 2023 FC 1501 at para 10.

[44] In the end, I have concluded that while several aspects of the decision under review appear reasonable, and were not challenged, I cannot conclude that the redetermination of this matter would be a foregone conclusion. The wife's letter was a potentially important piece of evidence, most notably because it sought to confirm the events that led to the Applicant's final departure from India. The wrongfully translated sentence was specifically mentioned by the RPD, and then by the RAD, as a reason for doubting the genuineness of the letter, and I cannot

say with certainty that the letter (or the subsequent one provided by the Applicant's wife) would have been viewed in the same manner, absent the concerns with the wrongly translated sentence.

V. CONCLUSION

[45] As a result of the above, I will grant this application for judicial review. The parties did not propose a question for certification, and I agree that none arises.

JUDGMENT in IMM-12960-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a different decision-maker for reconsideration in accordance with these reasons.

3. No question is certified for appeal.

"Angus G. Grant"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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