Federal Court  Cour fédérale

Date: 20220608

Docket: IMM-3890-21

Citation: 2022 FC 857

Toronto, Ontario, June 8, 2022

PRESENT: Madam Justice Go

BETWEEN:

DUSKO JANKOVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Dusko Jankovic [Applicant] is a citizen of Croatia who arrived in Canada in 2011 and made a refugee claim based on his sexual orientation and Serbian ethnicity. He was found by the Refugee Protection Division [RPD] to be excluded from seeking refugee protection. The Applicant seeks judicial review of the RPD's refusal to reopen his claim [Reopening Decision] pursuant to Rule 62 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*].

[2] I find the RPD erred in refusing to reopen the Applicant's claim and as such I grant the Application.

II. Background

[3] On May 28, 2014, the RPD found the Applicant was excluded from refugee protection, pursuant to s. 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and Article 1F(b) of the *Refugee Convention*, for committing the serious non-political crime of heroin trafficking in Croatia. In his claim documents, the Applicant noted that he had twice been convicted of "drug misuse or abuse", identifying the drug as marijuana, not heroin.

[4] After the Applicant sought judicial review at the Federal Court, and with the Minister's consent, the matter was sent back for redetermination.

[5] The Minister intervened in the Applicant's claim before the RPD based on information from Interpol Zagreb indicating that the Applicant had been found guilty of "Abuse of Narcotic Drugs (7 grams and 82 milligrams of heroin, in total)" and sentenced to five months' imprisonment. On appeal, the sentence was reduced to 50 days of community service. The Minister argued that this quantity of heroin amounted to 78 doses and was more than what would be required for personal use. The Minister also argued that in Canada the Applicant would have been convicted of either trafficking in a controlled substance or possession for the purposes of trafficking, contrary to s. 5(1) or s. 5(2) of the *Controlled Drugs and Substances Act* [*CDSA*], either of which are punishable by a maximum of life imprisonment under s. 5(3)(a) of the *CDSA*.

[6] The Applicant submitted that the amount of 7.082 grams of heroin did not appear in any of the judgments from Croatia; it only appeared in the document from Interpol Zagreb, which was extrinsic evidence. The Applicant contended that he had faced charges involving marijuana, not heroin, and that when he reported to the police station, an officer had brutalized him, harassed him, and forced him to sign a self-incriminatory police report. He also submitted that this officer had telephoned him daily, making remarks about his ethnicity and sexual orientation. The Croatian court documents before the RPD showed that the Applicant had stated the police had harassed and intimidated him, as well as that he had not pled guilty but had stated he felt "partially guilty" as he was purchasing drugs for his own needs.

[7] In a decision dated July 22, 2019, the RPD concluded that the Minister had met the burden of showing "serious reasons for considering that, in Croatia, the claimant committed the serious non-political crime of trafficking in a controlled substance" and that he was therefore excluded from refugee protection [Exclusion Decision].

[8] After the Exclusion Decision was issued, the Applicant, assisted by his Canadian common law partner, sought a retraction or amendment of his conviction from the Croatian authorities. In a letter dated February 26, 2021, the Croatian authorities stated that "with regards to the processed data regarding drug amounts, we hereby inform you that an adjustment has been made to the Criminal records" and that an amendment to inaccurate information would be submitted to "Ottawa NBC" [Adjustment Letter].

[9] On the basis of the Adjustment Letter, the Applicant requested that the RPD reopen his claim. The Applicant also made an access to information and privacy [ATIP] request through the *Access to Information Act*, RSC, 1985, c A-1 with a view to obtaining the letter, to no avail.

[10] After receiving the Minister's opposing submissions, the RPD asked the Applicant whether he intended to reply, which he did on May 18, 2021. While the Reopening Decision mentions the Applicant's reply arguments and was sent out under cover of a Notice of Decision dated May 19, 2021, the Reopening Decision itself is dated May 14, 2021.

[11] In the Reopening Decision, the RPD found that the Applicant had ample opportunity to challenge the Interpol evidence and to adduce his own evidence in response before the Exclusion Decision was made, and that the Exclusion Decision's reliance on the Interpol evidence was not unfair. In the RPD's view, the jurisprudence did not support the Applicant's argument that it was unfair for the RPD not to have verified the information contained in the Interpol letter. While the Applicant argued that the Minister was required to cooperate in obtaining the correction mentioned in the Adjustment Letter, the RPD found these arguments irrelevant to a reopening decision and stated the Applicant should instead make them in the context of a pre-removal risk assessment [PRRA]. The RPD further found that the Applicant could have appealed to the Refugee Appeal Division [RAD].

III. Issues and Standard of Review

[12] In his judicial review application, the Applicant raises several arguments which I summarize as follows:

a) The Reopening Decision and reasons pre-date the Applicant's reply to the RPD in breach of the RPD Rules allowing for a reply and the RPD's own assurance, and give rise to a reasonable apprehension of bias that the RPD Member prejudged the application in favour of the Minister;

b) The RPD erred in faulting the Applicant for failing to file a RAD appeal;

c) The RPD erred in finding no breach of procedural fairness resulting from the Exclusion Decision's reliance on extrinsic evidence, namely, the letter from Interpol Zagreb;

d) The RPD erred in finding that the RPD was under no obligation to make efforts to obtain and review the new correspondence from the Croatian authorities, either on its own or with the assistance of the Minister; and

e) Natural justice requires the RPD to give the Applicant an opportunity to present new evidence with respect to the amendment made by the Croatian authorities.

[13] The Applicant submits the decision of the RPD with respect to an application to re-open a refugee claim is reviewable on the reasonableness standard per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and that the standard of review for procedural fairness is effectively correctness, citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69; *Canada (Citizenship and Immigration) v XYZ*, 2019 FC 140 at para 9.

[14] The Respondent submits that the standard of review for the RPD's application of Rule 62 of the *RPD Rules* is reasonableness, citing *Djilal v Canada (Citizenship and Immigration)*, 2014 FC 812 at paras 6-7; *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at paras 20-21.

[15] For issues of procedural fairness, the Respondent submits that "the true question raised when procedural fairness and the duty to act fairly are the object of an application for judicial review is not so much whether the decision was 'correct', but rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered the parties a right to be heard and the opportunity to know and respond to the case against them": *Huang v Canada (Citizenship and Immigration),* 2018 FC 940 at paras 54. For questions of natural justice, the Respondent submits the standard is correctness per *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 55, 57, 79.

[16] I will apply the correctness standard to issues of procedural fairness and natural justice and the reasonableness standard to the remaining issues.

[17] 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 Applicant to demonstrate that the RPD 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.

IV. Relevant Provisions

[18] Rule 62 of the *RPD Rules* states, in relevant part:

Application to reopen claim	**Demande de réouverture d'une demande d'asile**
62 (1) At any time before the Refugee Appeal Division or the Federal Court	**62 (1)** À tout moment avant que la Section d'appel des réfugiés ou la

has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.	Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.
…	…
Factor	**Élément à considérer**
(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	**(6)** La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.
Factors	**Éléments à considérer**
(7) In deciding the application, the Division must consider any relevant factors, including	**(7)** Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
(a) whether the application was made in a timely manner and the justification for any delay; and	**a)** la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;
(b) the reasons why **(i)** a party who had the right of appeal to the Refugee Appeal Division did not appeal, or **(ii)** a party did not make an application for leave to apply for judicial review or an application for judicial review.	**b)** les raisons pour lesquelles : **(i)** soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés, **(ii)** soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

[19] The *IRPA* also states as follows:

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — a claim for refugee protection, an application for protection or an application for	**170.2** La Section de la protection des réfugiés n'a pas compétence pour rouvrir, pour quelque motif que ce soit, y compris le manquement à un principe de justice naturelle, les demandes d'asile ou de protection ou les demandes d'annulation ou de

cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.	constat de perte de l'asile à l'égard desquelles la Section d'appel des réfugiés ou la Cour fédérale, selon le cas, a rendu une décision en dernier ressort.

V. Analysis

[20] While the Applicant raises a number of arguments, I will only focus my analysis on the following three questions:

a) Whether the RPD breached procedural fairness or displayed an apprehension of bias based on the timing of the Reopening Decision;
b) Whether the RPD has an obligation to verify information in the Interpol communication; and
c) Whether natural justice requires the RPD to give the Applicant an opportunity to present new evidence.

Issue 1: Did the RPD breach procedural fairness or display an apprehension of bias based on the timing of the Reopening Decision?

[21] The Applicant points out that the reasons for the Reopening Decision are dated May 14, 2021, before the Applicant's reply submissions were filed on May 18, 2021. In the Applicant's view, to the extent that the decision and reasons were issued prior to the Applicant's reply, this was in breach of the *RPD Rules* allowing for a reply, as well as the RPD's assurance that he would be given five days to reply.

[22] While acknowledging that the RPD mentioned his reply in its reasons, the Applicant argues that the reference is brief and generic, partly in a different font size, and not responsive to

his detailed arguments, giving the clear impression that it was simply added to a decision that had already been written.

[23] The Applicant further argues that a reasonable apprehension of bias arises, as the circumstances give a clear impression that the decision had been made and substantially written on May 14, 2021 prior to the receipt of the Applicant's reply, and that the RPD prejudged the application in favour of the Minister. The Applicant points to the fact that the RPD Member allowed the late filing of the Minister's response without comment, asked the Applicant if he wished to reply despite his right to do so under the *RPD Rules,* and sent out the decision under cover of notice dated only a day after the Applicant's reply was received.

[24] I am not persuaded by the Applicant's argument on this point.

[25] As the Applicant submits, the test for a reasonable apprehension of bias was reaffirmed in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 [*Yukon*] at para 20:

> [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]

[26] More recently, this Court reiterated the high threshold required to establish an apprehension of bias in *Saran v Canada (Citizenship and Immigration)*, 2021 FC 524 at paragraph 10:

> [10] …There is a rebuttable presumption that a tribunal member will act fairly and impartially. Suspicion alone of bias is not enough; a real likelihood or probability of bias must be demonstrated (by the person alleging bias) and the threshold for a finding of real or **perceived** bias is high.
>
> [Emphasis in original]

[27] In my view, the Applicant has not met the high threshold for a finding of real or perceived bias on the part of the RPD.

[28] The Reopening Decision did refer to the Applicant's reply. While brief, the two paragraphs in the Reopening Decision under the heading "Submissions in Reply" reasonably captured the essence of the Applicant's reply arguments, namely, that the Exclusion Decision erred in relying on extrinsic evidence and that he was denied due process by the Croatian courts. Later on in the Reopening Decision, the RPD Member further explained why he rejected the Applicant's characterization of the Interpol evidence as extrinsic and why he found there was no denial of natural justice.

[29] Unlike the case in *Yukon*, where the trial judge advised counsel he would entertain additional arguments and then refused to hear the arguments *after* his ruling, the RPD Member in this case did invite and consider the reply submissions of the Applicant before the decision was issued.

[30] As to the date of the Reopening Decision, I agree with the Respondent that the reference to May 14, 2021 is of no factual significance. In reading the Reopening Decision as a whole, while taking into consideration the circumstances surrounding the issuance of the said decision, I am not convinced that an informed person, viewing the matter realistically and practically - and having thought the matter through - would conclude that there is a reasonable apprehension of bias.

Issue 2: Did the RPD have an obligation to verify information in the Interpol communication?

[31] The Applicant argues that the RPD has an obligation to verify information, especially where, as here, such information is not readily available to the Applicant. In *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 [*Paxi*] at para 52, the RPD found a letter of support not credible because it was not notarized and did not attach other objective evidence, but Justice Russell found that the Board should at least have attempted to contact the author through the contact information provided.

[32] The Reopening Decision rejected this argument, finding that *Paxi* "has been criticized and not generally followed recently." The RPD cited *Mohamed v Canada (Citizenship and Immigration)*, 2019 FC 1537 [*Mohamed*] at para 88, in which Justice Annis stated: "…I disagree that an administrative tribunal has an obligation to contact a witness to obtain information" (which was followed by Justice Roy in *Lutonadio v Canada (Citizenship and Immigration)*, 2021 FC 18 at para 23).

[33] In response, the Applicant argues that *Paxi* is in fact good law and has been followed in *Downer v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 45 at para 63, *Nugent v Canada (Citizenship and Immigration)*, 2019 FC 1380 at para 17; and *Avril v Canada (Citizenship and Immigration)*, 2019 FC 1512 at paras 60-64.

[34] In addition to the cases cited by the Applicant, I note that *Paxi* was mentioned as recently as this year by Justice Manson in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2022 FC 197 [*Zhang*] before finding an officer failed to provide cogent reasoning why the documents provided by the applicant should result in a determination of fraudulent conduct amounting to a misrepresentation. As Justice Manson noted:

> [24] In addition, while the onus lies on the Applicant to provide the best evidence and the Officer does not have to conduct further enquiries, there does appear to be an expectation that an Officer will take it upon themselves to simply use the contact information provided to verify the authenticity of the evidence that is provided [*Paxi v. Canada (Citizenship and Immigration)*, 2016 FC 905 at paragraph 52; *Kojouri v. Canada (Minister and Citizenship and Immigration)*, 2003 FC 1389 at paragraphs 18 to 19; *Hiu v. Canada (Citizenship and Immigration)*, 2011 FC 1098 at paragraph 3; *Huyen v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904) at paragraph 5]. The Officer, in this case, was provided contact information with the Applicant's documents and did not use this to simply call and verify their authenticity.

[35] Based on the above, I find the RPD's conclusion that *Paxi* "has been criticized and not generally followed recently" is not supported by the cases that have cited *Paxi*. At the very least, this conclusion does not reflect the totality of the case law.

[36] I also find it worth repeating why Justice Russell concluded in *Paxi* that the RPD should have taken steps to verify the information of which it questioned the authenticity:

> [52] …Lives are at stake here, and yet a simple check is not made. For the Board to take issue with the authenticity of the document yet make no further inquiries despite having the appropriate contact information to do so is a reviewable error: *Kojouri v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389 at paras 18-19; *Huyen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904 (CanLII), [2001] FCJ No 1267 at para 5.

[37] There is no question that the Applicant bears the onus of demonstrating why his claim should be reopened. However, his particular situation, in my view, illustrates why fairness would sometimes require the RPD to take a small, not-too-onerous, step of making further inquiry into the information relevant to a claim.

[38] The Applicant is not seeking the RPD's assistance to contact a witness, unlike the situation in *Mohamed*, or to verify the authenticity of a document, as in *Paxi* and *Zhang*. Rather, the Applicant seeks the RPD's assistance to obtain a document that has presumably been submitted to Canadian authorities, who have thus far failed to respond to the Applicant's ATIP request. The document in question is not in the possession of the Applicant, but instead is in the possession of the Canadian authorities. The Applicant is not in a position to force the Canadian authorities to produce the document to the RPD, only the Minister would be able to do so, should he so choose. Further, the Minister has relied on the Interpol Zagreb letter to seek the Applicant's exclusion from refugee protection – the same letter whose accuracy is now put into question by the very document that the Applicant requires assistance to obtain.

[39] Given all these circumstances, and given the importance of the Adjustment Letter to the Applicant's claim, the RPD's conclusion that verifying the information contained in the Interpol letter did not fall within its role was not only unreasonable, it was a breach of procedural fairness.

[40] At the hearing, the Respondent made the following arguments:

- The Adjustment Letter was unclear and therefore it was not for the RPD to rely on to find that there was any correction to the amount of drug;
- Based on the decisions from the Croatian courts, the amount of drug that the Applicant was alleged to be dealing was far greater than 7.082 grams; and hence the Applicant already had the benefit of a conservative error made by the RPD;
- The ATIP request is processed by a different department, and therefore RPD has no obligation to assist the Applicant with his ATIP request;
- The Applicant lacks credibility as he failed to disclose the heroin charges in his refugee claim.

[41] At one point during the hearing, the Respondent asserted that there was evidence indicating that ATIP had advised the Applicant that no letter has been received by the Canadian authorities regarding any amendment to his criminal conviction. The Respondent retracted this assertion after failing to find such evidence in the record.

[42] In my view, none of the Respondent's submissions addressed the key argument raised by the Applicant, namely, the RPD has an obligation to assist in obtaining evidence in this case. Nor were these the arguments relied on by the RPD in its analysis. It is not up to the Respondent to bolster the reasoning of the RPD.

Issue 3: Did natural justice require the RPD to give the Applicant an opportunity to present new evidence in the Reopening Decision proceedings?

[43] The Applicant further argues that natural justice now requires that he be given the opportunity to present the evidence he has obtained that Croatian authorities have retracted their misstatement. He states that he reasonably believes the correction relates to the amount of heroin, as this was what he requested. I also note that the Adjustment Letter stated that "with regards to the processed data regarding drug amounts, we hereby inform you that an adjustment has been made to the Criminal records" [emphasis added].

[44] Before the RPD, the Applicant submitted that he had made an ATIP request for the communication that Interpol Zagreb indicated it would make to Canadian authorities. However, the Applicant submits that there is no guarantee the information will be released, as there are numerous exceptions in this legislation. He adds that he has been served with a PRRA and may be removed before he receives a response. He also argues that an access to information request is not a substitute for disclosure (citing *Natt v Canada (Citizenship and Immigration)*, 2009 FC 238 at para 25, in which the Court stated "[n]o 'access to information' request is necessary to obtain information which the respondent relied upon in accusing the applicant of misrepresentation").

[45] In the Reopening Decision, the RPD responded that these arguments are not relevant to the question of natural justice and should rather be made in a PRRA. The RPD further concluded that despite the mention of an amendment or adjustment of the Applicant's criminal record, there was no information on file about what that amendment would be.

[46] The Applicant argues that the RPD's reasoning fails *Vavilov*'s requirement of responsive reasons and did not respond to his arguments. I agree.

[47] The Adjustment Letter was relevant to determining the seriousness of the Applicant's conviction. And, as I have noted above, as among the Applicant, the Respondent and the RPD, the Applicant is the least able to compel the Canadian authorities to produce the letter in question.

[48] Under these circumstances, natural justice requires the RPD to reopen his claim, to consider this evidence if obtained by the Applicant, or to assist the Applicant in obtaining and reviewing this information if he cannot, for instance, through a request from the Board's Research Directorate, or by requiring the Minister to make inquiries of the relevant Canadian law enforcement agencies.

[49] The Applicant further argues that the RPD erred in finding he should make his arguments to the officer in the context of a PRRA. The Applicant points to the Federal Court of Appeal's statement that a PRRA officer "does not have the discretion to revisit past evidence or to decide that the question of exclusion should be redetermined": *Tapambwa v Canada (Citizenship and* Immigration*)*, 2019 FCA 34 [*Tapambwa*] at paras 57-58.

[50] I note, first of all, stating that the Applicant has an opportunity to make PRRA submissions is not a cure to the procedural unfairness before the RPD. More importantly, a person who was excluded under article 1F has access only to a restricted PRRA under s. 97 of

IRPA and cannot be considered under s. 96, and this restricted PRRA can only stay removal and not confer refugee protection: *Tapambwa* at paras 2-5.

[51] I also reject the Respondent's submission that the Applicant was "misusing" the RPD and the court process by choosing not to appeal to the RAD or submit a PRRA.

[52] Thus, the only appropriate remedy is to send the matter back for redetermination by a different member.

[53] While I cannot compel the RPD or the Minister to assist the Applicant in obtaining the missing document, I would certainly hope that, in light of the seriousness of the allegations against the Applicant, and the serious consequence to the Applicant if his claim is not re-opened, both the RPD and the Minister would see fit to exercise their power to ensure fairness in the Applicant's claim process going forward.

VI. Conclusion

[54] The application for judicial review is granted and the matter is returned for redetermination by a different member of the RPD.

[55] There is no question to certify.

JUDGMENT in IMM-3890-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is returned for redetermination by a different member of the RPD.

3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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