Federal Court  Cour fédérale

Date: 20160608

Docket: IMM-3646-15

Citation: 2016 FC 629

Ottawa, Ontario, June 8, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MALIK ZARAR ALI QADDAFI
SUMAIRA MALIK
MUHAMMAD ASHIR ALI
MUHAMMAD SHARJEEL ALI
AIZA ALI MALIK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] dated July 17, 2015, which determined that

the Applicants were not Convention refugees or persons in need of protection within the meaning of ss 96 and 97 of the Act [Decision], confirming the decision of the Refugee Protection Division [RPD] that the Applicants had a viable internal flight alternative [IFA] within Pakistan in the city of Hyderabad.

II. BACKGROUND

[2] The Applicants are all citizens of Pakistan. Malik Zarar Ali Qaddafi [Principal Applicant] did contract work for the United Nations [UN] Humanitarian Air Services in Pakistan for a period of ten years.

[3] The Applicants claimed that they were at risk of persecution and harm from the Taliban after receiving two phone calls from unidentified persons on October 28, 2013 and November 25, 2013. The caller stated that he knew who the Principal Applicant and his family members were, and that it was time for him to die like other UN staffers.

[4] Following the phone calls, the Principal Applicant began making arrangements to travel to Canada. The Applicants left Pakistan on December 24, 2013. On December 25, 2013 they arrived in Canada, making their refugee claim on March 14, 2014.

A. *The RPD Decision*

[5] The Applicants' refugee claim was heard on May 26, 2014. The RPD determined that the Applicants were not Convention refugees or persons in need of protection. While the RPD

accepted that the Applicants were connected to a Convention refugee ground - imputed political opinion - as a result of the Principal Applicant's former employment with the UN, the RPD found that the Applicants relied on speculation to support their allegation that it was the Taliban that was responsible for the two threatening phone calls they had received in late 2013.

[6] Furthermore, the RPD found that the Applicants had not established that they faced more than a mere possibility of persecution from the Taliban in Hyderabad. The Applicants failed to demonstrate that the Principal Applicant, who had stopped working for the UN at the demand of the unidentified callers, was a high profile target of the Taliban's.

[7] The RPD also found that the Applicants had not made all objectively reasonable efforts to obtain protection in Pakistan before seeking out international protection, and they had also failed to demonstrate that the police in Pakistan would be unable to protect them.

[8] The Applicants appealed the RPD decision to the RAD asking that it be set aside and substituted with one of the RAD's own determination or, in the alternative, that the matter be referred back to the RPD with a differently constituted panel.

B. *Decision Under Review*

[9] The Applicants tendered fifteen documents as new evidence in support of their appeal of the RPD decision. Applying s 110(4) of the Act, the RAD found that the first ten of the proposed items did not meet the statutory criteria and as such were not accepted as new evidence. The remaining five, however, were found to be documents issued following the date of the RPD

decision and were admitted. Because the new evidence did not raise a serious issue with respect to credibility or, if accepted, would not necessarily justify allowing or rejecting the refugee protection claim, the RAD determined that it should proceed without a hearing on the basis of the RPD's record, despite the request of the Applicants.

[10] The RAD applied the established two-pronged test in determining whether the Applicants had an IFA available in the city of Hyderabad, Pakistan. It looked first to whether, on a balance of probabilities, there is a serious possibility of the Applicants being persecuted in Hyderabad. Then it considered whether conditions in Hyderabad were such that it would not be unreasonable, in all of the circumstances, including those particular to the Applicants, for them to seek refuge there: *Rasaratnam v Canada (Employment and Immigration)*, [1992] 1 FC 706 (CA).

[11] The RAD noted that, once an IFA is identified, a high burden is placed on the claimant to show that it is unreasonable. The test requires nothing less than the existence of conditions that would jeopardize the life and safety of the Applicants in relocating to a safe area.

[12] While the Applicants claimed that the RPD had specifically instructed counsel to limit submissions to the issue of IFA, upon reviewing the audio record and the transcript, the RAD found that the Applicants had extracted portions of the RPD's statements from the hearing without looking at their full context. The RAD determined that at no time did the RPD instruct counsel to narrow the scope of their case in such a way.

[13] The RAD found that, while UN employees and aid workers in Pakistan do face risks, this does not mean that they all necessarily qualify as refugees. The RAD agreed with the findings of the RPD. It found that the Applicants' argument that it was unreasonable for the RPD to find a lack of risk based on a lack of past persecution to the Applicants must fail.

[14] After reviewing the Applicants' documentary package, the RAD noted that it makes little direct reference to any problems in Hyderabad and, instead, focuses extensively on the port city of Karachi – which the RPD readily acknowledge is not a reasonable IFA location. The Applicants' new evidence did little to establish that the Taliban are rampant in the IFA area, that there is a lack of state protection there, or that it is unsafe generally. Rather, after considering it, the RAD found that the evidence actually provided support to the argument that Hyderabad, as an IFA, is a reasonable and viable location.

[15] The RAD went on to note the following: the Principal Applicant testified he was a "self-made man" who owns a number of income properties throughout Pakistan; the Applicants are experienced in international travel; the fact that the Applicants have no acquaintances in Hyderabad does not preclude the city as a safe haven and can only be considered a potential hardship; and no evidence was adduced to support the Principal Applicant's allegation that his children's education was at risk.

[16] The RAD found that, based on the evidence, it is clear that an IFA is available to the Applicants in Hyderabad. The Applicants did not satisfy their burden of establishing a serious possibility that they would be persecuted, or that they would be personally subjected to a risk to

their lives, or a risk of cruel and unusual treatment or punishment, or a danger of torture by any authority in Pakistan.

III. ISSUES

[17] The Applicants submit that the following are at issue in this proceeding:

1. Did the RAD err by failing to accept the Applicants' new evidence?
2. Did the RAD err by failing to assess the risk the Applicants faced?
3. Did the RAD fail to conduct a proper Internal Flight Alternative analysis?

IV. STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[19] The RAD's determination of the proper analysis to employ when assessing the admissibility of new evidence before the RAD pursuant to s 110(4) of the Act involves a tribunal

considering and applying its home statute and, as such, is within the RAD's expertise and does not involve a question of central importance to the legal system: *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at para 167; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 45-46; *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at paras 26, 30; *Deri v Canada (Citizenship and Immigration)*, 2015 FC 1042 [*Deri*]; *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 at para 13; *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 at paras 37-39, 42. The first issue, therefore, attracts the standard of reasonableness.

[20] The reasonableness standard applies to the RAD's factual findings, and its assessment of the evidence before it is entitled to deference: *Siliya v Canada (Citizenship and Immigration)*, 2015 FC 120; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 at para 27. Both parties concur, and I agree, that the standard of reasonableness should be applied to the RAD's assessment of the RPD's findings with respect to whether the Applicants have a viable IFA in Hyderabad. The second and third issues will therefor also be reviewed applying the reasonableness standard.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decision was unreasonable

in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

V. STATUTORY PROVISIONS

[22] The following provisions of the Act are applicable in these proceedings:

Convention Refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	(*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	(*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality,	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas

their country of former habitual residence, would subject them personally

de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de

protection.

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.

…

Appeal

110. (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

…

Procedure

(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before

Exclusions 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.

…

Appel

110. (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

…

Fonctionnement

(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois

a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

…

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

…

Decision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it

commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

…

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

…

Décision

La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

considers appropriate.

Referrals

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that

(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and

(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

Renvoi

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois:

(a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

(b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments preuve qui ont été présentés à la Section de la protection des réfugiés.

Schedule:

SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

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

Schedule :

SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS

E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

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

for considering that:	de penser:
(*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;	(*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*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	(*b*) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil 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.

VI. ARGUMENT

A. *Issue 1 - Did the RAD err by failing to accept the Applicants' new evidence?*

(1) Applicants

[23] The Court has held that there is a requirement for clear notice in IFA analyses: *Thevarajah v Canada (Citizenship and Immigration)*, 2004 FC 1654; *Ay v Canada (Citizenship and Immigration)*, 2010 FC 671. The Applicants submit that their counsel received no such notice and this should have been considered as to why the documents were submitted prior to the RAD proceeding. It is much more likely that Hyderabad would have been dismissed as an IFA had consideration been properly given to this evidence.

[24] The Applicants also argued at the hearing of this matter that the RAD should, in any event, have considered exercising its discretion to admit this documentation.

(2) Respondent

[25] The Respondent submits that the Applicants were advised that Hyderabad was being considered as an IFA at the beginning of the RPD hearing. Therefore, sufficient notice was given. The contention that their counsel did not anticipate the IFA is not a valid reason for attempting to introduce further evidence at the appeal stage.

[26] The Respondent says that the Applicants did not meet the onus of demonstrating why their proffered new evidence met the requirements for admission under s 110(4) of the Act. The Court has stated that s 110(4) offers no discretion to the RAD to refuse to apply its explicit admissibility requirements for new evidence: *Deri*, above.

[27] The RAD found that the Applicants' former counsel had three opportunities to provide evidence on the suitability of Hyderabad as a proposed IFA: at the outset of the hearing when the proposed IFA was identified; at the time of oral submissions by counsel for the Applicants; and at the time that the RPD issued its oral decision at the hearing. It was reasonable for the RAD to determine that the Applicants should not be permitted to submit evidence which pre-dated the RPD decision because the Applicants could have sought an adjournment to submit the same evidence to the RPD prior to the rejection of their refugee claim.

B. *Issue 2 - Did the RAD err by failing to assess the risk the Applicants faced?*

(1) Applicants

[28] The RAD found that the Applicants did not meet the test for persecution under s 96 of the Act or for persons in need of protection under s 97. The RPD had found the Applicants, including their statements on fear, to be credible. It also found the Applicants to have a nexus to a Convention ground. The refusal, according to the Applicants, appears to be based on a proposed IFA and their failure to establish the agent of persecution and risk.

[29] As noted by the RPD, the Principal Applicant was earning $10,000/month in Pakistan. The Applicants submit that it is difficult to imagine why someone would abandon such success unless there was a clear threat to his or her life. The RPD had accepted testimony that the Applicants were threatened and had also accepted the nexus to a convention ground as imputed political opinion.

[30] However, the RPD's findings regarding the persecution faced by the Applicants, including its statement that the agent of persecution did not act on their threats, are blatantly unfair and ought to have been dismissed by the RAD. Furthermore, it is pure speculation on the part of the RAD and RPD that the Taliban are not the agents of persecution, and it is not clear as to why the RAD accepts evidence on the Taliban – including that the group is the predominant terrorist group in Pakistan and often targets humanitarian workers – if the Taliban are not accepted as the agents of persecution. While it may not be clear beyond a reasonable doubt that the Taliban was responsible for the calls received by the Applicants, it can safely be said that, on

a balance of probabilities, given the country condition evidence before the RAD, that it was. It is unfair to ask the Applicants to pursue their pursuers to confirm their identity.

[31] In light of the evidence, it is not reasonable that the RAD failed to arrive at the conclusion that there was more than a mere possibility of persecution.

(2) Respondent

[32] The RAD concluded that the RPD had considered both prongs of the IFA test and came to an intelligible and transparent decision in concluding that Hyderabad was a safe location for the Applicants.

[33] It was reasonable for the RAD to uphold the RPD's conclusion that the Applicants did not face a serious possibility of harm or persecution from the Taliban. The RAD properly assessed the evidence before it, as well as the Applicants' new evidence on their appeal, and determined that it was insufficient to establish that the phone calls received by the Applicants in October and November of 2013 were in fact from the Taliban. It was not an error for the RAD to find that the Applicants were relying on speculation to ground their belief that they had been targeted.

[34] The RAD noted that the RPD had taken all of the following into account: the Applicants had not been able to identify the callers of the two threatening phone calls they received; the Applicants had lived in Pakistan for two months without incident before departing for Canada; the Applicants had been given the opportunity to provide an explanation for why they believed

the agent of persecution would still be interested in finding them given that the Principal Applicant had ceased working for the UN and had complied with their demands; the objective documentary evidence indicated that high profile targets were at risk from the Taliban throughout Pakistan but the Principal Applicant was not a high profile target.

[35] The Respondent submits that the RAD also properly considered the evidence and confirmed the RPD's finding on the second part of the IFA test that it would be reasonable for the Applicants to relocate to Hyderabad.

C. *Issue 3 - Did the RAD fail to conduct a proper Internal Flight Alternative analysis?*

(1) Applicants

[36] The Applicants submit that the RAD's reasoning in accepting the RPD's finding of an IFA is unclear and inappropriate. It is clear that the RAD relied on the RPD's analysis which indicated that the Applicants should have requested protection from the UN, when the UN is not the provider of protection in Pakistan and there is no evidence to suggest that the UN has any meaningful presence in Hyderabad. The Applicants argue that it is difficult to imagine what the UN would do to protect them in Hyderabad, particularly given the Principal Applicant's recent resignation – clearly a relevant factor when considering its viability as an IFA.

[37] As regards the RPD's treatment of the Taliban, the conclusion that they are less powerful than the police should not have been accepted by the RAD. The Taliban's continued influence and instigation of violence in Pakistan shows that the police are not able to protect against them.

[38] The RAD also noted that Sindh, the province in which Hyderabad is located, has seen a tightening of security due to threats from the Taliban. However, the Applicants note that the evidence does not show that the state is actually capable of protecting its citizens from terrorists. In fact, the evidence shows that the police are unable to protect themselves, let alone citizens. The Taliban have shown that they are capable of striking at targets, including police, in Hyderabad. In its IFA analysis, the RAD does not accept the Taliban as agents of persecution for the purpose of finding the Applicants did not meet the test for persecution. This analysis then clearly misconstrued evidence regarding the capacities of the Taliban to persecute the Applicants in Hyderabad.

[39] The Applicants say that while the Principal Applicant had previously done well for himself in Islamabad, it is unclear if any remotely similar opportunities exist in Hyderabad. Hardships faced by applicants in establishing themselves are factors in considering IFAs and the Applicants would struggle in re-establishing themselves in an alien city within a war-torn country. The finding that Hyderabad is safe and a viable IFA is clearly not reasonable.

(2) Respondent

[40] The Respondent says that the Court has held that a finding pertaining to an IFA is determinative and, as a separate component of the tribunal's analysis, is sufficient to dispose of a refugee claim: *Sarker v Canada (Citizenship and Immigration)*, 2005 FC 353 at para 7. A decision based on a viable IFA should stand if the tribunal applied the correct test to its analysis and its conclusions on the existence of an IFA were not unreasonable.

[41] While the Applicants argue that the RAD should not have accepted the RPD's findings on state protection, even if it hadn't, the IFA finding remains determinative. The Applicants failed to establish that their agent of persecution was the Taliban and the evidence indicated that it was unlikely that the Taliban would pursue them in Hyderabad. The onus was on the Applicants. It was not up to the RAD to prove that the Taliban were not the agents of persecution. There was no need for further consideration. The Applicants are now simply attempting to have the Court re-weigh the evidence which was before the RAD.

[42] The Respondent asserts that, in confirming the RPD's decision, the RAD found that: the Applicants were threatened, but that the threats did not amount to persecution; the Applicants had not established on a balance of probabilities who their agents of persecution were; there was a viable IFA in Hyderabad on the basis that there was no serious risk of s 96 persecution or s 97 risk there, and that it was not an unreasonable place for the Applicants to seek refuge; the Applicants had not sought any state protection; and the Applicants failed to rebut the presumption of state protection.

[43] The Federal Court of Appeal has stressed that the test for showing that an IFA is unreasonable is a strict one, and the onus on an applicant to do so is quite high: *Ranganathan v Canada (Citizenship and Immigration)*, [2001] 2 FC 164 at para 15 (CA). The Applicants failed to prove who their agents of persecution were and failed to establish that the threats amounted to persecution. The RAD was therefore justified in its IFA determination.

VII. ANALYSIS

[44] The Applicants raise a number of issues for review which I will address in sequence.

A. *Failure to Accept New Evidence*

[45] The Applicants say the RAD erred when it failed to accept articles 1-10 of their new evidence which were submitted to address the RPD's concerns about the proposed IFA in Hyderabad.

[46] Articles 1-10 were excluded by the RAD because they did not meet the requirements for new evidence under s 110(4) of the Act in that all of this documentation was available prior to the rejection of the Applicants' claim by the RPD.

[47] The Applicants argue that they could not have anticipated that an IFA in Hyderabad would be an issue before the RPD, and that the transcripts of the RPD hearing show that their previous counsel had not planned to address the IFA suggestion. They say that their previous counsel had no way to anticipate the IFA issue, and so had no reason to submit articles 1-10.

[48] The RAD reviewed the record, including the audio recording notes, which reveals that the Hyderabad IFA was identified to the Applicants at the beginning of the RPD hearing, but that counsel for the Applicants did not take the obvious steps to deal with it.

[49] When it came to oral submissions before the RPD, counsel acknowledged that she had no specific documentation to submit to deal with the IFA location. Hence, it is not possible to say, as the Applicants do in this application, that their former legal counsel was not aware of the IFA issue and had no opportunity to deal with it. Former legal counsel did not request more time to submit relevant documentation or to make further submissions on the point. Therefore, the facts are that the Applicants could easily have requested time to submit articles 1-10. This is evidence that could have been submitted to the RPD, but the Applicants, for reasons that remain unclear, chose not to submit it.

[50] It cannot be said, then, that the RAD acted unreasonably, or in a procedurally unfair manner, in refusing to admit this documentation on appeal. It was simply evidence that did not meet the requirements of s 110(4) of the Act.

[51] However, at the hearing of this application before me, the issue came up as to whether the RAD erred in interpreting s 110(4) by failing to consider and exercise its discretion to admit new evidence that was technically inadmissible, and thus failed to consider *Charter* values in refusing to admit new evidence. The Applicants argue that the RAD had discretion to do this, while the Respondent says there is no such discretion and the plain wording of s 110(4) must prevail.

[52] Justice Strickland addressed this very issue in *Deri*, above, and after a thorough review of the jurisprudence concluded that there was no discretion to admit new evidence under s 110(4):

> [53] I am inclined to agree with the Respondent that the test in *Raza* does not permit a PRRA officer to admit evidence that does not meet the explicit statutory conditions for new evidence found in s 113(a) of the IRPA. Rather, that the implicit factors

> articulated by the Federal Court of Appeal are to be taken into consideration once an officer has determined that the evidence first meets one of the explicit statutory conditions.
>
> [54] As stated in *De Silva v Canada (Citizenship and Immigration)*, 2007 FC 841 in the context of s 113(a):
>
> > [17] Although the PRRA process is meant to assess only evidence of new risks, this does not mean that new evidence relating to old risks need not be considered. Moreover, one must be careful not to mix up the issue of whether evidence is new evidence under subsection 133(a) with the issue of whether the evidence establishes risk. **The PRRA officer should first consider whether a document falls within one of the three prongs of subsection 113(a). If it does, then the Officer should go on to consider whether the document evidences a new risk.**
> >
> > (Emphasis in bold is added; emphasis in underline is original)
>
> [55] I see no reason why that same approach would not be followed in regard to s 110(4). The RAD must first determine if the three explicit conditions set out in s 110(4) have been met: 1) did the evidence arise after the rejection of their claim? If not, 2) was it reasonably available, or 3) could the applicant reasonably have been expected, in the circumstances to provide the evidence? If none of these conditions are met, then, on a plain reading of s 110(4), the RAD has no discretion to admit the new evidence.

[53] Having come to this conclusion, Justice Strickland found that the jurisprudence was unsettled and certified the following question:

> Does the admission of new evidence under s 110(4) involve the exercise of discretion by the RAD? If so, does this discretion permit the RAD to admit evidence which does not meet the test under s 110(4) and does its admission engage a consideration of *Charter* values?

[54] The Applicants have asked me to certify the same question in the present case. I believe that the reasons given by Justice Strickland in *Deri*, above, for certifying the question are equally applicable to the present case. However, the Federal Court of Appeal has recently dealt with this issue in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*].

[55] In *Singh*, the Federal Court of Appeal addressed for the first time how s 110(4) should be interpreted. According to *Singh*, the RAD's interpretation of s 110(4) is subject to a reasonableness review, as an administrative body's interpretation of its home statute is owed deference by a reviewing court.

[56] As regards whether the admission of new evidence under s 110(4) involves a discretionary exercise, the Federal Court of Appeal clearly states that the explicit conditions set out in the subsection are "inescapable" and "leave no room for discretion on the part of the RAD" (paras 34-35; 63);

> [63] However, subsection 110(4) is not written in an ambiguous manner and does not grant any discretion to the RAD. As mentioned above (see paras. 34, 35 and 38 above), the admissibility of fresh evidence before the RAD is subject to strict criteria and neither the wording of the subsection nor the broader framework of the section it falls under could give the impression that Parliament intended to grant the RAD the discretion to disregard the conditions carefully set out therein. Moreover, this approach complies perfectly with this Court's decision in *Raza*. The criteria set out in that decision regarding paragraph 113(a), which, moreover, are not necessarily cumulative, do not replace explicit legal conditions; rather they add to those conditions to the extent that they are "necessarily implied" from the purpose of the provision, to reiterate this Court's words at paragraph 14 of *Raza*. Otherwise, this would mean ignoring the conditions set out at subsection 110(4) and then delving into a balancing exercise between Charter values and the objectives sought by Parliament. In the absence of a direct challenge to this legislation, it should be

> given effect and the RAD has no choice but to comply with its requirements.

[57] While the proposed question is certainly one that transcends the facts of this specific case, it has effectively already been answered in *Singh*, and I see no reason to certify it.

B. *Assessment of the Risk – The Taliban*

[58] The Applicants say that the RPD made erroneous statements regarding the persecution faced by the Applicants from the Taliban. They say that the RPD engaged in "pure speculation that the Taliban are not the agents of persecution" and the RAD should have noticed this and reversed the Decision.

[59] In my view, it was not the RPD or the RAD who speculated. These tribunals accepted the two threatening phone calls but concluded, for reasons given, that the Applicants had not established that they had been threatened by the Taliban, or that the Taliban would target them in the future. The Applicants are attempting to reverse the onus of proof and/or ask the Court to reweigh the evidence and find that they have been, and will be, targeted by the Taliban. It is not the Court's role to reweigh evidence and reach a conclusion favourable to the Applicants. See *Khosa*, above, at para 61; *Saadatkhani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 614 at para 5.

C. *IFA Analysis*

[60] The Applicants say that the RAD failed to conduct a proper IFA analysis.

[61] They say that the RPD's analysis of the UN and state protection, within the context of a viable IFA in Hyderabad, is unreasonable. They say it was unreasonable for the RPD and the RAD to say that the Applicants could look to the UN for protection.

[62] The RAD specifically addressed this issue at para 25 of its Decision:

> The RAD has considered that the RPD in its oral decision does not address state protection and concludes it would be reasonable for the Appellant to have sought protection from the UN and the police prior to seeking international protection, but states the determinative issue is IFA. The RPD clearly noted in its later findings, "in the context of an IFA I have determined that state protection has not been rebutted in you case", confirming that it has considered the concept of State Protection in reference to its IFA findings as confirmed in a number of Federal Court decisions.
>
> [footnotes omitted]

[63] In other words, the issue is not the past conduct of the Applicants in failing to seek protection from the UN or the police. The issue is forward-looking risk and the availability of an IFA in Hyderabad. In its analysis of this issue, the availability of assistance from the UN is not a factor. The RAD simply acknowledges at para 30 of its Decision that UN workers are at risk and this needs to be taken into account when assessing a viable IFA:

> The RAD has reviewed the available documentation and finds that the evidence does confirm that UN or aid workers do face risks. The RAD had considered that the UN and various groups that provide humanitarian assistance continue to operate in Pakistan. The RAD finds despite the submissions of the Appellant that UN or aid workers face risks in Pakistan, this does not amount to an acknowledgement that all UN workers or other aid workers would be recognized as refugees. The RAD has considered the individual situation of the Appellants and after reviewing all of the evidence, finds it agrees with the findings of the RPD and the Appellants' argument must fail.

[64] The Applicants raise various other arguments as to why they think the RAD's IFA analysis was unreasonable.

[65] For example, the Applicants argue that "If the Applicants felt there was a valid IFA within their country, they obviously would have chosen that over trying to resettle on the other side of the planet." All this says is that the Applicants are the best judges of what is reasonable in their own case and the RAD and the Court should accept their judgment. This is not a principle known to refugee law. An IFA has to be assessed objectively, not in accordance with the Applicants' subjective views on the issue.

[66] The Applicants also argue that the IFA analysis is unreasonable because "the RAD does not accept that the Taliban are in fact the agents of persecution." There is no error here because the Applicants have not established that the Taliban is the agent of persecution.

[67] There is, however, one significant way that the Decision is problematic.

[68] The Respondent asserts in submissions that the RPD "noted that the principal applicant had stopped working for the United Nations, an action *which satisfied the demand* of the unidentified callers" [emphasis added].

[69] The Principal Applicant's account of the first phone call (both in his affidavit and in oral testimony) says he was told that as an employee of the UN, he was being watched and it was his time to die. No description of the threat indicates in any way that it was contingent on the

Principal Applicant's continuing to work for the UN. There is no clear indication that any "demand" was "satisfied" by the Principal Applicant's quitting.

[70] At para 28 of the Decision, the RAD lays out the grounds upon which the RPD made its decision, including the following:

> The RPD also considered its analysis in reference to the IFA location. The Appellant confirmed in his testimony that he quit his contract with the UN. *The RPD explained to the Appellant that his testimony indicated that this was what the caller wanted and asked him why whoever had threatened him would be motivated to seek him out now. The Appellant's response was that the Taliban would not stop, "They take it to the end."* The RPD found that there was less than a mere possibility of persecution in the IFA location by the unidentified caller.
>
> [emphasis added]

[71] Pages 13 and 20 of the transcript from the RPD hearing, indicate the following exchanges between the decision-maker and the Principal Applicant that is likely being referenced here by the RAD:

> Q Okay. So since you're no longer working for the UN, what reason would the Taliban have to target you?
>
> A Once they list a person, it doesn't matter that the person is still affiliated with the UN or not they complete their mission; they complete their target.
>
> Q How do you know that it's the Taliban that are threatening you?
>
> A People who – whoever is working as a humanitarian in Pakistan, they all get threats only from the Talibans.
>
> Q So the callers were anonymous, but you assumed that it was the Taliban?
>
> A Yes.

> Q Do you know anyone specifically that received a threat from the Taliban, somebody that works closely with you?
>
> A We had a blast in 2009, our own UN office, and also in Kabul.
>
> […]
>
> Q … But for – for me, I – I can't -- I can't see that the Taliban, even though they exist all over – over Pakistan, would have any interest in you because the only energy that they put into this so far is two anonymous phone calls. *You quit working for the UN agency. I – I can't understand why anybody would still want to harm you after that. So why – why would the Taliban seek you out in Hyderabad? I – I – I don't understand it*. What profile do you have that they would target you?
>
> A As I have mentioned before, that when Taliban threaten somebody and they – they take it to the end; they stay on that threat whether you work for the UN or not. And it doesn't matter that – whether you stay Islamabad or go anywhere else; they – their effort is so strong that they follow you. All the people who were killed in the blasts, and they killed, they only received phone calls.
>
> Q How do you know that?
>
> A Just recently they had killed a UN doctor – or lawyer in Multan; I – I think on 9th of May. And UN – UN has conducted a press conference. That lawyer has worked for 20 years for the UN.
>
> [emphasis added]

[72] In its decision, the RPD noted:

> You have quit your contract with the UN agency. There is little evidence that the agents of harm, whoever they might be, would be motivated or inclined to seek you out in Hyderabad *since you have already quit your job*. So I am not persuaded on a balance of probabilities that you would face more than a mere possibility of persecution by unidentified callers.
>
> [emphasis added]

[73] It is troubling that, without a negative credibility finding, both tribunals essentially discounted as speculation the Principal Applicant's explanation as to why he believed he would remain a target. Aside from a finding that the Principal Applicant was speculating in regards to the identity of the makers of the phone calls, the RPD decision makes no explicit reference to credibility. The beginning of the Decision incorrectly asserts otherwise:

> The Appellant's refugee claim was heard on November 13, 2014. In a decision of January 15, 2015, the RPD rejected the claim, *finding that the Appellant was not a credible witness* and that he had not established the central elements of his claim, and that he did not have a well-founded fear of persecution.
>
> [emphasis added]

[74] The Decision makes no other reference to credibility or to the Principal Applicant not being a credible witness. It must be noted that, as pointed out in the Principal Applicant's affidavit, the dates listed by the RAD of the RPD hearing in the above statement are incorrect.

[75] Both the RPD and RAD make comments to the effect of not being able to see how, after departing the UN, the Principal Applicant would remain a target. For example, the Decision notes in relation to the Principal Applicant's cessation of employment with the UN that the RPD "…explained to the Appellant that his testimony indicated that this was what the caller wanted and asked him why whoever had threatened him would be motivated to seek him out now." Such comments mischaracterize the threats.

[76] The threat was that the Principal Applicant would die because he had worked for the UN; it was not that he would die unless he ceased to work for the UN. Even if the Principal Applicant has not established that the threat was made by the Taliban, the threat to kill him was clearly

made on the evidence. In other words, the Principal Applicant has been specifically targeted. There is no evidence to support that the agent of persecution does not intend to follow through on this threat because the Principal Applicant does not have a sufficient profile. He obviously had a sufficient profile to provoke the threat. Both tribunals are not sufficiently alive to this and discount the threat because the Principal Applicant has ceased to work for the UN so that the caller had achieved his objective. This is an unreasonable characterization of the nature of the threat. The evidence is that the caller told the Principal Applicant that his time had come to die.

[77] In my view, this mischaracterization renders the IFA analysis unsafe and unreasonable. The Principal Applicant has been specifically targeted. There is nothing to suggest that the agent of persecution does not intend to follow through on that threat. Any state protection or IFA analysis needs to confront this directly without discounting the threat because the Principal Applicant lacks a profile and/or has given the caller what he wanted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted panel.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3646-15
STYLE OF CAUSE:	QADDAFI ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 16, 2016
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JUNE 8, 2016

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