Federal Court  Cour fédérale

Date: 20200128

Docket: IMM-2784-19

Citation: 2020 FC 145

Ottawa, Ontario, January 28, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

SHAHID HAMID

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Case

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision, dated April 8, 2019, that concluded that the Applicant is neither a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], nor a person in need of protection under section 97 of the IRPA.

[2] The RAD confirmed the findings of the Refugee Protection Division [RPD], in particular that the Applicant had a viable Internal Flight Alternative [IFA] in Islamabad (Pakistan), a finding that the RAD identified as determinative.

[3] In the present application for judicial review, the Applicant argues that the RAD's discussion as to the availability of a viable IFA was: (i) speculative as to the ongoing threat of persecution; and (ii) incomplete as it failed to assess the full range of factors under the second prong of the applicable test for an IFA.

[4] For the reasons that follow, I conclude that the RAD's decision was not unreasonable. I, therefore, dismiss the application for judicial review.

II. Facts and Proceedings

[5] The Applicant is a citizen of Pakistan and the owner of a drugstore in the Sahiwal District. Sahiwal is located in the Punjab province of Pakistan. The Applicant is a trained pharmacy technician with a licence to sell drugs and narcotics. In addition to his regular business operations, the Applicant supplied free contraceptives to a nearby doctor.

[6] On August 15, 2016, a gang of unknown individuals came to the Applicant's drugstore looking for prescription medications in bulk quantity. One of the individuals threatened to kill him and his family after the Applicant refused to supply them with the medicine.

[7] On September 9, 2016, the Applicant was the victim of a kidnapping incident. On that day, the same gang of individuals (now armed with guns) forced the Applicant to stop his vehicle while he was driving in the Punjab province. The gang then forced the Applicant out of his vehicle and walked him to a deserted area, where they tortured, threatened, and beat him. During the kidnapping incident, the gang demanded that he provide them with certain medications. The Applicant was able to break away from the gang. He subsequently lodged a police report about the kidnapping incident.

[8] On September 10, 2016, the Applicant was threatened by a religious leader and certain members of the Taliban Movement in Pakistan (Tekreek-i-Taliban). They wanted him to close his drugstore because his business operations included supplying contraceptives to women and, thus, were contrary to the tenets of Islam. On September 15, 2016, the Applicant was again threatened by another local religious leader and persons associated with the Taliban. During both of these incidents, they threatened to kill him and his immediate family.

[9] After these threats, the Applicant became fearful. On September 16, 2016, he closed his drugstore. On September 18, 2016, the Applicant contacted the local police to conduct an investigation but they apparently refused to do so.

[10] The Applicant, along with his family, moved to Karachi, a city on the coast of Southern Pakistan, some thousand kilometres from the Sahiwal District. While in Karachi, the Applicant received threatening phone calls from an unknown number. At the time, the Applicant was still using the business number of his drugstore. To the Applicant, these phone calls confirmed his

fear of persecution in Pakistan. The Applicant then left his home country for Canada on October 20, 2016.

[11] On November 30, 2016, the Applicant claimed refugee status. In his Basis of Claim form [BOC], the Applicant recounted the threatening incidents in Sahiwal, and the phone calls he received in Karachi. According to an affidavit from the Applicant's friend, unknown persons came to the village of Sahiwal searching for the Applicant on January 7, 2017.

[12] His claim for refugee protection was transferred to the RPD. The RPD held a hearing on June 15, 2017, and rejected his claim on June 30, 2017.

[13] Although the decision before me on review is that of the RAD, I think it is important in this case to also set out in some detail the decision of the RPD.

[14] The RPD concluded that the Applicant's credibility was determinative in the case; in particular, the RPD found that there were omissions and contradictions in the Applicant's testimony as compared with his BOC, that his testimony was vague and evasive, and that he unsuccessfully attempted to explain the inconsistencies that were identified by the RPD.

[15] In short, the RPD did not believe that the Applicant was threatened by those he claims to have been his assailants for the reasons he described, or that those incidents actually took place. As a consequence, the RPD concluded that the Applicant had failed to meet his burden to

demonstrate, on a balance of probabilities, that he would be personally subjected to the danger or the risk provided for in subsection 97(1) of the IRPA in other areas of Pakistan.

[16] That said, the RPD went on to state that *even if it had accepted* that the Applicant had been assaulted and threatened as he claims, the Applicant nonetheless had a viable IFA in Islamabad, the capital city of Pakistan. The basis of the determination of the RPD as to a viable IFA may be summarized as follows:

a) the threats made to the Applicant were as a result of his refusal to provide the assailants with the medication they demanded, and the fact that the Applicant provided contraceptives to a local physician to distribute to her patients. However, with the closure of his drugstore, the activity that placed him at risk no longer exists. The Applicant has not demonstrated that his assailants would still have an interest in pursuing him, and more so, so strong a willingness to pursue him to Islamabad. (The RPD cites the National Documentation Package for Pakistan); and

b) there is no evidence to suggest the Applicant would have difficulty travelling to Islamabad or settling down in that city in a reasonable manner. He is a successful, university-educated businessman who, according to his BOC, had travelled to Karachi and started to earn his livelihood.

[17] The Applicant then filed an appeal from the RPD decision before the RAD.

III. Decision Under Review

[18] In his memorandum on appeal to the RAD, the Applicant argued, amongst other things, that the RPD erred in its credibility finding as regards the Applicant, and that it also erred in the determination of a viable IFA. The Applicant did not present any new evidence, nor did he request a hearing before the RAD.

[19] I should mention that the Applicant's memorandum in his appeal to the RAD is quite extensive as regards the other issues raised in appeal, however, as regards the issue of the IFA in particular, the Applicant suggested only that the determination of a viable IFA was made in a factual vacuum, or was at least based upon a false premise, and that the Applicant provided evidence that his assailants were willing and able to track him down, without elaborating any further.

[20] In dismissing the appeal, the RAD stated clearly that the only determinative issue was whether the RPD had erred in its evaluation of the IFA, and thus it was unnecessary to discuss the issues pertaining to the credibility of the Applicant. The RAD concluded that the RPD had adequately addressed that issue, and thus dismissed the appeal.

IV. Issue

[21] The only issue argued before me by the Applicant was whether the RAD committed a reviewable error in finding that Islamabad offers a viable IFA. The Applicant did not raise the issue of the RAD not ruling on the credibility finding of the RPD. The Applicant focused only on the RAD decision, which made it clear that, given its finding on the viability of the IFA, a discussion of the RPD's credibility finding was not necessary.

[22] At this stage, I would like to make a simple suggestion of an administrative nature : in the future, in similar circumstances, the RAD may wish to address the credibility findings of the RPD, so as to avoid a situation where an IFA analysis is found by this Court to be unreasonable, and necessarily determinative solely on account of the lack of any analysis on credibility, which

may then require the return of the file to the RAD for the sole purpose of a complete analysis with regard to credibility.

V. Standard of Review

[23] In *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies (*Vavilov* at para 23). This presumption can be rebutted in the presence of (1) a clear legislative intention to prescribe a different standard of review, or (2) the types of questions in which the rule of law requires the application of the standard of correctness, such as constitutional question, questions of law of central importance to the legal system, and questions regarding the jurisdictional boundaries between administrative bodies (*Vavilov* at paras 33-64).

[24] The Applicant argues that the impugned decision should be reviewed on the correctness standard because the RAD decision violates the principles of natural justice and does not adhere to the proper test for the determination of whether a viable IFA exists. In essence, the Applicant argues that the RAD conducted a speculative and incomplete analysis of his persecution claims concerning Islamabad that raises "general questions of law of central importance to the legal system as a whole" citing *Vavilov* at paras 53, 58-59.

[25] I disagree. First, I find that the RAD did identify and follow the appropriate test in its review and determination with respect to a viable IFA. These are issues that do not engage with questions of central importance to the legal system, as the decision involves specific issues that

most directly affected the Applicant. In addition, I am not convinced that there was any lack of procedural fairness attributable to the RAD. In my view, the general points of contention in this case relate to the RAD's inquiry into the availability of an IFA. This type of issue is one that arises within the context of the RAD's delegated authority (*Vavilov* at para 30). Consequently, this issue must be examined according to a reasonableness standard (*Vavilov* at paras 73-143).

VI. Review

[26] The question of whether an IFA exists is an essential component of the refugee system. The IFA concept flows from the definition of convention refugee and helps ensure that international refugee law serves as a backup to the national protection when such protection is inadequate (*Dejo Dillon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 381 at para 8; James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge (United Kingdom): Cambridge University Press, 2014) at 332-333; UNHCR *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003 at para 6 [UNHCR *Guidelines on International Protection*]; Jamie Chai Yun Liew and Donald Galloway, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2015) at 341-342).

[27] In essence, the IFA concept helps ensure that persecuted individuals first approach their own country before seeking protection through the international refugee system (*Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 at para 18).

[28] The RAD found that the Applicant's safety would be assured in Islamabad and that it would not be unreasonable for him to seek refuge there. In particular, the RAD concluded that there was no evidence that the alleged agents of persecution would pursue him in Islamabad, and that the Applicant could earn a living there as a businessperson. On the basis of these factors, the RAD confirmed the RPD's conclusion that an IFA was available to the Applicant.

[29] In *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 710 [*Rasaratnam*], as well as in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 [*Thirunavukkarasu*]), this Court established a two-prong test to be applied in determining whether there is an IFA. Under the two-prong IFA test, it is required that:

> i. there is no serious possibility of the individual being persecuted in the IFA area (on the balance of probabilities); and
>
> ii. conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there
>
> (See also *Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 19; *Titcombe v Canada (Citizenship and Immigration)*, 2019 FC 1346 at para 15 [*Titcombe*]).

[30] Both prongs must be satisfied for a finding that the claimant has an IFA. This two-prong test ensures that Canada complies with international norms regarding IFAs (UNHCR *Guidelines on International Protection* at paras 7, 24-30).

[31] In *Gallo Farias v Canada (Citizenship and Immigration)*, 2008 FC 1035 at paragraph 34 [*Gallo Farias*], Mister Justice Kelen provided a "checklist of legal criteria" that further clarifies this Court's case law on the availability of an IFA:

1. If IFA will be an issue, the Refugee Board must give notice to the refugee claimant prior to the hearing (*Rasaratnam*, supra, per Mr. Justice Mahoney at paragraph 9, *Thirunavukkarasu*) and identify a specific IFA location(s) within the refugee claimant's country of origin (*Rabbani v. Canada (MCI)*, [1997] 125 F.T.R. 141 (F.C.), supra at para. 16, *Camargo v. Canada (Minister of Citizenship and Immigration)* 2006 FC 472 (CanLII), 147 A.C.W.S. (3d) 1047 at paras. 9-10);

2. There is a disjunctive two-step test for determining that there is not an IFA. See, e.g., *Rasaratnam*, supra; *Thirunavukkarasu*, supra; *Urgel*, supra at para. 17.

    i. Either the Board must be persuaded by the refugee claimant on a balance of probabilities that there is a serious possibility that the refugee claimant will be persecuted in the location(s) proposed as an IFA by the Refugee Board; or

    ii. The circumstances of the refugee claimant make the proposed IFA location unreasonable for the claimant to seek refuge there;

3. The applicant bears the burden of proof in demonstrating that an IFA either does not exist or is unreasonable in the circumstances. See *Mwaura v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 748 (CanLII) per Madame Justice Tremblay-Lamer at para 13; *Kumar v. Canada (Minister of Citizenship and Immigration)* 130 A.C.W.S. (3d) 1010, 2004 FC 601 (CanLII) per Mr. Justice Mosley at para. 17;

4. The threshold is high for what makes an IFA unreasonable in the circumstances of the refugee claimant: see *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449 (CanLII), per Mr. Justice Russell at paragraph 41. In *Mwaura*, supra, at para. 16, and *Thirunavukkarasu*, supra, at para. 12, whether an IFA is unreasonable is a flexible test taking into account the particular situation of the claimant. It is an objective test;

5. The IFA must be realistically accessible to the claimant, i.e. the claimant is not expected to risk physical danger or undue hardship in traveling or staying in that IFA. Claimants are not compelled to hide out in an isolated region like a cave or a desert or a jungle. See: *Thirunavukkarasu*, supra at para. 14; and

> 6. The fact that the refugee claimant has no friends or relatives in the proposed IFA does not make the proposed IFA unreasonable. The refugee claimant probably does not have any friends or relatives in Canada. The fact that the refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make the IFA unreasonable. The same may be true in Canada; and

[32] The Applicant submits that the RAD committed errors in respect of both prongs of the *Rasaratnam-Thironavukkarasu* test.

[33] I will address each prong in turn. As a preliminary matter, the Applicant submits that the RAD committed an error when it determined that the agents of persecution are no longer interested in harming the Applicant, and yet also determined that there existed a viable IFA. There is an inconsistency, argues the Applicant, in the analysis as the RAD only speculated as to whether the threat continued to exist; the Applicant argues that one cannot speculate as to the existence of such a risk and then find that an available IFA exists.

[34] I do not accept the Applicant's argument. The RAD clearly, at the outset, analyzed the determination of risk and concluded that no such risk of persecution or threat to life continued to exist in the event the Applicant was to return to Pakistan.

[35] Thereafter, and for the very limited purpose of reviewing the IFA option, the RAD stated: "even if the panel had believed that the claimant had been assaulted and threatened in the manner alleged, which is not the case, it would still have rejected this refugee claim because it would have assessed that the claimant would have had an internal flight alternative (IFA) in his country, in particular in the capital city Islamabad."

[36] Consequently, the RAD did not speculate, but only assumed, for the purpose of determining the existence of a viable IFA, that the risk continued to exist. I see nothing wrong with that approach, as it did not result, as is suggested by the Applicant, in an inconsistency in the IFA analysis by the RPD.

(1) *First prong - no serious possibility of the individual being persecuted in the IFA*

[37] The crux of the Applicant's argument is that the finding that Islamabad offered an IFA was but a "knee jerk" reaction, unsupported by any analysis as to its viability.

[38] However, in accordance with *Gallo Farias* (at para 34), the Applicant was given a full opportunity to challenge the suitability of Islamabad as an IFA.

[39] From the audio recording of the Applicant's hearing before the RPD, it is clear that the RPD first identified Islamabad as an acceptable IFA location, where the Applicant would not be exposed to a risk of persecution (*Utoh v Canada (Citizenship and Immigration)*, 2012 FC 399 at para 20).

[40] During the interview, the RPD member asked the Applicant why he left to go to Karachi, and whether he could live elsewhere in Pakistan such as Islamabad. The Applicant responded that he tried to resettle in Karachi but that he was scared that the persecutors would kill him. The Applicant did not specifically respond as to whether he could or could not live in Islamabad, but did claim that he would not be safe anywhere in Pakistan due to the agents of persecution's countrywide network.

[41] As to the viability of the IFA, the Applicant argues that the threatening telephone calls received by the Applicant while he was living in Karachi, as well as his friend's affidavit confirming that the assailants were still returning to the Applicant's business in Sahiwal, demonstrate the continued nature of his risk of persecution, even in Islamabad.

[42] During the hearing, the Applicant's counsel addressed the possibility of an IFA and argued that documentary evidence suggests that the Pakistani police force is inefficient, corrupt, and may be complicit with the persecuting organizations. Counsel postulated that certain members of the police force could leak the Applicant's location to the persecutors. According to the Applicant's counsel, the possibility of a leak undermines the possibility of an IFA.

[43] In its reasons, the RAD examined several components of the Applicant's fear of persecution regarding Islamabad. The RAD determined that the agents of persecution had no interest in chasing the Applicant to Islamabad since his drugstore was closed and he stopped selling contraceptives. The RAD also noted that the Applicant had failed to provide evidence as to the aggressors' ability or intentions to find him in Islamabad.

[44] Regarding the threatening telephone call received by the Applicant while he was in Karachi, the RAD determined that the Applicant could avoid these types of calls by changing his telephone number from the one he used for his drugstore. In any event, there was no evidence as to where the assailants were calling from, or that they knew that the Applicant was in Karachi at the time of the call.

[45] The RAD determined that the friend's report indicating that the assailants were returning to the Applicant's former drugstore looking for him simply shows that the aggressors were unaware of the Applicant's whereabouts. The RAD also determined that the lack of threats directed against the Applicant's spouse and children in Karachi or his father and siblings in Sahiwal shows that the aggressors have little interest in targeting the Applicant. Mere suspicions of being hunted in one's home country is insufficient to preclude an otherwise acceptable IFA location (*Kumar v Canada (Citizenship and Immigration)*, 2012 FC 30 at para 35).

[46] As a result, and with the burden of proof being on the Applicant, the RAD ruled that the Applicant had not discharged his burden to show that relocation to the proposed IFA would expose him to an unacceptable risk (*Gallo Farias* at para 23; *Thirunavukkarasu* at para 12; *Mwaura v Canada (Citizenship and Immigration)*, 2008 FC 748 at para 13; *Whenu v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1041 at para 11).

[47] According to the RAD, the Applicant failed to provide sufficient evidence as to his risk of persecution in Islamabad. I see nothing unreasonable about the RAD's findings on this issue, and thus no reason to disturb the RAD's determination under the first prong of the *Rasaratnam-Thironavukkarasu* test.

(2) *Second Prong: Was it reasonable for the Applicant to seek refuge in Islamabad?*

[48] Before this Court, the Applicant submits that the RAD's analysis under the second prong of the *Rasaratnam-Thironavukkarasu* test was incomplete because it failed to address the full

range of issues in determining whether, even if the first prong was met, it was reasonable for the Applicant to seek refuge in Islamabad.

[49] According to the Applicant, the RAD simply contented itself with the fact that the Applicant is a businessperson who could find suitable work and housing in Islamabad. Instead, the Applicant submits that the RAD should have addressed the full range of issues related to the IFA location, namely, transportation and travel, language, education, accommodation, religion, indigenous status and the availability of healthcare. In support of this argument, the Applicant cites a case from the RAD, one that does not cite a legal basis for the enumerated factors. The Applicant believes that the RAD unjustifiably omitted to address these issues.

[50] In its decision, the RAD claimed that the Applicant did not contest the RPD's analysis under the second prong. To the Applicant, this justification misconstrues the written argumentation in his appeal memorandum, wherein he challenges the RPD's lack of analysis as to the sufficiency of state protection in Islamabad.

[51] The Respondent agrees with the RAD, and argues that it was unnecessary to address each factor because the second prong of the test was uncontested by the Applicant. Moreover, the Respondent argues that the Applicant has not provided any evidence that shows how the substance of the RAD's determination was unreasonable under the second prong of the test.

[52] I reject the Applicant's arguments for four reasons.

[53] First, the Applicant's argument regarding the 'range of issues' under the second prong was not raised at the RAD level. The Applicant did not raise such arguments in his memorandum at the RAD, despite the Applicant's burden of proof to demonstrate how a proposed IFA would be unsuitable. Indeed, the Applicant merely challenges the RPD's analysis as to the level of state protection in Islamabad, a consideration that relates to the first prong of the *Rasaratnam-Thironavukkarasu* test (i.e., the analysis pertaining to the fear of persecution).

[54] The Applicant's memorandum before the RAD does not mention the factors of transportation and travel, language, education, accommodation, religion, indigenous status and the availability of healthcare. As a result, the Applicant is attempting to raise new legal issues that could have been raised prior to this judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, [2015] 4 FCR 75, 2014 FCA 245 at paras 42-47; *Erasmo v Canada (Attorney General)*, 2015 FCA 129 at para 33).

[55] Second, the Applicant misconstrues the nature of an IFA claim in requiring a full analysis of certain categorized factors. The "reasonable in all the circumstances" standard (of the second prong of the *Rasaratnam-Thironavukkarasu* test) is a high threshold that cannot be defined in an abstract manner. That standard requires "nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area" as well as "actual and concrete evidence of such conditions." (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, 2000 CanLII 16789 (FCA) at para 15, referring to *Thirunavukkarasu* at 597, 599). The relevant "conditions" and types of relevant

"evidence" vary from case to case. If accepted, the Applicant's argument would confine this fact-sensitive inquiry and transfer the burden of proof to the tribunal. These consequences would frustrate the contextual, case-by-case nature of the test.

[56] Third, the Applicant has not provided evidence or made a substantive argument as to Islamabad's inability to provide adequate employment, shelter, transportation, education, healthcare, and services adapted to the Applicant's situation (e.g., language, religion, indigenous status). Instead, the Applicant tries to fault the RAD for not taking upon itself this task. Again, the burden to show how a proposed IFA location is unsuitable lies with the Applicant – not the RAD. It is the Applicant's burden to show how relocation would cause him an undue hardship in the light of the Applicant's particular situation and objective information related to the proposed IFA location (e.g., *Okonkwo v Canada (Citizenship and Immigration)*, 2019 FC 1330 at para 17).

[57] Fourth, the Applicant is essentially asking this Court to reweigh the evidence under this second prong; that is not the role of the Court in judicial review proceedings (*Vavilov* at para 125; *Akinfolajimi v Canada (Citizenship and Immigration)*, 2018 FC 722 at paras 27-28; *Titcombe* at para 22; *Khosa* at para 61).

VII. Conclusion

[58] The application for judicial review is dismissed.

JUDGMENT in IMM-2784-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mark J. Gruszczynski	FOR THE APPLICANT
Erin Morgan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Immigration Team Westmount, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT