Federal Court  Cour fédérale

Date: 20201120

Docket: IMM-6178-19

Citation: 2020 FC 1077

Ottawa, Ontario, November 20, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

TANWEER-UL-HAQ MANZOOR-UL-HAQ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB], dated September 18, 2019 [RAD Decision]. In that decision, the RAD confirmed a decision of the Refugee Protection Division [RPD] that the Applicant is not a Convention refugee pursuant to s 96 of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], or a person in need of protection pursuant to s 97 of IRPA.

[2] As explained in greater detail below, this application is allowed, because I have found that the RAD breached its obligation of procedural fairness to give the Applicant notice of its intention to consider internal flight alternatives [IFAs] that were not found viable by the RPD. The only IFA unaffected by this breach was the community of Dadu, with respect to which the RAD failed to conduct a reasonable analysis under the second prong of the IFA test.

II. **Background**

[3] The Applicant is a citizen of Pakistan, who seeks refugee protection in Canada based on an alleged fear of persecution by the Islamic organization Tanzeem-e-Islami [TI] if he returns to Pakistan.

[4] The Applicant worked as a travel agent for several years in Jeddah, Saudi Arabia and Dubai, United Arab Emirates. He returned to Pakistan in 2015 and lived in Rawalpindi. In June of 2016, the Applicant traveled to Teri, Pakistan to spend the Eid holiday with his family. He alleges that, while in Teri, he received a call on his cell phone asking him for a financial donation and telling him that he was not welcome back after living abroad. Soon after, he found a stone in front of his family's home with a paper note wrapped around it that demanded 1,000,000 rupees. The Applicant alleges that he went to the police, but they did not file a complaint. Roughly one week later, the Applicant received another call. This time the caller stated that he knew that the Applicant had gone to the police and threatened to punish him for doing so.

[5] The Applicant alleges that, the following month, he was attacked near his family home in Teri by two men who identified themselves as “Islami Tazeem” (another name for the TI). The men threatened to kill his family if he did not pay the requested money. After this attack, the Applicant’s wife and son returned to Rawalpindi and stayed with the Applicant’s uncle. The Applicant left for Canada on July 18, 2016. He alleges that members of the TI went to his uncle’s home and physically attacked his brother-in-law. After this incident, the Applicant’s wife and son moved to a friend’s house and stopped attending work and school.

[6] The Applicant also believes that the TI obtained information about him through an extended family member named Waqas who lives in Teri. The Applicant suspects Waqas is an informant for the TI.

III. **The RPD Decision**

[7] In a decision dated March 27, 2018 [the RPD Decision], the RPD rejected the Applicant’s claim for refugee protection, finding that the Applicant was not a credible witness and, in the alternative, that there were viable IFAs for the Applicant in two communities in Pakistan – Dadu and Kasur.

[8] The RPD rejected the Applicant’s testimony that the TI could find him anywhere in Pakistan, preferring objective documentary evidence in the record indicating that the TI is a non-violent group whose goal is to establish an Islamic caliphate in Pakistan and the imposition of sharia law, and whose reach is restricted to major cities. The RPD found on a balance of probabilities that TI members are peaceful activists and that the Applicant’s problems were

localized to Teri and Ralwapindi and were perpetuated by rogue individuals from the TI operating under their own agenda. The RPD was not persuaded that the TI would be interested in pursuing the claimant to the proposed IFAs, because their motivation for pursuing the claimant would be to obtain donations, which they could obtain from others in the local area.

IV. **The RAD Decision**

[9] The Applicant filed an appeal of the RPD Decision with the RAD, submitting that the RPD had erred in its credibility findings and in its assessment of the IFAs.

[10] The RAD found that, on balance, there was no persuasive evidence that the Applicant is facing harm from an "Islamic organization" or, more specifically, the TI. The RAD noted that, in the Applicant's testimony, when asked who he was afraid of, the Applicant simply replied that it was an "Islamic organization." Additionally, letters and affidavits provided by the Applicant described the perpetrators of the threats and actions against him as "unknown persons" or "somebody." The RAD found that, if the group pursuing the Applicant was known to him, the authors of the documents provided to support his claim would have identified the group in those documents.

[11] The RAD also noted that the Applicant testified that he and his family suspected his relative, Waqas, of leaking information to the "group" and that some of his family members saw Waqas associating with individuals carrying guns. However, the RAD found that the Applicant's evidence indicated that Waqas is simply a local criminal. The RAD found that the Applicant's extortion based problems were limited and local to his home region.

[12] Turning to the IFA analysis, the RAD noted that, during the RPD hearing, the RPD asked the Applicant whether he could live in Multan, Lahore, Karachi or Hyderabad, as well as smaller centers such as Kasur or Dadu. Ultimately, the RPD found that the Applicant has a reasonable IFA in Kasur or Dadu.

[13] The RAD applied the two-pronged test from *Rasaratnam v Canada (Minister of Employment & Immigration)*, [1992] 1 FC 706 [*Rasaratnam*], to assess whether there was a viable IFA available to the Applicant. Under the first prong, the RAD must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted, or personally subject to a risk to life, cruel or unusual punishment, or torture in the part of the country where it finds an IFA exists. Under the second prong, the conditions in the location considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. The RAD noted that both prongs must be satisfied to find that the Applicant has an IFA and that he has the burden of proof to show that he does not have an IFA.

[14] Under the first prong of the test, the RAD found no serious possibility of the claimant being persecuted or at personal risk. The RAD reviewed country condition evidence from the United Kingdom Home Office and the United Nations High Commissioner for Refugees [UNHCR] concerning the opportunities for individuals to seek refuge from discrimination or violence by relocating within Pakistan. The RAD noted that the UNHCR document stated that certain militant groups may have reach beyond their physical point of origin, but that this document did not specifically reference the TI.

[15] The RAD reasoned that, in order to target the Applicant in Multan, Lahore, Karachi, Hyderabad, Kasur or Dadu, the agent of persecution would be required to: (1) learn the Applicant had returned to Pakistan, (2) learn the Applicant had relocated to any of the IFA locations, and (3) determine the whereabouts of the Applicant in that location. The RAD found that it would take a significantly organized entity to target the Applicant in one of the proposed IFA locations, given the geographic size of Pakistan, the large number of ports of entry into the country and the population of the proposed IFA locations. The RAD noted that it had reviewed the Applicant's submissions and the available documentary evidence, and found that there was not sufficient credible evidence to establish that Waqas or the TI have the operational capacity or geographic reach to learn of the Applicant's return to Pakistan at a particular port of entry to the country or to trace the Applicant's movements within Pakistan.

[16] Turning to the second prong of the *Rasaratnam* test, the RAD considered whether it would be unreasonable, in all the circumstances, for the claimant to seek refuge in the proposed IFAs. The RAD observed that the RPD questioned the Applicant about his ability to reside in Multan, Lahore, Karachi or Hyderabad, Kasur or Dadu and that he testified that his only concern was that the TI can find him anywhere. He explained that he was located and persecuted in Rawalpindi. However, the RAD was not persuaded that the ability of the agent of persecution to locate the Applicant's family at his uncle's house in Rawalpindi indicated that he could be found at the IFAs. Rawalpindi is only 200 km from Teri, and the Applicant traveled between Teri and Rawalpindi regularly. The RAD found it reasonable to believe that Waqas, a family member, would expect the Applicant to seek refuge with family at a location he was known to frequent. In

contrast, the Applicant's wife and child have resided safely with a friend in Rawalpindi since October 2016.

[17] The RAD noted that counsel for the Applicant made post-hearing submissions to the RPD and did not raise any specific concerns about the potential IFA locations, beyond the wide reach of extremist groups in Pakistan. However, the RAD observed that, in his memorandum in support of the appeal, the Applicant submitted that language and employment barriers make Kasur an unsuitable IFA, although without any evidentiary support as to the source of his information. The Applicant further argued that he should be provided notice and an additional opportunity to respond if any of the other IFA locations were considered by the RAD. The RAD found that no additional notice was necessary in the circumstances, because the Applicant was on notice at the RPD hearing of the potential IFA locations that were under consideration, and the Applicant was provided with two opportunities to submit additional evidence or make additional submissions.

[18] With respect to the proposed IFA in Kasur, the RAD found that, from Kasur, the Applicant could commute for employment the approximately one hour to Lahore, a major urban centre of over 10 million people, where he would face little risk. The RAD noted that the Applicant has a secondary school education, is an experienced international traveller, and has resided in a number of locations. He speaks Urdu (the national language of Pakistan), Pashto and English and testified that he had found employment in Dubai, where his primary language was not that of the country where he resided. The RAD found that the Applicant had not adduced any

evidence to confirm that there are any circumstances or conditions that make any of the proposed locations unreasonable IFAs.

[19] The RAD relied on *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 [*Thirunavukkarasu*] for the test for reasonableness under the second prong. It noted that the hardship associated with dislocation and relocation is not considered undue hardship that renders an IFA unreasonable, nor is a lack of friends and relatives in the IFA, or a possibility that the Applicant may not be able to find suitable work there. The RAD found, on a balance of probabilities, there were no serious social, economic, or other barriers to the Applicant relocating to Multan, Lahore, Karachi, Hyderabad, Dadu or Kasur.

[20] Having found that both prongs of the *Rasaratnam* test were met, the RAD dismissed the appeal and confirmed the decision of the RPD that the Applicant is neither a Convention refugee, nor a person in need of protection.

V. **Issues and Standard of Review**

[21] The Applicant raises the following issues in this application for judicial review:

A. Was the RAD Decision procedurally unfair?

B. Did the RAD make unreasonable findings with respect to IFA?

[22] The Applicant submits, and I concur, that the first issue is reviewable on the standard of correctness and the second issue on the standard of reasonableness.

VI. **Analysis**

[23] While the Applicant advances several procedural fairness arguments, the submission which resonates with me is the position that, before making an IFA determination related to locations that had not been found viable by the RPD, the RAD was obliged to give the Applicant notice that those locations were under consideration.

[24] As the Applicant submits, if the IRB considers that a claimant may have a viable IFA, it must give notice of that issue to the claimant. The burden then shifts to the claimant to establish that the proposed IFA is unreasonable (see *Thirunavukkarasu v Canada (MEI)*, [1994] 1 FC 589 (FCA) [*Thirunavukkarasu*] at para 10).

[25] The Respondent submits that this notice obligation was met because, as reflected in the RPD Decision, the RPD proposed consideration of six IFA locations (Multan, Lahore, Karachi, Hyderbad, Dadu and Kasur). The Respondent therefore argues that the Applicant was not "blindsided" by the RAD's decision to analyse all six possible IFAs. However, the RPD ultimately found only Dadu and Kasur to meet the test of being viable IFAs. The Applicant therefore argues that, if the RAD wished to consider as IFAs the four locations other than Dadu and Kasur, it was required to give him notice.

[26] I agree with the Applicant's submission. In *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 [*Ojarikre*] at para 9, Justice Annis held that there is a failure of procedural fairness where the RAD raises a new issue that was not determined by the RPD,

without first providing an opportunity to file new documentary evidence and submissions on the point, because it deprives the claimant of an opportunity to make submissions to the RAD on the issue that the RAD considers to be determinative of the matter. That authority involved a situation where the IFA issue was raised before the RPD, but the RPD made no determination on the issue. I therefore find *Ojarikre* applicable to the case at hand, where the RPD raised six IFA locations for consideration but made determinations with respect to only two of them. The RAD was required to give the Applicant notice before making determinations with respect to the other four IFAs.

[27] The Respondent makes a more compelling argument that this breach of procedural fairness (related to IFAs in Multan, Lahore, Karachi and Hyderbad) does not relate to a determinative issue, because the RAD also found that the Applicant had viable IFAs in Dadu and Kasur. As the Respondent submits, the Applicant does not dispute that the RAD was entitled to consider Dadu and Kasur without further notice to him. Therefore, if the RAD's determination, with respect to either of Dadu and Kasur, is free of reviewable error, this application for judicial review must fail.

[28] However, the Applicant also raises issues surrounding the RAD's application of the *Rasaratnam* test to both Dadu and Kasur. As explained below, I agree with the Applicant that the RAD erred in relation to these IFAs, although for different reasons in relation to each of the two locations.

[29] In relation to Kasur, the RAD's assessment is affected by the failure of procedural fairness described above. The Applicant raised concerns before the RAD about being able to find employment in both Kasur and Dadu. In applying the second prong of the *Rasaratnam* test in response to that concern, the RAD relied significantly on the conclusion that the Applicant could live in Kasur and commute to work in the nearby city of Lahore. The Applicant argues that the RAD erred in assessing the risk of him being identified by the TI in Lahore. I need not make a finding on the reasonableness of that risk assessment, as the RAD erred by failing to give notice that Lahore was under consideration before conducting that assessment.

[30] I appreciate that this component of the Decision does not expressly relate to Lahore as an IFA, but rather to the viability of Kasur. However, if the viability of Kasur turns on the possibility of working in Lahore, then the viability of Lahore is also engaged in this component of the analysis. The procedural fairness issue identified above is therefore also engaged.

[31] The Respondent argues that it is artificial to assess separately a city and one of its suburbs. The Respondent therefore argues that notice to the Applicant that Kasur is under consideration permits consideration of Lahore as well. The Applicant responds to this argument by emphasizing the explanation by the Federal Court of Appeal in *Thirunavukkarasu* that the IRB must give notice to a claimant if an IFA is going to be raised. I agree with the Applicant that this requires notice of the specific location under consideration. The Applicant did not receive the required notice that the RAD was examining the viability of Lahore as an IFA. It was therefore a reviewable error for the IFA to take the availability of employment in Lahore into account in applying the second prong of the *Rasaratnam* test to Kasur.

[32] The remaining question is whether the RAD erred in its assessment of Dadu as an IFA. There is no procedural fairness issue associated with this assessment. However, the Applicant argues that this component of the Decision is unreasonable, as it does not disclose an analysis of the viability of Dadu under the second prong of the *Rasaratnam* test.

[33] In response to this argument, the Respondent submits that the Applicant is taking too microscopic a view of the RAD's reasons. The Respondent argues that the RAD took into account the Applicant's background, including his education, history of employment and travel, and failure to explore relocation within Pakistan as a means of escaping persecution, and concluded that it would not be unreasonable for the Applicant to relocate to either Kasur or Dadu.

[34] The RAD's conclusion under the second prong of the test does extend to Dadu, as it found that there were no serious social, economic or other barriers to the Applicant relocating to any of the six IFAs under consideration. However, I agree with the Applicant that the Decision does not disclose an analysis that justifies this conclusion in relation to Dadu.

[35] The Applicant's Memorandum in support of his appeal to the RAD raised concerns about language and employment in relation to both Kasur and Dadu. The Applicant is a travel agent, and his wife is a teacher. In relation to Dadu, he explained that neither he nor his wife speaks Sindhu, the language spoken in Dadu, and that Dadu is primarily a farming community of approximately 150,000 people without an international airport. He therefore submitted that neither he nor his wife would be able to find employment in Dadu.

[36] As the Respondent points out, the Decision notes the Applicant's secondary school education, experience as an international traveller, and past residence and employment without resettlement concerns in a number of locations. However, the RAD's analysis does not engage with the arguments raised by the Applicant in relation to Dadu. Its analysis focuses upon the possibility of living in Kasur and working in Lahore, as a response to the Applicant's concerns related to employment and language in Kasur. The Decision discloses no comparable analysis related to Dadu.

[37] I also note that, in introducing its analysis under the second prong of the *Rasaratnam* test, the RAD stated, "In his Memorandum, the Appellant now submits that Kasur is an unsuitable location because of language and employment barriers …" [my emphasis]. The fact the RAD referenced only Kasur, and not Dadu, in relation to the Applicant's submissions, lends support to the Applicant's position that the Decision does not disclose a reasonable analysis with respect to Dadu.

[38] I therefore conclude that this application for judicial review must be allowed and the matter returned to the RAD for re-determination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6178-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is returned to a differently constituted panel of the Refugee Appeal Division for re-determination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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