Federal Court Cour fédérale

Date: 20220727

Docket: IMM-1467-20

Citation: 2022 FC 1123

Ottawa, Ontario, July 27, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ZHUOYAN WU (a.k.a. Zhuo Yan Wu)
HUIQIN CAO (a.k.a. Hui Qin Cao)
JIN PENG WU
ZIXIN WU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a peculiar case.

[2] This judicial review application challenges a decision of the Refugee Appeal Division (RAD) which confirmed that the Applicants have an internal flight alternative (IFA) in Guyana,

the country they have fled to eventually seek the protection of Canada, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

[3] At the outset of the hearing of this application, the Court raised the issue of whether or not the existence of an IFA can validly be before the Court. If it cannot be before the Court, the judicial review application must be dismissed. To put it another way, does the Court have jurisdiction to entertain the issue of the existence of an IFA? If not, should the RAD have considered the other issues advanced by the Applicant?

I. The issue

[4] The Applicants, in their memorandum of fact and law before this Court, argue that the RAD's finding that they have an IFA in Guyana was unreasonable. The Applicants also raise other issues. Here is the list found in paragraph 8 of their written case:

> ● the RAD erred by failing to assess the most recent NPD on Guyana;
>
> ● the RAD erred in finding that the Applicants do not face risk of persecution on the basis of their Chinese ethnicity;
>
> ● the RAD failed to assess the risk faced by the Applicants based on the grounds of particular social group;
>
> ● the RAD failed to assess the risk faced by the Applicants based on the ground of political opinion;
>
> ● the RAD failed to assess the Applicants' risks under s. 97.

[5] At the hearing before the Court, counsel for the Applicants readily acknowledged that he was not counsel before the RPD and the RAD, which may help explain the confusion that

resulted in this case. As a result of that confusion, this Court does not have jurisdiction to entertain the judicial review application. Here is why.

[6] The various grounds raised in this judicial review application were not addressed by the RAD. As a matter of fact, the RAD specifically finds that the "Appellants have made a number of other submissions. However, I find it unnecessary to comment on these in light of my finding above" (RAD decision, para 56). The "finding above" refers to the confirmation by the RAD that there exists an IFA for these Applicants. The issue before the Court is whether or not the IFA issue is validly before it. For that to be the case, it must have been before the RAD in order for the issue to be made a judicial review application.

[7] I note that a fourth appellant before the RAD, Zixin Wu, the daughter of the two principal applicants, was successful before the RAD in her appeal and her case was sent back to the RPD for redetermination in accordance with paragraph 111(2)(a) of the Act.

II. Analysis

A. *The RPD decision*

[8] The determinative issue in this case is the presence of an IFA. It is essential that it be understood how it was dealt with by the RPD and the RAD. We have to begin with the RPD decision. In that decision, the administrative tribunal reached two conclusions. First, it found that the Applicants did not establish a well-founded fear in Guyana. Second, the RPD found that the Applicants had an IFA in Guyana. Applying the two-part test as developed by the Federal Court

of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 [*Rasaratnam*] and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 [*Thirunavukkarasu*], and endorsed later in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 [*Ranganathan*], the RPD concluded to the existence of an IFA. The RPD sought post-hearing submissions, as indicated at paragraph 52 of the RPD decision, and received documentation that Mahida would be an appropriate location (another location was said to be Linthem). There is no doubt that the presence of an IFA was a live issue before the RPD.

[9] As is well known, the conclusion that an IFA exists means that a person is not a refugee. That is because the very definition of a Convention refugee requires that the person be a refugee of a country, not a refugee from a region of a country or a subdivision. Linden J.A. took great care in *Thirunavukkarasu* to explain the nature of an IFA, at pages 592 and 593.

> Despite the decision of this Court in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706, there remains some confusion about the nature of "the internal flight alternative" in Convention refugee claims. It should first be emphasized that the notion of an internal flight alternative (IFA) is not a legal defence. Neither is it a legal doctrine. It merely is a convenient, short-hand way of describing a fact situation in which a person may be in danger of persecution in one part of a country but not in another. The idea of an internal flight alternative is "inherent" in the definition of a Convention refugee (see Mahoney J.A. in *Rasaratnam*, *supra*, at page 710); it is not something separate at all. That definition requires that the claimants have a well-founded fear of persecution which renders them unable or unwilling to return to their home country. If claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country. As Mahoney J.A. stated in *Rasaratnam*, *supra*, at page 710: …
>
> [My emphasis.]

As the Federal Court of Appeal in *Rasaratnam* said at p 710, “It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee”. The same notion is found in *Thirunavukkarasu* where one reads that “If it is objectively reasonable to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee”. That passage is quoted with approval in *Ranganathan*.

[10] It follows that the existence of an IFA is determinative of a claim for refugee status. The RPD said that much at paragraph 14 of its decision: “The determinative issues in the decision are credibility, nexus, subjective fear, state protection, and internal flight alternative (IFA)”. The RPD having found that there existed an IFA, that disposed of the refugee claim because the claimant is not a refugee.

B. *The RAD decision*

[11] When we examine the RAD decision, we are struck by a number of statements made therein to the effect that the IFA finding of the RPD was not made the subject of the appeal before the RAD (RAD decision, paras 12, 16, 17, 34 and 42). It would therefore appear that the matter of the existence of an IFA was not before the RAD. The finding of the existence of an IFA was left undisturbed by the Applicants.

[12] At the hearing of the judicial review application, the Court raised the issue, noting that the RAD repeatedly stated that the IFA finding of the RPD had not been contested. Neither counsel before the Court was acting before the RPD or the RAD (the Applicants were represented by the same counsel before both administrative tribunals, but a new counsel was

acting for them before this Court). Counsel for the Applicants before the Court conceded that it seemed that there was no appeal launched of the finding of the existence of an IFA before the RPD. Nevertheless, the Court sought from the parties submissions on whether an appeal was launched and whether the lack of an appeal on a determinative issue is fatal.

[13] Both counsel offered written submissions. Counsel for the Applicants confirmed that the Applicants' submissions to the RAD did not include submissions about the existence of an IFA; the only issues raised concerned credibility, subjective fear, state protection and nexus. Counsel also submits that the RPD made its determination on the basis of five issues – none of which it indicated was determinative. As I have pointed out at paragraph 10 hereinabove, that is not so as paragraph 14 of the RPD decision attests. The IFA was said to be a determinative issue. At any rate, there is little doubt that the IFA on its own constitutes a determinative issue as a claimant found to have an IFA cannot be a refugee. A refugee claim cannot succeed.

[14] The Applicants seek to rely on the decision in *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 [*Ghauri*] for the proposition that "the IFA analysis taken by the RPD does not stand alone from the other issues appealed by the Applicants" (written submissions, para 7). In fact, *Ghauri* is of no assistance to the Applicants. Although the facts in *Ghauri* may resemble those in the case at bar, the decision never addresses the central issue of whether the absence of an appeal of the IFA decision prevents a consideration of the issue. The Court is careful to limit the scope of its ruling by writing at paragraph 34 that "my decision on these facts should not detract from the following principle that emerges from the case-law: appellants before the RAD that fail to specify where and how the RPD erred do so at their peril".

[15] In fact, the "peril" is that the lack of a proper appeal entails that there was no matter relative to an IFA that was before the RAD. Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257, provides specifically as follows:

> 3(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:
>
> (g) a memorandum that includes full and detailed submissions regarding
>
> (i) the errors that are the grounds of the appeal,
>
> (ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,
>
> (iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,
>
> (iv) the decision the appellant wants the Division to make, and
>
> (v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.

The Applicants never brought before the RAD the issue of the existence of an IFA as found by the RPD. Counsel for the Applicants very fairly conceded that the matter was not raised before the RAD. The jurisdiction of the Court to hear a judicial review application in circumstances like those in this case was never established.

[16] In *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 [*Dhillon*], Justice René LeBlanc, then of this Court, after noting that the "RAD is a creature of statute and so is the appeal before it" (para 14), summarized helpfully what is entailed by Rule 3(g):

> [16] According to subsection 3(g) of the Rules, an appellant before the RAD must file a record that includes, *inter alia*, the RPD's decision, all or part of the transcript of the RPD hearing, any documents the RPD refused to accept but that the appellant wants to rely on in the appeal, as well as a memorandum containing the full and detailed submissions regarding, in particular: (a) the errors that are the grounds of the appeal; (b) where the errors are located in the RPD's written decision, in the transcript of the hearing or in any audio or electronic recording of the hearing; and (c) the decision the appellant wants the RAD to reach.
>
> …
>
> [18] In sum, the appeal before the RAD (i) is directed at the decision of the RPD, (ii) unless new evidence is accepted, is to be entertained on the basis of the record as it was constituted at the time of the RPD's decision, and (iii) is to be concerned solely with the errors of law, of fact or of mixed fact and law that, according to the appellant, the RPD made. This is the statutory configuration of an appeal before the RAD.
>
> [19] This statutory configuration does not fit with the Applicants' argument that the RAD's authority to substitute its decision to that of the RPD entails a duty to speculate as to what might have been a better approach to a failed refugee claimant's appeal and to ultimately find that the claim should have been accepted based on risks that were not raised by the claimant in the first place.
>
> [20] This approach not only offends the statutory scheme but it conflicts with the principle that the onus is on a refugee claimant to prove his or her claim and to establish that the RPD erred in a way that justifies the intervention of the RAD. It is not the RAD's function to supplement the weaknesses of an appeal before it, or, for that matter, of the refugee protection claim presented in the first place. It is also not its role to come up with new ideas that might assist appellants in succeeding with their appeal and, ultimately, their refugee claim.
>
> [My emphasis.]

Dhillon stands for the proposition that the RAD is limited to what is contained in the appeal launched. It addresses the matters, be they errors of law, of fact or of mixed fact and law, which

are submitted to it. Here, the Applicants never appealed the finding of an IFA. *Stricto sensu*, the issue was never before the RAD.

[17] That is what, in my estimation, happened here. There was no appeal pending before the RAD of the finding made by the RPD that there existed an IFA. There was not anything before the RAD to identify errors that should have been considered for the purpose of ruling on the existence of an IFA. The creature of statute did not have an appeal before it to rule on.

[18] In *Broni v Canada (Citizenship and Immigration)*, 2019 FC 365, our Court found that an issue not raised before the RAD, as required by Rule 3(3)(g), does not create an obligation to consider the issue:

> [14] The Applicant argues that, although this issue was not raised directly with the RAD, it can still be raised in the context of this judicial review as the RAD has an obligation to conduct an independent assessment of the evidence and of the RPD decision. In effect, the Applicant is arguing that even if he did not identify an error by the RPD, the RAD still has an affirmative obligation to identify errors of the RPD.
>
> [15] While I agree with the Applicant that the RAD has an obligation to conduct an independent assessment of the evidence and of the RPD decision, the RAD does so within the parameters of Rule 3(3)(g). This *Rule* makes it clear that it is the Applicant's obligation, and not the RAD's obligation, to identify errors made by the RPD and to make submissions accordingly. It is neither logical nor reasonable to expect the RAD to search the record and find something to make the case for the Applicant. In fact, this approach has been specifically denounced in the guiding case of *Dhillon*.
>
> [My emphasis.]

In effect, the issue that the Applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act because an internal flight alternative is available never reached the RAD. That is because there was no appeal of that finding by the RPD. Such finding is evidently dispositive of a refugee claim.

[19] The Applicants also argue that the RAD relied on a new issue with its singular focus on the IFA, which amounts to a new issue. There is of course little doubt in my view that if the RAD raises an issue on appeal which is new, an opportunity must be offered to the parties to be heard. But such is simply not the case on the facts of this case.

[20] As I understand it, it is suggested that the fact that the IFA was not raised on appeal makes it a new issue. This is an odd proposition. The Applicants assert that the RAD was in error in making the existence of an IFA the only determinative issue because the Applicants did not have any idea "that IFA was or could have been determinative in the circumstances given that this was never mentioned by the RPD" (Applicants' written submission of November 26, 2021, at para 13). That is not accurate. The RPD stated that the IFA issue was determinative, and it is determinative of a refugee claim by operation of the law as emphatically found in three Federal Court of Appeal cases. The argument that the RAD created a "new issue" by making the existence of an IFA the determinative issue and, thus, finding that other issues did not need to be addressed, is to be rejected. A proper reading of the RPD decision reveals that it was always known that the existence of an IFA was dispositive of the case.

[21] The fact that the RPD found the existence of an IFA in Guyana had the effect of disposing of the refugee claim. When the determinative issue is not appealed to the RAD, that constitutes the end of the refugee claim. The other issues raised before the RPD, which are made the subject of the appeal, are concerned with the merits of a refugee claim. However, having found that there is no valid refugee claim in view of an internal flight alternative, it follows that other issues concerned with the merits of a refugee claim become moot. That is the conclusion reached by the RAD, a conclusion that is in my view unassailable.

III. Conclusion

[22] I agree with counsel for the Respondent that the failure to appeal an issue that is dispositive of a refugee claim is fatal to that appeal. The existence of an IFA, as found by the RPD, had the effect of disposing of the refugee claim. One is not a refugee in Canada if there exists a flight alternative in one's own country. There was therefore nothing before the RAD to contest the determinative issue of the existence of an IFA by the RPD. In hindsight, it would have been wiser to reject the appeal. In my view, the further comments on the issue constitute surplusage on the part of the RAD.

[23] As a result, this judicial review application cannot be entertained further as there was no appeal before the Refugee Appeal Division of the IFA issue which was itself dispositive of the refugee claim. The judicial review application must be dismissed.

JUDGMENT in IMM-1467-20

THIS COURT'S JUDGMENT is:

1. The judicial review application is dismissed.

2. There is no question to be certified pursuant to section 74 of the Act.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1467-20
STYLE OF CAUSE:	ZHUOYAN WU ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 10, 2021
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 27, 2022

APPEARANCES:

Vakkas Bilsin	FOR THE APPLICANTS
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT