

Federal Court



Cour fédérale

Date: 20230406

Docket: IMM-6141-22

Citation: 2023 FC 496

Ottawa, Ontario, April 6, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

NAVEED AHMED

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision of the Refugee Appeal Division [RAD] confirming the determination of the Refugee Protection Division [RPD] that he is not a Convention refugee under section 96 of the *IRPA* nor a person in need of protection under section 97.

[2] For the reasons that follow, I will allow the Judicial Review.

II. **Background**

[3] The Applicant is a citizen of Pakistan.

[4] He claims a risk of persecution by the extremist group Sipah-e-Sahaba Pakistan (SSP), Lashkar-e-Jhangei (LeJ), and Jaesh Muhammad (JM) based on his religious faith and activities as a Barelvi (Sufi) Muslim.

[5] The Applicant lived in China from 2009 to February 2020 and married a Chinese national in August 2010. While living in China, the Applicant made regular trips to Pakistan where he visited numerous Sufi shrines and donated to those shrines in the province of Punjab.

[6] The Applicant claims that when visiting Pakistan in December 2019, he was confronted by a group of individuals as he was exiting a shrine in Pakpattan, Punjab. While fleeing, the Applicant heard the group of men call him by name and the sound of a gunshot, which did not hit him. He received assistance from bystanders and later, his uncle.

[7] After this incident, the Applicant's uncle received a phone call from someone who identified himself as the leader of the LeJ. The caller threatened that if the uncle attempted to hide the Applicant, they would kill him too. They also seemed to be aware that the Applicant was married to a non-Muslim Chinese national and accused the Applicant of being guilty of polytheism and idolatry.

[8] The Applicant claims that after the incident a fatwa was issued against him. He subsequently returned to China.

[9] The Applicant applied for permanent residence in China in December 2019, but he was targeted by Chinese authorities after criticizing the government's response to COVID-19.

[10] The Applicant ultimately fled to Canada where he initiated a claim for refugee protection.

[11] On January 7, 2022, the RPD rejected the Applicant's claim. The RPD accepted the Applicant's claim as credible but, because of an available internal flight alternative [IFA] in Hyderabad, Pakistan, the RPD found he was neither a Convention refugee nor a person in need of protection.

[12] On appeal to the RAD, the Applicant argued that the RPD ignored evidence of the fatwa against him in finding that the agents of persecution were not motivated to find him. The Applicant also argued that the RPD erred in failing to consider the relevant UNHCR Guidelines, which indicated there was no viable IFA for individuals in the Applicant's circumstances.

[13] The determinative issue for the RAD was whether the RPD correctly found that the Applicant had a viable IFA in Hyderabad.

III. **Decision under Review**

[14] The RAD confirmed the decision of the RPD.

[15] The RAD concluded that the Applicant did not present sufficient evidence to establish that SSP and LeJ have the ability to locate the Applicant in the proposed IFA.

[16] The RAD also found that as the last threat from the LeJ was in December 2019, the Applicant had not shown that the agents of persecution were motivated to search for him, given the passage of time.

[17] The RAD further held that the Applicant's friends or family would not put themselves in danger by deceiving the agents of persecution, nor would the Applicant need to conceal his location from friends and family.

[18] In light of the above, the RAD concluded that RPD was correct in finding a viable IFA in Hyderabad, and as a result, the Applicant was not a Convention refugee nor a person in need of protection.

IV. **Issues and Standard of Review**

[19] The sole issue in this judicial review is whether the Decision is reasonable. The Applicant raises two sub-issues, both of which relate to the RAD's IFA analysis.

[20] First, the Applicant submits that the RAD erred in applying the wrong legal standard, a balance of probabilities threshold, to the risk assessment under the first prong.

[21] The Applicant further submits that the RAD ignored critical evidence explicitly raised by the Applicant on appeal, which showed that Hyderabad was not a viable IFA for him, and thus the Decision lacks justification and transparency.

[22] In this judicial review, the parties agree, as do I, that the appropriate standard of review is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[23] A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires a reviewing court defer to such a decision: *Vavilov* at para 85.

V. Analysis

A. *The RAD's IFA analysis*

[24] My decision to grant this application for judicial review turns on the RAD's analysis under the first prong of the IFA test.

[25] The two-prong test for assessing an IFA requires that: (i) there is no serious possibility of persecution in the proposed IFA and/or the claimant would not be personally subject to a risk to life or a risk of cruel and unusual treatment or punishment or a danger, believed on substantial grounds to exist, of torture in the IFA; and (ii) it would not be unreasonable in all the circumstances, including those particular to the claim, for the claimant to seek refuge in the proposed IFA: *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII

13517 (FCA), [1992] 1 FC 706 (CA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA).

[26] The refugee claimant bears the onus of establishing that a proposed IFA is not viable and can discharge the onus by defeating at least one prong of the two-prong test.

[27] After a careful review of the record before this Court, I agree with the Applicant that the RAD failed to consider critical evidence that contradicts its conclusions on the geographic reach of the agents of persecution and their ability to locate him in the proposed IFA.

[28] At paragraph 17 of the Decision, the RAD makes a central finding that the objective evidence does not support the Applicant's subjective belief that the LeJ has the geographical reach to find the Applicant in Hyderabad. The RAD does not cite any particular source for this conclusion.

[29] In his appeal submissions to the RAD, the Applicant raised item 1.22 of the Board's National Documentation Package (NDP). While the evidence does not cite Hyderabad directly, the Applicant asserts that it shows a significant geographical reach in close proximity to the IFA. It states:

Giving a more detailed account of the areas where the LeJ operates, the same ICG paper reports that "LeJ is primarily responsible for mass killings of Shias in sectarian hotbeds such as Jhang, Karachi and KPK, in particular Dera Ismail Khan, Hangu, and Kohat districts" (ICG, 30 May 2016, p. 4). Additionally, "the January 2015 bombing of a Shia Mosque in Shikarpur district, killing 60, showed it has expanded its presence in northern Sindh". The ICG also explains that "[i]n the southern Punjab context, it and

other sectarian extremists are bent on destroying largely tolerant religious traditions. Not just Shias are targeted but also the region's majority Barelvis and Sufis, who embrace a more syncretic form of Islam, with practices and rituals that Deobandis and Wahhabi/Salafis portray as heretic": ICG, 30 May 2016, page 5, Item 1.22.

[30] There was further evidence in the record to show that extremist groups are making inroads in Sindh province, where Hyderabad is located. None of this evidence was referred to by the RAD when it reached its conclusion on the ability of the agents of persecution to locate him in the proposed IFA.

[31] The Applicant points to other critical evidence in the NDP including item 1.8, the UNHCR Eligibility Guidelines on Assessing the International Protection Needs of members of Religious Minorities from Pakistan. This document was also highlighted in the Applicant's appeal submissions to the RAD. It states:

UNHCR considers furthermore that an IFA/IRA will generally not be available to individuals who are members of other religious minorities and who are at risk of being targeted by armed militant groups, given the sustained religiously- motivated sectarian violence and the wide geographic reach of such groups.

[32] The RAD never addressed the evidence raised by the Applicant or the significance of item 1.8 in its reasons. In assessing the SSP's and LeJ's means to locate the Applicant, the Member simply found that the evidence did not establish that their geographic reach is everywhere, "particularly in Hyderabad".

[33] The Respondent's position is that the RAD is presumed to have considered all of the evidence, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 [FC] at para 16 [*Cepeda-Gutierrez*].

[34] The Applicant cites this Court's recent decision in *Pasha v Canada (Citizenship and Immigration)*, 2023 FC 43, [*Pasha*] as being closely on point. In that case, Mr. Justice Diner addressed the same UNHCR document at issue, and found that the evidence in item 1.8 of the NDP demonstrates that militant groups like LeJ and SSP have wide geographical reach across Pakistan, even in regions where they do not have dominant operation. Mr. Justice Diner held that given its importance, the RAD's failure to consider this evidence in finding a viable IFA in Hyderabad, was a "fatal flaw" in the decision.

[35] In oral submissions, the Respondent conceded that the RAD never referred to the UNHCR Guidelines, but asserted that this Court should infer that the Member considered it given that the language used in the Decision closely resembles the language in the Guidelines.

[36] While the Respondent is correct that the RAD is presumed to have considered all of the evidence, *Cepeda-Gutierrez* also stands for the proposition that the more important the evidence that is not mentioned specifically and analyzed in the reasons, the more willing a court may be to infer from the silence that a finding of fact was made without regard to the evidence.

[37] I agree with the Applicant that *Pasha* is analogous to the case at bar.

[38] In arriving at his decision, Mr. Justice Diner also considered Mr. Justice Brown’s analysis of the significance of the very same UNHCR Guidelines in *Humayun v Canada (Citizenship and Immigration)*, 2022 FC 1640 at paragraphs 36-38::

[36] The UNHCR – a most credible assessor of refugee risk - concludes that a viable IFA is *generally not available* [Emphasis added] to individuals at risk of being targeted by certain armed militant groups:

“Given the wide geographic reach of some armed militant groups (as evidenced by high profile attacks, particularly in urban centres) a viable IFA/IRA will generally not be available to individuals at risk of being targeted by such groups.”

[Emphasis added]

[37] Critically, that statement is followed by a footnote (444) that specifically identifies the SSP as one such armed militant group.

[38] With respect, I am not satisfied the RAD’s findings reasonably took this stark analysis and conclusion by the UNHCR into consideration, nor am I able to see how the UNHCR’s conclusion squares with the RAD’s assessment. In this connection, I agree with the Applicants who submit the question before the RAD was not whether Shia generally are attacked in the IFA, but whether it was more than a mere possibility these specific individual Applicants could be found and attacked by the SSP in the IFA. In my view that question was not adequately assessed in light of the critical finding by the UNHCR that viable IFA will generally not be available to individuals – such as the Applicants - at risk of being targeted by the SSP.

[39] In light of the foregoing, I too am not satisfied that the RAD considered this critical evidence which was explicitly raised by the Applicant on appeal. The evidence is significant as, in Mr. Justice Brown’s words, it paints a “stark analysis and conclusion” for individuals with the Applicant’s profile as a religious minority who has been previously targeted by armed militant groups. It clearly points to a different conclusion, and therefore ought to have been considered and addressed in the Decision.

[40] While a reviewing court must refrain from reweighing and reassessing the evidence, a reasonable decision is one that is justified in light of the facts: *Vavilov* at paras 125, 126. The facts in this case, according to the UNHCR Guidelines, are such that an IFA will not generally be available to individuals with the Applicant's profile. It was unreasonable for the RAD to overlook this evidence in their assessment of whether the Applicant had a viable IFA in Hyderabad.

VI. **Conclusion**

[41] The RAD's Decision failed to account for the evidence before it and it is therefore unreasonable. I will allow the application for judicial review.

[42] The parties proposed no question of general importance for certification, and I agree that none arises on these facts.

JUDGMENT IN IMM-6141-22

THIS COURT'S JUDGMENT is that:

1. This application is granted and the Decision is set aside.
2. This matter is to be returned to the RAD for redetermination by a different panel.
3. There is no question for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Steven Blakey FOR THE APPLICANT

Brendan Stock FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario