Federal Court  Cour fédérale

Date: 20171108

Docket: IMM-431-17

Citation: 2017 FC 1017

Ottawa, Ontario, November 8, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MUQARAB TARIQ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Muqarab Tariq, is a 66-year-old citizen of Pakistan who fears persecution in Pakistan from extremists known as "Sunni Tehreek" due to his conversion from Sunni Islam to Shia Islam. After being assaulted three times in Gujranwala, a city in the province of Punjab, Pakistan, the Applicant obtained a visitor's visa from the Canadian Embassy in Islamabad; he left Pakistan on October 16, 2014, to travel to Canada. Shortly after his arrival in Canada on October 18, 2014, the Applicant applied for refugee protection. In a decision dated February 25,

2015, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected his claim for protection, with credibility being the determinative issue.

[2] The Applicant appealed the RPD's negative decision to the Refugee Appeal Division [RAD] of the IRB, and in a decision dated August 27, 2015, the RAD sent the matter back for redetermination by the RPD. In a decision dated June 17, 2016, the RPD again rejected the Applicant's claim, this time because of the availability of an internal flight alternative [IFA] in the city of Multan. The Applicant's appeal to the RAD in respect of the RPD's second decision was dismissed by the RAD in a decision dated January 3, 2017. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the RAD's second decision in respect of his claim for refugee protection.

I. Background

[3] The Applicant was raised as Sunni Muslim, but in 2010 converted to the Shia Muslim faith. In early 2014 he was appointed General Secretary of the Jafria Scout Organization, a local Shia organization dedicated to helping the poor. In late February or early March 2014, a group of masked individuals came to the Applicant's home, assaulted him and demanded that he stop attending the local Shia mosque or else they would kill him. Although the Applicant went to the police, they told him they could not help unless he could identify the attackers. Approximately two weeks later, while he was returning from work, the Applicant was stopped by two masked men, one of whom was carrying a firearm. The men demanded that the Applicant return to the Sunni faith. The Applicant reported the incident to the police the following day but received no assistance.

[4] A week or so after the second assault, the Applicant was again assaulted by a group of men who threatened to kill him if he did not immediately stop being Shia. The Applicant recognized the voices of two of the men as being members of the local Sunni community. Once again the Applicant reported this incident to the police, but he received no assistance. Throughout this time, the Applicant and his family also received threatening phone calls from unidentified individuals. After the assaults on the Applicant, his wife and children went into hiding with various relatives, and the Applicant remained in Pakistan to tend to his ailing father until he departed for Canada on October 16, 2014. The Applicant believes his attackers to be affiliated with Sunni Tehreek, an extremist organization known for persecution of Shia Muslims.

II. The RAD's Decision

[5] In its decision dated January 3, 2017, the RAD, after noting the background to the appeal, stated that its role in view of *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*], was to review the RPD's decision on a correctness standard and to conduct its own analysis of the record to determine whether the RPD had erred. The RAD identified the two-pronged test for determination of an IFA emanating from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1256, [1992] 1 FC 706 (CA) [*Rasaratnam*], stating (at para 13 of its decision) that:

> 1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists 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.
>
> 2) moreover, the conditions in the part of the country considered to be an IFA must be such that it would not be

> unreasonable, in all the circumstances, including those particular to the claim, for the claimant to seek refuge there.

[6] In considering whether the RPD had erred in its consideration of the documentary evidence in determining that the Applicant had a viable IFA in Multan, the RAD noted that while Shia Muslims are represented in government, the judiciary, and civil society within Pakistan, they are also the target of frequent attacks by Sunni extremist groups. The RAD considered a number of documentary sources and found the evidence to be mixed with respect to risks faced by Shia Muslims in Pakistan in general and in Multan in particular. The RAD noted evidence indicating that high-profile members of the Shia community in Multan, such as doctors, lawyers, and clerics, were more likely to be targeted by Sunni extremists than the general populace. The RAD found that the Applicant did not fit the profile of persons likely to be targeted in Multan. It further found that the Applicant "will face no more than the mere possibility of persecution in Multan due to being a Shia Muslim and practicing his faith."

[7] The RAD then considered the Sunni Tehreek, noting that the documentary evidence showed it is an extremist group founded in 1990. Before the RPD, the Applicant had agreed with the RPD's finding that the group was severely weakened in 2001 when a bomb attack killed much of its leadership. However, before the RAD, the Applicant maintained that the group was regaining strength, pointing to incidents to support this; notably, the 2011 assassination of Punjab governor Salman Taseer, and a 2016 attack on Pakistani singer Junaid Jamshed. The RAD reviewed the evidence about these incidents and found that, while the Sunni Tehreek had expressed support for the assassination of the governor, the evidence did not confirm that his assassin was a member of the group; and also that there was no evidence that Junaid Jamshed's

attackers belonged to the Sunni Tehreek, that the singer was not seriously injured in the attack, and that the Pakistani Interior Minister had condemned the attack, illustrating state support for Shia Muslims.

[8] The Applicant also pointed to recent Sunni Tehreek demonstrations in the cities of Karachi and Islamabad, but the RAD noted that these demonstrations were unrelated to attacks on Shia Muslims. The Applicant further contended that the Sunni Tehreek would be able to collude with police to locate him in Multan, but the RAD found there was no evidence that the Sunni Tehreek had the ability to influence the police actions in Pakistan. After reviewing the Applicant's testimony before the RAD about links between Sunni Tehreek and other radical Sunni organizations, the RAD found the Applicant's testimony in this regard to be based on speculation. The RAD further found that there was not sufficient credible evidence to establish that the Sunni Tehreek had an operational presence in Multan, or that it had the operational capacity or geographic reach to locate the Applicant if he were to relocate in Multan. The RAD concluded its analysis on the first prong of the IFA test by finding that:

> … the Appellant has not provided sufficient persuasive evidence to corroborate the Appellant's speculation that the individuals who assaulted him from Sunni Tehreek have the ability to locate him elsewhere in Pakistan. As such, the RAD finds the problem faced by the Appellant is limited and local in nature.
>
> The RAD finds, after its review and assessment of the evidence, that the Appellant's risk of harm is speculative at best.

[9] On the second prong of the IFA test, the RAD considered whether the Applicant was a "prominent" member of the Shia community in Gujranwala. As General Secretary for the Jafria Scout Organization, the Applicant testified before the RPD that he regularly attended at the local

Shia mosque and elsewhere, helping the poor, helping with weddings and blood donations, and providing security at religious festivals. The Applicant testified that he was "on the front" leading other individuals during these activities. The RAD found that this description did not support the Applicant's contention that he was a prominent member of the Shia community. When asked if there were other activities which made him a prominent member of his community, the Applicant had told the RPD that he performed similar activities at his Sunni mosque. Based on the record, the transcript, and the audio recording of the hearing before the RPD, the RAD found that the Applicant was attacked not because of his prominence in the community, but because his "conversion from Sunni to Shia that came to the attention of local individuals."

[10] The RAD then considered the suitability of Multan as an IFA. The Applicant had submitted that Multan was in the same province as Gujranwala and was a smaller city with a similar demographic makeup, and that his family would be at risk if they left from hiding to relocate with him. The RAD found that similarities between Gujranwala and Multan would facilitate the Applicant's establishment in Multan. The only reason the Applicant provided as to why he would be in danger in Multan was the possibility of an old acquaintance recognizing him, something which the RAD found to be unlikely since Multan is over 400 km from Gujranwala and has a population of over 1 million. The RAD noted that the Applicant had testified before the RAD that if no one in Multan knew he had converted from the Sunni faith to Shia, there would be "no problem." The RAD also noted that the RPD's use of a Wikipedia document at the hearing was not utilized to form any aspect of the RPD's decision other than to determine the population of Multan.

[11] The RAD noted that the test in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1172, [1994] 1 FC 589 (CA) [*Thirunavukkarasu*], sets a high threshold for what makes an IFA unreasonable, and found on a balance of probabilities that there were no serious social, economic or other barriers to the Applicant relocating to Multan, and that there was no serious risk to his life or safety there. The RAD thus found that it would not be unreasonable, in all the circumstances, including those particular to the Applicant, for him to return to Pakistan and seek refuge in Multan. Accordingly, the RAD confirmed the RPD's decision and dismissed the appeal pursuant to s. 111(1) (a) of the *IRPA*.

III. Issues

[12] This application for judicial review raises the following issues:

1. Did the RAD err in its application of the IFA test?
2. Did the RAD make unreasonable findings of fact with respect to Multan?
3. Were the RPD and RAD processes procedurally fair?

IV. Analysis

A. *Standard of Review*

[13] The applicable standard for review of the RAD's decision is reasonableness (*Huruglica* at para 35). Accordingly, the Court should not intervene if the RAD's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if

"the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

[14] It is well-established that determinations on the availability of an IFA are reviewed on the reasonableness standard (see: e.g., *Momodu v Canada (Citizenship and Immigration)*, 2015 FC 1365 at para 6, [2015] FCJ No 1470; also see *Verma v Canada (Citizenship and Immigration)*, 2016 FC 404 at para 14, [2016] FCJ No 372). Moreover, as the Court noted in *Lebedeva v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1165 at para 32, [2011] FCJ No 1439, determinations concerning an IFA "warrant deference because they involve not only the evaluation of the applicant's circumstances, as related by their testimony, but also an expert understanding of the country conditions involved."

[15] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). Whether an administrative decision was fair is generally reviewable by a court. However, the analytical framework is not so

much one of correctness or reasonableness but, instead, one of fairness. As noted by Jones & deVillars (*Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 266):

> The fairness of a proceeding is not measured by the standards of "correctness" or "reasonableness". It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court…decides whether the proceedings were correctly held. There is no deference to the tribunal's way of proceeding. It was either fair or not.

[16] Under the correctness standard of review, the reviewing court shows no deference to the decision-maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision-maker's determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

B. *Did the RAD err in its application of the IFA test?*

[17] The Applicant advances two lines of argument with respect to this issue: first, that the Court's jurisprudence concerning IFAs is contrary to the spirit of the *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 [*Convention*];

and second, that the RAD misapplied the IFA test by applying the wrong standard to assess the risk faced by the Applicant.

[18] The Applicant notes that the concept of an IFA is not addressed in the *Convention*, but exists as a legal inference developed in subsequent jurisprudence and it ought not to subvert the spirit of the *Convention*. The Applicant further notes that the *Convention* was developed in the context of post-war Europe which was divided into different zones of occupation, and the notion of an IFA is more applicable to a largely peaceful country with regionalized conflicts than a country such as Pakistan which faces generalized threats. The Applicant cites the 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, which states that criteria in international refugee treaty law must be interpreted in a liberal and humanitarian spirit, and that an IFA, while not explicitly mentioned, may arise as part of the refugee determination process. In the Applicant's view, the IFA test has taken on an excessively formalistic character which subverts the spirit of the *Convention*.

[19] The Applicant contends that the RAD misapplied the IFA test. According to the Applicant, the "serious possibility" standard on the IFA test is lower than a balance of probabilities or the standards of "likelihood" or "reasonable likelihood," and requires only an articulable threat which is not slight or negligible; the threat need not rise to the level of "likely" or "probable." The Applicant says the RAD misapplied the test by requiring him to show that it would be "impossible" for him to avail himself of an IFA, rather than determining whether there

is a "serious possibility" that he will be persecuted there. The Applicant contends that the facts of *Thirunavukkarasu*, where no IFA was found to be available, are analogous to the case at bar and that case should be followed in this case because, despite having been initially persecuted in northern Sri Lanka, the claimant in *Thirunavukkarasu* faced a generalized threat throughout Sri Lanka from the militant Liberation Tigers of Tamil Eelam.

[20] The Respondent argues that the concept of an IFA is entirely consistent with the spirit of the *Convention* and is "inherent" in the definition of a *Convention* refugee. The onus was on the Applicant, the Respondent says, to establish that an IFA is unreasonable. According to the Respondent, the RAD correctly set out and applied the IFA test, including the requirement that there be no serious possibility of persecution in the IFA. In the Respondent's view, the RAD did not require the Applicant to prove it was "impossible" for him to suffer persecution but, instead, merely remarked that it was not impossible for an individual persecuted by militant groups to find a viable IFA. The Respondent states that the RAD reasonably concluded that the Applicant would face "no more than the mere possibility of persecution" in Multan.

[21] The concept of an IFA is well-established in the case law and is consistent with the definition of a refugee as an individual who cannot avail themselves of state protection in their home country. The Applicant's submission that the IFA test has taken on an excessively formalistic character subverting the spirit of the *Convention* is not convincing and runs counter to decades of case law. In this regard, Justice Linden's observations in *Thirunavukkarasu* warrant note:

> 2 Despite the decision of this Court in *Rasaratnam*… 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*…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*…at page 710:
>
> > [T]he Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists.

[22] As to the Applicant's submission that the RAD misapplied the test by requiring him to show that it would be "impossible" for him to avail himself of an IFA, rather than determining whether there is a "serious possibility" that he will be persecuted there, this submission is without merit. When read in context, the RAD merely remarked that it was not impossible for an individual persecuted by armed militant groups with a wide geographic reach to find a viable IFA. The RAD did not require the Applicant to prove that persecution in the IFA was "impossible." The RAD did not err in its identification and application of the IFA test. In this case, the RAD reasonably found that the Applicant would face no more than the mere possibility of persecution or harm in Multan.

C. *Did the RAD make unreasonable findings of fact?*

[23] The Applicant contends that the RAD made unreasonable findings of fact on three matters: Multan as a viable IFA; the Applicant's status as a prominent community member; and the ability of Sunni Tehreek or other extremist organizations to locate him in Multan. The Respondent maintains that the RAD reasonably found that the mixed evidence on generalized risk to Shia Muslims in Multan did not raise more than a mere possibility of persecution or harm; that the Applicant did not meet the profile of a community leader such that he faced an increased risk; and that there was no evidence that the Sunni Tehreek would track the Applicant where they were not otherwise present.

[24] In my view, the RAD acted reasonably within its fact-finding role in resolving ambiguities in the evidence and reached a conclusion which was within the range of possible acceptable outcomes. While the Applicant may disagree with the findings and conclusions reached by the RAD, those findings and conclusions were reasonably available to and made by the RAD based on the evidence before it and the law. It is not the Court's function or role on judicial review to reweigh the evidence before an administrative decision-maker such as the RAD and the Court will not intervene merely or solely on the basis of the Applicant's disagreement with the RAD's findings of fact.

D. *Were the RPD and RAD processes procedurally fair?*

[25] The Applicant says procedural fairness requires a decision-maker to warn an applicant that an IFA will be raised, so that the applicant may prepare arguments and evidence to respond.

According to the Applicant, this duty to warn includes the duty to inform the Applicant of the specific IFA being considered, since the warning is otherwise meaningless in view of the large number of potential IFAs within a country such as Pakistan. The Applicant maintains it was unfair to require him to make arguments for which it is impossible to obtain evidence; he states that he is not an expert in Pakistani terrorism and cannot call members of an extremist organization to testify about links between various organizations.

[26] The Respondent acknowledges that there is a general duty of procedural fairness with respect to providing notice of an IFA. According to the Respondent, if notice is clearly given during the hearing and the applicant has a chance to respond, the duty is met. The Respondent states that there is no evidence that the RPD did not give notice of Multan as a possible IFA or not afford the Applicant a chance to respond. As to the Applicant's argument that he was required to provide evidence which could not possibly be available to him, the Respondent cites *Thirunavukkarasu* (at para 9), where Justice Linden observed that when an applicant does not have personal knowledge of a potential IFA, documentary evidence will suffice.

[27] The jurisprudence generally finds that if a decision-maker raises a potential IFA during a hearing and gives the party a chance to respond, sufficient notice has been given. This was established in *Rasaratnam* where Justice Mahoney wrote (at para 12) that: "The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument." This passage was cited in the subsequent case of *Thirunavukkarasu* where Justice Linden wrote (at para 10) that: "there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised... neither

the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing."

[28] Despite the above passage in *Rasaratnam* being cited in *Thirunavukkarasu*, there is some ambiguity between the two passages as to whether notice during a hearing will satisfy the procedural fairness requirement, or whether notice must be provided prior to the hearing. Subsequent case law has gone in different directions on this point. For example, in *Ay v Canada (Citizenship and Immigration)*, 2010 FC 671 at para 45, 192 ACWS (3d) 259 [*Ay*], Justice Boivin cited *Thirunavukkarasu* for the proposition that "proper notice is given only when the applicant is notified that the IFA is to be considered prior to a hearing so that the claimant can have an adequate time to adduce evidence to demonstrate that there is no IFA." However, in *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521, 266 ACWS (3d) 435, Justice Strickland considered *Ay* and noted (at paras 27-28) that, although *Ay* cites *Thirunavukkarasu*, it omits the latter's quotation from *Rasaratnam*. Justice Strickland also noted that the transcript for the decision at issue in *Ay* showed that the IFA had not been raised at the hearing in a clear manner. Accordingly, she concluded (at para 56) that: "While it might have been preferable for the RPD to provide notice before the hearing, jurisprudence suggests that notice during the hearing, so long as it is clear and the Applicants have an opportunity to respond, is also sufficient."

[29] In any event, in this case the RPD clearly raised Multan as a potential IFA during the hearing. The Applicant was alerted, therefore, to the issue of an IFA in Multan before the RPD and could have adduced evidence before the RAD to show why it was not suitable as an IFA, or

at the very least raised any question of a breach of procedural fairness before the RAD as to the manner in which he had been notified about the potential IFA.

V. Conclusion

[30] For the reasons stated above, this application for judicial review is dismissed. The RAD's decision in this case was reasonable because it is transparent and intelligible and falls within the range of possible and acceptable outcomes defensible in respect of the facts and law.

[31] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT in IMM-431-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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