Federal Court  Cour fédérale

Date: 20220913

Docket: IMM-7319-21

Citation: 2022 FC 1289

Ottawa, Ontario, September 13, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MD ELIAS SARDER GHUNU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated September 15, 2021, dismissing the Applicant's appeal and confirming the decision of the Refugee Protection Division [RPD], which found the Applicant was not a Convention refugee nor a person in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[2] The Applicant is a 40-year-old man from Bangladesh. His narrative is as follows.

[3] In June or July 2014, two men stopped him on the street, displayed a firearm and demanded a monthly donation to the Jamaat-e-Islami [JeI], a national political party. The men allegedly said they needed lots of money for their organization. The Applicant was told they would kill him if he did not pay. The Applicant paid the JeI approximately 400 to 1,000 Bangladeshi taka every two to three months until 2018.

[4] In May 2018, the Applicant was approached by two members of the JeI in a marketplace. They indicated they knew which school his son attended and would kidnap him if he did not pay them 500,000 taka. The Applicant's materials suggest they threatened to kill his son. The Applicant's employer advised him to leave his home city.

[5] The Applicant changed his cell phone number and relocated with his wife and children. There was no doctor there, so they moved back to his home city in September 2018. Several days later, the Applicant received a telephone call from a man who demanded 1,000,000 taka on behalf of a person who the Applicant believes to be a terrorist. The Applicant was then intercepted in a rickshaw several days later by three men on a motorcycle who slapped and punched him, warning they would kill him if he did not pay the terrorist. Later he received another call from a member of JeI demanding money from properties he had sold.

[6] The Applicant left Bangladesh made a claim for refugee protection on September 27, 2018.

III. Decision under review

[7] The RAD determined the RPD was correct in finding the Applicant had a viable Internal Flight Alternative [IFA] in another city in Bangladesh. As such, the RAD confirmed the decision of the RPD that the Applicant is neither a Convention refugee nor a person in need of protection. In making this determination, the RAD applied the two-part test for assessing an IFA from *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*], which requires an assessment of (1) whether there is a serious possibility that the Applicant will be persecuted, or whether he will face, on a balance of probabilities, a danger of torture, a risk to his life, or cruel and unusual treatment or punishment in the IFA; and (2) that it would be not be unreasonable to seek refuge there.

A. *No Serious Possibility of Persecution or Risk of Harm in the IFA*

[8] The RAD declined to assess the issue of nexus between the Applicant's claim and section 96 of the IRPA (and the Convention grounds) in relation to which refugee status may be granted. because "the question of IFA is integral to both the definition of a Convention refugee and that of a person in need of protection."

[9] The RAD found the IFA was viable because the Applicant would not face a serious possibility of persecution or a risk of harm. It stated there can only be a serious possibility of

persecution if the agents of harm have the “means and motivation” to seek out and locate the Applicant. In the RAD’s view, this possibility is not established on the evidence. On a balance of probabilities, nothing in the evidence suggests that the agents of harm have the motivation to search for the Applicant outside of Dhaka. Nor did the evidence suggest that the agents of harm sought out the Applicant after he relocated to another city in Bangladesh. The RAD points out the fact that the Applicant’s problems with the agents of harm only resumed upon his return to Dhaka.

[10] In summary, the RAD agreed with the RPD on the first part of the test from *Rasaratnam*.

B. *Reasonable for the Applicant to Relocate to the IFA*

[11] As noted, the RAD declined to assess the issue of nexus between the Applicant’s claim and section 96 of the IRPA (and the Convention grounds) in relation to which refugee status may be granted because “the question of IFA is integral to both the definition of a Convention refugee and that of a person in need of protection.”

[12] The RAD found it was reasonable for the Applicant to relocate to the IFA based on his circumstances, citing *Ranganathan v. Canada (Minister of Citizenship and Immigration)* (C.A.) [2001] 2 F.C. 164 which established “a very high threshold for the unreasonableness test. It 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.” In making this determination, the RPD considered factors including the Applicant’s level of education, work experience, language skills, religion, and ability to secure employment. The RAD upheld this determination.

[13] While there were other issues, in summary, the RAD agreed with the RPD's finding on the second part of the test from *Rasaratnam*.

IV. Issues

[14] The Applicant submits the following issues:

1) Was the decision of the Refugee Appeal Division unreasonable?

2) Was the RAD's failure to determine the nexus issue unreasonable?

3) Did the RAD err in finding that the applicant has an internal flight alternative in the IFA?

4) Was the RAD's finding that despite the COVID restrictions in Bangladesh the applicant could still relocate to Bangladesh made without any evidentiary foundation?

5) Did the RAD deny the applicant procedural fairness in its determination of IFA?

[15] The Respondent submits the following issues:

1) Did the RAD reasonably determine that the Applicant is not a Convention refugee or person in need of protection?

[16] In my view, the issue is whether the Decision of the RAD was reasonable in terms of its decision not to assess nexus.

V. Standard of Review

A. *Reasonableness*

[17] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[Emphasis added]

VI. Analysis

[18] The Applicant submits the RAD misapplied the two-part test from *Rasaratnam* because it did not address the issue of nexus to a convention ground. In the Applicant's view, resolving the issue of nexus is essential to a reasonable determination of the first prong of the IFA test. In this way, the Applicant submits the RAD failed to consider both the nature of the organization and its power in the IFA. The Applicant had submitted to the RAD that "it cannot be said there is not at least a reasonable chance of their being motivated to pursue the Applicant due to his refusal to donate to their extremist Islamist causes." The Applicant points to the agent of harm's classification as a religious party that has fought against the liberation of Bangladesh and evidence of [the IFA] as one of its "historical strongholds." The Applicant further draws out his claim by referring to "violent acts" committed by the agents of harm to achieve political goals.

[19] The Applicant submits that the RAD evaded confronting the political and extremist nature of the agents of harm by not addressing the issue of nexus. By doing so, in the Applicant's view, it failed to consider that "fanaticism can increase the motivation to pursue perceived opponents." The country condition evidence is demonstrative, in the Applicant's view, of both the means and motivation to "strike out against its perceived opponents."

[20] The Applicant cites to *Al Bardan v. MCI*, 2020 FC 733, for the proposition that "the tribunal must consider the totality of the evidence, including the country condition evidence and the reasons must reflect the higher stakes in refugee claims." Justice Diner states in *Al Bardan*:

> [18] Since the RAD conceded that it was tasked with reviewing the issue of the teenage sons' risk of recruitment anew, it was incumbent on the RAD to consider the totality of the evidence, namely the oral evidence from the three witnesses who testified to it (the father and both sons), along with the written evidence contained in the BOC, and the full picture portrayed by the country condition evidence.
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> [19] The RAD failed to engage with the Applicants' testimony and evidence regarding their fear of recruitment activity that occurred to them in the past, but also what they feared for the future. The lack of past incidents of violence, or worse, is not determinative of future risk.

[21] While I accept the RAD may move straight to an assessment of IFA, I do not agree it may asses an IFA without considering nexus in terms of its section 96 analysis. While it may be more convenient to bypass a nexus analysis, to do so may result in an incomplete assessment of the risks posed relating to the various factors set out section 96 and in the Convention.

[22] Notably, despite the nexus issue being central to the Applicant's submissions, I was provided with no jurisprudence allowing the RAD to proceed without assessing nexus, nor am I persuaded to make such a precedent given the stakes are high in cases like this. I am not persuaded the RAD may properly assess either persecution, or the absence of persecution, under section 96 without an examination of the nexus involved. Without a nexus assessment, the reviewing Court is unable to determine what risks were assessed, and therefore is unable to determine if the risk of persecution on an *IRPA* or Convention ground was reasonably assessed.

[23] As but an example, in this case I note the strong evidence of the "means" of persecution of the Applicant by the agents of persecution in the IFA. As I understand it, the RAD found

insufficient “motivation.” I am not persuaded an assessment of nexus could not have tilted the balance in favour of protected status had nexus been assessed.

[24] In my respectful view, this is a determinative issue in respect of which judicial review will be granted; the Decision was made contrary to constraining law.

[25] It is not necessary to consider the other issues raised.

VII. Conclusion

[26] The Decision is not reasonable for the reasons given. Therefore judicial review will be granted.

VIII. Certified Question

[27] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7319-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remitted for reconsideration by a different decision maker, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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