Federal Court  Cour fédérale

Date: 20230713

Docket: IMM-3836-22

Citation: 2023 FC 953

Ottawa, Ontario, July 13, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

RAFIQUL ISLAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judicial review application, authorized pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeks to challenge the decision of the Refugee Appeal Division [RAD] which agreed with the Refugee Protection Division [RPD] that found that the Applicant has an internal flight alternative [IFA] in his country of citizenship, Bangladesh. As such, he cannot be a refugee or a person in need of protection according to sections 96 and 97 of the IRPA.

[2] For the reasons that follow, the Court must conclude that the judicial review application fails because the Applicant has not demonstrated, on a balance of probabilities, that the decision under review is not reasonable, as was his burden.

I. The facts

[3] Counsel for the Applicant stated in his submissions before the RPD that “in fact it’s a very simple story” (transcripts of hearing before the RPD, CTR p 296). He was right.

[4] In March-April 2010, the Applicant who lived in a village, Kasba, a village in North-East Bangladesh, some two hours from Dhaka, operated a mobile phone store. On April 25, 2010, four students from a local Madrassa (religious school), along with their Mowlana (a religious instructor) approached the Applicant at his store. They demanded that he join and contribute financially to their extremist Islamic movement. They received a refusal on the part of the Applicant, in no uncertain terms, who indicated that he was not interested in religion or politics. Fearing for his life at the hands of “Islamist terrorists”, the Applicant went into hiding in Dhaka, the capital, until he was able to leave Bangladesh with the assistance of a smuggler.

[5] Less than two weeks later (May 5, 2010), the Applicant embarks on a journey that will take him to Ecuador with stops in Dubai and Brazil. He lived in South and Central America until November 29, 2011, when he finally arrived at the US border, in Texas. He claimed that he travelled through countries, taking him to Panama (where he was detained for nine months), Costa Rica, Nicaragua, El Salvador, Guatemala and Mexico before arriving in the United States on November 29, 2011.

[6] The Applicant was detained in Texas for close to one year. He was released from detention in October 2012, but a removal order was issued. It appears that upon his release, he travelled north, reaching New York City some time in November 2012. He worked as a food delivery contractor with Uber Eats until March 2018. On March 11, 2018, he crossed the border into Canada, avoiding a port of entry. He did not have with him his passport as he claimed it had been taken from him by the smuggler who allegedly assisted him throughout his ordeal that took him to North America.

[7] In support of his claim for asylum in Canada (his Basis of Claim form [BOC] is dated March 26, 2018), the Applicant submitted his father's affidavit according to which he was approached on September 25, 2018, by four or five men in Islamic dress on his way to the market. They asked about his identity and left. According to the Applicant's mother, they were somehow more insistent in that her husband told her that Islamist fundamentalists were looking for their son. Moreover, the father affirmed that he received a telephone call on December 16, 2020, from an unknown person asking him about the whereabouts of his son. The caller allegedly threatened that the Applicant will be found no matter where he fled.

II. The administrative tribunals' decision

[8] Both the RPD and the RAD disposed of the claim for refugee protection on the basis that there exists an IFA in Bangladesh. If a claimant can find refuge in his own country, "there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country" (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA), p 593). As such, the person cannot claim refugee status in Canada as the person will

not have demonstrated a well-founded fear of persecution which makes him unable or unwilling to return to his country of nationality.

[9] The RPD found that the Applicant does not have the profile, according to the objective documentary evidence, of someone who could be the target for forced recruitment into Jihadist groups: they are generally selective and recruit highly motivated individuals, which is not the case with this Applicant.

[10] Considering the two-prong test developed by the jurisprudence, the RPD finds that the alleged agents of persecution do not have the motivation, nor the means to find and harm the Applicant. Thus, there is no serious possibility for the Applicant to be persecuted in another part of the country where an IFA is considered in such circumstances. It was also noted that the versions of the father and the mother of the incident on September 25, 2018, diverge; furthermore, the encounter with the father comes some eight years after the Applicant had left Bangladesh.

[11] Although the RPD accepted that there were the encounter of September 2018 and the telephone call of December 2020, these two incidents fall short of demonstrating the required motivation and the means in order to trace back to the Applicant in his country of nationality.

[12] As for the second-prong, i.e. that the conditions in the IFA are such that it would be unreasonable for the Applicant to seek refuge there, the threshold set by the Federal Court of Appeal is high. According to *Ranganathan v Canada (Minister of Citizenship and Immigration)*,

[2001] 2 FC 164, “(i)t requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant” (para 15). The Applicant was unsuccessful in demonstrating that the IFA was not objectively reasonable.

[13] It is, of course, the RAD decision which is the subject of the judicial review application.

[14] In effect, the RAD agreed completely with the RPD. There was no demonstration that the alleged agents of persecution have the motivation and the means to locate the Applicant and harm him in the IFA. It specifically noted:

- Twelve years have passed since the incident of April 25, 2010, with only two inquiries apparently about the Applicant’s whereabouts. The Applicant testified that his father guessed that the inquiries came from the same people he encountered in 2010;
- The country condition documentation does not support a contention that the agents of persecution have the means to infiltrate mobile applications or the tenant registration system in Bangladesh to locate the Applicant;
- If the agents of persecution threaten the Applicant because they seek to extort him, that is not sufficient to amount to persecution, or to a risk to life or to cruel and unusual treatment or punishment, let alone torture;
- Islamist Jihadists in Bangladesh do not target private unbelievers. In the words of the RAD, “jihadists focus on those who would visibly and actively undermine their ambitions of imposing a totalitarian theocracy” (para 18). Such is evidently not the case of this Applicant.

The evidence that there is a risk of persecution is simply insufficient. Indeed, the Applicant had to demonstrate, on a balance of probability, a serious risk of persecution, and not a mere possibility. The RAD concludes:

> [20] It should be noted that the Appellant must demonstrate a serious possibility of persecution or, on a balance of probabilities, a risk of section 97 harm in [the IFA]. A mere possibility of harm does not suffice. The country condition evidence simply does not

> suggest that secular Muslim private citizens in the IFA location are threatened, attacked, or otherwise targeted. Militant extremists pursue those who pose a clear threat to their political and religious objectives. The Appellant has consistently maintained his lack of interest in religion and politics. As a result, I am unable to find a forward-facing risk of harm in [the IFA].
>
> [Emphasis in original]

[15] As for the reasonableness of relocating in the proposed IFA, the RAD finds without much difficulty that, given the Applicant's profile, he would not find his life or safety jeopardized in relocating. The RAD articulates its conclusion thusly:

> [22] The Appellant is single, male, 37 years old, and fluent in Bengali. He has a secondary school diploma, and work experience running a mobile phone business and being an Uber driver. Freedom of movement is guaranteed under the law, and it is generally protected with the exception of the Chittagong Hill Tracts and Cox's Bazar, which are located in the southern part of the country. There are extensive railway and road networks in Bangladesh, an unemployment rate of approximately 4.5%, and a sizeable informal economy. The Appellant would not face any cultural or linguistic barriers, given the dominance of Bengali culture throughout the entire country.
>
> [Footnote omitted]

[16] Finally, the RAD considered who the agents of persecution were: are they the individuals who approached the Applicant in 2010 for him to contribute to their school or are they a notably militant Islamist socio-political movement, Jamaal-el-Islami [JeI]? Given the emphasis put by the Applicant on who the agent of persecution is, it is necessary to examine more closely the conclusion reached by the RAD. The importance of the issue stems from the fact that, depending on the identity of the agent of persecution, and thus the power it may generate, this may have an impact on the two prongs of the IFA test.

[17] The RAD noted that, without being able to identify precisely the identity of the assailants, it is still possible to establish a forward-looking threat in the IFA: there may be credible and probative evidence to conclude about the existence of a serious possibility of persecution throughout the entire country even where the assailants are not precisely identified.

[18] That being acknowledged by the RAD, it is also reckoned that the reference to the JeI was late coming as it came only when the Applicant testified before the RPD. And then only by reference to the Applicant claiming that he would have seen people from the Madrassa carrying JeI banners during strikes organized by JeI, and seeing the name JeI on the receipt book of those he encountered who sought to extort money from him. The problem, identified first by the RPD, was that the BOC never identified those who threatened the Applicant as members of JeI. When confronted with this significant omission, the Applicant contended that he had mentioned JeI in his BOC. That is misleading. As noted by the RPD, "JeI was mentioned in his BOC when the claimant was discussing the history of the rise of jihadists in Bangladesh but that he did not link the people who threatened him to JeI" (RPD decision, para 18). Given the importance of JeI as the largest Islamic political party in Bangladesh, the RPD found that "(i)t is not a minor detail." The credibility as to the allegation that the agents of persecution are linked to JeI was affected.

[19] The RAD followed suit. It noted rather that the Applicant claimed that he was the target of Islamist Jihadists, not JeI. The BOC was very detailed, carefully prepared with the assistance of counsel (who was not the counsel before this Court) and it referred meticulously to the events of 2010, including the departure from Bangladesh. That made the RAD conclude that a negative

credibility finding was warranted: the RPD did not misidentify the agents of persecution. Here is how the RAD justifies its own finding:

> [16] Under these circumstances, failing to reference JeI constitutes a material omission, for which the Appellant did not provide a reasonable explanation. The Appellant's testimony that the assailants bore the JeI insignia only highlights the significance of the BOC omission, and the lack of trustworthiness of the Appellant's testimony on this issue. Moreover, the affidavits of the Appellant's parents do not refer to JeI. Therefore, I reject the Appellant's contention that he has established a conclusive link between the events of 2010 and JeI.

III. Standard of review

[20] There is no doubt that the standard of review is that of reasonableness. The parties agree and the Court concurs.

[21] What may be worth repeating is what that standard implies. Perhaps first and foremost, the reasonableness standard of review requires that the reviewing court refrain from substituting its view of the merits of the case. The court of review is not a court of first view. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], reviewing courts are instructed as follows:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472

> N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

The starting point is said to be the principle of judicial restraint (para 13) and the court adopts a posture of respect (para 14).

[22] The task consists in developing an understanding of the reasoning that led to the decision to assess whether the decision as a whole is reasonable: "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*, para 85). Deference towards such decision follows.

[23] Contrary to what is often argued by counsel, perfection in an administrative decision is not the standard, nor is it expected that a decision maker will include "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov*, para 91, referring to *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16). Indeed, the Supreme Court warns against the expectation of technical dexterity by administrative decision makers:

> [92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision

> — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

IV. Analysis

[24] The Applicant raises what he considers errors made by the RAD in its consideration of the appeal of the RPD decision. In spite of the robust review required on judicial review (*Vavilov*, para 13), the Applicant does not discharge his burden to show, on a balance of probabilities, that the decision under review is unreasonable in that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency." Superficial or peripheral flaws or shortcomings will not do. On the contrary, "the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, para 100).

[25] As alluded to earlier, the Applicant put significant emphasis on his contention that the individuals who approached him in 2010 were associated with JeI. In support of that contention, the Applicant argues that the RAD did not refer specifically to what the RPD considered explicitly, that is the banners in protests organized by JeI and the word "JeI" written on the receipt book carried by those who approached him back in 2010. The fact that this statement, as part of the Applicant's testimony before the RPD, was not explicitly dealt with by the RAD is said to demonstrate that the evidence was thus ignored. The contention is without merit.

[26] First, the RAD's reasons are read in light of the record. The matter was addressed squarely by the RPD and the RAD agreed with the RPD. Second, and more importantly, the point is rather that the Applicant did not mention a link between his assailants and JeI in his BOC, a document which puts forth his refugee claim and which was carefully crafted. That is the material omission in the BOC that was not explained. That is fully considered by the RAD. Third, the RAD did not ignore the evidence. On the contrary, it was said at paragraph 16 of the RAD decision that "the Appellant's testimony that the assailants bore the JeI insignia only highlights the significance of the BOC omission, and the lack of trustworthiness of the Applicant's testimony on this issue."

[27] The Court also rejects the suggestion that it did not matter that the Applicant referred in his BOC to "Islamist Jihadists" instead of JeI. The only reason given before the RPD for the testimony that the JeI is the agent of persecution was the banners and the receipt book, yet the Applicant omitted to identify JeI as his agent of persecution in his BOC, a remarkably important document presented with many details over a number of pages. In other words, the first reference to JeI as an agent of persecution came before the RPD. When confronted with the omission of identifying JeI as an agent of persecution, the Applicant said that he had referred to JeI in his BOC; however, that was not in relation to his agent of persecution but rather to the history of the rise of Jihadists in Bangladesh. What is more, the affidavits of the Applicant's parents did not even mention JeI. It was certainly open to the RAD to consider the significant omission in reaching its conclusion that the Applicant's testimony's trustworthiness was lacking. I can see no flaw or shortcoming requiring an intervention by a reviewing court.

[28] The Applicant concedes in his memorandum of fact and law (para 23) that the threat would have been more serious had the RAD accepted the JeI as an agent of persecution in view of its power, the alleged propensity to violence as well as the symbiotic ties to the main opposition party. That may explain the insistence to connect JeI with the incidents in this case. However, the connection is not present. The Applicant is therefore left with arguing that the agents of persecution other than the JeI have the motivation and the means to cause harm to the Applicant in the proposed IFA. He failed to do so.

[29] Instead of demonstrating how the RAD decision is unreasonable, the Applicant seeks to transfer the burden onto the shoulders of the RAD by suggesting that the mere fact that, in 2018, men approached the Applicant's father on his way to the market to ask him who he was, and that he received an anonymous phone call in December 2020, ought to be enough for the RAD to justify, or explain, how the Applicant would find safety in the IFA from religious fanatics. In making the argument, the Applicant flips the burden on its head. The RAD explained in its decision why the means and motivation were missing. It was for the Applicant to demonstrate that the reasons given did not meet the requirements of justification, transparency and intelligibility, taking into account the legal and factual constraints that bear on the decision. I can see nothing unreasonable in finding that a neutral encounter in 2018 and an anonymous phone call in 2020 fall short of demonstrating motivation and means. At any rate, it was for the Applicant to demonstrate that that would be unreasonable.

[30] When the Applicant seeks to challenge the RAD decision on its justification, he misses the mark. For instance, considering the finding by the RAD that the country documentation does

not support an argument that the agents of persecution can infiltrate mobile applications or the tenant registration system in order to locate someone in a country of some 173 million inhabitants, it is met by an argument that the Bangladesh police would be capable to do so. As is quite obvious, such is not the point: the police are not the agents of harm. This is irrelevant in this case. The agents of persecution cannot be equated with the police without evidence to that effect: there was nothing that could support such contention on this record.

[31] Similarly, on the issue of motivation, that is the motivation of the agents of persecution to locate the Applicant in Bangladesh, the Applicant suggests that the agents of persecution sought to extort him and threatened him. How that changes the agents of persecution's motivation is left untold.

[32] The Applicant also took issue with the RAD's characterization of his profile being merely that of a "private unbeliever." Actually, this is not what the RAD found when the reference is put in context. It rather concluded, on the basis of the documentation on Bangladesh, that "Islamist jihadists in Bangladesh target secular activists, minorities, writers, journalists, intellectuals, and artists who publicly insult Islam, and not mostly private unbelievers" (para 18). The RAD continues by finding that "(t)here is insufficient credible and trustworthy evidence to suggest that the Appellant's views were relayed to jihadists". Put simply, the Applicant's views expressed in 2010 about religion and politics have remained private as there is no evidence that Jihadists would have been informed. As the RAD correctly notes, what is required is a demonstration of a serious possibility of persecution. The professed lack of interest in politics and religion in one encounter in April 2010 would not make the Applicant a target. As the RAD

says, “(t)he country condition evidence simply does not suggest that secular Muslim private citizens in the IFA location are threatened, attacked, or otherwise targeted” (para 20). The Applicant never came close to threatening that conclusion.

[33] At best, the Applicant seems to argue that he does not have an iron-clad guarantee that he would not be targeted in the IFA on the basis that the documentation does not fully and unequivocally offer such assurance. For instance, documentation stating that Jihadists prioritized for victimization political elites, intellectuals invoking secularism, including bloggers, atheists and Sufis, does not exclude the possibility that targets may be more encompassing to the point of targeting him. The Applicant never demonstrates how a mere possibility, assuming that this describes a possibility and not merely speculation, rises to the level of a serious possibility, to the point that the RAD concluded unreasonably.

[34] Finally, the Applicant referred to other decisions of the RAD where persons with experiences the Applicant contends were similar to his situation, were found to be at risk in Bangladesh. With all due respect, this last gasp attempt is misguided.

[35] First, these cases are simply not comparable. Here, we have someone who, 13 years ago, faced individuals, in his small town, who sought to extort money from him and threatened him in the process. There is no evidence of any other threat but for an anonymous telephone caller to his father who, in December 2020, threatened that he would find his son wherever he fled. This cannot be compared to the cases submitted by the Applicant where the refugee claimant’s house was raided and pictures of him were distributed to other extremists, or the person was targeted as

a religious minority, or where the business was set on fire by a close relative affiliated with extremists.

[36] Second, the review conducted by the Court is for reasonableness. The reviewing court is not to delve into the merits of an administrative decision, which is what this Applicant is inviting the Court to do in the instant case by suggesting that other decisions ought to be preferred. Indeed, *Vavilov* holds that past decisions of administrative decision makers do not bind other decision makers (*Vavilov*, para 129). The point of the matter is not to suggest that it is not preferable to have like cases treated alike. Evidently, it is. A decision which would depart from long standing practices or established internal authority would require for the decision maker to justify the departure. A lack of justification may well make the decision unreasonable. But here, there is simply no such thing. The RAD concluded that the facts of these other decisions were materially different. The Applicant did not show how that justification would not be a complete response to the argument.

[37] On the second prong of the test, the Applicant advanced that he could be located through his family disclosing his new location. The RAD found, on the contrary, that the IFA, a populous city a fair distance away from the place he left 13 years ago, is safe. The Applicant has not challenged that conclusion in order to make it unreasonable. It must be remembered that the RAD reasonably found that the identified agents of persecution did not have the means nor the motivation to find the Applicant and harm him. The Applicant’s burden was to demonstrate that in all the circumstances, it was not reasonable to consider the IFA safe. That burden was not discharged.

V. Conclusion

[38] As a result of the Applicant's failure to satisfy the Court that the RAD made an unreasonable decision concerning the serious possibility of persecution in the proposed IFA, or that the said IFA was not reasonable, the judicial review application must be dismissed.

[39] There is no question to be certified pursuant to s 74 of the IRPA.

JUDGMENT in IMM-3836-22

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question to be certified pursuant to s 74 of the *Immigration and Refugee Protection Act*.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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