Federal Court Cour fédérale

Date: 20230912

Docket: IMM-4438-22

Citation: 2023 FC 1226

Ottawa, Ontario, September 12, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

RAFAQAT ALI AZHAR GONDAL
SHAHMEER KARAM
ZARA KARAM
HASHAM KARAM
SHAZAL KARAM
NAZMA HAYAT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Rafaqat Ali Azhar Gondal [Principal Applicant], his spouse and their four minor children [Associate Applicants] seek judicial review of the decision of the Refugee Appeal Division [RAD] upholding the decision of the Refugee Protection Division [RPD], which found that the

Applicants are not Convention Refugees or persons in need of protection under s 96 and s 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

[2] For the reasons that follow, I am dismissing this application. The RAD did not breach the duty of procedural fairness owed to the Applicants and its decision was reasonable.

Background

[3] The Applicants' claims are all based on the Principal Applicant's Basis of Claim narrative [BOC]. Therein, the Principal Applicant claimed that all of the Applicants are citizens of Pakistan and that he also holds permanent resident status in Italy. He claimed that the Applicants are Shia and fear persecution in Pakistan from Sunni extremists. More specifically, he claimed that he participated in the organization of the Imambargah Hussainia in Mandi Bahauddin, and, in 2016, his home was designated as the origin point of the Ashura procession, a Shia religious ceremony. In 2019, members of a militant group, Ahl-e-Sunnat Wal Jamaat [ASWJ], threatened harm to the Principal Applicant if the procession proceeded. The Principal Applicant claimed that on September 10, 2019, the ASWJ ambushed and attacked the procession as it passed a Sunni mosque, and the police assigned to protect the procession failed to do so. The Principal Applicant claimed that he identified more than a dozen of the attackers to the police and made a First Information Report [FIR], but no arrests were made. Further, he claimed he was attacked on September 13, 2019, and received a threatening phone call on September 15, 2019. The Applicants moved to a cousin's home in Lahore, where the Principal Applicant received another threatening phone call. The family then stayed with a brother-in-law in Islamabad prior to obtaining United States [US] visitor visas and flying to New York on

December 23, 2019. They entered Canada on December 27, 2019, and made their claim for refugee protection.

[4] The RPD denied their claim on October 19, 2021. The RPD found aspects of the Principal Applicant's claim not to be credible. It concluded that he is a Shia who helped organize processions, but he is not a high-profile Shia as described in the documentary evidence contained in the National Documentation Package [NDP] and at risk as such. The RPD also found that the Applicants have a viable internal flight alternative [IFA] in Islamabad. The Applicants appealed to the RAD.

[5] The RAD found that the determinative issues on appeal were exclusion under Article 1E of the Convention for the Principal Applicant, and an IFA for the Associate Applicants. The RAD found that Principal Applicant is a permanent resident of Italy, with the rights attendant with that status, rendering him ineligible for refugee protection in Canada. The RAD further found that the Associate Applicants had not demonstrated that the local ASWJ group in Mandi Bahauddin had the motivation to find them in Islamabad. The RAD also addressed the Applicants' assertion that the RPD erred in its credibility assessment. The RAD conducted an independent analysis of the Principal Applicant's profile, including whether or not he was personally targeted. Having assessed the Applicants' supporting evidence, the RAD found, among other things, that the Principal Applicant was not the permit holder for the 2019 procession, that the procession was not attacked in 2019 in Mandi Bahauddin, that the FIR was more likely than not inauthentic, and that the Principal Applicant embellished his profile with the Mandi Bahauddin Shia community.

Issues and Standard of Review

[6] The Applicants raised the following issues:

1. Did the RAD breach natural justice by not advising the Principal Applicant that exclusion was an issue?

2. Was the exclusion finding unreasonable?

3. Was the IFA finding unreasonable?

[7] Issues of procedural fairness are to be reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*], the Federal Court of Appeal held that the required reviewing exercise is best – albeit imperfectly – reflected in the correctness standard. The Court is to determine whether the proceedings were fair in all of the circumstances (*CPR* at paras 54-56; see also *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 17).

[8] When a court reviews the merits of an administrative decision, there is a presumption that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigrations) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). The parties do not suggest there are any circumstances in this case that would serve to rebut the presumption, and I find there are none. Accordingly, reasonableness is the standard of review applicable to the merits of the RAD's decision.

[9] "A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks 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).

No Breach of Procedural Fairness

[10] Article 1E of the *Convention Relating to the Status of Refugees* states that the Convention does not apply to persons who have taken residence in a third country and are recognized by that country as "having the rights and obligations which are attached to the possession of the nationality of that country." Section 98 of the *IRPA* incorporates Article 1E into Canadian law and states that persons described in Article 1E are not Convention refugees or persons in need of protection. The Federal Court of Appeal in *Zeng v Canada (Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*] set out the test for assessing whether exclusion under Article 1E applies as of the date of an RPD hearing:

> [28] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[11] With respect to changes in status, once the Minister establishes a *prima facie* case of exclusion under Article 1E, the onus shifts to the refugee claimant to rebut the exclusion, that is, to demonstrate that a status previously held has lapsed or been lost (*Lu v Canada (Citizenship and Immigration)*, 2012 FC 311 at para 24 [*Lu*]; *Dieng v Canada (Citizenship and Immigration)*, 2013 FC 450 at para 21; *Mulugeta v Canada (Minister of Citizenship and Immigration),* 2022 FC 1436 at para 22).

[12] In its decision, the RPD noted that on April 22, 2021, the Minister was informed of the Principal Applicant's permanent resident status in Italy, but that the Minister did not indicate any intent to intervene up to the time of the hearing. The RPD further noted that the documentary evidence clearly states that the permanent resident status of foreigners in Italy is invalid after an absence of one year. As a result, the RPD found that the Principal Applicant does not have any status in Italy.

[13] The RAD noted that the Minister sent a Notice of Intervention [NOI] to the RAD on February 23, 2022. This included submissions on a breach of natural justice by the RPD and exclusion under Article 1E for the Principal Applicant, as well as proof of service that a NOI, evidence and submissions had been sent to the RPD on May 6, 2021. The RAD noted that, according to the RPD record, the RPD notified the Minister of a possible exclusion of the Principal Applicant on April 22, 2021, pursuant to Rule 26 of the *Refugee Protection Division Rules*. However, although served, the May 6, 2021, NOI was not found in the RPD record and was not before the RPD when it made its decision. Given this, the RAD stated that it was considering the February 23, 2022, NOI, submissions and evidence as new evidence on appeal. It

also noted that the February 23, 2022, NOI was served on counsel for the Applicants but that the Applicants had not responded to the NOI. They had not challenged the credibility or trustworthiness of the new evidence.

[14] The Applicants submit that natural justice was violated when the RAD failed to notify them that it would consider a "new issue" raised on appeal relating to the Minister's intervention. They assert that exclusion did not form a basis for the RPD to find against the Applicants, and the issue was analyzed for the first time by the RAD. Thus, the exclusion submissions by the Minister were "new" to the Applicants. The Applicants cite case law in support of the proposition that when the RAD considers new issues, the parties are entitled to notice and an adequate opportunity to address the new issues (citing *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 67, 71, 74 and 76; *Husain v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10). The Applicants further submit that the February 23, 2022, NOI was not in evidence before the RAD until the RAD determined it would be considering it as new evidence on appeal. They submit that at that point the RAD ought to have informed the Applicants that the Article 1E exclusion "was in play" and allowed further submissions or a request for an oral hearing. The Applicants submit they were not required to address the allegations in the February 23, 2022, NOI until the RAD confirmed its admission.

[15] I agree with the Respondent that the Applicants' assertion of a breach of procedural fairness is without merit.

[16] The February 23, 2022, NOI indicated that the RPD had stated in its reasons that the Minister was informed of the Principal Applicant's permanent residency in Italy "but did not indicate any intention to intervene up to the time of hearing." However, in fact, the Minister had sent the NOI and their evidence and submissions to the RPD on May 6, 2021. The Minister submitted that, given its probative value, their evidence should be considered by the RAD. The Minister clearly indicated that the RPD had erred in failing to consider the NOI and the evidence and submission that accompanied it.

[17] In my view, the February 23, 2022, NOI was "notice" of the issue. It is not disputed that this notice was served on counsel for the Applicants. In my view, the Article 1E exclusion was clearly "in play" when the NOI was served on the Applicants. Nor was the Principal Applicant's status a new issue, as it was dealt with by the RPD – albeit erroneously given that the Minister's NOI dated May 6, 2021, was improperly not before it.

[18] Further, as the Respondent points out, s 4(1) of the Refugee Appeal Division Rules [RAD Rules] permits the Respondent to intervene at any time before the RAD makes a determination by serving written notice of the intervention and accompanying evidence. RAD Rule 5(1) provides that, to reply to a Minister's intervention, the appellant "must" provide a reply record to the Minister and then the RAD. This reply record must be received by the RAD no later than 15 days after the day on which the appellant receives the NOI, the Minister's intervention record or any additional documents provided by the Minister (RAD Rule 5(5)). Thus, the Applicants had an opportunity to, but did not, reply to the NOI.

[19] Finally, while the Applicants may be of the view that they were under no obligation to address the allegations contained in the NOI until the RAD "confirmed" the admission of the NOI, this is not supported by RAD Rules 4(1) and 5(1), and the Applicants point to no process or jurisprudence that supports their view. As the Respondent submits, the RAD had no authority to decline to accept and address the appropriately filed NOI. In my view, the Applicants' election not to respond was at their own risk.

[20] There was no breach of procedural fairness in these circumstances.

Exclusion was Reasonable

[21] The RAD found that although the RPD did not have the Minister's May 6, 2021, NOI materials before it, the RPD erred in not obtaining an explanation from the Principal Applicant before finding that he had lost his status, given that he described himself as a permanent resident of Italy. It noted that the Applicant described himself in his BOC narrative as a citizen of Pakistan and as having permanent resident status in Italy. He also stated, "being a permanent resident of Italy, I could have travelled to that country but my wife and children could not. I could not take my wife and children to Italy because sponsoring them requires at least two years' residence in that country and proof of a strong income in Italy." The RAD referred to the Federal Court of Appeal's decision in *Lu* as indicating that when there is *prima facie* evidence that the claimant has status in another country, the onus shifts to them to establish that status has been lost.

[22] Further, the RAD found the Applicants had not contested the Minister's submission that the Principal Applicant can work and have access to social services, including health care and education, as a permanent resident of Italy. The RAD also noted that the Minister provided evidence that the Italian authorities had confirmed that the Principal Applicant holds a permanent resident permit issued for work purposes (self-employment) with no expiry date.

[23] The RAD concluded that the Principal Applicant is excluded from refugee protection pursuant to Article 1E.

[24] The Applicants submit that whatever the Principal Applicant thought his status in Italy might be, in fact he was no longer a permanent resident of that country. They refer to RIR ITA104045.E in support of this, which states that "a permanent resident who is absent from Italy for twelve months or more will lose his or her permanent resident status, regardless of the validity indicated on the Carta di Soggiorno."

[25] The Respondent submits that, in accordance with *Zeng*, the RAD reasonably assessed the evidence in the record to conclude that the Principal Applicant previously held permanent resident status in Italy and had not met his onus of demonstrating that his status had lapsed. While the Applicants assert before this Court that the Principal Applicant's status has expired, they did not put this position to the RAD. In the absence of a response from the Applicants as to the Principal Applicant's status, the RAD was entitled to rely on the record before it, which included the Principal Applicant's statements in his BOC narrative; the Applicants' acknowledgment, through their counsel in post-RPD-hearing submissions dated August 30,

2021, that the Principal Applicant “holds permanent resident status in Italy”; and the information obtained from the Italian authorities.

[26] In my view, the Applicants’ failure to respond to the February 23, 2022, NOI had a predictable, negative impact on the RAD’s assessment of the Article 1E exclusion. As the Respondent points out, the evidence in the record before the RAD clearly supports that the Principal Applicant had permanent resident status in Italy, and the Principal Applicant does not dispute that he once had such status. Once that was established, the onus was on the Principal Applicant to demonstrate that he lost that status and that he could not return to Italy (renew his status) (see *Canada (Minister of Citizenship and Immigration) v Choovak*, [2002] FCJ No 767 at para 41; *Osazuwa v Canada (Minister of citizenship and Immigration),* [2016] FCJ No. 122 at para 29). While the RAD did not address the RIR, the RIR was not raised by the Applicants in a reply to the February 23, 2022, NOI. Further, while the Principal Applicant left Italy in 2015, the RAD noted that the Minister provided evidence that the Italian authorities had confirmed that the Principal Applicant continues to hold a permanent resident permit. This evidence was a statutory declaration of an immigration officer, dated May 4, 2021, confirming that a response from the Italian authorities had been reviewed and that it advised that the Principal Applicant holds a specified permanent resident permit “issued for work purposes (self-employment) from a Questura di Prato on 2008/05/26 (no expiry date).”

[27] Thus, the information received from the Italian authorities in 2021 indicates that, at that time, the Principal Applicant held permanent resident status. This was long after the Principal Applicant had been out of that country for 12 months. The Applicants did not file a reply to the

NOI and did not address this objective documentary evidence that was specific to the Principal Applicant's permanent resident status in Italy.

[28] In these circumstances, the RAD's finding that the Principal Applicant is excluded pursuant to Article 1E is reasonable.

IFA

[29] The Applicants submit that the RAD's IFA determination was based on the false assumption that only prominent Shi'ites were at risk in Pakistan. And, regardless of the RPD and RAD's credibility concerns about the Principal Applicant's profile, there was uncontradicted evidence that he was harassed.

[30] I do not agree that the RAD erred in its assessment of the IFA.

[31] Significantly, the RAD found that the Associate Applicants had not established that the local ASWJ group in Mandi Bahauddin would have the motivation to find them in Islamabad. This conclusion was premised on the RAD's finding that the Principal Applicant did not have the high profile that might warrant individual targeting. That finding as to profile is not substantively disputed by the Applicants on judicial review. In the absence of motivation, the Associate Applicants were not at risk from the alleged agents of persecution.

[32] In support of their assertion that a low profile does not negate their risk, the Applicants point to one piece of documentary evidence that indicates that there has reportedly been an

increase in sectarian violence targeting Shi'ite groups since 2012, with attacks primarily targeting ordinary individuals. The RAD found that while the documentary evidence indicates that the ASWJ has the capacity to strike throughout Pakistan, this capacity does not extend beyond indiscriminate mass casualty strikes or the specific targeting of high-profile individuals. Per the RAD's analysis, the Principal Applicant did not fall within that profile. However, the RAD also stated that it had reviewed the NDP excerpts referenced by the Applicants, but that these excerpts did not establish that Lashkar-e-Jhangvi or other groups specifically target low-profile individuals for attacks, notwithstanding that such individuals may be affected by general or mass attacks. Where the objective evidence states that ordinary Shia individuals have been targeted, that evidence refers to militant groups attacking crowded Shia areas, not to the specific targeting of low-profile Shia individuals.

[33] Read in whole and in context, the extract from the UNHCR Eligibility Guidelines quoted, in part, by the Applicants supports the RAD's finding:

> **b)** ***Treatment of Shi'ite Individuals by Non-State Actors***
>
> The militant groups which are reportedly responsible for most of the attacks against Shi'ites in Pakistan are the Ahl-e Sunnat Wal Jama'at (ASWJ) (formerly named Sipah-e-Sahaba (SSP)), the Lashkar-e-Jhangvi (LeJ), Tehrik-e-Taliban Pakistan (TTP) and the Jundullah, a group closely affiliated with the TTP. Analysts have emphasized that sectarian attacks against civilians are a growing threat, particularly for the Shi'ite community. There has reportedly been an increase in sectarian violence **targeting Shi'ite groups** at least since 2012, with attacks primarily targeting ordinary Shi'ite individuals. **Militant groups are reported to have used suicide bombers and grenade attacks in crowded Shi'ite areas such as schools, shopping areas and markets, as well as buses and other vehicles.** They have reportedly attacked Shi'ite pilgrims travelling to and from Iran, and are reported to have targeted mosques, particularly during prayer times, as well as religious festivals, in particular the Ashura processions during the Shi'ite holy month of Muharram. There have also reportedly been targeted

> killings of Shi'ite professionals and officials, including, doctors, lawyers, politicians, prominent business people and local traders.
>
> (Emphasis added)

[34] In my view, the RAD's depiction of the objective documentary evidence was accurate. The evidence does not support that individual, low-profile Shias are targeted as such.

[35] The RAD also reviewed other documentary evidence and noted that, while violent incidents are possible anywhere and have occurred in Islamabad, these appeared to be untypical and isolated incidents.

[36] In my view, the RAD took a measured and balanced approach in analyzing the objective documentary evidence, and its IFA finding is reasonable.

JUDGMENT IN IMM-4438-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;
2. There shall be no order as to costs; and
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4438-22
STYLE OF CAUSE:	RAFAQAT ALI AZHAR GONDAL, SHAHMEER KARAM, ZARA KARAM, HASHAM KARAM, SHAZAL KARAM, NAZMA HAYAT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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