Federal Court  Cour fédérale

Date: 20141210

Docket: IMM-4136-13

Citation: 2014 FC 1194

Toronto, Ontario, December 10, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MUHAMMAD IDREES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Muhammad Idrees [the Applicant], is a citizen of Pakistan applying for judicial review of a decision of the Refugee Protection Division [RPD, Board] of the Immigration and Refugee Board of Canada which determined he is not a Convention refugee or a person in need of protection according to the criteria specified in sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] due to the existence of an Internal Flight

Alternative [IFA] in Karachi. The Application was commenced pursuant to section 72(1) of *IRPA*.

II. Facts

[2] The Applicant fears that he will be harmed, kidnapped, or killed by Taliban extremists if forced to return to Pakistan due to the fact that he is a young Muslim male from the Tirah region, where the Taliban have looked to find fighters for their cause, and that he faces a risk of retribution by the Taliban because he refused to report to fight or to help them financially in their war effort after his family received a demand letter.

[3] In December 2010, while the Applicant was studying at a university in Peshawar, Pakistan, his cousin's family received a letter from Taliban extremists demanding that the family pay a substantial sum, or send his cousin to fight for the Taliban in Afghanistan.

[4] His cousin's family and his own family lived in a village located close to the Pakistani-Afghan border in the Khyber Pakhtunkhwa Province (formerly the North-West Frontier). His cousin's family did not comply with the demand in the letter, but rather filed a report with the police. Shortly thereafter, the Taliban extremists kidnapped his cousin. The family then paid the ransom money, with the help of the Applicant's father, and the Applicant's cousin was released.

[5] On March 19, 2011, while the Applicant was in his village on university break, his family received a similar letter, demanding that he either be sent to fight for the Taliban or that his family pay an amount even greater than had been demanded the year earlier for his cousin. As a

result, he left the village the next day and returned to Peshawar, where his roommate knew a man who was able to obtain a visa for him to come to Canada.

[6] On July 29, 2011, the Applicant flew to Toronto and made a refugee claim. Before his RPD hearing, he was given notice that an issue at the hearing would be whether Karachi was available to him as an IFA.

[7] The Applicant's hearing at the RPD was held on May 14, 2013. The Applicant, responding to questions from the Member, confirmed that in the two year period since the demand letter was received, his family had not: paid the demand; received anything else from the persons who demanded the money; been approached for payment; and/or been harmed. The Applicant believed that the reason that his family had suffered no repercussions was that his family currently had no adult male family members in Pakistan: his father and brother were in Saudi Arabia, and he was in Canada.

[8] The Applicant testified that he believed the Taliban would still be interested in him, and that he would not be safe from them in Karachi (the proposed IFA) because they have an integrated network capable of locating him. Furthermore, he believed that even if the Taliban were not interested in him, he would not be safe in Karachi due to violence there between Sindh and Pashtun people. The Applicant is of Pashtun ethnicity.

[9] In submissions before the RPD, Applicant's counsel addressed the issue of a potential IFA in Karachi. First, addressing the risk in moving to Karachi, counsel relied on the

documentary evidence of Taliban activity to submit that the Taliban have a very integrated network in Pakistan, including a stronghold in Karachi. Second, addressing the reasonableness of the Applicant seeking refuge in Karachi, counsel relied on the documentary evidence to submit that targeted killings are endemic in Karachi and have recently spiked, and that due to the very serious violence between the Sindh and Pashtun in that city, the Applicant's Pashtun ethnicity would create a new area of risk if he moved there.

[10] The RPD released its decision on May 28, 2013, refusing the Applicant's claim on the basis that he had an IFA available to him in Karachi.

III. Issue

[11] This matter raises the following issue:

1. Did the RPD err in finding that the Applicant had an IFA in Karachi?

IV. Decision

[12] The RPD released its decision on May 28, 2013, finding that the claimant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of *IRPA*.

[13] The Board Member [Member] found that an IFA was available to the Applicant in Karachi, and that this was determinative of his claim. She outlined the two-prong test for determining whether a valid IFA exists, which required her to consider (1) the possibility of

persecution or risk in the IFA location, and (2) the reasonableness, in all the circumstances, of the claimant seeking refuge there.

[14] Regarding the first prong of the IFA test, the Board Member found that there was not more than a mere possibility that the Applicant would be targeted by members of the Taliban in Karachi, and that he could live safely in Karachi without fear of persecution or other cruel and unusual treatment. She based her conclusion on the following findings:

a. There was no credible evidence to indicate that members of the Taliban were still interested in targeting the Applicant or would pursue him in Karachi. For example, there was no evidence that they pursued him before he left Pakistan, or that they approached his two younger brothers, who still lived in the village. Furthermore, the Applicant testified that despite not paying the demand, his family had not been threatened or harmed since receiving the letter.

b. Criminal activity that occurs generally in Karachi cannot be attributed, in a significant way, to the Taliban. The Taliban is primarily involved in attacks on government forces in northern Pakistan, mainly in rural areas along the Afghanistan border. The violence in Karachi is mainly due to political and ethnic rivalry and occurs primarily in the poor sections of the city.

c. There was persuasive documentary evidence indicating that persons such as the Applicant would not be targeted by the Taliban in Karachi. The Applicant does not fit the profile of someone the Taliban primarily targets for harm.

[15] Regarding the second prong of the IFA test, the Member found that the Applicant could seek refuge in Karachi because it would not be unduly harsh for him to reside there. Her reasons were the following:

a. It would be easier for the Applicant to readjust to life in a different locale in his home country than in Canada, where he was able to adjust to life in a new country with an unfamiliar culture and language.

b. The Applicant's work history and educational background suggest that it would not be unduly harsh for him to reside in Karachi, a city of some 23 million inhabitants.

c. The Applicant is fluent in Pashto and Urdu.

V. Relevant Provisions

[16] The relevant provisions of sections 96 and 97 of *IRPA* are attached as Annex A.

VI. Submissions of the Parties

[17] The Applicant submits that the RPD erred in finding that the Applicant had an IFA available to him in Karachi, as the RPD's findings on the two prongs of the IFA test were inconsistent with the documentary evidence.

[18] With respect to the first prong of the test - in which the Member concluded that there was no serious possibility of the claimant facing persecution or risk to life or cruel and unusual

treatment or punishment or danger of torture in the proposed IFA – the Applicant submits that the Member made an error of fact in finding that the crime in Karachi cannot be attributed to the Taliban. He contends that the Member failed to understand that the Taliban's terrorist activity in the Northern areas and the criminal activity in Karachi are interlinked, as the Taliban contract and control many of the gangs that commit the targeted killings. Instead, she found that there was general crime in Karachi, stating that the violence in Karachi is "mainly due to political and ethnic rivalry and occurs primarily in the poor sections of the city" (Decision, Applicant's Record [AR], p 11, para 21).

[19] The Applicant submits that the country documentation shows that the Pakistani Taliban has shifted its focus out of the tribal belt and is now more focused on major cities, including Karachi. The country documentation shows that the Pakistani Taliban is financed through criminal activity that occurs in Karachi. The Applicant argues that since the documentation clearly shows that the Taliban is active in Karachi, the RPD's analysis on the first prong is unreasonable, because the Taliban's reach is far greater than just the rural areas and northern Pakistan, as the Board found. The evidence, rather, shows that many groups are under the control of the Taliban (AR, pp 98-99, 163-164 and 200-201). Overlooking this evidence rendered the Board's conclusion unreasonable regarding the risks to the Applicant from the Taliban in Karachi.

[20] With respect to the second prong of the IFA test – in which the Board concluded that the Applicant could reasonably seek refuge in Karachi – the Applicant submits that the Board did not consider the unique circumstances of the Applicant as a Pashtun person who would be

destined to Karachi and who has already been targeted by the Taliban. While the Member acknowledged ethnic violence and targeted killings in Karachi, she did not consider the effect the sectarian violence would have on the circumstances of this particular individual, as a member of the Pashtun ethnic group. As with the first prong of the IFA test, the Applicant states that the Board missed key evidence, including evidence regarding the level of ethnic violence between the Pashtun and Sindh, causing Pashtun people to leave Karachi, in the Board's Response to Information Request about violence in Karachi. The Applicant submits that the Board failed to acknowledge or analyse this evidence.

[21] Specifically, the Pashtun in Karachi live in ethnic enclaves that are protected by the Taliban and its affiliated groups. Due to the particular circumstances of this Applicant, he cannot live in these Pashtun areas, lest he put himself amongst the agents of persecution; nor can he live in non-Pashtun areas, where he risks being targeted for his Pashtun ethnicity and will not be protected by the Taliban.

[22] In contrast, the Respondent submits that the RPD's IFA finding was reasonable. The onus was on the Applicant to show that Karachi was not a viable IFA for him, and he failed to satisfy his legal burden in that regard. The Applicant's fears in Karachi are generalized and speculative. Contrary to what the Applicant claims, the RPD considered his personal circumstances, recognized the issue, and concluded that the violence in Karachi could not be attributed in a significant way to the Taliban.

[23] First, the Respondent argues, it was reasonable for the Member to find that the Applicant had failed to show that members of the Taliban continued to have any interest in him or would pursue him in Karachi. In reaching this conclusion, the RPD considered that despite never paying the demand money, the Applicant's family, including his two younger brothers, had not been approached, threatened or harmed by the Taliban since the Applicant left Pakistan in May 2011.

[24] Further, the Member was not persuaded that the problems in Karachi were attributable in a significant way to the Taliban or that the Applicant fit the profile of someone the Taliban primarily targets. The Respondent contends that the Board Member indeed considered the documentary evidence, but found that the Taliban is primarily involved in attacks on government forces in northern rural areas and that violence in Karachi is mainly due to political and ethnic rivalry occurring in the poor sections of the city.

[25] Second, the Respondent submits that the test to show that an IFA is unreasonable is a very high one, requiring actual and concrete evidence of the existence of conditions which would jeopardize the life and safety of the Applicant, and that test was not met in this case. Generalized and random criminality and terrorist violence unconnected to an applicant's claim of a well-founded fear of persecution is insufficient to negate the viability of an IFA (*Velasquez v MCI*, 2011 FC 804; *Velasquez v MCI*, 2009 FC 109).

VII. Analysis

[26] An IFA finding is a question of fact and is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53; *Velasquez*, 2009, above, at para 14).

[27] To find that there is a viable IFA in a particular location, the Board must be satisfied, on a balance of probabilities, that both prongs of the two prong test set out above are met. That is, first, there is no serious possibility of the claimant being persecuted in the IFA region, and second, that in all the circumstances, including circumstances particular to the applicant, conditions in the IFA location are such that it is reasonable for the applicant to seek refuge there (*Rasaratnam v Canada (MEI)*, [1992] 1 FC 706 at para 10 (CA); *Thirunavukkarasu v Canada (MEI)*, [1994] 1 FC 589 at paras 12-15 (CA)). Ultimately, the onus is on the Applicant to demonstrate to the Board that Karachi is not a viable IFA.

[28] I find that the Board's finding on the first prong of the IFA test – that the Applicant would not be persecuted by the Taliban in Karachi – was reasonable. It was open to the Board to find that there was no credible evidence that the Taliban were still interested in the Applicant or that the Taliban would pursue him in Karachi. It was also open to the Board to find that the crime in the city was not attributable, in a significant way, to the Taliban. As Applicant's counsel pointed out for the Court, the documentary evidence suggests that the Taliban have a presence in Karachi and are linked to criminal activity there. However, there is also much evidence of ethnic violence in Karachi, and there is insufficient evidence to link the bulk of the ethnic violence, or indeed, the majority of the other violence in the city, to the Taliban in

particular. Although it would have been preferable for the Member to acknowledge the evidence that there is at least some Taliban activity in Karachi and that the Taliban's networks extend through the Sindh province, in which Karachi is located, the Member's finding that the crime in Karachi is not linked to the Taliban *in a significant way* is not contradicted by the evidence.

[29] However, I am not satisfied that the Board adequately considered the second prong of the IFA test: whether in all the circumstances, including circumstances particular to the Applicant, conditions in Karachi were such that it was reasonable for the Applicant to seek refuge there. My conclusion is similar to that in *Sabir v MCI*, [1998] FCJ No 1556 at para 12, where Justice Campbell found that since Karachi was raised by the Convention Refugee Determination Division [CRDD] as a potential IFA, and since the Applicant had raised ethnic persecution in Karachi in response, the CRDD made an error by not making a finding on that point.

[30] In this case, the Board raised Karachi as a potential IFA and the Applicant submitted significant evidence to the Board of ethnic violence in Karachi, including against persons of Pashtun ethnicity. In analyzing the *first* prong of the IFA test (whether there is a serious possibility the Applicant would be persecuted in Karachi), the Member acknowledged the violence but discarded it on the basis that it could not be attributed in a significant way to the Taliban.

[31] In my view, whether the violence in Karachi is perpetrated by the Taliban is relevant only to the first prong of the test as it speaks to the presence and activity of the Taliban in the city, and so the violence in Karachi – although it was discarded in the first prong of the test – should

have been considered in the second prong. To determine whether it is reasonable for the Applicant to seek refuge in Karachi requires consideration of the broader circumstances beyond the persecution that caused the Applicant to flee his original location. The Board Member recognized this in the beginning of her decision, where she wrote:

> …If there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it before they seek safety in Canada, unless they can show it is objectively unreasonable or unduly harsh for them to do so…. [T]he claimant cannot be required to encounter great danger or undergo undue hardship either in travelling there or in remaining there. (RPD Decision, AR, p 8, para 10)

[32] However, the Board Member failed in her analysis to take account of the broader circumstances, including the personal circumstances of the Applicant, when considering whether Karachi was a viable IFA for him. In analyzing the second prong of the IFA test (reasonableness of Karachi as an IFA), the Member did not consider the ethnic violence against the Pashtun in that city. Thus, in finding that it was reasonable for the Applicant – of Pashtun ethnicity – to seek refuge in Karachi, she did not consider his safety in staying there, although this was clearly raised in the evidence before her and in counsel's submissions (Certified Tribunal Record, pp 28, 207-210, 589-590, 605).

[33] I recognize that this Court has found the Board's finding of a viable IFA in Karachi to be reasonable in the following recent cases: *Abid v Canada (Citizenship and Immigration)*, 2012 FC 483 at para 23; *Gillani v Canada (Citizenship and Immigration)*, 2012 FC 533 at paras 19, 35; *Rana v Canada (Citizenship and Immigration)*, 2012 FC 453 at para 44; *Begum v Canada (Citizenship and Immigration)*, 2011 FC 10 at para 65; *Malik v Canada* (Citizenship and Immigration), 2010 FC 229 at paras 13, 18. However, in none of those cases did the applicant

submit to the Board that inter-ethnic violence in Karachi made it an unsafe location for him or her. Further, only one of those cases (*Begum*) dealt with an applicant who had submitted to the Board that she could not live safely in Karachi for reasons other than the persecution she was fleeing (i.e. for reasons relevant to the second prong of the IFA test, rather than the first). Unlike in our case, it was clear in *Begum* that the Board had addressed under the second prong of the IFA test the safety concern raised by the applicant to determine whether it was reasonable for her to take refuge in Karachi: See paras 54, 61-64.

[34] The Respondent argues that the personal history of this Applicant and his family shows that the Taliban are not still interested in the Applicant. While this may be true, and persecution by the Taliban is relevant to the first prong of the test, it does not address the Board's failure to consider the Applicant's risk of ethnic violence in determining whether it is reasonable for him to seek refuge in Karachi.

[35] It may be that the Board ultimately finds against the Applicant or the second prong of this test, but it is not the role of this Court to undertake that analysis, which is wholly within the domain of the Board.

[36] In the absence of a finding on whether it was reasonable under the second prong of the test for the Applicant to seek refuge in Karachi despite the evidence of ethnic violence there, it was unreasonable for the Board Member to find that Karachi was a viable IFA for the Applicant.

VIII. Conclusions

[37] I find that the Board erred in finding that the Applicant had a viable IFA in Karachi, having failed to properly consider the second prong of the IFA test.

[38] The parties proposed no questions for certification and none arise.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted to a differently constituted panel for re-determination.

"Alan Diner"

Judge

ANNEX A

Immigration and Refugee Protection Act (SC 2001, c 27) Sections 96 and 97

Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27) Articles 96 et 97

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays

every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

STYLE OF CAUSE:	MUHAMMAD IDREES V. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 5, 2014
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 10, 2014

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