Federal Court  Cour fédérale

Date: 20161201

Docket: IMM-663-16

Citation: 2016 FC 1323

Ottawa, Ontario, December 1, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MUHAMMAD ASIF

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 by Muhammad ASIF [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [the IRPA] of a decision by the Refugee Appeal Division [the RAD], dated January 13, 2016, whereby the RAD determined that the Applicant's appeal of the decision made by the Refugee Protection Division

[RPD] on June 23, 2015, wherein the Applicant was found to be neither a Convention refugee nor a person in need of protection. Leave was granted May 20, 2016.

[2] Briefly, the Applicant is a 38-year-old Pakistani national of the Shia faith who alleges a well-founded fear of persecution from the Sunni extremist group, Sipah-e-Sahaba (SSP). The SSP sought to force him to sell his land at a reduced price because he is of the Shia faith and because they wanted him out of the area. Before fleeing his home, the Applicant lived in the Punjab province in the village of Murali Wala. The residents of Murali Wala are primarily Sunni, with only four or five Shia families living in the area.

[3] The Applicant inherited his land from his father, as did his brothers; the Applicant farmed it all and wished to continue farming there. In 2011, the Applicant's brothers were approached by two prominent Sunni extremists, who demanded the Applicant's family sell their land at a reduced price. The siblings did so, but the Applicant refused. The extremists built a Sunni school, used to preach jihad and terrorism, on the purchased lands. After the Applicant's refusal to sell, there followed a campaign of increasing harassment against him, including multiple instances of his crops being destroyed and pressure by other members of the community. He was branded an infidel. In 2013, he was assaulted by extremists, at which time they attended the Applicant's property, slapped him and threatened to kill him if he did not sell the land.

[4] The Applicant alleges that, in late 2013, he spread a rumour that he had written a will leaving his land to the government for the construction of a school. He did so in the hopes of

dissuading the extremists from killing him, since the existence of such a will would mean his land would not go to his brothers, who might be persuaded to sell it as they their own land.

[5] In January 2014, the Applicant was again assaulted by people who work for the extremists. The Applicant alleges these men attended his farm, beat him up, fired their guns into the air and threatened him. The Applicant filed a report with the police but nothing happened. The Applicant alleges that he filed a complaint with the District Police Officer but, once again, no action was taken.

[6] In February 2014, the Applicant was kidnapped and forcibly confined in a small cell in a basement for approximately one month. He was threatened, but not assaulted. The Applicant alleges that he was kept alone in this cell and fed only once every 24 hours. The Applicant alleges that, during this time, the same two extremists would enter the cell every few days and demand that he sell his land at a reduced price, to which the Applicant would respond with an offer to sell at full price. They were not satisfied with his response and would return him to his cell.

[7] During his confinement, the man who served the Applicant food informed him that the extremists planned to kill the Applicant after buying his land. This man eventually helped the Applicant escape.

[8] The Applicant alleges that he was also warned by a friend, a village elder, in late 2011, that the SSP was planning on killing him after acquiring his land.

[9] After escaping, the Applicant hid at a relative's house in Dhonkal, a village located in the Punjab province. Several weeks after his escape, the extremists came to this relative's house looking for him. The Applicant then moved to another relative's home, located in the village of Faizabad, also located in the Punjab province. The extremists tracked him again, this time assaulting the relative he was staying with in Faizabad. The Applicant alleges that the extremists were accompanied by police when attending at his relative's home in Faizabad. The Applicant's brother had arranged for him to leave Pakistan and, after being tracked down the second time, the Applicant moved to Lahore to await his flight out of the country.

[10] The Applicant left Pakistan on June 25, 2014, with the assistance of a people smuggling agent. He made a claim for refugee protection in Canada on October 6, 2014.

[11] The Applicant also makes the following allegations:

- The extremists have attended at his siblings' homes with the police several times both before and after he left the country. During these visits, the extremists searched his siblings' homes, demanded to know his whereabouts, were verbally abusive and threatened death should the Applicant's whereabouts be concealed.

- His neighbour in Murali Wala is a Sunni Muslim with land equal in value to his own who had not been disturbed by the extremists. While in hiding, the Applicant asked this neighbour to look after his land and take any profits that resulted therefrom. Despite agreeing at first, this neighbour refused to tend the farm after being visited by the extremists, who insisted the land was theirs.

[12] In support of his claim, the Applicant filed a psychological report by a psychologist, in which the Applicant was diagnosed with Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD). The report concluded that a return to Pakistan would result in disabling psychological harm to the Applicant.

II. Decision under review

[13] The RAD heard the Applicant on January 13, 2016. No new evidence was submitted and no request was made for an oral hearing. The issue before the RAD was whether there was an Internal Flight Alternative [IFA] in Hyderabad, a city in Sindh province located in the Southeast of Pakistan. The RPD found he had an IFA, which was why it dismissed his claim originally.

[14] Applying the standard of review stated by the Federal Court in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paras 54-56 [*Huruglica (FC)*], the RAD found that the RPD's credibility findings were clear, it had given reasons for its credibility concerns and it had made clear which allegations it believed to be true. I should note that the RPD dismissed the Applicant's claim also citing credibility concerns based on the fact the Applicant gave inconsistent stories about his intentions respecting the land – essentially, that the Applicant had claimed both that the land was not for sale and also that it was for sale at a fair price. The RAD agreed with the RPD that the Applicant's statements regarding his intent to sell his land, as indicated in his BOC and at the hearing, were inconsistent. The RAD agreed that the RPD's failure to challenge the evidence regarding the SSP's actions, the Applicant's flight and the

SSP's pursuit indicated that these allegations were assumed to be true. It did not find, however, that this made the viability of an IFA unreasonable.

[15] The RAD agreed that the SSP sought the Applicant's land because he is a Shia Muslim but found, on a balance of probabilities, that the extremists' pursuit was based on the Applicant's failure to sell his land. The RAD found no evidence had been presented to support the contention that the extremists would continue to pursue the Applicant after the land was sold. The RAD noted the Applicant's evidence indicating that he had been informed that he would be killed after selling his land was uncorroborated. The RAD further noted that the evidence "strain[ed] credulity," since such threats would constrain him from agreeing to sell the land.

[16] The RAD noted the RPD's contradiction in its analysis regarding SSP activity in Hyderabad and found the RPD's statements regarding possible SSP presence in that city to be speculative and without an evidentiary basis. The RAD found that there was no evidence that the SSP operates in Hyderabad and held that the Applicant had not provided any evidence to the contrary.

[17] The RAD found that extremist organizations like the SSP and the Lashkar-e-Jhangvi (LeJ) retained their ability to harm individuals and organizations in Pakistan, but that the evidence regarding an IFA there was mixed. The RAD made specific note of documentation by the Australian Government's Department of Foreign Affairs and Trade, finding that, on a balance of probabilities, an IFA in Pakistan was available to people like the Applicant with similar fears. The RAD found the RPD's reasoning (that the SSP was able to pursue the

Appellant on two separate occasions because he stayed with family members within the Punjab province) convincing on this point.

[18] The RAD found that the report of the psychologist should be given little weight in regards to the availability of an IFA for the Applicant because:

- it crossed the line separating expert opinion from advocacy;
- it made findings of credibility that should have been reserved for the panel;
- it had not been subjected to any form of validation;
- it reached very serious conclusions regarding the Appellant's psychological health after only one interview; and,
- it spoke to the lack of available resources in Pakistan without providing any evidence of knowledge regarding treatment options in that country.

III. Issues

[19] This matter raises the following issues:

1. Was it reasonable for the RAD to find an IFA in the city of Hyderabad, located elsewhere in Pakistan?

2. Did the RAD err in assigning little weight to the report provided by the psychologist?

IV. Analysis

A. *Standard of Review*

[20] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The existence of an IFA is a question of mixed fact and law and therefore reviewable on the standard of reasonableness: *Diaz v Canada (Minister of Citizenship and Immigration*), [2008] FCJ No 1543. The RAD's decision is reviewed on a reasonableness standard: *Huruglica v Canada*, 2016 FCA 93 at para 35 [*Huruglica (FCA)*] While the Federal Court of Appeal in *Huruglica (FCA)* determined that the standard of review to be applied by the RAD is that of correctness, except on matters of credibility where the RPD had an advantage, the RAD's application of the earlier standard endorsed by the Federal Court in *Huruglica (FC),* above, is not necessarily a reviewable error, so long as the RAD conducts, in substance, a thorough, comprehensive and independent review of the kind endorsed by the Federal Court of Appeal: *Shala v Canada (Minister of Citizenship and Immigration)*, 2016 FC 573 at para 9.

[21] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] In this case, a decision by the RAD meets the *Dunsmuir* criteria 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. In addition, the Court is instructed that judicial review is not to become a line-by-line treasure hunt for errors: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. I should add that the RAD's assessment, of the evidence is entitled to deference: see *Dunsmuir* at para 53; *Zhong v Canada (Citizenship and Immigration)*, 2016 FC 346 at para 16.

B. *Discussion*

[23] On balance, I have determined that this application for judicial review should be dismissed for the following reasons.

[24] I agree that the issue is the reasonableness of the IFA finding. The law in this respect is found in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA), 1993 CanLII 3011, at para 12:

> 12 Mahoney J.A. expressed the position more accurately in Rasaratnam, supra, at page 711:
>
> > In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.

[25] I also find the RAD conducted a proper review per *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 9; the RAD's review was, in substance, a thorough, comprehensive and independent review as required.

[26] I will deal with each part of this two-part test.

Whether there was no serious possibility of the Applicant being persecuted in Hyderabad?

[27] As noted, the RAD's findings regarding the availability of an IFA in Hyderabad is challenged on the basis it is unreasonable for several reasons. I will now set out each of these reasons and discuss *seriatim*.

[28] I do not find the RAD's reasons contradictory as alleged. The country condition evidence regarding the possibility of persecution in Hyderabad was indeed mixed, as the RAD reasonably

found. The RAD set that evidence out and drew a conclusion based on the facts of this case. Drawing that conclusion fell within the purview of the RAD to assess the mixed evidence and come to a conclusion. It applied the recognized test for this assessment to itself and chose to rely on an Australian report in preference to others; that in my respectful view was its prerogative and duty and did not offend *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paras 14-17.

[29] The RAD's finding on whether or not the SSP and others would pursue the Applicant in Hyderabad, assuming the land was sold, is also reasonably open on the facts. This, again, is a factual assessment that falls within the province of the RAD to determine. In this connection, I note the RAD is a specialized body in terms of assessing a possible IFA and I am prepared to defer, as is generally required, to its assessment in this regard.

[30] The issue of the rumour spread by the Applicant that he had willed his land to the government (a rumour calculated to result in there being no benefit to the SSP in having him dead) is exactly the sort of nuanced and factual assessment that the RAD is designed to assess and determine. While not mentioned in its analysis, it is well-known that the RAD is not obliged to deal with each and every issue propounded by an applicant: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

[31] The allegation that the SSP would kill the Applicant even if he sold the land was considered and dealt with by the RAD. Once again, this argument invites this Court to engage in

a re-litigation of the facts of this case, which is generally not its duty. I agree that the RAD's finding these reports to be uncorroborated is contrary to the evidence, if that evidence was in fact accepted. According to the Applicant, two different sources informed him that he would be killed regardless of whether he sold the land or not: his jailer and a village elder who was also his friend. Each, in my view, corroborated the other. Although the RPD's finding this evidence to be uncorroborated is unsupported by the record. In my view it is not sufficient to render the decision unreasonable.

Were conditions in Hyderabad such that it would not be unreasonable for the Applicant to seek refuge there?

[32] The onus of proof rests on the claimant to show that it is objectively unreasonable for them to avail themselves of a "safe haven" within their own country: *Thirunavukkarasu* at para 12.

[33] In my view, the determination of this issue depends on the assessment of the report filed by the Applicant's psychologist, to which the RAD gave little weight. The reasons the RAD provided for doing so and my comments on each are as follows:

A. *It crossed the line separating expert opinion from advocacy*. In my view, while it is expected that expert reports will be supportive of the claim made by the person filing them, there is a line between providing a diagnosis and prognosis with appropriate support and open advocacy: *Egbesola v Canada (Citizenship and Immigration)*, 2016 FC 204. The determination of which side of the line an expert report falls on comes down to a matter of weighing

the evidence and assessing its bearing on the facts at hand. That is a matter for the RAD as part of its duty to assess the evidence. Such an assessment is to be afforded deference by the Court. I have reviewed the report and cannot say the RAD's assessment of this particular report is unreasonable.

B. *It made findings of credibility that should have been reserved for the panel*. In my view, credibility findings are well known to lie at the heartland of tribunals such as the RPD and the RAD. While I do not know the practice of the particular expert in issue, it is rare that such reports deal with an applicant's credibility at all, much less delve into the level of detail as was the case here. Not only does this report purport to assess the Applicant's credibility, it goes further and may appear to counsel the trier of fact on how to assess the Applicant's credibility when he appears before it. The Applicant offers an explanation in which he explains the psychologist's comments as being an assessment of what the Applicant was reporting to him, in order to determine the credibility of the facts provided to him and upon which he based his conclusions. However, a fair reading of this report, with respect, does not support such an argument. In this I defer, as I am required, to the RAD's assessment. In any event, I have concluded that this aspect of the RAD's consideration of the report is reasonable.

C. *It had not been subjected to any form of validation.* In my view, this is not a stand-alone basis for assigning little weight to the report. If it were so, most, if not all, such reports would be given little weight. Therefore, I conclude this basis of attack is not reasonable.

D. *It reached very serious conclusions regarding the Applicant's psychological health after only one interview.* We know the Applicant met the psychologist only once; we do not know for how long. The Court was told this psychologist usually meets with such clients for 2 or 3 hours. With respect, this again involves an assessment of the weight assigned to the report, which is for the RAD to reasonably determine. Such determination is entitled to deference, particularly given the RAD's experience in reviewing such reports.

E. *It spoke to the lack of available resources in Pakistan without providing any evidence of knowledge regarding treatment options in that country.* On the one hand, the psychologist said there were "no psychological or psychiatric treatment options for MDD and PTSD in Pakistan"; however, nothing suggests he had expertise in this respect. On the other hand, the Applicant argues that this comment was meant to indicate the Applicant would be untreatable should he return to Pakistan, without speaking to the state of mental health treatment in that country. On balance, my view is that this finding is reasonable.

[34] I have considered these matters as individual findings for the sake of convenience, and appreciate it is not a matter of adding up the positives and subtracting the negatives.

[35] Standing back and reviewing the decision as an organic whole, looking at each part of the two-part test for determining the reasonableness of an IFA per *Thirunavukkarasu* and bearing in

mind that judicial review is not a treasure hunt for errors, I have concluded that the RAD's decision is reasonable. It satisfies *Dunsmuir* because it falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

V. Certified Question

[36] Neither party proposed a question to certify, and none arises.

VI. Conclusions

[37] Judicial review must be dismissed. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-663-16
STYLE OF CAUSE:	MUHAMMAD ASIF v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD VIA VIDEOCONFERENCE

PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 17, 2016
JUDGMENT AND REASONS:	BROWN J.
DATED:	DECEMBER 1, 2016

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