

Federal Court



Cour fédérale

Date: 20180726

Docket: IMM-5353-17

Citation: 2018 FC 785

Ottawa, Ontario, July 26, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

NAEEM AKRAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Naeem Akram, is a 41-year-old citizen of Pakistan. He arrived in Canada in December 2015 and, shortly after his arrival, claimed refugee protection. In a decision dated April 12, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected his claim, with credibility being the determinative issue. On May 8, 2017, the Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB. The RAD dismissed the appeal in a decision dated November 17, 2017 and, pursuant to

paragraph 111(1) (a) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], confirmed the RPD's decision but for reasons other than those of the RPD. The Applicant has now applied under subsection 72(1) of the *IRPA* for judicial review of the RAD's decision. He asks the Court to set aside the RAD's decision and return the matter for redetermination by another member of the RAD.

I. Background

[2] The Applicant is married and his wife and three children currently live in the city of Gujrat, Pakistan. He is originally from Karachi, Pakistan, and worked at, and later owned, his father's business selling petroleum products. The Applicant's father also owned several rental properties in Karachi. In September 2015, the Applicant's father sought to sell one of his apartments in Momin Square, Karachi, but a real estate agent informed him several men were living there illegally. On September 19, 2015, when the Applicant's father confronted these men, they assaulted him, claiming they owned the apartment. The Applicant's father and the real estate agent went to the police, but received no assistance. Two days later, when the Applicant visited the apartment, three men there advised him the apartment belonged to them and they would kill him if he returned. The Applicant immediately went to the police who said the matter was private and refused to register a report. The Applicant then spoke to a higher-ranking police officer who also refused to register a report, but agreed to take a complaint in exchange for a bribe. No action was taken by the police, and when the Applicant returned to the police four days later, he was advised to be patient.

[3] On September 28, 2015, two men on motorcycles stopped the Applicant and forced him out of his vehicle. They robbed and assaulted him, and threatened to kill him if he went to the police about the apartment. The Applicant once again went to the police who reported the incident as a robbery but made no mention of the apartment since it was being handled in another jurisdiction. A few days later, the police arrested a number of individuals in Momin Square on terrorism charges. The following day, the police arrested the Applicant's father on terrorism charges; he was released without charges after the Applicant showed the police the earlier complaints and provided them with a bribe.

[4] On October 11, 2015, the Applicant found his business had been vandalized and a threatening note had been left. The Applicant went to the police who took a written complaint. Two days later, the Applicant received a threatening phone call saying he had created an issue by getting the caller's friends arrested. The Applicant once again went to the police who took some details and warned him the men who had threatened him were linked to the Taliban. The Applicant subsequently started receiving threatening calls on a daily basis.

[5] On October 22, 2015, while driving to a wedding with a friend, two men on motorcycles shouted his name and began shooting at him. The Applicant went to the police and made a complaint. The following day, he and his family travelled to Gujrat to stay with his wife's parents. He then left his family and went to Rawalpindi to stay with his uncle. Shortly after his arrival in Rawalpindi, the Applicant's uncle was threatened by men who claimed he was assisting an enemy of Islam. Shots were fired near his uncle's home. The Applicant then left Pakistan and arrived in the United States on November 4, 2015, on a multiple-entry visa. He

made no claim for asylum in the United States as he could not afford the fees charged by American immigration consultants. On December 8, 2015, the Applicant entered Canada and in late January 2016 he claimed refugee status. He alleged before the RPD that he fears the militant group, Tehreek-e-Taliban (alternatively referred to as the TTP, the Taliban or the Pakistani Taliban). The RPD found the Applicant to be not credible and rejected his claim on April 12, 2017. The Applicant appealed the RPD's determination to the RAD on May 8, 2017, and prior to rendering its decision on November 17, 2017, the RAD requested additional submissions from the Applicant's counsel on the availability of an Internal Flight Alternative [IFA].

II. The RAD's Decision

[6] The RAD found after its own review and assessment of the evidence that the determinative issue on the appeal was the availability of an IFA for the Applicant. The RAD noted that this issue had been fully canvassed at the RPD hearing and in the Applicant's post-hearing submissions but was not referred to in the RPD's reasons. The RAD accepted the new evidence submitted by the Applicant, which included a news clip from Awam Ki Awaz and several global media articles about the activities of the TTP in Pakistan. Although the Applicant had requested an oral hearing based on the news clip as it went to the issue of his credibility, the RAD determined it would proceed without an oral hearing since the media articles did not raise a serious issue as to the Applicant's credibility.

[7] The RAD then considered the two-pronged test for an IFA established in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1256, [1992] 1 FC 706 (CA) [*Rasaratnam*]. In the RAD's view, the documentary evidence showed the Pakistani Taliban does

not operate as a unified organization with a solitary hierarchical structure but, instead, is a network of up to 30 loosely connected groups. This evidence did not, the RAD stated, provide persuasive evidence that these groups have the ability to locate individuals with a profile similar to that of the Applicant or that he would be personally targeted by a suicide bomber. The RAD found the police in Pakistan have taken action against Taliban militants and they would continue to do so based on the Applicant's evidence of arrests of Taliban members in Momin Square and the arrest of an investigator in the counter-terrorism unit suspected of leaking information to militants involved in terrorism.

[8] In reviewing the Applicant's testimony, the RAD found he did not occupy a high profile position of concern to the Taliban and that this was confirmed by his ability to reside in Rawalpindi where the Taliban confronted his uncle but took no action beyond firing shots outside his uncle's home. The RAD further found it was reasonable to believe that if the Taliban intended to harm the Applicant, they would have done so when confronting his uncle. The RAD also found the Applicant's statement that the Taliban perhaps located him in Rawalpindi through tracking his cell phone was speculative, and that his allegation the Taliban found him in Rawalpindi, a location over 1,500 km distant from his home, was not credible.

[9] The RAD next considered evidence as to whether the Taliban would be able to track the Applicant throughout Pakistan. In view of the Applicant's documentary evidence and other objective evidence, the RAD found the risk of Taliban persecution was mostly concentrated in areas where armed anti-government groups operated, and the new evidence of attacks in the proposed IFAs showed either generalized attacks or police operations resulting in the

apprehension of militants. The RAD further found the evidence did not indicate that the Taliban targeted individuals matching the Applicant's profile, or that the Taliban had the willingness or capacity to locate the Applicant outside of Karachi. The RAD concluded that the problem faced by the Applicant was limited and local in nature.

[10] In assessing the proposed IFAs in Lahore or Gujrat, the RAD noted that since the Applicant's testimony about being located in Rawalpindi was not credible, it removed this from consideration. With respect to Lahore, the RAD reviewed a document attesting to the threat of terrorist activity in that city, but found it did not show Taliban activity or threats faced by persons of the Applicant's profile, and therefore assigned it little weight. The RAD noted that violence and extremism were not part of mainstream society in Lahore, finding that the Applicant had provided no credible testimony or evidence as to how the Taliban would locate him there. With respect to Gujrat, the RAD observed that the Applicant's parents, wife and children currently lived in Gujrat with his in-laws, although their activities were limited. The RAD found it was not reasonable that the Applicant's father would remain unharmed in Gujrat for nearly three years if the Taliban truly had the ability to track individuals throughout Pakistan, and that his family's activities were not so limited individuals in the neighbourhood where they reside would not be aware of their presence. The RAD further found the Applicant's documentary evidence concerning the security situation in Gujrat supported a conclusion that authorities in Gujrat were taking action to protect its citizens, and that if the TTP was interested and had the ability to locate the Applicant in Pakistan, they would have sought out his family members in Gujrat.

[11] In view of the evidence, the RAD concluded that the Taliban was not a unitary organization, that the larger cities were relatively free of extremist violence and would provide a degree of anonymity, and that the documentary evidence did not support a conclusion that the Taliban was sufficiently coordinated to track the Applicant throughout Pakistan. Thus, on the first prong of the *Rasaratnam* test, the RAD found there was not a serious possibility the Applicant would face persecution by the Taliban in Lahore or Gujrat. On the second prong of the test, the RAD determined that the Applicant had adduced no evidence to establish there were serious social, economic, or other barriers to him relocating to Lahore or Gujrat, and that he would not suffer undue hardship in relocating to these cities. In concluding, the RAD stated there was not a serious possibility of persecution for the Appellant, nor would he be subjected personally, on a balance of probabilities, to a risk to life, a risk of cruel and unusual treatment or punishment, or a danger of torture, should he return to Pakistan; and therefore he was neither a Convention refugee nor a person in need of protection, and dismissed the appeal.

III. Issues

[12] The Applicant's submissions raise a number of issues which can be summarized as follows:

1. What is the appropriate standard of review?
2. Did the RAD make unsubstantiated credibility findings?
3. Were the RAD's IFA findings unreasonable?

IV. Analysis

A. *Standard of Review*

[13] The standard for review of the RAD's decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, [2016] 4 FCR 157). The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met 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, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*]).

[14] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of*

Citizenship and Immigration), 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. As the Federal Court of Appeal recently observed: “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, [2018] FCJ No 382). This is particularly so where the alleged breach is an unintentional omission rather than a deliberate procedural choice. In other words, a procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct. Furthermore, a reviewing court will pay respectful attention to the procedures followed by a decision-maker and will not intervene except where they fall outside the bounds of natural justice (*Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3, [2018] FCJ No 403).

B. *Did the RAD make unsubstantiated credibility findings?*

[15] The Applicant contends that, despite the RAD’s statement that the determinative issue was the availability of an IFA, it made an unreasonable and unsubstantiated credibility finding concerning the Taliban locating him in Rawalpindi. In the Applicant’s view, the RAD’s finding that the Taliban could have used this opportunity to kill him if they wanted to do so is an error of law, since such speculation suggests the only way he could prove persecution is by actually being killed. The Applicant says the RAD’s finding that he was not high profile enough to be targeted by the Taliban amounts to the same logical error. The Applicant notes that sworn testimony is presumed to be true unless there are reasons to doubt its truthfulness, and the RAD provided no justification for its negative credibility finding against him and provided no

opportunity to respond, thereby breaching procedural fairness. According to the Applicant, the RAD's decision is flawed and cannot stand because its IFA findings were based on the negative credibility finding about the Taliban following him to Rawalpindi.

[16] The Respondent maintains that the RAD was not required to make a determination on the RPD's credibility findings which did not impact the availability of an IFA. According to the Respondent, in view of *Verma v Canada (Citizenship and Immigration)*, 2016 FC 404 at para 18, [2016] FCJ No 372, it was reasonable for the RAD not to consider the RPD's credibility findings which did not impact the IFA. In the Respondent's view, the Applicant has failed to displace the onus upon him to show the proposed IFAs were unreasonable.

[17] The only issue on which the RAD made a negative credibility finding was in respect of the Applicant's allegation that he was found by the TTP at a location over 1,500 km distant from his home. Although the RAD offers scant explanation for this finding, it does not constitute a breach of procedural fairness. As noted by the Court in *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13, 290 ACWS (3d) 394 [*Oluwaseyi Adeoye*]: "There is no procedural fairness issue when the RAD finds an additional basis to question the Applicant's credibility using the evidentiary record before the RPD." Similarly, in *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243, 289 ACWS (3d) 791 [*Marin*], Justice Mosley stated that:

[37] The RAD can make independent credibility findings, without putting them to the Applicant and giving him an opportunity to make submissions: *Koffi*, above at para 38; see also *Ortiz*, above at para 22. In other words, the failure to give an applicant an opportunity to respond to a credibility finding does not necessarily constitute a breach of procedural fairness.

[18] The RAD may independently assess the documentary evidence or make credibility findings (see: *Bakare v Canada (Citizenship and Immigration)*, 2017 FC 267 at para 19, [2017] FCJ No 247; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at paras 36 to 41 and 46 to 49, [2016] FCJ No 840; *Oluwaseyi Adeoye* at paras 11 to 15; *Marin* at paras 35 to 38).

[19] This is not a case where the RAD raised a new question or issue and identified additional arguments and reasoning, going beyond the RPD decision under appeal, without affording the appellant an opportunity to respond to them (*Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600, 267 ACWS (3d) 676). Nor is this case like *Jianzhu v. Canada (Citizenship and Immigration)*, 2015 FC 551, [2015] FCJ No 527, where the Court found the RAD's decision unreasonable because it had raised and decided the issue of an applicant's *sur place* refugee claim when that issue had not been determined by the RPD or raised by the appellant on the appeal to the RAD. To similar effect is the Court's decision in *Ojarikre v. Canada (Citizenship and Immigration)*, 2015 FC 896, 257 ACWS (3d) 922, where the RAD's decision was set aside because it had raised and decided the issue of an IFA which had not been raised by either party before the RAD and the RPD had made no determination on the issue.

[20] In this case, although the RAD's negative credibility finding was not one made by the RPD, it was however based on the RAD's independent assessment of the evidence which was before the RPD. It is evident in the RAD's reasons for its decision that the Applicant's submissions on the IFA issue were reviewed and considered. The RAD reasonably and appropriately requested the Applicant's counsel to provide submissions on the IFA issue before rendering its decision for reasons other than those of the RPD. Had it not done so, its decision

would have been unfair or unreasonable because, although the IFA issue had been addressed before the RPD, the RPD's reasons were silent on this issue. It cannot be said that the Applicant was denied procedural fairness by not being afforded an opportunity to address the IFA issue, which for the RAD in this case was determinative.

C. *Were the RAD's IFA findings unreasonable?*

[21] The Applicant says the RAD's finding that the police would be able to protect him ignores the numerous instances when he went to the police and received either inadequate or no assistance. According to the Applicant, his narrative is extensively supported by the documentary evidence and the RAD unreasonably focused on a few instances of police efficacy amidst evidence that points to inadequacy. The Applicant contends that the RAD misquoted an IRB Response to Information Request [RIR] by stating the RIR "specifically notes that the TTP is a fractious group and they do not appear to have the ability to track individuals," when in fact it makes no reference to the Taliban's ability to track individuals. Even if ordinary Pakistanis targeted by the Taliban are exclusively those who have opposed the Taliban in some way, the Applicant maintains that he fits that profile by attempting to evict Taliban members from his father's apartment.

[22] The Applicant further says the evidence of a corrupt counter-terrorism investigator being arrested does not, as the RAD found, suggest state protection is available but, rather, in the Applicant's view, shows there is a serious problem with corruption within Pakistani law enforcement. The Applicant notes that a number of the documents consulted by the RAD on the availability of IFA pertain to Pakistanis fleeing religious and ethnic persecution, yet the RAD

decides without further explanation that they support its IFA findings. In the Applicant's view, the RAD unreasonably ignored his personal profile and its conclusion that the Taliban do not target individuals with his profile, despite their ability to deploy suicide bombers throughout Pakistan, ignores the fact he was personally targeted. In response to the Respondent's contention that the RAD summarized the Applicant's arguments and did not ignore them, the Applicant says this does not mean the RAD engaged with his arguments, and the RAD could not have concluded that an IFA was available if it had considered his evidence that the Taliban tracked him to Rawalpindi or documentary evidence that the Taliban is extremely well-networked and connected throughout Pakistan.

[23] The Respondent says the RAD reasonably found there was no persuasive evidence to suggest the agents of persecution had the intention or capacity to track the Applicant in the highly populated cities of Lahore and Gujrat. According to the Respondent, the RAD's alleged misquote is in fact accurate; the RIR does in fact refer to the Taliban as a fractious group, and the RAD then reasonably concluded based on this fact that they did not appear to have the ability to track individuals. In the Respondent's view, the RAD set out and summarized all of the Applicant's arguments which he claims were ignored by the RAD and, in any event, the RAD is presumed to have considered all relevant evidence even where pieces of evidence are not specifically mentioned.

[24] The Respondent further says the RAD reasonably considered the country conditions evidence and reasonably found the police were doing their job and were not complicit in terrorism, and that the Applicant did not fit the profile of a person who would be targeted by the

Taliban. With respect to the documentation stating that ordinary Pakistanis have been targets of the Taliban, the Respondent notes that this evidence refers to students and those perceived to be opposing the Taliban or not following Sharia law, and that if there was evidence that the Taliban frequently targeted individuals in the context of personal vendettas, one would expect this to be highlighted in the documentary evidence. In the Respondent's view, the Applicant is asking the Court to review the RAD's weighing of the evidence.

[25] I disagree with the Applicant that the RAD misquoted the RIR. The RAD noted that "the IRB Response to Information Request (RIR) discussed previously specifically notes that the TTP is a fractious group and they do not appear to have the ability to track individuals." It is true that the RIR says nothing about the Taliban's ability to track individuals. However, in my view, what the RAD was saying in this regard is that the RIR says the Taliban are a fractious group, and also in the RAD's view it did not appear they have the ability to track individuals. On this point, I agree with the Respondent that after the RAD stated the RIR specifically refers to the Taliban as a fractious group, it then reasonably concluded based on this fact that they did not appear to have the ability to track individuals. I also agree with the Respondent that the Applicant's submissions amount to a request to review the RAD's weighing of the evidence before it and reach a different conclusion. It is not the function of this Court on judicial review to reweigh the evidence.

[26] It is clear upon review of the RAD's reasons that it considered the Applicant's personal profile and it did not ignore the Applicant's claim he had been targeted by the Taliban. It was not unreasonable for the RAD to find it was not credible that the Taliban had tracked him outside Karachi and base its IFA assessment on that finding as well as the evidence in the record before

it. The RAD's determination that the Applicant's profile did not fit that of a person who would be targeted by the Taliban was central to its IFA finding and was reasonable.

V. Conclusion

[27] In conclusion, I find that the RAD reasonably conducted its own independent analysis of the record before it. The RAD's reasons provide an intelligible and transparent explanation for its decision to dismiss the Applicant's appeal, and the outcome is defensible in respect of the facts and the law.

[28] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT in IMM-5353-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed;
and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5353-17

STYLE OF CAUSE: NAEEM AKRAM v THE MINISTER OF CITIZENSHIP
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 5, 2018

JUDGMENT AND REASONS: BOSWELL J.

DATED: JULY 26, 2018

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