Federal Court  Cour fédérale

Date: 20190305

Docket: IMM-3724-18

Citation: 2019 FC 274

Ottawa, Ontario, March 5, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

NAZAR BUTTRUS MOUSA AL-HADDAD,
FATIN ADWER ABDULMASIH HABABA

Applicants

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 the Applicants, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a Refugee Protection Division [RPD] decision dated June 28, 2018, concluding the Applicants are neither Convention refugees or persons in need of protection [Decision].

II. Facts

[2] The Applicants, husband and wife, are citizens of Iraq. Their allegations are summarized in the Decision at para 3:

> [3] The claimants allege they are Christian Iraqis who lived in Kirkuk, Iraq. They claim they faced harm due to their religion in that city, with the male claimant having been threatened and attacked at his workplace, a public school where he acted as principal since 2003. They claim that their home was attacked in August, 2016, so they used U.S.A. visas to go to that country and then on to Canada, where they joined their daughter. This daughter had also made a refugee claim that was refused, but her appeal of that refusal was discontinued because she gained permanent residency in Canada due to a separate, successful claim of her spouse.

[3] The Applicants' daughter, who is not an applicant in this matter, had her refugee claim heard on February 13, 2015 by the same RPD panel member who heard the Applicants' claims. That member rejected the daughter's claim on April 28, 2015 based in part on credibility. This is important, as will be seen, because the RPD in this case relied heavily on what the daughter said previously as the basis on which the RPD decided to dismiss the Applicants' claim - notwithstanding that this same RPD had found the daughter's claim not credible in part. This is demonstrated in the following passage where the RPD preferred the daughter's previous evidence over that of the current Applicants:

> [4] The main issue in this claim was credibility. The claimants state they lived in Kirkuk and experienced a number of issues in that city. The claimant's daughter, on her Canadian refugee claim launched in 2014, stated that they had been living in Erbil. For the following reasons, the panel finds the claimants have not provided sufficient credible evidence to establish that they were residing in Kirkuk as alleged, experiencing the issues as described in the claim. The panel finds the claimants have been untruthful about their residential history and experiences in Iraq. Documentary

> evidence does not establish that Christians in Erbil face persecution.

[4] The RPD also concluded the Applicants have a viable internal flight alternative [IFA] in Erbil.

[5] Judicial review is granted because both findings fail the test of reasonableness established by the Supreme Court of Canada.

III. Issues

[6] The Applicants raise a number of issues, but in my view the central ones concern the reasonableness of the credibility assessment and the IFA determination. Procedural fairness is also raised.

IV. Standard of review and relevant law

[7] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 57, 62, the Supreme Court of Canada holds 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." It is well-established that reasonableness is the standard with respect to an RPD decision: *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2016 FC 828, per Boswell J at para 9; *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1273, per LeBlanc J at paras 13, 21–22; *Sater v Canada (Minister of Citizenship and Immigration)*, 2013 FC 60, per de Montigny J at para 3.

[8] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, per Gascon J at para 55, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[9] The Decision also discusses IFA, in respect of which two aspects must be considered: (1) risk of persecution, and (2) reasonableness of the claimant moving to the IFA: *Hamdan v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 643, per Crampton CJ:

> [10] There are two parts to the test for an IFA.
>
> [11] First, in the context of section 96 of the IRPA, the RPD must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which an IFA exists (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, at 593 (FCA) [*Thirunavukkarasu*]). In the context of section 97, the corresponding test is that the RPD must be satisfied that the claimant would not be personally subjected to a danger described in paragraph 97(1)(a), or to a risk described in paragraph 97(1)(b).
>
> [12] Second, for the purposes of both section 96 and section 97 of the IRPA, the RPD must determine that, in all of the circumstances, including the circumstances particular to the

> claimant, conditions in the part of the country where a potential IFA has been identified are such that it would not be objectively unreasonable for the claimant to seek refuge there, before seeking protection in Canada (*Thirunavukkarasu*, above, at 597). In this regard, the threshold for objective unreasonableness is "very high" and "requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to" the area where a potential IFA has been identified (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, at para 15 (FCA) [*Ranganathan*]). Stated differently, objective unreasonableness in this context requires a demonstration that the claimant would "encounter great physical danger or […] undergo undue hardship in travelling" to the IFA (*Thirunavukkarasu*, above, at 598). In addition, "actual and concrete evidence of such conditions" must be adduced by the claimant for refugee protection in Canada (*Ranganathan*, above, at para 15).

[10] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. That said, I wish to note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69.

[11] In *Dunsmuir* at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the

> outset, the court must ask whether the tribunal's decision was correct.

[12] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

V. Analysis

[13] In my respectful view, the RPD's decision does not meet *Dunsmuir*'s requirement of "transparency and intelligibility within the decision-making process" in connection with the member's reliance on and preference for the daughter's evidence over the evidence of the Applicants; and in particular, the documentary evidence the Applicants offered, which included government-issued Identity Cards, government-issued Residence Card, Ration Card, and recently issued Iraqi passports.

[14] The Applicants provided the RPD with many government issued documents to prove they lived in Kirkuk. However, the RPD decided:

> [11] The citizenship, identity cards, marriage certificate, and residence card were issued in 2009 or earlier, and as such do not address the information that the claimants subsequently moved to Erbil. The certificates of baptism establish their religion, but not residence history.

[15] To begin all these documents were genuine; the RPD did not even suggest otherwise. I am not satisfied the RPD's analysis adequately considered and applied the presumption that government-issued documents are presumed valid: *Ramalingam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 10 (QL) (TD), per Dubé J at para 5. And see *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14, per Grammond J at para 65 for a more recent exposition of the law.

[16] It is not disputed that the Applicants' passports were issued in Kirkuk on March 16, 2015 and January 14, 2015. The RPD made no attempt to explain how the presumption of validity was displaced in connection with these government-issued passports, which, in my view, are of obvious importance in establishing residence. Once again, these passports are genuine. We do not know why the daughter's evidence was preferred over these official documents.

[17] The Applicants' Residence Card and Ration Card were issued in Kirkuk. The husband's Identity Card was issued in Kirkuk on February 10, 2007 and the wife's Identity Card was issued on December 14, 2014, not 2009 or before as the RPD inaccurately stated. While the husband's Residence Card (there is no Residence Card for the wife) was issued in 2009, it was genuine. I consider it relevant that the Response to Information Request IRQ 104655.E in the National Documentation Package [NDP] on Iraq states: "the purpose of the Residence Card is to prove place of residence." The Applicants submit if they had moved, their Kirkuk Residence Card and Ration Card would have been replaced with Erbil ones, and their passports would have been issued in Erbil, not Kirkuk. This underscores the need to consider the presumption of validity

and whether it should be displaced, which was not done. We do not know why the RPD preferred the daughter's evidence in this connection either.

[18] There is no doubt that the RPD is entitled to considerable deference in its documentary analysis. But there are other concerns in this case, including the panel's discounting of the husband's apparently genuine Ration Card, which was issued in 2013 for use in 2014–2015. The panel, after reviewing, concluded that it "did not observe any indication on the original that the card was not valid." The Ration Card was ignored however, because it "does not clearly establish that they were not living primarily in Erbil at the time." I am not satisfied so specific a test - "clearly establish" - must be met by each and every document examined. The same elevated test was used in connection with other documents tested by the panel, which relied on the standard of whether they were "clearly indicative of residence."

[19] While the Court has concerns with the documentary analysis, its primary concern is the lack of intelligibility and transparency of the RPD's reliance on the daughter's evidence given the same RPD panel refused the daughter's due to credibility concerns. This is not adequately explained.

[20] On the procedural fairness issue, the Applicants say the RPD should have subpoenaed the daughter before extensively relying on her evidence. The Respondent in effect says the Applicants could have called their daughter themselves. In my view there is no merit to the suggestion that procedural fairness required the RPD to have compelled the daughter's attendance.

[21] Turning to the IFA, the Applicants submit in their memorandum that there were "legal impediments" to finding Erbil is available as an IFA. At the hearing, they pointed to Canada's NDP on Iraq that includes a document dated April, 2016 from the Danish Refugee Council, which states: "... in order to work or settle in KRI [where Erbil is located, ed.], a sponsorship is required in practice." Without such sponsorship, "Iraqi citizens will be granted a one week residence permit. A western diplomat stated that nobody needs sponsorship to enter KRI, but Iraqi citizens do need a sponsorship in order to work in KRI." Additionally, the report states "...sponsorship, in practice, is still being enforced."

[22] It seems sponsorship is necessary to work in Erbil. However, this was not considered by the RPD, notwithstanding its materiality to the IFA finding.

[23] Because this argument was not raised in detail before the hearing, the Respondent was given additional time to file a written response, which stated in part:

> First, the principal Applicant ("Applicant") was asked about the availability of an IFA in Erbil at the hearing. He testified that he could live in Erbil if he had not been threatened (CTR, Transcripts, p. 624). At no time during questioning by the Member or his counsel, did he indicate that he could not live in Erbil due to any legal impediments.
>
> Second, the Applicants based their claim on the grounds of religion (Christian) and ethnicity (Chaldean) (CTR, BOC Narrative, p. 375). The document prepared by the Danish Refugee Council: "The Kurdistan Region of Iraq (KRI): Access, Possibility of Protection, Security and Humanitarian Situation", dated April 2016 found in the CTR at pp. 50-254 indicates that the sponsorship requirement was abolished in 2012 (CTR, Item 2.1.1, p. 63), however, in practice, sponsorships may still be required. The same document also states however, that a sponsorship is not required for certain individuals with a certain ethnic or religious profile (CTR, Item 2.1.3, pp. 63-64). The document indicates that Christians are generally permitted entry to Erbil without pre-

> existing residence documents (CTR, Item 2.1. 7.2, pp. 64-65). Moreover, Christians have less difficulty and they do not necessarily need a sponsorship (CTR, Item 2.8.1, p. 75-76).
>
> Consequently, based on the Applicants' particular circumstances, they may not need a sponsorship if they were to relocate in Erbil. The application of any such requirements was not addressed by the Applicants at their hearing to establish that an IFA would not be available to them and the onus was on the Applicants to do so.

[24] In my view this submission at its highest confirms that whether or not sponsorship is necessary is unclear. In my respectful view, this lack of clarity underscores the need for the RPD to assess this material contrary information, which it did not do.

VI. Conclusion

[25] Stepping back and looking at the Decision as an organic whole, I am of the view it is unreasonable. Keeping in mind that judicial review is not a line-by-line treasure hunt for errors, the RPD's determination regarding the Applicants' residence lies at the crux of its negative credibility finding. In this connection, the Decision does not fall within a range of possible, acceptable outcomes because the finding on the Applicants' residence was not defensible in respect of the facts and law, pursuant to *Dunsmuir* at para 47. In addition, the IFA finding cannot stand given the failure to consider the sponsorship requirement in light of contrary or inconsistent information reported in the NDP. Therefore judicial review will be ordered.

VII. Certified question

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

JUDGMENT in IMM-3724-18

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the matter is remanded for redetermination by a different decision-maker, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3724-18
STYLE OF CAUSE:	NAZAR BUTTRUS MOUSA AL-HADDAD, FATIN ADWER ABDULMASIH HABABA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 28, 2019
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 5, 2019

APPEARANCES:

John Rokakis	FOR THE APPLICANTS
Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Windsor, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT