

Federal Court



Cour fédérale

Date: 20191210

Docket: IMM-429-19

Citation: 2019 FC 1576

Ottawa, Ontario, December 10, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**ZAHID ABBAS
KHASHAF ZAHRA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of Pakistan, and are a father and daughter. The Applicants submitted a claim for refugee protection under sections 96 and 97(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 (“IRPA”) in August 2017. They fear persecution on the basis of religion and disability. The Principal Applicant is a Shia Muslim and his wife, Ms. Rohi

Bano (“Ms. Bano”) is a Sunni Muslim. The Principal Applicant’s family did not accept this “mixed marriage”, and as a result, Ms. Bano was harassed and physically assaulted by her in-laws and the Shia community. The Principal Applicant’s daughter, Khashaf, is a 9-year-old girl with Poland Syndrome, which manifests as muscular underdevelopments on her right-side chest, shoulder, and webbed hand. The Principal Applicant’s family viewed the Minor Applicant’s medical condition as a sign that the mixed marriage was illegitimate and wrong. The Minor Applicant fears being tortured and kidnapped by her relatives for her disability.

[2] The Applicants’ refugee claim was heard by the Refugee Protection Division (“RPD”) on November 22, 2017 and was rejected by way of a decision (“RPD Decision”) dated January 2, 2018. The RPD Decision was appealed to the Refugee Appeal Division (“RAD”), and by a decision dated January 2, 2019 (“the RAD Decision”), the RAD confirmed the determination of the RPD and dismissed the appeal. The RAD, stating the determinative issue in the appeal as the Internal Flight Alternative (“IFA”), agreed with the RPD’s findings that the Applicants have a reasonable IFA in Islamabad, Pakistan. The RAD reviewed the documentary evidence and testimony, and concluded that it supported the RPD’s findings that there is only a mere possibility the Applicants would face serious harm from their relatives were they to relocate to Islamabad. The RAD further found that discrimination experienced by the Minor Applicant, does not rise to the level of persecution. The RAD concluded that the Applicants would not suffer undue hardship in relocating.

[3] On application for judicial review to this Court, the Applicants argue three submissions: the RAD failed to consider the appropriate feared agents of persecution in assessing IFA; section

110(4) of the IRPA does not apply to country condition information; and the RAD failed to consider whether cumulative harassment upon the Minor Applicant amounted to persecution.

The Respondent argues that as the Applicants did not rebut the presumption of state protection, it is immaterial for the Applicants to challenge other aspects of the RAD Decision.

[4] For the reasons below, I find the RAD Decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicants*

[5] Zahid Abbas (the “Principal Applicant”) and Khashaf Zahra (the “Minor Applicant”) (collectively, the “Applicants”) are a 35-year-old father and 9-year-old daughter, from Pakistan. The Principal Applicant’s wife, Ms. Rohi Bano, and his younger 5-year-old daughter, Tehreem Zahra, are still in Pakistan.

[6] The Principal Applicant and Ms. Bano met in Islamabad in 2003, and married in May 2009. The Principal Applicant is a Shia and Ms. Bano is a Sunni. While they were dating in Islamabad, there were no issues concerning their differing religious sects. However, when they married and relocated to the Principal Applicant’s hometown, Multan, issues surfaced. The Principal Applicant’s family openly censured and showcased their disapproval of this “mixed marriage” of the different sects, and began to harass Ms. Bano to change her religious practices.

Ms. Bano acquiesced and tried to change some of her practices, but the Principal Applicant notes that the harassment continued and his family also physically assaulted Ms. Bano.

[7] In 2009, Ms. Bano came under extreme stress during her pregnancy with the Minor Applicant, as she was receiving death threats from her in-laws and extended family members. In February 2010, the Minor Applicant was born with Poland Syndrome, a rare birth defect characterized by the underdevelopment of her right-side chest, shoulder, and webbed hand. The Principal Applicant believes that the extreme stress during his wife's pregnancy contributed to the Minor Applicant's medical condition. The Principal Applicant's family interpreted the Minor Applicant's condition to be a sign that the mixed marriage was illegitimate, and continued to abuse Ms. Bano and the Minor Applicant. In June 2013, the Principal Applicant decided to move out from his family home with his wife and daughter. They could not move very far due to the Principal Applicant's position as a police officer in the Punjab Province, which prevented him from relocating to a different province. In February 2016, the Principal Applicant pulled the Minor Applicant from school out of fear from torture and kidnapping by relatives and the Shiya community, as well as bullying from classmates.

[8] On April 17, 2016, Ms. Bano was physically assaulted in her own home by three women, one of whom was identified as the Principal Applicant's cousin. This led the Principal Applicant to conclude that the women were from the Shiya sect. The intruders hit Ms. Bano's face, and hit and punched her stomach. Ms. Bano had been pregnant with her third child at the time, and the assault led to a miscarriage. Being under immense stress, in October 2016, the Principal Applicant moved his wife and two daughters to his in-laws' home in Islamabad. He remained in

Multan because of his job. Then, in February 2017, the Principal Applicant filed a U.S. Visitor's Visa application for his family to leave Pakistan and escape from harassment, and to treat the Minor Applicant's medical condition. However, only the Applicants received the visa. Ms. Bano and the younger daughter's applications were refused. The Principal Applicant and Ms. Bano decided that the Applicants would leave for the U.S. first and later make arrangements for the rest of the family.

[9] On March 12, 2017, the Applicants entered the U.S. In April 2017, the Minor Applicant had a minor surgery on her right hand from Shriners Hospitals for Children in Tampa, Florida. As the U.S. visitor's visa was set to expire in September 2017, fearing deportation back to Pakistan, the Applicants travelled north to Canada and submitted a refugee claim.

B. *Procedural History*

(1) RPD Decision

[10] The Applicants' claim for refugee protection was heard by the RPD on November 22, 2017. The RPD Decision was rendered on January 2, 2018, denying the claim, on the basis that the Principal Applicant was not a reliable witness, and on a lack of evidentiary credibility. The RPD noted serious credibility concerns concerning the maltreatment from family members and evidentiary discrepancies to support the family's disapproval of the mixed marriage. The RPD took issue with the supplementary narrative submitted six weeks after the original Basis of Claim ("BOC") form, which included details on the Applicants' family home being invaded and the physical assault on Ms. Bano. The RPD found it "unclear how such a drastic event would be omitted from the original narrative."

[11] Furthermore, the RPD questioned how the family “managed to survive, if they have been threatened since the marriage in 2009.” The RPD also found that the Applicants have a viable IFA in Islamabad. With regard to the Minor Applicant’s disability, the RPD concluded that the Minor Applicant did not face a reasonable chance of persecution or serious harm from society in general in Pakistan.

(2) RAD Decision & Judicial Review

[12] On January 16, 2018, the Applicants filed an appeal with the RAD. In a decision dated January 2, 2019, the RAD dismissed the appeal, confirming the RPD Decision to deny the Applicants’ claim.

[13] Following the RAD Decision, the Applicants filed an application for leave and judicial review on January 21, 2019. The RAD Decision forms the subject of this judicial review.

C. *Decision Under Review*

[14] On appeal to the RAD, the Applicants sought to introduce new evidence. Two articles relating to country conditions that were published prior to the RPD hearing were not accepted as evidence. A medical report from an orthopedic surgeon relating to the Minor Applicant was assessed by the RAD to be credible, relevant and new, and was admitted into evidence.

[15] The RAD noted the determinative issue in the appeal as the IFA. After conducting its own review and assessment of the evidence, it agreed with the RPD’s finding that the Applicants

have a reasonable IFA in Islamabad, Pakistan. The RAD also found that the Applicants did not rebut the concept that state protection is available.

[16] In assessing IFA, the RAD applied a two-prong test from *Rasaratnum v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, p. 710):

1) The Board 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 it finds an IFA exists and/or the claimant would not be personally subject to a risk to life or a risk of cruel and unusual treatment or punishment or a danger, believed on substantial grounds to exist, of torture in the IFA;

2) Moreover, the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claim, for the claimant to seek refuge there.

[17] In assessing the first prong of the test, the RAD considered country condition documentary evidence on religion in Pakistan. From the United Kingdom Home Office reports, the RAD found that it affirmed the viability of an IFA for religious minorities in Pakistan and those being pursued due to interaction with various religious groups. The RAD also noted that the report “explicitly envisions the possibility of viable relocation alternatives for Shia Muslims in Pakistan.”

[18] The RAD noted the agents of persecution as family and community members of the Applicant’s own faith, and further found that his wife and younger daughter have not experienced any problems from the agents of persecution after their relocation to Islamabad, which is some 500 km away from Multan, where the assaults and threats had taken place previously. The RAD found the Applicant’s statements regarding the timing of the “attacks” were inconsistent, as he claimed it took seven years for the first attacks to occur, but also

described that “torture and harassment” began in 2009. The RAD concluded that Ms. Bano and the younger daughter’s ability to be free from attack for the past fourteen months served to support the proposition that Islamabad is a viable IFA location.

[19] With regard to state protection, the RAD concluded that the evidence confirms there is a willingness of the authorities to assist the members of the Shia community, and found it reasonable that the Principal Applicant’s position as a long-serving police officer in Pakistan and association with law-enforcement would facilitate the Appellants in seeking assistance from the authorities. Moreover, based on the available documentary evidence and recording of the hearing, the RAD found there was insufficient credible evidence to establish that the Principal Applicant’s family members have the “operational capacity or geographic reach to learn of the Appellants’ return to Pakistan upon arrival at a regular port of entry to the country, or trace the Appellants’ movements within Pakistan.” The RAD found the Applicants’ issue to be limited and local to the Principal Applicant’s hometown of Multan, and thus concluded there is only a mere possibility for serious harm from relatives were the Applicants to relocate to Islamabad.

[20] With regard to the Minor Applicant’s medical condition, the RAD noted that medical reports indicate the Minor Applicant “seems to be functioning quite well”. The RAD found no evidence that ongoing care of physical therapy, occupational therapy and reconstructive surgery could not be provided in Pakistan. The RAD found that although the Minor Applicant has faced taunting and inappropriate comments from peers and teachers, on a balance of probabilities, the harassment does not rise to the level of persecution.

[21] In assessing the second prong of the test for IFA, the RAD found that the Principal Applicant did not provide evidence to confirm that Islamabad would be an unreasonable IFA. The RAD noted the Principal Applicant's educational background, long-standing occupation as a police officer, his language abilities, and foreign travel experience to support the finding of Islamabad as a viable IFA. The Applicants' argument that they will eventually be located by the agents of persecution was found insufficient to justify their claim of being unable to relocate to Islamabad.

III. Issue

[22] In my view, there is one issue that arises on this application for judicial review: Did the RAD err in finding that the Applicants had a viable internal flight alternative ("IFA")?

IV. Analysis

[23] The Applicants assert that the RAD failed to properly identify the feared agents of persecution. In support of this, the Applicants refer to the RAD's discussion of the Taliban, the population in Islamabad, and religious views of actual or potential neighbours in Islamabad.

[24] In my view, the RAD's reference to country condition information about state protection from intercommunal sectarian tensions was not misstated. The Applicants assert that the agents of persecution are the Principal Applicant's family members, with some Shia community support, not the intercommunal sectarian tensions. However, the same root issue underlies intercommunal sectarian tensions, or in this case, isolated threats and assaults against one family: religious intolerance. The Principal Applicant's family members engaged in threats and assaults

towards Ms. Bano precisely due to their perceived sectarian differences and ill feelings towards Ms. Bano being a Sunni Muslim. Given this fact, when assessing the availability of state protection for religious minorities or individuals assaulted for religious differences, it is reasonable for the RAD to have referred to country condition information about state protection from intercommunal sectarian tensions.

[25] However, despite the RAD having reasonably referenced country condition information, the RAD's finding that the Applicants had a viable IFA is unreasonable.

[26] The Applicants state that through networks, the agents of persecution would eventually find the Applicants in Islamabad. In my view, this is a reasonable assertion given that the rest of the Applicants' family members are currently staying with Ms. Bano's family. It is entirely plausible that the agents of persecution know the whereabouts of their in-laws location in Islamabad.

[27] The RAD notes that the agents of persecution would be required to learn of the Applicants' return to Pakistan, and determine the whereabouts of the Applicants in Islamabad, a city of 1.35 million people. However, stating the population figure of Islamabad is misleading. Family networks and connections would facilitate an easier access to locating the Applicants without having to comb through 1.35 million people in a city. I agree with the Applicants submission that it would be unreasonable for the Principal Applicant to cut himself off from all his family members and acquaintances. Also, it would be unrealistic that this effort would be successful.

[28] Furthermore, I am not persuaded by the Respondent's position supporting the RAD's determination that Islamabad was a viable IFA for the reason that no issues had arisen with the agents of persecution since the time of relocation. Although assaults have not materialized yet, that does not preclude a serious possibility of the Applicants being persecuted in Islamabad when they are discovered by the Principal Applicant's family members.

[29] The present case at bar bears resemblance to *Ng'aya v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1136 (CanLII), where Justice Barnes used the test of whether the presence of the claimant in the IFA location "would eventually become known" to the feared agent of persecution. Similarly, the same test was used in *Lopez Martinez v Canada (Citizenship and Immigration)*, 2010 FC 550 (CanLII).

[30] Given the severe nature of previous assaults and persecution of the Applicants' family, i.e. incidents such as the one resulting in Ms. Bano's miscarriage, it is unreasonable to conclude that there is only a mere possibility that the Applicants would face serious harm from their relatives on relocating to Islamabad, only on the basis that there is no objective evidence at the present time. Therefore, RAD's analysis on the finding of a viable IFA is unreasonable.

V. **Certified Question**

[31] The Applicants propose the following question for certification:

Does *Immigration and Refugee Protection Act*, SC 2001, c 27 section 110(4) apply to country condition information?

[32] Under section 74 of the *IRPA*, questions for certification must present an issue of general importance that is dispositive of an appeal. The proposed question for certification is neither one of general importance nor dispositive of the appeal at hand.

[33] The test for certification was recently confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 (CanLII) [*Lunyamila*] where the court states, “The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance,” (*Lunyamila*, para 46).

[34] Furthermore, this same question presented for certification was proposed in *Jess v Canada (Citizenship and Immigration)*, 2018 FC 1285 (CanLII), considered by Justice McDonald, and dismissed.

[35] As Justice McDonald notes in *Jess*, the interpretation of section 110(4) of the *IRPA* has been fully addressed in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 (CanLII).

[36] This Court declines to certify this question as it is not of broad significance or general importance.

VI. **Conclusion**

[37] In my view, the RAD’s analysis of finding the Applicants had a viable IFA is unreasonable. Therefore, this application for judicial review is allowed.

JUDGMENT IN IMM-429-19

THIS COURT'S JUDGMENT is that

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.
2. No question is certified.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-429-19

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