

Federal Court



Cour fédérale

Date: 20201130

Docket: IMM-6209-19

Citation: 2020 FC 1101

Ottawa, Ontario, November 30, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

MEHMOOD KHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mehmood Khan is a teacher from the Swat region in northern Pakistan, and an advocate for female education and for child vaccination. In 2015, Mr. Khan began working for the World Health Organization (WHO) as a vaccination monitor. In May 2016, while involved in a polio vaccination campaign, he was attacked by several unknown men, who said that he was marked,

and would be found and killed. He left Swat for Abbottabad and left Pakistan a month later, ultimately arriving in Canada and seeking refugee status here.

[2] Mr. Khan says that in April 2017, the Taliban distributed a letter identifying him as an infidel for promoting vaccination, and saying that he was to be killed. Three months later, the police came to his family's home indicating that there was a religious complaint about him. Mr. Khan states that he fears the Taliban, the police, and other extremist groups and will be killed by them if he returns to Pakistan.

[3] The Refugee Protection Division (RPD) did not believe Mr. Khan's story, but in any event concluded that he had not demonstrated that there was inadequate state protection available in Pakistan, and that he had a viable internal flight alternative (IFA) in Karachi, Lahore City, Faisalabad, or Rawalpindi. It therefore dismissed his refugee claim. The Refugee Appeal Division (RAD) concluded that the IFA issue was determinative, and that the RPD did not err in its IFA finding.

[4] Despite Mr. Khan's arguments to the contrary, I find the RAD's decision to be reasonable, and the process leading to it to be fair. The evidence that Mr. Khan relies on to undermine the RAD's IFA conclusion does not make the IFA finding unreasonable and was, in any case, not raised before either the RPD or the RAD. Nor did he argue before the RAD that the RPD process was unfair because he was not warned prior to his hearing that the viability of an IFA was in issue, an argument that in any event cannot stand in the face of the jurisprudence on the issue.

[5] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[6] Mr. Khan's challenges to the RAD's decision raise the following issues:

- A. Was the RAD's decision that Mr. Khan had a viable IFA in Karachi, Lahore City, Faisalabad, or Rawalpindi unreasonable?
- B. Was the process leading to the dismissal of Mr. Khan's claim for refugee protection unfair, and in particular was it unfair for the RPD to raise the potential existence of an IFA at his refugee hearing?

[7] The first of these issues goes to the merits of the RAD's decision that there was an IFA.

The parties agree that this issue is reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Tshindela v Canada (Citizenship and Immigration)*, 2019 FC 344 at para 22. When conducting reasonableness review, the Court assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision: *Vavilov* at paras 87, 99. A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting “an internally coherent and rational chain of analysis” when read as a whole and taking into account the administrative setting, the record before the decision maker, and the submissions of the parties: *Vavilov* at paras 81, 85, 91, 94–96, 99, 127–128.

[8] The second issue is a question of procedural fairness. On such issues, the Court assesses whether the procedure was fair having regard to all the circumstances: *Canada (Citizenship and*

Immigration) v Khosa, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

III. Analysis

A. *The RAD's finding on an IFA was reasonable*

[9] An internal flight alternative is a place within a claimant's country of nationality where the claimant may safely and reasonably relocate. Where an IFA exists, the claimant is expected to seek refuge there from any persecution or danger they are facing, rather than seek refuge in Canada. The concept of an IFA is inherent in the definition of a "Convention refugee," and is relevant to the assessment of a risk of harm central to the definition of a "person in need of protection": *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], ss 96–97; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) at pp 592–593, para 2; *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 16.

[10] In assessing whether there is a viable IFA, the decision maker must be satisfied, on a balance of probabilities, that (1) the claimant will not be subject to persecution (on a "serious possibility" standard), or a danger or risk described in section 97 (on a "more likely than not" standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there: *Thirunavukkarasu* at pp 595–597, paras 12–15; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12. Once the

potential for an IFA is raised, the claimant bears the onus of establishing that an IFA is not viable: *Thirunavukkarasu* at pp 594–595, para 9.

[11] The RAD considered the first branch of the IFA test in the context of Mr. Khan's assertions that he feared the police and the Taliban. With respect to the police, the RAD was not satisfied that Mr. Khan had demonstrated the police were seeking him. No First Information Report (FIR) had been issued against him, and he was able to obtain a national identity card after arriving in Canada without triggering any police reaction. While Mr. Khan had expressed a concern that the police could locate him upon his application to register as a tenant, there was no evidence that Mr. Khan was a person of interest to the police given the absence of an FIR and his ability to obtain a national identity card.

[12] With respect to the Taliban, the RAD pointed to Mr. Khan's evidence that it was the police, rather than the Taliban, that he feared in the proposed IFAs of Karachi, Lahore City, Faisalabad, and Rawalpindi, noting that the country condition evidence was consistent with Mr. Khan's testimony in showing that the Taliban are not present in the proposed IFAs. After referring to the documentary evidence with respect to Pakistan's operations against the Taliban, the RAD concluded that the Taliban did not have the capacity or resources to locate Mr. Khan in the proposed IFAs.

[13] The RAD also noted that the letter from the Taliban that exhorted local villagers to locate and kill Mr. Khan was handwritten. This led the RAD to conclude that it was distributed locally, and that the Taliban did not itself have the resources to locate Mr. Khan, given their apparent

reliance on locals. The RAD further noted that Mr. Khan did not have any trouble with the Taliban when he was in hiding in Abbottabad. Referring to the documentary evidence showing the Taliban's limited operational capacity at a national level in Pakistan, the RAD found that Mr. Khan had not established that the Taliban was seeking him beyond his village or the Khyber Pakhtunkhwa province.

[14] With respect to the second branch of the IFA test, the RAD referred to Mr. Khan's profession, education, and knowledge of Pakistan's official languages. The RAD noted that Mr. Khan had not raised any arguments with respect to his ability to re-establish himself in one of the proposed IFAs. Nonetheless, the RAD considered Mr. Khan's Pashtun ethnicity and the evidence of some violence against Pashtun rights activists. Noting that Mr. Khan was not himself an activist in that sense and that he testified that he was not aware of any problems for Pashtuns before his arrival in Canada, the RAD concluded that there was no evidence that rendered the proposed IFAs unreasonable.

[15] Mr. Khan raised no challenge on the RAD's assessment of the second prong of the IFA test, but argues that the RAD's conclusion on the first prong was unreasonable. He argues that as a teacher and a representative of the WHO, the Taliban would find him and would torture, harm, or possibly kill him. The difficulty with this argument is twofold. First, it amounts to a request that the Court reweigh and reassess the country condition evidence and reach a contrary conclusion to that of the RAD, which is not the Court's role on judicial review: *Vavilov* at paras 83, 125. Second, the argument was not supported by references to the evidence that would allow for a conclusion that the RAD's assessment was unreasonable.

[16] Mr. Khan relies on a number of news articles that were filed with the RPD regarding Taliban attacks against health workers, including in Karachi. However, he did not refer to these articles in his submissions to the RAD, such that the RAD cannot be faulted for failing to refer to or consider those documents: *Vavilov* at paras 127–128. In any event, the articles neither speak to the Taliban’s interest in Mr. Khan, nor to the viability of the other proposed IFAs.

[17] Mr. Khan also included in his application record a report from the Central Intelligence Agency (CIA) showing Taliban presence in Karachi. This document was not put before the RAD, and so cannot be considered by this Court in assessing the reasonableness of the RAD’s decision: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19. In any event, even if accepted, I cannot agree with Mr. Khan that it “follows” from this document that there must also be a large Taliban presence in the other proposed IFA cities.

[18] Mr. Khan invited the Court to take judicial notice of what is happening in Pakistan, notably that Pakistan is filled with religious extremists. This Court has on rare occasions taken judicial notice of certain aspects of country conditions broadly: see, *e.g.*, *Ramasamy v Canada (Citizenship and Immigration)*, 2016 FC 473 at para 29. However, the Court cannot take judicial notice of the ability and desire of either the Taliban or any other extremist group to locate and threaten health care workers generally or Mr. Khan specifically, particularly where such a finding would directly contradict the RAD’s conclusion based on the documentary evidence before it.

[19] With respect to the risk of persecution or harm at the hands of the police, Mr. Khan points to evidence in the National Documentation Package (NDP) regarding the existence of police violence and corruption in Pakistan. He also relies on a statement from a United Kingdom Home Office report to the effect that where a “person’s fear is of persecution or serious harm at the hands of the state, they will not be able to relocate to escape that risk.” In my view, this generalized evidence again does not support Mr. Khan’s particular allegation that the police were interested in him due to the Taliban’s efforts, particularly in the face of the RAD’s contrary factual findings that he had not established that the police were interested in him.

[20] Mr. Khan also contends that it is “obvious” that if police in one district had a complaint against him, they would pass it to other police forces in the country, and that the Taliban and religious extremists have their own information networks. However, these are not matters for which the Court (or the RAD) can simply rely on what the claimant believes to be obvious in the absence of evidence to support the existence of such police practices or information networks, and in the absence of evidence of a motivation by police in Pakistan to locate and harm him.

[21] In this regard, Mr. Khan’s reliance on this Court’s decisions in *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 1576 and *Ng’aya v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1136 do not assist him. The Court in those cases adopted an approach of assessing whether the applicant’s location “would eventually become known” to the feared agent of persecution: *Abbas* at paras 26–29; *Ng’aya* at para 14. However, those cases involved situations where the claimants were specifically targeted by persecutors who were family

members who could draw on family networks of communication. This is not analogous to Mr. Khan's situation.

[22] I do note that the RAD appears to have overstated Mr. Khan's evidence in stating that "he testified that he does not fear the Taliban in any of the IFAs." I have reviewed the recording of Mr. Khan's refugee hearing before the RPD, and in particular the time references given by the RAD. Mr. Khan responded to a question about why the Taliban would go into one of the IFA cities to look for him by saying that "[i]f the Taliban are not there, there is a police complaint against me." Particularly given Mr. Khan's repeated assertion that he was afraid of both the police and the Taliban, it was in my view unreasonable for the RAD to assert based on this evidence that Mr. Khan testified that he does not fear the Taliban in the IFAs. However, this misstatement of the evidence is not material to the outcome of the RAD's analysis, as it considered the risk of persecution or harm at the hands of both the Taliban and the police despite this reference. I therefore view this as a "misstep" that does not undermine the reasonableness of the decision as a whole: *Vavilov* at para 100.

[23] I therefore conclude that the RAD's determination that there was a viable IFA available to Mr. Khan in Pakistan, and that he was therefore neither a Convention refugee nor a person in need of protection, was reasonable.

[24] Mr. Khan raised a concern that the RAD did not address the various other issues that were argued before it, namely the RPD's credibility finding and its conclusions on adequate state protection. However, having concluded that there was a viable IFA, the RAD was under no

obligation to address the remaining issues, which could not have affected the outcome. As the existence of an IFA means that a person is neither a “Convention refugee” or a “person in need of protection,” a finding of an IFA is fatal to a claim for refugee protection, and the RAD need not proceed with the analysis of other issues: *Kaisar v Canada (Citizenship and Immigration)*, 2017 FC 789 at para 25; *Mendez Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 153 at para 36.

B. *There was no breach of procedural fairness*

[25] Mr. Khan asserts that he was “surprised” and even “blindsided” by the RPD raising the question of an IFA at the refugee hearing, and did not have the opportunity to properly address this issue before the RPD, including through the filing of documents showing risks to health-care workers in the proposed IFA cities.

[26] I agree with the Minister that these arguments must be rejected for two reasons. First and foremost, the jurisprudence of this Court is clear that procedural fairness is satisfied by the RPD raising the question of an IFA at the hearing, and affording an opportunity to respond: *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at para 56; *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at pp 710–711, para 9. There is no indication that Mr. Khan was prevented by the RPD from filing any evidence at or after the RPD hearing, and Mr. Khan did not seek to file evidence with the RAD under subsection 110(4) of the *IRPA* based on his inability to do so before the RPD.

[27] Second, Mr. Khan did not raise a concern about procedural fairness before the RAD. As an internal appellate tribunal, the RAD is the appropriate place in which to raise allegations of unfairness arising before the RPD. This Court will generally not hear arguments attacking the decision of the RPD that could have been but were not raised before the RAD: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 23–26; *Abdulmaula v Canada (Citizenship and Immigration)*, 2017 FC 14 at para 15. In my view, this principle applies equally to procedural fairness arguments.

IV. Conclusion

[28] The application for judicial review is therefore dismissed. No party proposed a question for certification, and I agree that none arises in the matter.

JUDGMENT IN IMM-6209-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6209-19

STYLE OF CAUSE: MEHMOOD KHAN v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

HEARING HELD BY TELECONFERENCE ON MAY 26, 2020

JUDGMENT AND REASONS: MCHAFFIE J.

DATED: NOVEMBER 30, 2020

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