Federal Court  Cour fédérale

Date: 20220628

Docket: IMM-1746-20

Citation: 2022 FC 964

Ottawa, Ontario, June 28, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

MOHAMMED FAISAL SIDDIQUE
ASHI MUHAMMAD FAISAL SIDDIQUE
SIMRAH MOHAMMED FAISAL SIDDIQUE
SAMARAH MOHAMMED FAISAL SIDDIQUE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision of the Refugee Appeal Division (RAD or Panel) upholding the decision of the Refugee Protection Division (RPD) that determined they were not *Convention* refugees or persons in need of protection.

[2] The Principal Applicant, Mohammed Faisal Siddique, and the eldest minor Applicant, Simrah Mohammed Faisal Siddique, are citizens of India. The Co-Applicant, Ashi Muhammad

Faisal Siddique, is the Principal Applicant's wife and a citizen of Pakistan. The younger minor Applicant, Samarah Mohammed Faisal Siddique, is a citizen of the United States. The Principal Applicant alleges that he cannot return to India because of threats from organized criminal elements there. The Co-Applicant claims she cannot return to Pakistan because the same criminal elements pose a threat to her there. In addition, she claims that she faces a risk as a single woman without immediate family to support her if she is forced to return to Pakistan.

[3] The Applicants submit that the RAD hearing was unfair because the Panel failed to give due weight to the inadequate representation they had received from their former counsel, who represented them at the RPD hearing. They also claim the procedure was unfair because the RAD failed to refer to the most recent documentary evidence about conditions in India and Pakistan. They further claim that the decision is unreasonable because the RAD failed to consider the threats they would face as a family comprised of citizens of India and Pakistan, the risks the Principal Applicant would face as a Muslim in India, and the prospect of family separation.

[4] For the reasons that follow, I am not persuaded that the RAD denied the Applicants procedural fairness or that the decision is unreasonable.

I. Background

[5] The Principal Applicant alleges that he and his family cannot return to India and that the Co-Applicant cannot return to Pakistan because he has been threatened by a powerful Indo-Pakistani mafia organization called "D-Company" as well as a man named Abu Salem. He says that Abu Salem used to work for D-Company, but then formed his own mafia organization. The

Principal Applicant's father was allegedly falsely implicated in the activities of Abu Salem and he has been imprisoned in India since 2005. The Principal Applicant claims that his father's involvement with Abu Salem and D-Company is at the root of the threats he has received; he states that the threats began in 2004 and continued until he left India in 2016.

[6] The Principal Applicant married the Co-Applicant in Dubai in 2005. They lived in Dubai until 2014, when the Principal Applicant lost his job and consequently could no longer live in that country. He returned to India to look for work, and lived there for a year with the eldest minor Applicant. The Co-Applicant remained in Dubai during this period. In November 2016, the Principal Applicant, the Co-Applicant and the eldest minor Applicant travelled to the United States on a visitor's visa. The younger minor Applicant was born while the family was in the United States. In October 2017, the Applicants, including the younger minor Applicant, came to Canada, where they made a refugee claim.

[7] The RPD rejected the claims of the Principal Applicant and the eldest minor Applicant because it found they had a viable Internal Flight Alternative (IFA) in either Bangalore or Delhi. The Co-Applicant's claim against Pakistan was rejected because she had not demonstrated a prospective risk and there was no nexus to a Convention ground.

[8] The Applicants appealed this decision to the RAD, claiming that their counsel had failed to provide competent representation before the RPD, and challenging the findings regarding an IFA in India and the absence of risk in Pakistan.

[9] The RAD accepted that the Applicants' former counsel had not properly prepared for the hearing and had failed to produce relevant evidence. Based on this, the RAD accepted the Applicants' request to file new evidence regarding the mafia organization, as well as new country condition information dealing with the rise of Hindu nationalism in India, India-Pakistan relations, and visa information regarding the Co-Applicant. The RAD did not hold an oral hearing because the Applicants had not requested one.

[10] On the substance of the Applicants' appeal, the RAD rejected the appeal and upheld the decision of the RPD. The RAD found that the quality of the former counsel's representation was not determinative, noting the counsel's vigorous denial of the allegations, and that the Applicants' main complaint was their former counsel's failure to file relevant evidence – which had been overcome by the RAD's admission and consideration of that new evidence. The RAD determined that the RPD had correctly assessed each Applicant's risk with respect to their respective country of citizenship, and had properly considered the interest of family unity in the assessment. On the evidence, the RAD concluded that family separation was not a necessary consequence of the denial of the refugee claims, because there was a legal mechanism available to enable the Co-Applicant and the younger minor Applicant to obtain permission to live in India.

[11] While the Co-Applicant claimed that the RPD erred in failing to consider her risk of gender-based persecution in Pakistan, the RAD found that the RPD did not need to consider this aspect because the Co-Applicant said that the only risk she feared was from D-Company and Abu Salem. She testified that she felt she could live and obtain employment in Pakistan if she had to return there.

[12] The RAD also upheld the IFA findings, noting that the new evidence it had admitted demonstrated that D-Company could not operate with impunity in India and the evidence did not show it had the means or motivation to find the Principal Applicant in the IFA locations.

[13] Although the RAD acknowledged the increased tensions between Hindus and Muslims in India, the Panel was not persuaded that the Applicants faced any risk of communal violence. The RAD noted that none of them had testified that they or their families had experienced such attacks, and that they lack characteristics that would make them especially vulnerable. The RAD also rejected the younger minor Applicant's claim against the United States, because the Applicants' fear was really that she would be left alone if they were forced to return to India and Pakistan, but that was not an inevitable consequence of a denial of the refugee claim.

[14] The Applicants seek judicial review of this decision.

II. Issues and Standard of Review

[15] Two issues arise in this case:

A. Was the procedure fair, including the RAD's treatment of the National Documentation Packages, the decision not to hold an oral hearing, and the response to the allegations of incompetent representation?

B. Was the RAD's decision reasonable?

[16] In addition, the Respondent raised a preliminary issue, objecting to certain portions of the affidavit filed by the Applicants in the present proceeding because they were argumentative. It is

not necessary to deal with this at length, because the Applicants did not seek to rely on these portions of the evidence, and so they were given no weight in my consideration of the matter.

[17] Questions of procedural fairness require an approach resembling the correctness standard of review, in which a reviewing court asks "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 [*Canadian Pacific*] at para 54). As noted in *Canadian Pacific* at paragraph 56, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond."

[18] The second issue is to be assessed under the reasonableness standard of review, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 2). The burden is on the applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

III. Analysis

A. *There was no denial of procedural fairness*

[19] The Applicants' procedural fairness arguments relate to three matters: (1) the RAD's reliance on out-dated National Documentation Packages (NDP) for Pakistan and India; (2) the failure to hold an oral hearing; and (3) the treatment of their allegation that their former counsel had provided inadequate representation. I will address these in turn.

(1) The National Documentation Packages

[20] The Applicants argue that the RAD's reliance on the Pakistan NDP dated April 30, 2018 was unfair to them because the Panel should have referred to the more recent information in the latest version of the NDP Package (dated March 29, 2019) that was available when it issued the decision. Similarly, they submit that the RAD's failure to rely on the most recent NDP for India was also unfair, because some of the new documents that were added to that package related directly to their claims.

[21] I am not persuaded. The RAD is to engage in a forward-looking analysis of risk, and thus it is generally required to rely on the most recent information available about the relevant country. However, the RAD is only required to provide notice to parties when relying on a new NDP that became available after the appeal was heard and the more recent information departs from the older material (*Lin v Canada (Citizenship and Immigration)*, 2021 FC 380 [*Lin*] at para 26, and the cases cited therein). Jurisprudence holds that the RAD is entitled to rely on older versions of the NDP unless there is "different, novel and significant" information in the new

NDP that was unavailable when the applicants made their argument (*Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 at para 60).

[22] In this case, the RAD cited the NDP packages specifically relied on by the Applicants, and cannot be faulted for responding to their particular arguments. Insofar as the more recent versions of the NDP included new information, I am unable to find that the information was so "different, novel and significant" that the failure to refer to it or to give the Applicants an opportunity to make submissions about it constituted a denial of procedural fairness.

[23] The new information about Pakistan showed that the situation of women was deteriorating in some respects, but the RAD had acknowledged that the situation was very difficult for women in Pakistan, based on the earlier NDP. I will return to this question below, but I am not persuaded that this information was so different or new that it required that notice be provided to the Applicants. The same is true for the information about the situation in India, and in particular that country's treatment of people from Pakistan. The RAD acknowledged that the Co-Applicant would face certain challenges in India because she is a citizen of Pakistan, and the new information simply confirms that fact. Again, there was no denial of procedural fairness in failing to specifically refer to this information or to give the Applicants a chance to submit arguments relating to it.

[24] At a more general level, the RAD is presumed to have considered all of the evidence in the record, including the publicly available information in the most recent NDPs for the relevant countries. The fact that the Panel only specifically cites the versions that the Applicants had relied on is not, in itself, proof that the more recent versions were ignored, in particular because

the new information did not depart in any significant way from that set out in the versions it cited.

[25] For these reasons, I am not persuaded that the RAD's failure to specifically cite the most recent NDP documents for Pakistan or India, or to give the Applicants an opportunity to make reference to them, amounted to a denial of procedural fairness.

(2) The failure to hold an oral hearing

[26] The Applicants submit that the RAD was required to consider whether to hold an oral hearing, even though they did not request one, citing a number of cases including *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 911, and *Mohamed v Canada (Citizenship and Immigration)*, 2020 FC 1145. They submit that the circumstances required an oral hearing, particularly because the RAD had acknowledged that their former counsel had not properly prepared for the hearing before the RPD, and thus it was unfair to hold them to their testimony.

[27] I am unable to accept this argument for several reasons. First, the Applicants did not request a hearing. Although they rested their appeal before the RAD partly on their allegations of incompetent representation, they did not advance the argument put forward here, namely that it was unfair to hold them to their testimony before the RPD when they had been inadequately prepared for the hearing. The RAD cannot be faulted for failing to consider an argument that was never raised before it. Further, the RAD was bound by the restrictions on its ability to hold an oral hearing that are set out in the relevant statute, and the Applicants have failed to demonstrate that they met the test set out in subsection 110(6) of the *Immigration and Refugee Protection Act*,

SC 2001, c 27. There was no real issue of credibility raised by the RPD and the RAD accepted the factual basis for the Applicants' asserted fear of D-Company and Abu Salem.

[28] The failure to hold an oral hearing did not deny the Applicants a fair procedure. The RAD conducted a *de novo* review of the evidence, including the new evidence they submitted, the Applicants had a full and fair opportunity to present their appeal, and the Panel carefully considered the Applicants' arguments. The Applicants did not demonstrate that they met the statutory requirements for an oral hearing, and thus the RAD's failure to hold an oral hearing did not deny them procedural fairness.

(3) The allegations of incompetent representation

[29] The Applicants claim that the quality of their former counsel's representation is a determinative issue, because it denied them the opportunity for a fair consideration of their claim for refugee protection. They submit that the lack of adequate preparation for the hearing had the effect of denying them the opportunity to properly present their case. The RAD acknowledged that their former counsel had not adequately prepared for the hearing, and thus it admitted the new evidence. However, the Applicants claim that the RAD failed to give effect to this finding when it considered the impact of counsel's incompetence on the fairness of the hearing before the RPD.

[30] I am not persuaded by this argument. The law sets a high bar for a claimant to show that incompetent representation amounted to a denial of procedural fairness. The case law requires that a claimant establish not only that there was incompetent representation but that there is a

reasonable probability that but for counsel's incompetence, the result would have been different (*Galayas v Canada (Citizenship and Immigration)*, 2013 FC 250 at paras 84-89).

[31] In the present case, the RAD admitted new evidence because of concerns about the quality of the representation provide by the former counsel relating to the preparation for the RPD hearing. The RAD then conducted a *de novo* review of the totality of the evidence, and provided the Applicants an opportunity to make submissions on that evidence, as well as on the original record. In light of this, it is not possible to conclude that the RAD was required to overturn the RPD decision simply because of the concerns about the quality of the former counsel's representation. This is not one of the "extraordinary circumstances" where a breach of procedural fairness occurred (see *Sabitu v Canada (Citizenship and Immigration)*, 2021 FC 165 at para 90 and *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234 at para 18).

B. *The RAD's decision was reasonable*

[32] The Applicants submit that the RAD's decision is unreasonable as a whole, and they focus in particular on the failure to consider the risks the Co-Applicant would face if she returned to Pakistan. They argue that the RPD and the RAD had a duty to examine her risks as a single, educated adult female in Pakistan without male protection; that is the particular social group to which the Co-Applicant belongs, and her risks had to be assessed based on that. The Applicants contend that the RAD failed to consider the evidence in the NDP that supported the risks faced by members of that social group, and therefore its decision is unreasonable.

[33] The RAD's reference to the U.K. Home Office Report at paragraph 41 of its decision, noting that "[b]eing female does not on its own establish a need for international protection" shows that the RAD missed the point, according to the Applicants. The Applicants argue that the documentary evidence shows that there are significant risks for women in Pakistan, but that educated single women without male protection face even greater dangers. They assert that the RAD's failure to refer to the evidence in support of this aspect of her claim is unreasonable.

[34] The Applicants object to the RAD's statement that "[t]he more educated, wealthy and urban the environment, the less likely [a woman will] be at risk." (RAD Decision at para 42). They cite the information in the more recent NDP for Pakistan, which shows that the urban-rural divide is no longer a reliable gauge of the risk that women face, and that wealthy, educated women may face greater risks because they are perceived to be more likely to challenge traditional gender roles. The Applicants note that the NDP includes ample documentation about the risks faced by women in Pakistan, summarized by the assessment that Pakistan ranks 143 out of 144 countries in terms of its gender equality in economy, politics, education and health. They argue that the RAD's failure to engage with this evidence, and the finding that the Co-Applicant had not demonstrated a nexus to a Convention ground, were unreasonable.

[35] Applying the *Vavilov* framework of analysis, I am unable to conclude that the RAD's decision is unreasonable. Even if a different decision-maker might have reached a different conclusion on the evidence, the RAD's decision is based on the assessment of the evidence relating to the country conditions and to the particular situation of the Co-Applicant. The RAD explains this reasoning process, and the line of analysis is clear and not marred by logical flaws. That is all that reasonableness review requires.

[36] The RAD noted that the RPD had failed to discuss the risk of gender-based violence because the Co-Applicant did not mention this in her Basis of Claim form or during her testimony. Before the RPD, her evidence was that she feared returning to Pakistan because of the threats from D-Company and Abu Salem. She said she thought she would be able to find work if she had to return to Pakistan, noting her previous work experience in other countries. The Co-Applicant had expressed a concern about the fact she had no family in Pakistan, but also testified that she was in touch with neighbours of her father there, so she knew some people in the country. The RAD considered all of this evidence.

[37] In addition, the RAD went on to consider the Applicants' arguments regarding the risk of gender-based persecution faced by the Co-Applicant in Pakistan. The Panel noted that she had to demonstrate a personalized risk of harm, because the level of discrimination against women in Pakistan did not amount to persecution. The RAD had earlier acknowledged the Applicants' argument that women, without male protectors, are specifically vulnerable to gender based violence, which had become normalized in Pakistan. The Panel's review of the evidence, in light of the particular circumstances of the Co-Applicant, led to the conclusion that even if she were to return to Pakistan alone, "it would seem she has many advantages which could assist her to establish herself in safety" and therefore no serious risk of persecution on the basis of her gender alone had been made out (RAD Decision at para 42).

[38] The Applicants say this is unreasonable, citing evidence in the NDP that points in the opposite direction. The passage cited by the Applicants stating that the more educated and wealthy a woman is, the greater her risk is in a section on the risks of domestic violence, which is not pertinent here. While there are some references that indicate that the situation of women in

urban areas is becoming worse, the overall evidence tends to support the RAD's view that the risks are greater for poorer women located in rural communities.

[39] It is also relevant that the Co-Applicant's testimony indicated her belief that she had the individual background and resources she would need to be able to live and work there, if she needed to. Lastly, the RAD noted elsewhere in its decision that the Co-Applicant had the opportunity to apply for the authorization she needed to be able to live in India, and this is a relevant consideration, because she may never have to face the prospect of returning to Pakistan.

[40] For all of these reasons, I am unable to conclude that the RAD's decision on this point is unreasonable. Again, the fact that a different decision-maker might have reached a different conclusion is not itself a basis to overturn a decision. The RAD's reasons show the Panel considered the evidence, assessed the country condition evidence against the personal circumstances of the Co-Applicant, and then explained its reasoning. That is what reasonableness requires.

[41] In regard to the Applicants' argument that the RAD erred in failing to consider the persecution they faced as a family, I am not persuaded that the evidence supports their claim. They said they faced threats from D-Company and Abu Salem, but the evidence does not support a conclusion that their entire family faced any risk because of similar threats. The RAD's finding that the Principal Applicant and the eldest minor Applicant had an IFA in India is based in the evidence, and there is no basis to overturn it.

IV. Conclusion

[42] For the reasons set out above, the application for judicial review is dismissed.

[43] There is no question of general importance for certification.

JUDGMENT in IMM-1746-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1746-20
STYLE OF CAUSE:	MOHAMMED FAISAL SIDDIQUE ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 4, 2021
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	JUNE 28, 2022

APPEARANCES:

Jatin Shory	FOR THE APPLICANTS
David Shiroky	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shory Law Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANTS
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT