Federal Court  Cour fédérale

Date: 20220704

Docket: IMM-7567-19

Citation: 2022 FC 984

Ottawa, Ontario, July 4, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MOHAMMAD JAMAL SALMAN

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made by the Refugee Protection Division (RPD) on November 12, 2019 (the Decision) rejecting the Applicant's claim for refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the *IRPA*].

[2] The Applicant sought refugee protection on the basis that he was at risk in Lebanon due to ISIS attempting to recruit him, and in both Lebanon and the UAE due to his Palestinian ethnicity.

[3] For the reasons that follow, this application is allowed.

II. **Background Facts**

[4] The Applicant was born on September 19, 1987 in Abu Dhabi, United Arab Emirates (UAE). He is a stateless Palestinian and Sunni Muslim. His spouse and daughter were also born in the UAE and are stateless Palestinians and Sunni Muslims.

[5] The Applicant, his spouse and their child arrived in Canada on December 30, 2017 and applied for refugee status. They were deemed eligible pursuant to the close family exception under the Safe Third Country Agreement (STCA).

[6] The Applicant, who claimed to be a citizen of Lebanon, disjoined his refugee claim from his family as he and his wife separated after arriving in Canada.

III. **The Decision**

[7] The RPD hearing was held September 12, 2019.

[8] The RPD found the determinative issue was the Applicant's lack of an objective basis for a claim.

[9] The RPD accepted that the Applicant had established his identity and that he was a stateless Palestinian. It also found that the Applicant had established a nexus to a Convention ground given that he was a stateless Palestinian.

[10] The RPD found the UAE was the Applicant's only place of habitual residence. It found that Lebanon was not a place of habitual residence.

[11] The RPD rejected the Applicant's explanation for not claiming asylum in the United States and drew a negative inference regarding his credibility and subjective fear.

[12] The RPD made a number of negative credibility findings against the Applicant. I will only discuss those that are unreasonable and significant enough, particularly when considered cumulatively, to render the Decision unreasonable.

IV. **Issues**

[13] The issue in this application is whether the Decision is reasonable.

[14] The Applicant alleges the Decision is unreasonable, for many reasons. However, it will not be necessary to address all the reasons put forward. I find that only two of them need to be addressed. These are: (1) that the RPD erred by finding the Applicant lacked subjective fear due

to his failure to claim asylum in the United States despite meeting the "close family exception" clause in the STCA; and (2) the RPD erred in law by assessing the Applicant's claim against both the UAE and Lebanon.

V. **Standard of Review**

[15] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, none of the exceptions to the presumption are present here.

[16] The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves: *Vavilov*, at para 83.

[17] Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[18] The burden is on the party challenging the decision to show that it is unreasonable. To set a decision aside, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision.: *Vavilov* at para 100.

VI. **The STCA and subjective fear**

[19] The analysis of the Applicant's subjective fear was discussed only once and that was with respect to not claiming asylum in the United States.

[20] The analysis is found at paragraphs 24 and 25 of the Decision:

> [24] The panel finds it unreasonable that the claimant, who was stateless, would not apply for refugee status in the first signatory country that he arrived at, even considering Trump's language regarding Muslim claimants. The panel notes that the Palestinian Authority and the UAE were not on the list of countries subject to a travel ban.
>
> [25] The panel rejects the claimant's explanation and draws a negative inference on credibility and subjective fear.

[21] I find this reasoning unintelligible.

[22] The Palestinian Authority, referred to in paragraph 24 above, is not a country and therefore it can not be subjected to a travel ban by the United States. Even if the 'Palestinian Authority' is excluded from the RPD's analysis, the fact that the UAE is not included in a policy that prevents foreign nationals of some Muslim majority countries from entering the United States is irrelevant to the Applicant's subjective fear. If anything, it serves as objective evidence of Islamophobia that the Applicant would face in the United States.

[23] The Applicant submits that the RPD erred in failing to consider the close family exception to the STCA and then erred again by using it to undermine his credibility and find a lack of subjective fear.

[24] The Respondent submits that the RPD fulfilled their obligation to consider the Applicant's explanation and it was entitled to reject the explanation.

[25] The only explanation the RPD considered was that on their way to Canada, the Applicant's family stayed with the wife's family in the United States.

[26] The RPD did not consider that the third paragraph of the Applicant's BOC stated "On December 30, 2017, my family and I arrived at Niagara Falls, Ontario, Canada and applied for Convention Refugee status after which, we were deemed **eligible** through the **'close-family'** exception to the **Canada/U.S. S.T.C.A.**". The RPD also failed to consider that the next page again mentioned they had "close family members residing in Canada" (Emphasis in original, other similar emphasis omitted to enhance readability).

[27] Similarly, the Applicant's Notice of Referral to the RPD, dated January 11, 2018, had the word "Yes" typed next to "Safe third country exception" and "Deemed" next to "Eligibility decisions".

[28] The RPD made no reference to or acknowledgement of the foregoing references anywhere in the Decision.

[29] The failure to claim elsewhere is not, in and of itself, determinative. However, the RPD must carefully consider any explanation provided by the applicant and give reasons for rejecting it: *Jumbe v Canada (Minister of Citizenship and Immigration)*, 2008 FC 543, at para 12.

[30] No such consideration was made by the RPD.

[31] The RPD only considered, and rejected, the Applicant's explanation for not immediately making a claim for asylum in the United States which was that, while they were on their way to Canada, they stayed with the wife's family.

[32] Mr. Justice Diner has confirmed that delay in claiming or a failure to claim has been found by this Court to be consistent with the family member exception in the *Safe Third Country Agreement* between Canada and the United States: *Wamahoro v Canada*, 2015 FC 889 at paragraph 33.

[33] Similarly, Mr. Justice Grammond recently found that the presence of a relative in Canada is a valid reason for not claiming asylum in the United States: *Yasun v Canada (MCI)*, 2019 FC 342 at para 21 and cases cited therein.

[34] Given this jurisprudence and the lack of any acknowledgement by the RPD of the Applicant's family exception argument, I find the RPD erred by failing to accept the existence of a relative in Canada as an explanation for the Applicant's delay in claiming asylum in the United States.

[35] In my view, that shortcoming is more than merely superficial or peripheral to the merits of the decision. The reasoning of the RPD on the subject of the STCA led to a negative inference with regard to both the Applicant's credibility and his subjective fear. Those conclusions were unreasonable on the facts before the RPD.

[36] Mr. Justice Rennie, when a member of this Court, found that "the failure to claim elsewhere is not, in and of itself, determinative. However, the [RPD] must carefully consider any explanation provided by the applicant and give reasons for rejecting it": *Valencia Pena v Canada (Citizenship and Immigration)*, 2011 FC 326, at para 4.

[37] For these reasons, I find the RPD's reasoning in drawing a negative inference with respect to the Applicant's credibility and subjective fear, for not claiming in the United States was unreasonable.

VII. **The CFHR**

[38] The RPD set out at paragraphs 15 and 16 of the Decision the approach to be used to establish former habitual residence. Paragraph 15 is taken from *Thabet v Canada* (*Minister of Citizenship and Immigration*) [1998] 4 FC 21 (FCA) [*Thabet*] and paragraph 16 is from *Maarouf v Canada (Minister of Employment and Immigration*), [1994] 1 FC 723 (TD).

> [15] The concept of "former habitual residence" implies a situation where a stateless person was admitted to a country with a view to enjoying a period of continuing residence for some duration. The claimant does not have to be legally able to return to a country of former habitual residence. The claimant must have established a significant period of *de facto* residence in the country in question. The claimant must establish that he is persecuted in

> one country of former habitual residence, and is unable to safely return to any other.
>
> [16] The Federal Court of Appeal established that a broad and liberal approach must be taken when assessing a proposed country of former habitual residence: there is no minimum period of residence required in that country, the analysis should not be unduly restrictive, the claimant does not need to be able to legally return; and the claimant must have established some significant period of *de facto* residence there.

[39] The RPD determined that the UAE was the Applicant's only country of habitual residence.

[40] The RPD specifically concluded that "Lebanon is not a country of habitual residence."

[41] The RPD accepted the Applicant's testimony that he had never resided in Lebanon with an intent to reside there permanently. In addition, the RPD accepted the Applicant had documents from Lebanese authorities, was able to enter and leave Lebanon and had some familial connections in Lebanon.

[42] The RPD found that it was clear from the Applicant's testimony that he had only been in Lebanon on four occasions for relatively brief periods of 1-2 weeks.

[43] Notwithstanding their clear findings, the RPD made the following negative credibility findings concerning risk to the Applicant in Lebanon:

1. The Applicant was in fear in Lebanon due to being approached by ISIS on two occasions, but wrote in his BOC that they were generic "armed members of a militant group". The panel finds it unlikely that the claimant would not have

named the militant group ISIS if he had serious inclination that they were affiliated with ISIS.

2. The Applicant said that the militants only knew his first name. The panel finds it improbable that the claimant could be identified in another part of Lebanon if only his first name "Mohammed" is known to the recruiters.

3. The Applicant said that he accepted to work for them, but in his BOC indicated that he had declined. The panel rejected the discrepancy and drew a negative inference on credibility.

[44] The above findings all concern an assessment of risk in Lebanon.

[45] The finding is irrational. The RPD assessed risk in Lebanon as if it was a CFHR despite having already clearly found that it was not and only the UAE was a CFHR. The RPD then unreasonably made the negative credibility finding against the Applicant for Lebanon.

[46] A refugee claimant cannot be expected to establish risk in a country that is not a country of former habitual residence.

[47] The test for establishing refugee status for stateless persons is set out in *Thabet* at paragraph 30 where the certified question that was posed to the Court of Appeal is addressed as follows:

> In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in *any country of former habitual residence*, and that he or she cannot return to any of his or her other countries of former habitual residence. (My emphasis)

[48] From this answer it appears clear that an assessment of risk is only to be made against a CFHR. That is also supported by recent cases in this Court.

[49] The proper methodology for the test for stateless claimants is a two part test as set out in *Iraqi v Canada (Citizenship and Immigration)*, 2019 FC 1049 at paragraph 23:

> The first part of the test is to establish the country or countries of the claimant's former habitual residence. The second part of the test (which is at issue here) requires that the claimant must be outside the country of his or her former habitual residence or unable to return to that country by reason of a well-founded fear of persecution for a Convention ground (*Maarouf* at para 33). (Balance omitted)

[50] The RPD established in the first part of the test that the UAE was the CFHR and that Lebanon was not a CFHR.

[51] The Applicant bears the burden of proof to show on a balance of probabilities that they are unable or unwilling to return to *any country of former habitual residence*: *Thabet* at para 28. It is unreasonable to assess an applicant's risk against any country that will allow them to enter.

[52] The RPD found the Applicant in this case was born, educated and employed in the UAE along with his wife and daughter. Although he would be able to enter Lebanon if deported from the UAE, the risk assessed at the day of the hearing was a risk of persecution as a stateless Palestinian and Muslim in the UAE.

VIII. **Conclusion**

[53] People are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention: *Thabet* at para 16

[54] While the RPD did not specifically state that the Applicant was not credible, it certainly considered the credibility findings in assessing the claim as a whole.

[55] The negative credibility findings based on the failure to claim asylum in the United States and the findings of lack of risk in Lebanon are not supported by the reasons, the evidence or the jurisprudence. Without them, no credibility concerns remain.

[56] For all the reasons set out above and my review of the Decision in light of the documents in the underlying record, I am satisfied that there are sufficiently serious shortcomings in the Decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency.

[57] The identified flaws and shortcomings are more than merely superficial or peripheral to the merits of the decision. They are central and significant to the outcome. As a result, I find they render the Decision unreasonable: *Vavilov* at para 100.

[58] This application is granted.

[59] The Decision is set aside and this matter will be sent back to a different member of the RPD for determination.

[60] No serious question of general importance was posed for certification.

JUDGMENT in IMM-7567-19

THIS COURT'S JUDGMENT is that:

1. This application is granted.
2. The Decision is set aside and this matter will be sent back to a different member of the RPD for determination.
3. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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