Federal Court Cour fédérale

Date: 20220816

Docket: IMM-4916-20

Citation: 2022 FC 1205

Ottawa, Ontario, August 16, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ANDRII KARAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of Ukraine who seeks judicial review of a decision by the Refugee Appeal Division (RAD) dated September 16, 2020. The RAD dismissed his appeal, rejecting his claim for refugee protection arising from persecution by a criminal gang called Yumaks (the Decision).

[2] The Applicant alleges that he cannot return to Ukraine because he would be pursued by the Yumaks.

[3] For the reasons that follow, I find the Applicant has not met their onus to show the finding by the RAD that there is a viable Internal Flight Alternative (IFA) was unreasonable.

II. Background

[4] The Applicant was a successful crop and livestock farmer.

[5] In 2009 he was forced to pay extortion money amounting to about $1,000 US dollars a month to the Yumaks gang. The Applicant was able to pay the gang until 2013, when he could no long afford to pay them as his business was suffering. The Yumaks assaulted him and demanded payment by a certain date.

[6] When the Applicant missed a payment the Yumacks would threaten and assault him. When he went to the hospital for treatment the nursing staff, following protocol, called the police. When the police attended it made matters worse for the Applicant as he was required to make a statement to a corrupt police officer with whom he was familiar.

[7] The Applicant was not provided with any assistance from the police. He later received a phone call from the leader of the Yumaks threatening him for making the police statement.

[8] In November 2013, the Applicant borrowed money to pay off his debt to the Yumaks, but was threatened again later that month. The Applicant was beaten up. A passerby drove him to the hospital where a third party informed the prosecutor's office about the incident. The police called the Applicant in to the station for questioning and threatened him for making a complaint.

[9] The Applicant went into hiding after his release from the police station.

[10] In April 2014, Yumaks gang members located the Applicant in Lanivtsi where he was attacked and told that they could find him anywhere. The gang members returned the Applicant to his home in Laskivtsi.

[11] The Applicant decided to leave Ukraine. He arrived in Canada on August 18, 2014. He claimed refugee protection on December 3, 2014.

[12] In a decision, dated April 5, 2018, the RPD refused the Applicant's claim for refugee protection on the basis that there was a viable IFA in Kiev and Odessa.

[13] The Applicant appealed the RPD decision on May 1, 2018.

III. **The Decision**

[14] The RAD indicated it had listened to the recording of the RPD hearing and reviewed the entire record.

A. *New Evidence*

[15] The Applicant did not submit any new evidence to the RAD when he filed the appeal.

[16] On June 16, 2020, the RAD sent a notice to all counsel and designated representatives further to the Practice Notice on Resumption of Time Limits, providing over 30 days notice of the resumption of the regular time limits for filing a notice of appeal and appellant's record.

[17] Further to that Practice Notice, the RAD advised by way of a separate letter to Applicant's counsel that it was requesting submissions. Those submissions were due no later than 30 days from the date of the correspondence.

[18] The Applicant submitted several pieces of new evidence to support his allegation that he was at risk and the Yumaks had an ongoing interest in, and ability to find him, throughout Ukraine. He did not request an oral hearing.

[19] The RAD indicated the new evidence it admitted was not relevant to any credibility issues therefore an oral hearing could not be held.

[20] After articulating the test for admission of new evidence set out in subsection 110(4) of the *Immigration and Refugee Protection Act* SC 2001, c27 (the *IRPA*) the RAD determined that four items of evidence in support of the attacks against the Applicant's wife were not admissible. The RAD found the evidence was not credible because of the timing of the submission of the

evidence. The Applicant submitted his appeal record in May 2018 but waited until July 2020 to submit evidence of his wife's earlier attacks in August 2019, December 2019, February 2020 and June 2020. The RAD also noted that the Applicant left Ukraine in August 2014. The Yumaks attacked his father in December 2015, and attacked his wife in May 2016.

[21] There was no further evidence of attacks as of the time of the RPD hearing on March 2, 2018. The RAD found it was not credible that the Yumaks would attack the Applicant's wife more than three years after the last attack and more than 5 years after the Applicant left the country. In addition, neither the Applicant nor his wife could offer an explanation as to what would motivate the Yumaks to repeatedly attack the Applicant's wife given they did not appear to derive any real benefit from those actions.

[22] The RAD accepted the Applicant's additional country condition documents.

B. *IFA*

[23] In considering the first prong of the IFA test, the RAD found that the Applicant would not face a serious possibility of persecution in the proposed IFA of Odessa because the Yumaks lacked the capacity and motivation to pursue him there.

[24] For the second prong of the test, the RAD found it would not be unreasonable for the Applicant to seek refuge in Odessa. The basis for that conclusion was that the RPD had found that there was insufficient evidence that the Yumaks gang had a national reach throughout Ukraine.

[25] The RAD also noted that the RPD had reviewed the objective documentation and the documents submitted by the Applicant before reaching the conclusion that the Applicant would be able to relocate safely to Odessa. It did not arrive at that conclusion simply because the Applicant had not been found by the gang while he was hiding in Kiev and Khmelynytsky.

[26] The RAD found the RPD correctly noted that the country condition evidence did not suggest that the police across the country were "automatically linked to criminal gangs". Nor did it suggest that police corruption was "monolithically pervasive".

[27] The RAD noted that the objective country condition documentation specified that the overall presence of organized crime groups in Ukraine was declining rapidly.

[28] The RAD observed that the Applicant appeared to have misunderstood the RPD's reasons as the RPD did not conduct a state protection analysis. Rather, the IFA analysis of the RPD determined the Applicant should not be granted refugee protection.

[29] The RAD confirmed the RPD decision, concluding that the Applicant had a viable IFA in Odessa.

IV. **Issues**

[30] The Applicant challenges the RAD's decision to reject some of the new evidence. The Applicant also submits that the RAD unreasonably assessed each of the two prongs of the IFA test.

[31] I accept these are the issues in this application.

V. **Standard of Review**

[32] 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*, 2015 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, none of the exceptions to the presumption are present here.

[33] A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. It does not attempt to ascertain the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem: *Vavilov* at para 83.

[34] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[35] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *Vavilov* at para 125.

VI. **The RAD reasonably rejected some of the new evidence**

[36] The Applicant submits the RAD's reasoning is perverse, as it had specifically requested additional documents in its letter dated June 15, 2020.

[37] The Applicant has focussed on one sentence in the letter counsel received inviting submissions: "A document or written submissions in support of the appeal will be accepted without an application." The Applicant submits that as an application was not required the RAD necessarily ought to have admitted any new evidence. The Applicant states "[i]t is perverse to specifically give the Applicant the opportunity to submit additional documents without an application and then take the position that legal principals (*sic*) pertaining to the acceptance of new evidence at the RAD were not suspended."

[38] The Applicant has not addressed the next sentence in the letter: "Other requirements of Rule 29 and 110(4) continue to apply."

[39] I find that the reference to Rule 29 of the RAD Rules and subsection 110(4) of the *IRPA* make it clear that the only thing waived by the letter was the necessity of a formal application to submit new evidence. Apart from that, the usual rules regarding admission of new evidence continue to apply.

[40] Rule 29(3) requires the Applicant to explain how a document provided meets the requirement of subsection 110(4) and how that evidence relates to the applicant.

[41] Rule 29(4) sets out relevant factors the RAD must consider when evaluating whether to allow an application for new evidence.

[42] Subsection 110(4) stipulates that “[o]n appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.”

[43] The Applicant states that one of the issues in the RAD’s refusal to accept the Applicant’s personal documents was the timing of the submission of the additional documents.

[44] In deciding if the new evidence should be admitted the RAD, as it was entitled to, assessed whether the evidence submitted was credible: *Mavangou v Canada (Minister of Citizenship and Immigration)*, 2019 FC 177, at para 25.

[45] The RAD noted that the Applicant submitted his appeal record in May 2018 but waited until July 2020 to submit evidence of his wife’s earlier attacks. In assessing whether the evidence was credible, the RAD was entitled to consider the delay in submitting it, the timing of the attacks and the discrepancies in the evidence regarding the attacks.

[46] In summary, the fact that the RAD gave the Applicant the opportunity to submit further evidence and submissions, does not excuse the Applicant’s evidence from meeting the applicable statutory criteria for new evidence.

VII. **The IFA analysis was reasonable**

A. *The IFA test*

[47] In determining whether there is an IFA, the RAD must be satisfied that: (1) there is no serious possibility that an individual would be persecuted or subjected to persecution in the proposed IFA location and (2) the conditions of the proposed IFA must be such that it would not be unreasonable for the Applicant to seek refuge there: *Rasaratnam v Canada (Minister of Citizenship and Immigration)*, [1992] 1 FC 706 (CA).

[48] In considering the viability of the IFA city, the RAD identified and applied the two-pronged test set out above.

[49] The first prong requires the Applicant to prove that there is a serious possibility of being persecuted in the IFA. In other words, the onus is on the Applicants to show they will be persecuted; it is not up to the Respondent to show they will not be persecuted.

[50] The second prong requires that the Applicant show he could not reasonably seek refuge in the IFA location when considering all the circumstances including those particular to him.

[51] To succeed in proving that a proposed IFA is not viable, an applicant must persuade the decision-maker, in this case the RAD, that at least one prong of the two-prong test is not made out: *Aigbe v Canada* (*Minister of Citizenship and Immigration*), 2020 FC 895 at paragraph 9.

[52] An applicant must meet a very high threshold to prove the unreasonableness of an IFA. To do so requires actual and concrete evidence proving that there are conditions that would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (FCA) at paragraph 15.

B. *The first prong*

[53] The RAD clearly acknowledged that it would be possible for the Yumaks gang to find the Applicant's address through the help of a corrupt officer, but found that the Yumaks would not have the capacity or motivation to act on this information.

[54] I agree with the Respondent that the RAD reasonably concluded based on the evidence, that the Yumaks was a regional group active in the Ternopil region. It did not have the capacity to take action against the Applicant outside their sphere of influence. In refusing to admit the Applicant's evidence of recent attacks on his wife, the RAD noted that there was little to indicate that the Yumaks were still interested in locating and harming the Applicant.

[55] I find the Applicant has failed to show the analysis by the RAD of the first prong of the test was unreasonable.

C. *The second prong*

[56] The Applicant submits that the RAD erred by not considering the obstacles he would face in obtaining registration in Odessa, considering he has no friends or family there and the documentary evidence states that there are obstacles for individuals who live in households not owned by them or their family. He notes that registration is also needed in order to access social services, including medical treatment.

[57] The Applicant also submitted to the RAD that the Covid-19 pandemic rendered it unreasonable to expect the Applicant to relocate to Odessa at this time.

[58] The RAD reasonably found that the Applicant's evidence about the impact of Covid-19 on Ukraine did not demonstrate it would be unreasonable for him to relocate. Ukraine has not been as hard hit as some other European countries and there were only little differences in the number of cases between Odessa and Ternopil. The Applicant's ability to travel to Odessa was not hindered by the pandemic and the social safety net in Ukraine is well developed. The RAD was not satisfied that the Applicant had met the high threshold for what would make an IFA an unreasonable location to which he could relocate.

[59] 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": *Hamdan v Canada* (*Minister of Citizenship and Immigration*), 2017 FC 643 at para 12.

[60] The onus was on the Applicant to present sufficient evidence to overcome the presumption of a viable IFA once it was raised by the RPD. The RAD reasonably found that the Applicant did not demonstrate any concrete evidence that travelling to or residing in Odessa would place him in great physical danger.

VIII. **Conclusion**

[61] For all the foregoing reasons, I find the Decision is one that is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrained the decision maker.

[62] The Applicant failed to show either that there was a serious possibility that he would be persecuted in Odessa or that he could not reasonably seek refuge in Odessa. As he failed to defeat one of the two prongs of the IFA test, this application is dismissed.

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

JUDGMENT in IMM-4916-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

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

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4916-20
STYLE OF CAUSE:	ANDRII KARAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 27, 2021
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	AUGUST 16, 2022

APPEARANCES:

Arthur Yallen	FOR THE APPLICANT
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yallen Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT