

Federal Court



Cour fédérale

Date: 20221116

Docket: IMM-6140-21

Citation: 2022 FC 1568

Ottawa, Ontario, November 16, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**NAYMA FARDUSI
KAZI MD RAUFUL ISLAM
and KAZI JAIMA ISLAM**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated May 6, 2021 [the Decision]. In the Decision, the RAD confirmed the decision of the Refugee Protection Division [RPD], which determined that the Applicants had a viable internal flight alternative [IFA] in Chittagong, Bangladesh. As such, the RAD confirmed the

RPD's determination that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is granted, because the RAD erred in its analysis as to whether to admit the Applicants' new evidence on appeal.

II. **Background**

[3] The Principal Applicant, Nayma Fardusi, and the other two Applicants who are her minor children [the Minor Applicants], are all citizens of Bangladesh. They claim to have a well-founded fear of persecution at the hands of persons the Principal Applicant assumed were involved in conflicts with her husband. The Principal Applicant also fears abuse at the hands of her husband.

[4] The Applicants claim to be the victims of ongoing harassment and extortion threats. According to the Principal Applicant's Basis of Claim [BOC] form, in July 2018 her son was kidnapped, held for six hours, and released only after a ransom payment was made. Thereafter, the Principal Applicant claims that she was verbally threatened on three separate occasions. The first incident occurred in September 2018 while she was on her way home. She claims that three unknown persons armed with weapons approached her, blocked her rickshaw, and demanded that her husband pay them money or they would kill her and her children.

[5] The second incident occurred in October 2018. Again, the Principal Applicant claims that she was stopped while she was returning home from the office. She claims that two unknown men again threatened to kill her and that they called her two children by name and threatened to kill them if they were not paid.

[6] The third incident is alleged to have occurred less than a week later. The perpetrators were waiting for the Principal Applicant and allegedly shouted and threatened her, stating that if her husband reported the incident to the police or any other powerful people her children would be cut into pieces and they would disappear.

[7] The Principal Applicant stated in her BOC that she had concerns about her husband's business activities and that he may have enemies. She suspected that her husband may have owed money to people as a result of business dealings, which led to the incidents described above. She stated that she felt that her husband was keeping information from her and that she believed he knew more about the kidnapping and subsequent threats than he was telling her.

[8] The Principal Applicant claims that her distrust of her husband stemmed from an affair he had and continues to have. She also claims that her husband abused her throughout their marriage and that the abuse worsened over time. She claims to have been sexually assaulted by her husband, sometimes to the point of physical injury. The Principal Applicant states that she therefore fears her husband but that she was unable to leave him, because divorce is stigmatized in Bangladesh and she is afraid her daughter will face stigma as a result of coming from a "broken family" and that nobody will marry her.

[9] The Applicants arrived in Canada on in December 2018 and applied for refugee protection in January 2019. The RPD heard their claim on January 6, 2020, and issued a decision dated February 10, 2020, rejecting it. The RPD found the Applicants generally credible, that the Principal Applicant was in an abusive relationship, and that the incidents with local criminals had occurred. However, it concluded that the Applicants had a viable IFA in Chittagong. The Applicants appealed this decision to the RAD.

III. Decision under Review

[10] As a preliminary matter, the RAD addressed whether to accept new evidence filed by the Applicants. The Applicants asked for admission of new evidence that they argued would establish that the agents of persecution were powerful and connected to the Awami League [AL] ruling political party in Bangladesh. This evidence included an application by the Principal Applicant's husband before the Ontario Courts seeking joint custody and access related to the minor Applicants, in which the husband provided details of the suspected agents of persecution [the Custody Application]. The Custody Application identified the suspected agents of persecution, their relationship to the husband, and their connections in Bangladesh. Based on this evidence, the Applicants argued that the agents of persecution should be equated with the state and, as a result, the proposed IFA identified by the RPD was not viable.

[11] The Applicants also sought to admit a number of other documents before the RAD. While psychotherapist reports related to the Principal Applicant were admitted, the RAD refused to admit the other new evidence including the Custody Application, other documentation related to the individuals identified in the Custody Application as the suspected agents of persecution,

and portions of an affidavit from the Principal Applicant that related to the information in the Custody Application.

[12] The RAD found that the Custody Application did not meet the requirements of subsection 110(4) of the IRPA, which governs the admission of new evidence in an appeal to the RAD. The RAD concluded that, although the Custody Application was issued subsequent to the rejection of the Applicants' claim by the RPD, it contained information that was in existence prior to the rejection of the claim before the RPD. The Applicants argued that this information only came into the Principal Applicant's possession after the rejection of their refugee claims and that the Custody Application itself indicated that the husband had not previously shared this information with the Principal Applicant. However, the RAD found that this did not explain why the Applicants could not have submitted this information prior to the rejection of their claim on February 10, 2020. The RAD reasoned that, because the issues of IFA and the identity of the alleged agents of harm were put in issue by the RPD, it would have been reasonable for the Applicants to try and obtain this information earlier, particularly as the Applicants had at least some contact with the husband through their lawyers.

[13] Ultimately, the RAD found that the information contained in the Custody Application was reasonably available to the Principal Applicant and could have been expected, under all the circumstances, to have been presented at the time of the rejection of her claim by the RPD.

[14] With respect to its substantive analysis, the presence of a viable IFA was the determinative issue before the RAD. The RAD concluded that a viable IFA existed in

Chittagong and that there was no evidence to support the Applicant's new claims that the agents of persecution were affiliated with the ruling AL. As a result, the RAD concluded that the Applicants were fleeing non-state actors.

[15] On the first prong of the IFA test, the RAD found that the Applicants had failed, on a balance of probabilities, to show that the Principal Applicant's husband or the other agents of persecution had the means and/or motivation to pursue them to Chittagong. As such, the RAD concluded that the Applicants failed under the first prong.

[16] Regarding the second prong – the reasonableness of the proposed IFA – the RAD concluded that: (i) the Principal Applicant is well-educated, (ii) has family in Chittagong, and (iii) would be able to find residence and employment. The RAD also noted that while the objective documentation indicates that single women face significant social stigma and that single women with no support network may face difficulties, the Principal Applicant in this case had a support network in Chittagong. The RAD also found the fact that the Principal Applicant is separated from her husband insufficient, in itself, to demonstrate that the IFA was unreasonable.

[17] In considering the psychotherapist reports that had been admitted as new evidence, the RAD found that while the Principal Applicant has symptomology of various mental health issues, her mental health would not render the proposed IFA unreasonable. The RAD found that country condition documentation indicated that mental health care is available and would be accessible to the Principal Applicant given her ability to support herself. The RAD therefore

found that the Applicants had failed to show that relocation to Chittagong would be unreasonable.

[18] Concluding that a viable IFA existed, the RAD dismissed the appeal.

IV. Issues

[19] The Applicants submit that the following three issues are raised in this application:

- A. Did the RAD err by failing to admit the Applicants' evidence?
- B. Did the RAD err by applying the balance of probabilities threshold to future risk?
- C. Did the RAD err by failing to consider the totality of the evidence in determining there was a viable IFA?

[20] The parties agree, and I concur, that the applicable standard of review is reasonableness.

V. Analysis

[21] My decision to grant this application for judicial review turns on the first issue raised by the Applicants.

[22] I agree with the Applicants' submission that it was unreasonable for the RAD to conclude that the information contained in the Custody Application was reasonably available to the Principal Applicant at the time of the rejection of her claim by the RPD. In arriving at this

conclusion, the RAD reasoned that it would have been reasonable for the Principal Applicant to try to obtain this information from her husband. However, as Applicants submit, this reasoning ignores the fact that the husband is one of the Principal Applicant's agents of persecution. At a minimum, the RAD was required to consider these circumstances and provide justification for its conclusion that a woman, whose allegations of persecution were found to be credible, was obliged to contact her persecutor to obtain information to assist in asserting her refugee claim.

[23] Moreover, the intelligibility of the RAD's analysis must be analysed with attention to the information available to the Principal Applicant at the time the RPD rejected her claim. Her evidence at that stage was that she suspected that her husband may have owed money to people as a result of business dealings, which led to the kidnapping and other incidents described in her BOC. She stated that she felt that her husband was keeping information from her and that she believed he knew more about the kidnapping and subsequent threats than he was telling her. Obviously, these circumstances changed when she was served with the Custody Application, in which the husband provided information about the agents of persecution in support of the custody and access relief he was seeking. However, I have difficulty with the conclusion that, prior to being served with the Custody Application, the Principal Applicant had any basis to expect that inquiries of her husband by her or her counsel would generate this information.

[24] As explained in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 102, in order to find an administrative decision reasonable, a reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in the overarching logic. I find the RAD's analysis surrounding the admissibility of the Custody

Application, and therefore the other proposed new evidence related to the information disclosed by the Custody Application, to be logically flawed.

[25] As this evidence relates to the identities of the alleged agents of persecution, and their alleged connections with the Bangladeshi state, it is clearly material to the Applicants' refugee claim and the IFA analysis pursuant to which their appeal was dismissed by the RAD. My finding that the admissibility analysis is unreasonable is therefore sufficient to grant this application for judicial review, and it is not necessary for the Court to consider the other issues raised in this application.

[26] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6140-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the decision of the Refugee Appeal Division is set aside, and this matter is returned to a differently constituted panel for re-determination.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6140-21

STYLE OF CAUSE: NAYMA FARDUSI
KAZI MD RAUFUL ISLAM
KAZI JAIMA ISLAM V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA TELECONFERENCE

DATE OF HEARING: NOVEMBER 15, 2022

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: NOVEMBER 16, 2022

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