Federal Court  Cour fédérale

Date: 20230111

Docket: IMM-1436-22

Citation: 2023 FC 43

Calgary, Alberta, January 11, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

MUHAMMAD USMAN PASHA
SYEDA AYESHA RIAZ
MUHAMMAD AOUN

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the Refugee Appeal Division [RAD] confirming the determination of the Refugee Protection Division [RPD] that they are not Convention refugees under s. 96 of the IRPA nor persons in need of protection under s. 97 of the IRPA. For the reasons that follow, I will allow the Judicial Review.

I. Background

[2] The principal Applicant, his wife and their minor child are citizens of Pakistan. They arrived in Canada on December 9, 2019 and filed a claim for refugee protection. They fear persecution at the hands of Lashker-e-Jhangiv [LeJ], Sipah-e-Sahaba [SSP], Al-Qaeda and other extremist organizations, as well as from family members who are part of these organizations, because the principal Applicant is a Shia convert—his wife remains a practicing Sunni Muslim.

[3] On July 30, 2021, the Applicants' claim for refugee protection was heard by the RPD. On August 25, 2021, the RPD rejected the Applicants' claim and determined that they are not Convention refugees nor persons in need of protection, because of a finding of a viable internal flight alternative [IFA] in Hyderabad.

[4] The Applicants appealed the RPD decision to the RAD. On January 20, 2022, the RAD dismissed the appeal and confirmed the RPD decision [Decision]. The determinative issue was the finding of an IFA in Hyderabad, where both the RPD and RAD concluded that the Applicants would not be at risk of harm because of their religious belief, nor could the agents of harm be able to locate them there.

II. Issues and Standard of Review

[5] The Applicants argue that the Decision is unreasonable because the RAD erred in finding that there is no serious possibility of persecution or likelihood of harm in the proposed IFA of Hyderabad. The Applicants submit the RAD did not address the issues raised on appeal about the

RPD's consideration of a key item (1.8) of the National Documentation Package [NDP], ignored other key evidence, and erred in concluding that LeJ and SSP did not have the means to locate the Applicants in Hyderabad due to these extremist groups not having dominant operations in that part of the country. The standard of review for these issues is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

III. Arguments and Analysis

[6] I first note that the RPD and RAD have acknowledged that LeJ, SSP, and members of the principal Applicant's family who are part of these organizations, are the agents of harm and that their motivation to find the Applicants is not in dispute. Neither tribunal questioned the Applicants' narratives, or otherwise impugned their credibility, including the fact that their family members, who are senior members of the organizations in question, had made threats and issued a fatwa against the principal Applicant due to the conversion.

[7] Rather, the Parties are in disagreement about whether the Applicants have established that there is a serious possibility of persecution by the agents of harm in the proposed IFA of Hyderabad, and whether the tribunals reasonably considered and applied the documentary evidence that had been highlighted to them.

[8] The Applicants argue that the RAD failed to address the RPD's consideration of item 1.8 of the NDP, a document authored by the United Nations High Commissioner for Refugees [UNHCR]. In its reasons, the RPD states:

> I have considered item 1.8 of the NDP, which indicates that "given the wide geographic reach of some armed militant groups, a viable IFA/IRA will generally not be available to individuals at risk of being targeted by such groups," and that "they often operate with impunity and their reach may extend beyond the area(s) under their immediate control.
>
> The same item indicates that "in the context of Pakistan, and IFA/IRA will generally not be available in areas which are affected by sustained security and military counter-insurgency operations and retaliatory militant attacks." This item does not indicate that an IFA will not be available everywhere, only in areas where there is sustained activity and operations of the alleged agent of harm. As such, the important analysis is to consider whether the proposed IFA has such sustained activity or operations. In this item, there is no evidence of the SSP or the LeJ being active and operational specifically in Hyderabad.
>
> [Emphasis added]

[9] The Applicants argue that the RPD misstated and misunderstood item 1.8 of the NDP. They submit the passage cited by the RPD (underlined above) does not stand for the proposition that an IFA will not be available only in areas which are affected by sustained military operations and retaliatory attacks, placing the onus on the Applicants to show that Hyderabad was not a viable IFA because of sustained military operations and retaliatory attacks.

[10] Rather, the Applicants submit that evidence in item 1.8 of the NDP clearly supports that they are individuals who are at risk of persecution, and that the RAD erred in not finding that the RPD misunderstood the meaning of this document:

> UNHCR considers furthermore that an IFA/IRA will generally not be available to individuals who are members of other religious minorities and who are at risk of being targeted by armed militant groups, given the sustained religiously-motivated sectarian violence and the wide geographic reach of such groups.

[11] The Respondent counters that the RAD reasonably determined that LeJ and SSP would not be able to find the Applicants in the proposed IFA. The Respondent claims that the evidence cited by the Applicants in the NDP does not state that all Shias will be persecuted or will be subjected personally to a likelihood of harm by virtue of their religious beliefs. The Respondent points out that this was noted by the RAD in its reasons, indicating that they did consider the objective documentary evidence in coming to this conclusion.

[12] The Respondent submits that the objective evidence shows that LeJ and SSP would not be able to find the Applicants in Hyderabad, and that the Applicants have not submitted evidence to demonstrate that they would be at risk of harm there: neither LeJ nor SSP have dominant operations in Hyderabad, and the Applicants have not been in contact with their families since 2019, so the agents of persecution (whether the family members or the terrorist organizations they belong to) would not be able to trace their location and would have no reason to know that they had moved to Hyderabad.

[13] Before addressing these arguments, I note the recent decision in *Sami-Ullah v Canada (Citizenship and Immigration)*, 2022 FC 1525 [*Sami-Ullah*], in which the applicant was a Shia Muslim who feared persecution from an extremist group in Pakistan, and who was found by the RAD not be a Convention refugee nor a person in need of protection based on an IFA in Hyderabad or Islamabad. That decision made two key observations – first, that administrative decisions are heavily fact-dependent, and second, regarding the Hyderabad IFA, “there is no unanimous canvas depicted by the jurisprudence – whether coming from the Court or the

tribunals – regarding the plight of Shia claimants that have been targeted by the TTP or related groups in Pakistan" (*Sami-Ullah* at para 29).

[14] The factual scenario in this case is distinguishable from *Sami-Ullah* in that here, the agents of persecution's motivation to find the Applicants is not in dispute, as it was there. On the contrary, as described above, both tribunals in this case accepted the fact that the terrorist organizations targeted the Applicants.

[15] Furthermore, in *Sami-Ullah*, the applicant's wife and children had safely remained in Pakistan, while here, the principal Applicant's wife and child fled to Canada as well. Here, the principal Applicant's wife testified before the RPD that despite not having converted herself, she feared returning to Pakistan with their children given the risks they faced.

[16] Here, the key issue can be boiled down to whether LeJ and SSP have the means to locate the Applicants in Hyderabad. In finding not, the RAD erred in two key ways. The RAD did not address the interpretation of item 1.8 of the NDP, a central issue raised by the Applicants on appeal. This oversight demonstrates the RAD's "failure to meaningfully grapple with key issues or central arguments raised by the parties [and] may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128).

[17] Justice Brown recently decided a case on all fours with this particular IFA arising from religious persecution of Shias in Pakistan in *Humayun v Canada (Citizenship and Immigration),*

2022 FC 1640 at paras 36-38 [*Humayun*]. There, he addressed item 1.8 of the NDP – the same UNHCR document at issue in this case:

> [36] The UNHCR – a most credible assessor of refugee risk - concludes that a viable IFA is *generally not available* [Emphasis added] to individuals at risk of being targeted by certain armed militant groups:
>
> "Given the wide geographic reach of some armed militant groups (as evidenced by high profile attacks, particularly in urban centres) a viable IFA/IRA will generally not be available to individuals at risk of being targeted by such groups."
>
> [Emphasis added]
>
> [37] Critically, that statement is followed by a footnote (444) that specifically identifies the SSP as one such armed militant group.
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> [38] With respect, I am not satisfied the RAD's findings reasonably took this stark analysis and conclusion by the UNHCR into consideration, nor am I able to see how the UNHCR's conclusion squares with the RAD's assessment. In this connection, I agree with the Applicants who submit the question before the RAD was not whether Shia *generally* are attacked in the IFA, but whether it was more than a mere possibility *these specific individual* Applicants could be found and attacked by the SSP in the IFA. In my view that question was not adequately assessed in light of the critical finding by the UNHCR that viable IFA will generally not be available to individuals – such as the Applicants - at risk of being targeted by the SSP.

[18] Justice Brown's comments highlight the importance and relevance of UNHCR's finding that a viable IFA in Pakistan will generally not be available to individuals at risk of being targeted by armed militant groups like SSP and LeJ (which are both specifically named in the list at footnote 444 noted in this extract). Justice Brown concluded in *Humayun* that the RAD did not reasonably consider this "stark analysis and conclusion" when it concluded the applicants in that case had not demonstrated that Shia generally are attacked in Hyderabad.

[19] Similarly, here, the RAD found that the Applicants had brought no evidence of attacks by LeJ and SSP against Shia in Hyderabad and that these groups did not have dominant operations in the region. However, in light of the evidence in item 1.8 of the NDP – that militant groups like LeJ and SSP have wide geographical reach across Pakistan, even in regions where they do not have dominant operations – the RAD did not adequately address whether there was more than a mere possibility that the Applicants would be persecuted in Hyderabad.

[20] The Applicants' profiles in this case placed them in a category of individuals who had been targeted by extremist groups – namely LeJ and SSP – for whom, the UNHCR had concluded, "a viable IFA/IRA will generally not be available." Consequently, it was unreasonable for the RAD to overlook this evidence in their assessment of whether the Applicants had a viable IFA in Hyderabad. This was a fatal flaw in the Decision, just as it was in *Humayun*.

IV. Conclusion

[21] The RAD's Decision was unjustified and thus unreasonable. I will therefore grant the Applicants' Judicial Review Application. The parties propose no question of general importance for certification, and I agree that none arises.

JUDGMENT in IMM-1436-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.

2. No questions for certification were argued and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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