Federal Court  Cour fédérale

Date: 20181116

Docket: IMM-2187-18

Citation: 2018 FC 1157

Ottawa, Ontario, November 16, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

AHMED IBRAHIM AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ahmed Ibrahim Ahmed, seeks judicial review of the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated April 13, 2018, which allowed the appeal by the Minister of Citizenship and Immigration [the Minister or the Respondent] of the decision of the Refugee Protection Division [RPD]. The RAD substituted its decision for that of the RPD and refused the Applicant's claim for refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [the Act].

[2] The RAD found that the RPD had erred in finding that state protection would not be forthcoming to the Applicant and erred in finding that he would not have a viable Internal Flight Alternative [IFA] in Erbil, Iraq.

[3] For the reasons that follow, the Application for Judicial Review of the decision of the RAD is allowed.

I. Background

A. *The Applicant's Claim*

[4] The Applicant, a Kurdish citizen of Iraq, arrived in Canada via the United States and made a claim for refugee protection shortly thereafter on July 20, 2016. The Applicant claimed that he feared being targeted by the Islamic State of Iraq and the Levant [ISIL] in Iraq.

[5] The Applicant recounts that he lived and worked in Erbil in 2014. His parents and brothers lived in Mosul. ISIL captured Mosul in 2014. Fearing for the lives of his family, the Applicant tried to help his brothers escape Mosul. The Applicant waited for two of his brothers outside Mosul at an appointed time in May 2016, but they never arrived. The Applicant was unable to contact his family on their cell phones and has not heard from them since.

[6] The Applicant recounts that on May 27, 2016 he received a phone call from a person who accused him of being a Kurdish infidel and threatened to kill him because he had planned to assist his brothers escape ISIL control. The caller knew details about the Applicant's

whereabouts and schedule. Two days later, the Applicant reported the threat at the office of the Asayish, a security and intelligence organization. The Asayish officers told him that they did not have his brothers in their custody and that they could not help individuals in his situation because the Asayish directed their efforts against fighting ISIL, "a strong enemy".

[7] In early June 2016, the Applicant relocated to a hotel in Sulaimaniyeh. On June 15, 2016, he received another threatening call. The caller stated that he knew the Applicant had left Erbil and was hiding. Fearing that the caller knew where he was and that he would be found in Sulaimaniyeh, the Applicant returned to Erbil, but stayed at the home of a friend. He then decided to leave the country.

B. *The RPD decision*

[8] The RPD found the Applicant to be credible. The RPD found that the Applicant's nexus to a Convention ground was his imputed political opinion as he would be perceived by ISIL to have flaunted ISIL's objectives by attempting to assist his family in fleeing Mosul, which ISIL controls. The RPD concluded that state protection would not be forthcoming, noting that the general security situation described in the country condition documents was not sufficient to find that there is adequate state protection for the Applicant from a threat to his life from ISIL and, therefore, that the presumption of state protection was rebutted. The RPD also concluded that Erbil would not be safe as an IFA as there is more than a mere possibility that the Applicant will be targeted by ISIL for his imputed political opinion.

C. *The Minister's Appeal to the RAD*

[9] The RPD mailed its decision, dated April 3, 2017, to counsel for the Respondent, the Minister of Citizenship and Immigration, by regular mail. On April 21, 2017, the Respondent filed a Notice of Appeal of the RPD decision. The Respondent's Appeal Record was hand delivered to the RAD on May 8, 2017. A Canada Post tracking document indicates that the Applicant's Counsel received the Respondent's Appeal Record on May 12, 2017, a few days after it was delivered to the RAD (Note: the RAD found that the Application Record was received by the Applicant on May 11, 2017.).

[10] On May 15, 2017, the Applicant applied to the RAD seeking the dismissal of the Respondent's appeal due to the failure of the Respondent to meet all the requirements for perfection of the appeal, which among other things, require that the subject of the appeal receive the Appeal Record before it is submitted to the RAD.

[11] By letter dated May 26, 2017, a Case Management Officer at the RAD advised the Applicant and Respondent that the Assistant Deputy Chairperson had instructed as follows:

> The Minister's Appeal is deemed perfected on May 8, 2017. Rad (*sic*) rule 35(2) specifies that documents are considered received as of 7 days after mailing date. As RPD reasons were deemed to be received on April 10, 2017, Appellant's Record was due May 10, 2017. Appellant's Record received on time.

II. The RAD Decision

[12] The RAD first addressed the preliminary issue regarding the Deputy Assistant Chairperson's finding that the appeal had been perfected. The RAD noted that it had read the Act and the *Refugee Appeal Division Rules* SOR/2012 257 [the Rules]. The RAD agreed that the Minister had perfected the appeal within the required timeframe, specifically, on May 8, 2017, when the Minister's Appeal Record was delivered to the RAD.

[13] The RAD acknowledged that the Minister submitted the Appeal Record to the RAD before it was received by the Applicant, and that this was a clear violation of the Rules. The RAD then noted that "in determining how to handle a violation of the Rules, I must first consider whether the violation has done harm to the other parties involved and secondly whether the violation was intended or not." The RAD found that the Respondent did not intentionally violate the Rules, and that no harm had resulted from this error.

[14] With respect to the merits, the RAD allowed the appeal, and substituted the finding that the Applicant is not a Convention refugee or a person in need of protection. The RAD found that there was adequate state protection for the Applicant, particularly in the Kurdistan Regional Government (KRG) controlled region, the Applicant had failed to rebut the presumption of adequate state protection, and alternatively, that Erbil was a viable IFA.

[15] With respect to state protection, the RAD agreed with the Respondent that the documentary evidence demonstrates that the territory of the KRG is relatively secure and that

adequate state protection is provided at an operational level. The RAD found that the Applicant did not seek "attention" from the police, the organization responsible for individual protection, or from a higher authority, and only reported the first threatening call to the Asayish intelligence officer.

[16] With respect to the Applicant's evidence that ISIL sleeper cells were present in the region and posed a risk to him, the RAD stated that no secret assets would expose themselves to a risk of capture merely to harm an insignificant man.

[17] The RAD noted that despite the "onslaught of terrorism", Iraq is a democracy with a functional judicial system and several military and security forces, along with police. The RAD noted that in a functioning democracy with a willingness and ability to protect its citizens, a failure to pursue protection opportunities will usually be fatal to a refugee claim. The RAD concluded that the Applicant did not do enough to pursue state protection in order to rebut the presumption of adequate state protection.

[18] With respect to the IFA, the RAD set out the two pronged test, adding that the onus was on an applicant to show the proposed IFA is not reasonable. The RAD noted the Respondent's argument that the RPD had erred by selectively relying on documentary evidence of incidents in Erbil without analyzing the KRG's ability to provide adequate protection at the operational level in that city. The RAD also noted the Respondent's argument that if the KRG is continuing to combat ISIL, it would be reasonable for the KRG to also provide protection to the Applicant from ISIL threats.

[19] The RAD concluded that Erbil is a viable IFA for the Applicant because it is a large, accessible city with modern infrastructure and a World Heritage Site, and has been recognized as the Arab Tourism Capital.

[20] After making this finding, the RAD noted the Applicant's submissions that given his profile as a western educated man, who is unmarried, speaks English and does not wear a beard, he would be perceived by ISIL as a political enemy, and also that he had been personally targeted by ISIL.

[21] The RAD reiterated that Erbil was a viable IFA, finding that there is less than a mere possibility that the alleged persecutors would locate the Applicant in Erbil. The RAD added that Erbil is a good place to live and work, has a large military and police presence, and offers many amenities and opportunities.

III. The Issues

[22] The Applicant's submissions raise three issues:

- Whether the RAD erred in finding that the appeal should not be dismissed due to the Minister's failure to perfect the appeal;
- Whether the RAD erred in finding that there would be adequate state protection for the Applicant in Iraq; and
- Whether the RAD erred in finding that Erbil would be a viable IFA for the Applicant.

IV. The Standard of Review

[23] The parties agree that the RAD's determination regarding state protection and an IFA are issues of mixed fact and law, which are reviewed on the standard of reasonableness (*Salazar v Canada (Citizenship and Immigration)*, 2018 FC 83 at para 22, [2018] FCJ No 64 (QL)*; Ugbekile v Canada (Citizenship and Immigration)*, 2016 FC 1397 at paras 13-14, 275 ACWS (3d) 360; *Iyere v Canada (Citizenship and Immigration)*, 2018 FC 67 at para 16; 288 ACWS (3d) 140).

[24] It is well established that, where the standard of reasonableness applies, the role of the Court is to determine whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). There might be more than one reasonable outcome. However, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

[25] The Applicant characterizes the RAD's determination that the Respondent's appeal had been perfected as an issue of procedural fairness and submits that the standard of correctness should apply.

[26] The RAD stated that it had considered the Act and the Rules. In this context, the RAD's interpretation and application of the relevant statutory provisions is best characterized as an issue of statutory interpretation reviewable on a standard of reasonableness, given that the RAD interpreted its home statute, the Rules, and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*],with which the RAD is presumed to be familiar (*Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 at para 12, 270 ACWS (3d) 377; *George v Canada (Citizenship and Immigration)*, 2016 FC 884 at para 9; 270 ACWS (3d) 174).

[27] However, as explained below, the outcome would be the same regardless of the standard for judicial review. The RAD made a reasonable preliminary finding that the appeal should not be dismissed. Moreover, the Respondent's non- compliance with the Rules did not result in a breach of procedural fairness in the particular circumstances.

V. Did the RAD err in finding that the appeal should not be dismissed due to the Minister's failure to perfect the appeal in accordance with the Rules?

A. *The Applicant's Submissions*

[28] The Applicant submits that the Minister did not perfect the appeal in accordance with the governing Regulations and Rules. The Applicant submits that the RAD erred by not dismissing the appeal. He argues that the Minister's non-compliance with the Rules reduced the time available to him to respond to the Minister's Appeal Record, which is a breach of procedural fairness.

[29] The Applicant points to subsection 110(2.1) of the Act, paragraph 159.91(1)(b) of the Regulations and Rule 9, which applies to appeals by the Minister. The Applicant submits that taken together, these provisions require that in order to perfect an appeal, the Minister must observe the 30-day time limit to file the Appeal Record with the RAD and must also provide the Appeal Record first, to the subject of the appeal and second, to the RAD.

[30] The Applicant notes that although the Appeal Record is dated May 8, 2017, which is within the 30-day period, the Canada Post tracking document indicates that counsel for the Applicant received it on May 12, 2017, four days after it had been provided to the RAD and two days beyond the 30-day time limit for perfection.

[31] The Applicant acknowledges that the RAD has some discretion under the Regulations and the Rules to extend the time for perfection of appeals but notes that the Respondent did not apply for an extension of time to perfect the appeal, nor did the RAD consider an extension on its own initiative.

[32] The Applicant submits that the RAD failed to consider the applicable Regulations or Rules and instead made up reasons to excuse the Minister's violation of the Rules.

B. *The Respondent's Submissions*

[33] The Respondent disputes whether the Minister's Appeal Record was delivered to the Applicant after it was delivered to the RAD, but acknowledges that the RAD found that there was a violation of the Rules. The Respondent argues that in any event, there was no breach of

procedural fairness. The Applicant did not suffer any prejudice, given that the Applicant had received the Notice of Appeal, the Appeal Record was delivered at most two days beyond the 30-day period, and the Applicant had ample time to respond and did respond. The Respondent adds that the Rules provide the RAD with the jurisdiction to control its own proceedings, pointing to Rules 52-54. The RAD reasonably determined that any prejudice to the Applicant was minor and that the Minister had no malicious intent to delay service of the Appeal Record.

C. *The RAD reasonably found that the Appeal should not be dismissed due to the Respondent's non-compliance with the Rules*

[34] The relevant provisions of the Act, Regulations and Rules are set out in Annex A.

[35] The RAD, faced with the Applicant's arguments that the Minister had not perfected the appeal in accordance with the Regulations and Rules, agreed that the Rules had been violated, but excused the Minister's non-compliance.

[36] The Rules address how the Minister shall perfect an appeal to the RAD. Rule 9 specifically requires the Minister to provide any supporting documents and the Appeal Record "first to the person who is the subject of the appeal and then to the Division". Rule 9 also sets out in detail the contents of an Appeal Record.

[37] Subsection 159.91(1) of the Regulations provides that the time limit for perfecting an appeal to the RAD is 30 days after the appealing party receives written reasons for the RPD

decision. Subsection 159.91(2) gives the RAD discretion to extend this time limit by the number of days necessary in the circumstances, for reasons of fairness and natural justice.

[38] Rule 12 permits the Minister to apply in writing for an extension of time to perfect an appeal. Rule 12 does not include any factors to guide the RAD where the Minister seeks an extension to perfect the appeal; it only requires that there be supporting documents and an appellant's record.

[39] As noted by the Respondent, Rules 52 and 53 give the RAD significant discretion to control its proceedings. However, Rule 52 only allows the RAD to "do whatever is necessary to deal with the matter" where there is no provision in the Rules dealing with that matter, i.e. where there is a gap. In the present case there is no gap. Rule 9 sets out the order in which an appellant must provide supporting documents and the Application Record, within the time limitation of 30 days set out in the Act and Regulations. Rule 12 addresses how the Minister may seek an extension of time.

[40] Rule 53 provides the RAD with the discretion to act on its own initiative to change the requirement of a rule, to excuse someone from the requirement of a rule, and to extend time limits. However, in order to rely on Rule 53, the RAD must first provide the parties with a notice and an opportunity to object.

[41] As noted above, the RAD agreed that the Rules had been violated because the Minister did not comply with the requirement to first provide the Appeal Record to the subject of the

appeal. The RAD did not rely on subsection 159.91(2) of the Regulations to extend the time limit and did not rely on Rule 53 to change a rule, excuse the Minister from a rule, or extend the time limit for perfection in order to save the violation. Rather, the RAD relied on its finding that the breach was minor, had not caused any harm (which the Applicant disputes) and was not intentional, in order to excuse the Minister's non-compliance.

[42] There is very little jurisprudence on the interpretation of Rules 52-54 or on identical rules that apply to the Immigration Division, Immigration Appeal Division or Refugee Protection Division. The limited jurisprudence which comments on these rules suggests that their purpose is to give the boards the flexibility to control their own processes by applying rules liberally to deal with proceedings in an informal and expeditious manner (see for example: *Rodriguez Vieira v Canada (Minister of Citizenship & Immigration)*, 2012 FC 838 at para 14, 415 FTR 23 [*Rodriguez*]; *Manalang v Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 1368 at paras 92-95, 322 FTR 158).

[43] In *Rodriguez,* the Court noted:

> [14] The Refugee Protection Division of the Immigration of Refugee Board is a specialized tribunal and the master of its own procedure. As long as it respects the rules of fairness, the Board may control its own process: see *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25 (QL) at para. 16. This principle is reflected in Rules 68, 69 and 70 of the *Refugee Protection Division Rules*, SOR/2002-228, which accord the Board flexibility in determining how to proceed in a given case.

[44] In the Applicant's request to the RAD to dismiss the appeal due to the Minister's failure to perfect the appeal, he argued that there was a breach of procedural fairness. Although the

Assistant Deputy Chairperson of the RAD did not appear to grasp the issue raised by the Applicant regarding the order of receipt of the Appeal Record, on appeal, the RAD considered the Act and the Rules and the Applicant's argument regarding the fairness of proceeding with the appeal, despite this specific violation of the Rules. Although the RAD relied on factors that are not set out in the Rules, I cannot conclude that in these circumstances the RAD made an unreasonable finding or that this resulted in a breach of procedural fairness. The tenor of the Rules is that flexibility is needed to guard against form trumping substance and the interests of justice and to guard against decisions not being made on their merits. Although the RAD did not acknowledge the various Rules and Regulations that would permit this flexibility, it considered the facts, including that the RAD's official record indicated that the decision was sent by mail to all parties on April 3, 2017; applying the deemed delivery date, the Minister had until May 10, 2017 to perfect the appeal; the Minister delivered the Appeal Record to the RAD on May 8, 2017; and the Applicant received the Minister's Appeal Record on May 11, 2017 (or on May 12, 2017, according to the Applicant) . The RAD considered that although this was after the Appeal Record had been received by the RAD, it was only a few days later. Given that the date to perfect the appeal was May 10, 2017, the receipt by the Applicant of the Appeal Record at most two days after May 10, 2017 still provided him with ample time to respond and he did so.

[45] However, the determination in these particular circumstances should not be construed as generally absolving the RAD from compliance with its own Rules. The RAD should not gloss over its own Rules as this could have serious consequences and could result in a breach of procedural fairness in other cases. Nor should the RAD create new criteria for excusing non-

compliance with the Rules. Given that the RAD has a Rule for every scenario, the Rules should be followed.

VI. Did the RAD err in finding that adequate state protection would be available for the Applicant and that the Applicant had not rebutted the presumption of state protection?

A. *The Applicant's submissions*

[46] The Applicant argues that the RAD erred in its state protection analysis by failing to conduct a contextual analysis and to consider the reality of state protection in Iraq, the nature of the threats he had received and his other particular circumstances.

[47] The Applicant submits that, contrary to the RAD's finding, the RPD did not err in its analysis of the documentary evidence related to state protection in Iraq, the threat posed by ISIL, and similarly situated individuals to find that state protection would not be forthcoming.

[48] The Applicant submits that the RAD's assessment that Iraq is a functioning democracy, despite the "onslaught of terrorism", is based on its failure to consider the totality of the documentary evidence. The Applicant notes the documentary evidence about ISIL recruitment in the Kurdistan region and an Amnesty International report detailing human rights abuses and the lack of an independent judiciary. He submits that despite some indicators of democracy in Iraq, the country condition documents reveal a lack of protection for people who are targeted by ISIL, like him.

[49] The Applicant further argues that the RAD erred in finding that he should have approached the police rather than the Asayish, given that Asayish is responsible for counter-terrorism.

B. *The Respondent's submissions*

[50] The Respondent argues that the RAD reasonably concluded that there was adequate state protection in Iraq and that the Applicant failed to meet his onus to rebut the presumption of state protection, because he did not complain to the police or a higher authority or even report the second threatening phone call.

C. *The RAD's Finding that State Protection would be available to the Applicant is not reasonable*

[51] The RAD found that Iraq is a functioning democracy that is willing and able to provide adequate state protection and that the Applicant "has not done enough" to pursue state protection.

[52] However, the RAD's conclusions do not reflect the principle that democracy alone may not be an indicator of state protection, nor do they sufficiently account for the Applicant's particular circumstances. The RAD did not take into account all the relevant documentary evidence which highlights the gaps in state protection in concluding that adequate state protection would be available in the KRG-controlled region for the Applicant.

[53] The RAD did not dispute the Applicant's nexus to a Convention ground based on his imputed political opinion. Nor did the RAD take issue with the RPD's credibility findings. The RPD had found the Applicant to be a reliable witness and generally credible. Therefore, the Applicant's evidence regarding the threats he received and his risk from ISIL, even in the Kurdistan region, due to the presence of sleeper cells, should be accepted.

[54] The RAD relied on *Camacho v Canada (Citizenship and Immigration)*, 2007 FC 830 at para 10, [2007] FCJ No 1100 (QL) for the proposition that in a functioning democracy with a willingness and ability to protect citizens, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim. However, the RAD did not consider the jurisprudence which has elaborated on the "usually" qualifier and has explained that, while the fact that the state is a democracy is a relevant factor, democracy alone does not ensure state protection for everyone.

[55] In *Canada (Citizenship and Immigration) v Kadenko*, (1996) 124 FTR 160 at para 5, [1996] FCJ No 1376 (QL) (FCA), the Federal Court of Appeal established that the burden on a refugee claimant to demonstrate inadequate state protection is "directly proportional to the level of democracy in the state in question". This principle was reiterated in *Sow v Canada (Citizenship and Immigration)*, 2011 FC 646 at para 10, [2011] FCJ No 824 (QL)[*Sow*].

[56] Although the United States Department of State Report 2017 notes that there is a relatively low threat of crime in Erbil, this refers to crimes other than terrorist related activities. The same Report notes that terrorists often target Iraqi civilians.

[57] The Danish Refugee Council report, The Kurdistan Region of Iraq (KRI): Access, Possibility of Protection, Security and Humanitarian Situation states that the Kurdish security apparatus is strong in Erbil and is able "to some extent" to foster a secure environment.

[58] The Danish Refugee Council report also notes at page 45 that Human Rights Watch stated that, compared to south and central Iraq, the effectiveness of law enforcement in KRI is higher than elsewhere in Iraq. However, the report also explained that although Kurdish authorities have the potential to provide very effective security for the areas they control, if they don't want to protect an individual they can "also enforce that very effectively".

[59] In addition, the same report notes that according to the United Nations High Commissioner for Refugees, there is little regard for law enforcement among the local population in the KRI and that people do not make use of the police or the Courts (page 45).

[60] The RAD relied more extensively on documentary evidence describing law enforcement in general and the general security of the region, not protection to individuals from targeted attacks from ISIL. The RAD appeared to accept the Minister's argument that the KRG was combatting ISIL and would also provide protection to the Applicant from ISIL threats, but this is not consistent with the country condition documents or with the Applicant's own evidence that the Asayish advised him that their efforts were focussed on combatting ISIL, and that they could not help him.

[61] In *Gonzalez Torres v Canada (Citizenship and Immigration*), 2010 FC 234 at page 37, [2011] 2 FCR 480 [*Torres*], the Court found that a contextual approach is required to determine both whether state protection is available and whether a claimant has met the onus to rebut the presumption of state protection. The Court noted at para 37 that the contextual approach requires that several factors be considered in determining whether a refugee claimant has rebutted the presumption, including: the nature of the human rights violation; the profile of the abuser; the efforts taken to seek state protection; the response of the authorities to requests for assistance; and, the documentary evidence.

[62] The jurisprudence has also established that a refugee claimant cannot simply rely on their own belief that state protection will not be forthcoming without testing it by taking reasonable steps in the circumstances to pursue the courses of action available (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).

[63] In the present case, the Applicant did not simply assert a belief that there would be no state protection for him. He reported the first threat he received to the Asayish, which he believed to be from ISIL or ISIL supporters, in retaliation for attempting to assist his family to flee Mosul.. This evidence was accepted by the RPD as credible and the RAD did not disturb the credibility findings. However, the RAD simply dismissed the Asayish as a source of state protection and concluded that the Applicant should have reported the threats he received to the police.

[64] Given the nature and source of the threats the Applicant described, the documentary evidence, and the principle that an individual's efforts to rebut the presumption of state protection varies with the level of democracy and the quality of the democratic institutions, the Applicant's resort to the Asayish may have been reasonable in the context.

[65] The RAD did not acknowledge the country condition documents that suggest that the police are not highly regarded or resorted to and that the Asayish's mandate includes counter terrorism and responding to the type of threats the Applicant received.

[66] The Danish Refugee Council report includes several references that suggest that the Asayish is an appropriate recourse for the Applicant in his circumstances. The report states that the Asayish carries out law enforcement based on political instructions (page 124). The exact law enforcement powers of the other Kurdish intelligence branches remain unclear. According to Public Aid Organization and the Kurdish Human Rights Watch, "it is regulated by law that the Asayish is responsible for counter-terrorism, counter-drug trafficking, national security, counter-weapon trade and counter-human trafficking" (Danish Refugee Council report, page 40). The Asayish has powers of arrest and its duties include searching for terrorist groups, including members of ISIL.

[67] While the jurisprudence has established that the police are the first line of contact where a refugee claimant fears for their safety (as opposed to asserting persecution based on, for example, sexual orientation or ethnicity), the presumption can be rebutted. The police may not always be the appropriate recourse.

[68] In *Katinszki v Canada (Citizenship and Immigration*), 2012 FC 1326 at para 15, 421 FTR 107 Justice de Montigny noted:

> [15] The jurisprudence of this Court is very clear that the police force is presumed to be the main institution mandated to protect citizens, and that other governmental or private institutions are presumed not to have the means or the mandate to assume that responsibility…
>
> [Emphasis added]

[69] In *Zepeda v Canada (Citizenship & Immigration)*, 2008 FC 491 at para 25, [2009] 1 FCR 237, Justice Tremblay-Lamer stated that "unless there is evidence to the contrary", the police force is the only institution with a mandate and powers to protect citizens.

[70] While the Applicant did not go to great lengths to seek state protection, the issue for the RAD was whether the Applicant's efforts to seek state protection from the Asayish were reasonable in the overall context, including his need for protection from specific threats to him from ISIL or ISIL supporters.

[71] As a result, the RAD's findings that there would be state protection for the Applicant in his particular circumstances and that he failed to rebut the presumption of state protection are not reasonable.

VII. Did the RAD err in finding that the Applicant had an IFA in Erbil?

A. *The Applicant's Submissions*

[72] The Applicant notes that the RAD determined that there was an IFA after reviewing the Respondent's arguments, but before considering the Applicant's own arguments with respect to the two pronged test. He submits that the RAD did not consider his personal characteristics that mark him as a political enemy of ISIL, the documentary evidence that establishes a risk to similarly situated individuals, and the evidence that ISIL tracked him as he moved between cities in the KRI. The Applicant argues that the only way to make sense of the RAD's assessment of the IFA is that the RAD relied on a negative credibility finding about his evidence as a whole.

[73] The Applicant also submits that because the RAD must have based its IFA determination on veiled credibility findings, it should have held a hearing to permit him to address the issue.

B. *The Respondent's Submissions*

[74] The Respondent submits that the RAD accepted the same evidence that was provided to the RPD. The RAD's conclusion is based on its analysis of that evidence, not on a veiled negative credibility finding. The Respondent submits that it is not the Court's role to reweigh the evidence and that RPD's finding is entitled to a high degree of deference.

C. *The IFA finding is not reasonable*

[75] The RAD noted the two part test for an IFA. First, the decision-maker must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA. Second, the conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including the personal circumstances of the refugee claimant, for the refugee claimant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 at paras 2, 12, [1993] FCJ No 1172 (QL)(FCA)).

[76] In the present case, the RAD concluded that there is less than a mere possibility that the Applicant's alleged persecutors would locate him in Erbil and that Erbil is a good place for the Applicant, noting its amenities.

[77] I do not agree with the Applicant that the RAD made a veiled credibility finding regarding his evidence about the viability of Erbil as an IFA or about his other evidence. As noted above, the RAD acknowledged that the RPD found the Applicant to be credible. The RAD does not address credibility or disturb the RPD's finding at any point in the decision. However, the RAD's findings with respect to the IFA cannot be reconciled with the Applicant's evidence, which the RAD apparently accepted as true.

[78] The RAD's assessment of the IFA is challenging to read as the headings make no sense, issues of state protection are reiterated under the IFA heading, and the Applicant's submissions are noted only after the RAD's conclusion that Erbil is a viable IFA.

[79] The RAD noted that Erbil is a good place to live with "ample opportunities for protection if sought". However, as noted above, the adequacy of state protection for the Applicant from the threats he faces is in doubt.

[80] Even if state protection opportunities exist in Erbil (as opposed to Iraq as a state), the Applicant's evidence is that it would be unreasonable, in his particular circumstances, for him to return to Erbil. He explained that he had been personally targeted by ISIL in Erbil and his whereabouts were tracked by the callers who threatened him. The RAD's suggestion that the Applicant would 'fit in' as a western educated, single, beardless man in Erbil because Erbil is a tourism capital with many amenities ignores that he had lived in Erbil, he was threatened in Erbil, his whereabouts were tracked and that he fled from Erbil. Without finding that this evidence was untrue, the RAD reached a conclusion that Erbil would be a reasonable IFA. The RAD's finding with respect to the second part of the IFA test is not supported by the evidence and is not reasonable.

JUDGMENT in IMM-2187-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is allowed.
2. The matter is remitted back to a differently constituted panel of the RAD for re-determination.
3. No question is proposed for certification.

"Catherine M. Kane"
Judge

ANNEX A

RELEVANT REGULATIONS AND RULES

Immigration and Refugee Protection Act, SC 2001, c 27

110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	110 (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
(1.1) The Minister may satisfy any requirement respecting the manner in which an appeal is filed and perfected by submitting a notice of appeal and any supporting documents.	(1.1) Le ministre peut satisfaire à toute exigence relative à la façon d'interjeter l'appel et de le mettre en état en produisant un avis d'appel et tout document au soutien de celui-ci.
(2) No appeal may be made in respect of any of the following:	(2) Ne sont pas susceptibles d'appel :
(a) a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a designated foreign national;	a) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile d'un étranger désigné;
(b) a determination that a refugee protection claim has been withdrawn or abandoned;	b) le prononcé de désistement ou de retrait de la demande d'asile;
(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly	c) la décision de la Section de la protection des réfugiés rejetant la demande d'asile en faisant état de l'absence de minimum de fondement de la demande d'asile ou du fait que

unfounded;

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and

(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);

(e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;

(f) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a

celle-ci est manifestement infondée;

d) sous réserve des règlements, la décision de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :

(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),

(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

d.1) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile du ressortissant d'un pays qui faisait l'objet de la désignation visée au paragraphe 109.1(1) à la date de la décision;

e) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant la perte de l'asile;

f) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant

decision to allow a claim for refugee protection.	l'annulation d'une décision ayant accueilli la demande d'asile.
(2.1) The appeal must be filed and perfected within the time limits set out in the regulations.	(2.1) L'appel doit être interjeté et mis en état dans les délais prévus par les règlements.

Immigration and Refugee Protection Regulations, SOR/2002-227

159.91 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,	159.91 (1) Pour l'application du paragraphe 110(2.1) de la Loi et sous réserve du paragraphe (2), la personne en cause ou le ministre qui porte en appel la décision de la Section de la protection des réfugiés le fait dans les délais suivants :
(a) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and	a) pour interjeter appel de la décision devant la Section d'appel des réfugiés, dans les quinze jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision;
(b) the time limit for a person or the Minister to perfect such an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision.	b) pour mettre en état l'appel, dans les trente jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision.
(2) If the appeal cannot be filed within the time limit set out in paragraph 1)(a) or perfected within the time limit set out in paragraph (1)(b), the Refugee Appeal Division may, for reasons of fairness and natural justice, extend each of	(2) Si l'appel ne peut être interjeté dans le délai visé à l'alinéa (1)a) ou mis en état dans le délai visé à l'alinéa (1)b), la Section d'appel des réfugiés peut, pour des raisons d'équité et de justice naturelle, prolonger chacun de ces délais

those time limits by the number of days that is necessary in the circumstances.

du nombre de jours supplémentaires qui est nécessaire dans les circonstances.

Refugee Appeal Division Rules SOR/2012 257

8 (1) To file an appeal in accordance with subsection 110(1.1) of the Act, the Minister must provide, first to the person who is the subject of the appeal, a written notice of appeal, and then to the Division, two copies of the written notice of appeal.

8 (1) Pour interjeter un appel aux termes du paragraphe 110(1.1) de la Loi, le ministre transmet à la personne en cause un avis d'appel écrit, puis à la Section, deux copies de l'avis d'appel écrit.

(2) In the notice of appeal, the Minister must indicate

(2) Dans l'avis d'appel, le ministre indique :

(a) counsel's contact information;

a) les coordonnées de son conseil;

(b) the name of the person who is the subject of the appeal and the identification number given by the Department of Citizenship and Immigration to them; and

b) le nom de la personne en cause et le numéro d'identification que le ministère de la Citoyenneté et de l'Immigration a attribué à celle-ci;

(c) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that the Minister received the written reasons for the decision.

c) le numéro de dossier de la Section de la protection des réfugiés, la date de l'avis de décision concernant la décision portée en appel et la date à laquelle le ministre a reçu les motifs écrits de la décision.

(3) The notice of appeal provided to the Division must be accompanied by proof that it was provided to the person who is the subject of the appeal.

(3) L'avis d'appel transmis à la Section est accompagné d'une preuve de la transmission à la personne en cause.

(4) The notice of appeal provided under this rule must

(4) L'avis d'appel transmis en application de la présente règle

be received by the Division within the time limit for filing an appeal set out in the Regulations.

doit être reçu par la Section dans le délai prévu par le Règlement pour interjeter un appel.

9 (1) To perfect an appeal in accordance with subsection 110(1.1) of the Act, the Minister must provide, first to the person who is the subject of the appeal and then to the Division, any supporting documents that the Minister wants to rely on in the appeal.

9 (1) Pour mettre en état un appel aux termes du paragraphe 110(1.1) de la Loi, le ministre transmet à la personne en cause, puis à la Section, tout document à l'appui qu'il veut invoquer dans l'appel.

(2) In addition to the documents referred to in subrule (1), the Minister may provide, first to the person who is the subject of the appeal and then to the Division, the appellant's record containing the following documents, on consecutively numbered pages, in the following order:

(2) En plus des documents visés au paragraphe (1), le ministre peut transmettre à la personne en cause, puis à la Section, le dossier de l'appelant qui comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

(a) the notice of decision and written reasons for the Refugee Protection Division's decision that the Minister is appealing;

a) l'avis de décision et les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel;

(b) all or part of the transcript of the Refugee Protection Division hearing if the Minister wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;

b) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés, si le ministre veut l'invoquer dans l'appel, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;

(c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the Minister wants to rely on

c) tout document que la Section de la protection des réfugiés a refusé d'admettre en preuve pendant ou après l'audience, si le ministre veut

the documents in the appeal;

(d) a written statement indicating

(i) whether the Minister is relying on any documentary evidence referred to in subsection 110(3) of the Act and the relevance of that evidence, and

(ii) whether the Minister is requesting that a hearing be held under subsection 110(6) of the Act, and if the Minister is requesting a hearing, why the Division should hold a hearing and whether the Minister is making an application under rule 66 to change the location of the hearing;

(e) any law, case law or other legal authority that the Minister wants to rely on in the appeal; and

(f) a memorandum that includes full and detailed submissions regarding

(i) the errors that are the grounds of the appeal,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the Minister is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing, and

(iii) the decision the Minister

l'invoquer dans l'appel;

d) une déclaration écrite indiquant :

(i) si le ministre veut invoquer des éléments de preuve documentaire visés au paragraphe 110(3) de la Loi et la pertinence de ces éléments de preuve,

(ii) si le ministre demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, les motifs pour lesquels la Section devrait en tenir une et s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66;

e) toute loi, jurisprudence ou autre autorité légale que le ministre veut invoquer dans l'appel;

f) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

(iii) la décision recherchée.

wants the Division to make.

(3) The memorandum referred to in paragraph (2)(f) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.

(3) Le mémoire prévu à l'alinéa (2)f) ne peut comporter plus de trente pages dactylographiées au recto seulement ou quinze pages dactylographiées aux recto et verso.

(4) Any supporting documents and the appellant's record, if any, provided to the Division must be accompanied by proof that they were provided to the person who is the subject of the appeal.

(4) Tout document à l'appui et le dossier de l'appelant, le cas échéant, transmis à la Section sont accompagnés d'une preuve de la transmission à la personne en cause.

(5) Documents provided under this rule must be received by the Division within the time limit for perfecting an appeal set out in the Regulations.

(5) Les documents transmis en application de la présente règle doivent être reçus par la Section dans le délai prévu par le Règlement pour mettre en état un appel.

[…]

. . .

12 (1) If the Minister makes an application to the Division for an extension of the time to file or to perfect an appeal under the Regulations, the Minister must do so in accordance with rule 37.

12 (1) Si le ministre fait une demande de prorogation du délai à la Section pour interjeter ou mettre en état un appel aux termes du Règlement, il le fait conformément à la règle 37.

(2) An application for an extension of the time to file an appeal under subrule (1) must be accompanied by two copies of a written notice of appeal.

(2) La demande de prorogation du délai pour interjeter un appel visée au paragraphe (1) est accompagnée de deux copies d'un avis d'appel écrit.

(3) An application for an extension of the time to perfect an appeal under subrule (1) must be accompanied by any supporting documents, and an appellant's record, if any.

(3) La demande de prorogation du délai pour mettre en état un appel visée au paragraphe (1) est accompagnée de tout document à l'appui et du dossier de l'appelant, le cas

échéant.

(4) A person who is the subject of an appeal may make an application to the Division for an extension of the time to respond to an appeal in accordance with rule 37.

(4) La personne en cause peut faire, conformément à la règle 37, une demande de prorogation du délai à la Section pour répondre à un appel.

(5) The person who is the subject of the appeal must include in an application under subrule (4)

(5) Dans la demande visée au paragraphe (4), la personne en cause indique :

(a) their name and telephone number, and an address where documents can be provided to them;

a) ses nom et numéro de téléphone, ainsi que l'adresse à laquelle des documents peuvent lui être transmis;

(b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;

b) les coordonnées de son conseil, le cas échéant, et toute restriction au mandat de celui-ci;

(c) the identification number given by the Department of Citizenship and Immigration to them; and

c) le numéro d'identification que le ministère de la Citoyenneté et de l'Immigration lui a attribué;

(d) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that they received the written reasons for the decision.

d) le numéro de dossier de la Section de la protection des réfugiés, la date de l'avis de décision concernant la décision portée en appel et la date à laquelle elle a reçu les motifs écrits de la décision.

(6) In deciding an application under subrule (4), the Division must consider any relevant factors, including

(6) Pour statuer sur la demande visée au paragraphe (4), la Section prend en considération tout élément pertinent, notamment :

(a) whether the application was made in a timely manner and the justification for any delay;

a) le fait que la demande a été faite en temps opportun et la justification de tout retard;

(b) whether there is an

b) la question de savoir si la

arguable case;

(c) prejudice to the Minister, if the application was granted; and

(d) the nature and complexity of the appeal.

(7) The Division must without delay notify, in writing, both the person who is the subject of the appeal and the Minister of its decision with respect to an application under subrule (1) or (4).

[…]

52 In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.

53 The Division may, after giving the parties notice and an opportunity to object,

(a) act on its own initiative, without a party having to make an application or request to the Division;

(b) change a requirement of a rule;

(c) excuse a person from a requirement of a rule; and

(d) extend a time limit, before or after the time limit has expired, or shorten it if the

cause est soutenable;

c) le préjudice que subirait le ministre si la demande est accordée;

d) la nature et la complexité de l'appel.

(7) La Section avise sans délai par écrit la personne en cause et le ministre de sa décision sur la demande visée aux paragraphes (1) ou (4).

. . .

52 Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre des procédures, la Section peut prendre toute mesure nécessaire pour régler celle-ci.

53 La Section peut, si elle en avise au préalable les parties et leur donne la possibilité de s'opposer :

a) agir de sa propre initiative sans qu'une partie ait à lui présenter une demande;

b) modifier l'exigence d'une règle;

c) permettre à une personne de ne pas suivre une règle;

d) proroger un délai avant ou après son expiration ou l'abréger avant son expiration.

time limit has not expired.

54 Unless proceedings are declared invalid by the Division, a failure to follow any requirement of these Rules does not make the proceedings invalid.

54 Le non-respect d’une exigence des présentes règles ne rend les procédures invalides que si la Section les déclare invalides.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2187-18
STYLE OF CAUSE:	AHMED IBRAHIM AHMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 19, 2018
JUDGMENT AND REASONS:	KANE J.
DATED:	NOVEMBER 16, 2018

APPEARANCES:

Mojdeh Shahriari	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mojdeh Shahriari Barrister and Solicitor Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT