Federal Court  Cour fédérale

Date: 20230324

Docket: IMM-1226-22

Citation: 2023 FC 410

Montréal, Quebec, March 24, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

RAKEBUL ISLAM BHUIYAN
SAMIZA KHAN MOJLISH
FAEEZAH RUQUYYAH ZAINA
FAWZIYAH RUBABA BHUIYAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Rakebul Islam Bhuiyan, his wife Ms. Samiza Khan Mojlish, and their children Faeezah Ruquyyah Zaina and Fawziyah Rubaba Bhuiyan [together, the Bhuiyans] are seeking judicial review of a decision rendered on January 14, 2022 [Decision], whereby the

Refugee Appeal Division [RAD] confirmed the Refugee Protection Division's [RPD] decision rejecting their claims for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RAD determined that viable internal flight alternatives [IFAs] existed for the Bhuiyans in Khulna or Chittagong, Bangladesh, their country of citizenship.

[2] The Bhuiyans are asking the Court to set aside the RAD Decision on the basis that the RAD's assessment of viable IFAs in Bangladesh is unreasonable.

[3] The only issue to be determined is whether the RAD's Decision is reasonable. For the following reasons, I will grant the Bhuiyans' application for judicial review. I am not persuaded that the RAD's reasons for concluding that the Bhuiyans face no serious possibility of being persecuted in the IFAs have the qualities that make the RAD's reasoning logical and consistent in relation to the relevant legal and factual constraints. In the circumstances, this is sufficient to warrant the Court's intervention.

II. Background

A. *The factual context*

[4] The Bhuiyans are citizens of Bangladesh. Mr. Bhuiyan was a successful business owner of a car rental business in Dhaka, Bangladesh, and invested in real estate. From his success came pressure from political parties — namely, the BNP Jubo Dal Party [BNP] and Awami League

Chatra [AL] — to provide them "donations." Mr. Bhuiyan complied with those requests, because even though they constituted money extortion, he feared those groups.

[5] Between 2016 and 2018, Mr. Bhuiyan received a visit from a group of imams who threatened him on a few occasions because of the sexual orientation of his older daughter, Farizma Rushnan Orni [Orni]. Threats were also coming from Mr. Bhuiyan's cousin, Henary, who has colleagues in both the BNP and AL political parties. The cousin demanded Mr. Bhuiyan's properties and businesses, or otherwise he would report Orni to the authorities.

[6] On September 8, 2018, after his agents of prosecution threatened to kidnap Orni because her sexual orientation is against the Islamic religion, the Bhuiyans travelled to Texas to stay with Mr. Bhuiyan's brother. They came to Canada on September 14, 2018, where they claimed refugee protection.

[7] On February 24, 2021, Mr. Bhuiyan submitted an amendment to his Basis of Claim [BOC] to make various additions to the Bhuiyans' refugee claim. He stated that, since he arrived in Canada, his cousin has worked for the AL in the recent elections where the AL candidate was elected. According to Mr. Bhuiyan, his cousin had also appropriated Mr. Bhuiyan's house in Dhaka where his offices were located. Moreover, in March 2019, an imam known as Imam J had allegedly denounced Orni, Mr. Bhuiyan and his wife, and stated that they would all be punished because of their support of Orni. In addition, a relative apparently informed Mr. Bhuiyan that, in March 2020, unidentified imams had inquired as to the whereabouts of the Bhuiyan family.

Finally, in November 2020, Mr. Bhuiyan's cousin contacted him to request that Mr. Bhuiyan legally transfer him his businesses and properties.

[8] At the hearing before the RPD, Mr. Bhuiyan testified that he feared his cousin, political operatives from both the BNP and the AL, as well as Islamic extremists led by Imam J.

[9] The RPD found that Orni was a Convention refugee under section 96 of the IRPA. Because of her sexual orientation, there was no viable IFA in Bangladesh for her. However, because Orni was an adult — and therefore no longer a dependant —, and Khulna and Chittagong were viable IFAs for the rest of the Bhuiyan family, the Bhuiyans were denied refugee protection.

B. ***The RAD Decision***

[10] The Bhuiyans appealed the RPD decision to the RAD. In its Decision, the RAD found that the RPD did not err when concluding that the Bhuiyans were neither Convention refugees nor persons in need of protection because of the availability of the two viable IFAs in Bangladesh.

[11] On the first prong of the test, the RAD found that there was no serious possibility that the alleged agents of persecution would pursue the Bhuiyans if they relocated to either Khulna or Chittagong. While the political operatives from both the BNP and the AL and Islamic extremists led by Imam J. may retain motivation to find and punish the Bhuiyans, the RAD determined that they would lack the means to locate them absent the cooperation of Mr. Bhuiyan's cousin. The

RAD further found that Mr. Bhuiyan's cousin lacked the motivation to pursue the Bhuiyans to the proposed IFAs because he had already seized most of Mr. Bhuiyan's properties and businesses. The RAD stated that it was reasonable for Mr. Bhuiyan to transfer his remaining properties to his cousin in order to eliminate the future risk posed by him.

[12] On the second prong of the test, the RAD found that the Bhuiyans would not undergo great physical danger or undue hardship in travelling or staying in the proposed IFAs. The RAD determined that despite a psychological report submitted by the Bhuiyans, a family separation would not constitute undue hardship and the family would still be able to meet in Texas, where Mr. Bhuiyan's brother lives. Also, the Bhuiyans would be able to obtain treatment in Bangladesh for their mental health issues. For these reasons, the RAD concluded that the Bhuiyans had failed to show how the proposed IFAs of Khulna or Chittagong were unreasonable.

C. *The standard of review*

[13] The Minister of Citizenship and Immigration [Minister] submits that a RAD decision on appeal of the RPD's findings regarding the existence of a viable IFA is reviewable under the reasonableness standard. I agree (*Valencia v Canada (Citizenship and Immigration)*, 2022 FC 386 [*Valencia*] at para 19; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 14; *Ambroise v Canada (Citizenship and Immigration*), 2021 FC 62 at para 6; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 [*Singh*] at para 17; *Kaisar v Canada (Citizenship and Immigration)*, 2017 FC 789 at para 11). This is confirmed by the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*], where the Court established a presumption that the standard of reasonableness is the applicable standard in all judicial reviews of the merits of administrative decisions.

[14] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must therefore ask whether the "decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[15] Such a review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with "respectful attention," and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[16] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. It must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

III. Analysis

A. *The applicable test on IFA determinations*

[17] The test to determine the existence of a viable IFA comes from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA) [*Thirunavukkarasu*]. Two criteria must be met in order to find that a proposed IFA is reasonable:

1) There must be no serious possibility of an applicant being persecuted in the part of the country in which the IFA exists; and
2) It must not be unreasonable for the applicant to seek refuge there, given all the circumstances of the individual applicant.

[18] In *Singh*, the Court noted that "the analysis of an IFA is based on the principle that international protection can only be offered to refugee protection claimants in cases where the country of origin is unable to provide to the person requesting refugee protection adequate protection everywhere within their territory" (*Singh* at para 26).

[19] If an IFA is established, the onus is on the applicant to demonstrate that the IFA is inadequate (*Thirunavukkarasu* at para 5; *Salaudeen v Canada (Citizenship and Immigration)*,

2022 FC 39 at para 26; *Manzoor-Ul-Haq v Canada (Citizenship and Immigration)*, 2020 FC 1077 at para 24).

B. *First prong of the IFA test: the serious possibility of persecution or risk in the IFA locations*

[20] The Bhuiyans argue that it was unreasonable to ask Mr. Bhuiyan to concede his business to his cousin in order to end the latter's persecution, because his business was his source of livelihood. They also argue that the persecution is ongoing, as Mr. Bhuiyan submitted that his cousin reached out in November 2020 to ask him to concede his businesses and properties and because unidentified Islamic imams asked Mr. Bhuiyan's relatives about them in March 2020. Accordingly, returning to Bangladesh would mean the Bhuiyans would be forced to keep their location secret from their relatives, which demonstrates that no viable IFAs exists in Bangladesh (*AB v Canada (Citizenship and immigration)*, 2020 FC 915 [*AB*] at paras 20–21, 24, 26).

[21] The Minister responds that the Decision is reasonable because the RAD committed no error in finding viable IFAs. The Minister argues that it was reasonable for the RAD to expect Mr. Bhuiyan to abandon his remaining properties if it eliminated the risks of persecution, as this was the main reason of the persecution from his cousin and because property ownership is not a fundamental right. Because the other agents of persecution are mainly colleagues of Mr. Bhuiyan's cousin, the Minister adds, it was also reasonable for the RAD to determine that absent motivation on the cousin's part, the other agents of persecution would lack the means to locate the Bhuiyans without his cooperation.

[22] I cannot agree with the Minister. In the Decision, the RAD stated that there is no forward-facing fear of pursuit because Islamic extremists and BNP and AL operatives would lack the means to locate the Bhuiyans absent the cooperation of Mr. Bhuiyan's cousin. Yet, the RAD failed to consider the amendment to the BOC where Mr. Bhuiyan claimed that unidentified Islamic imams asked one of his relatives about his and Orni's whereabouts and whether they were in the country. In sum, the RAD's reasons do not allow me to conclude that the RAD considered this other independent source of persecution raised by the Bhuiyans, namely, the persecution by the imams based on the family's support of Orni's sexual orientation.

[23] I do not dispute that an administrative decision maker's failure to mention evidence does not necessarily make a decision unreasonable (*Valencia* at para 25; *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160 [*Khir*] at para 48; *Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 24). It is a well-settled principle that administrative decision makers are presumed to have weighed and considered all the evidence before them unless proven otherwise (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). In the same vein, a failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[24] However, when an administrative decision maker does not properly deal with evidence squarely contradicting its findings of fact, the Court may intervene and infer that the decision maker overlooked the contradictory evidence when reaching its conclusion (*Ozdemir v Canada*

(Minister of Citizenship and Immigration), 2001 FCA 331 at paras 9–10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17). The failure to consider specific evidence must be viewed in context and may sometimes be sufficient to overturn a decision, but it is only the case when the evidence is critical and contradicts the decision maker's conclusion, and where the reviewing court determines that its omission means that the tribunal disregarded the material before it (*Khir* at para 48; *Torrance v Canada (Attorney General)*, 2020 FC 634 at para 58).

[25] Here, neither the RPD nor the RAD explained why they did not consider Mr. Bhuiyan's additional narrative. While the RAD briefly stated that it had concerns with the Bhuiyans' credibility, it did not elaborate on this statement. Therefore, this cannot be an appropriate reason for the RAD to ignore this evidence.

[26] The fact that the agents of persecution contacted the Bhuiyans' relatives almost two years after they left their country indicates that they still "have the means" to locate the Bhuiyans, whether or not they rely on or obtain the cooperation of Mr. Bhuiyan's cousin.

[27] In *AB*, this Court found that because the agents of persecution visited and endangered relatives to inquire about an applicant's whereabouts, IFAs were unreasonable. In such a situation, not being able to share location information with family or friends is tantamount to hiding, which does not support a viable IFA (*AB* at paras 20–23). Although there are no threats of violence by the agents of persecution against Mr. Bhuiyan's relatives, the situation is still similar to that in *AB*, as the relatives are being questioned about the applicants' whereabouts. The

family and friends cannot be expected to lie and put their life in danger if they are visited again by the agents of persecution, who are known to be capable of making violent threats.

[28] Additionally, the RAD stated it was of the opinion that Mr. Bhuiyan's cousin would stop looking for the Bhuiyans if Mr. Bhuiyan transferred his remaining properties to him. However, based on the evidence submitted, I find nothing that could have reasonably allowed the RAD to arrive at such conclusion. Indeed, obtaining Mr. Bhuiyan's businesses and properties is only one of the motivations of Mr. Bhuiyan's cousin; just as the imams did, the cousin also threatened Mr. Bhuiyan for his lack of action regarding his daughter's sexual orientation. It is not apparent from the Decision how the RAD came to the conclusion that the latter would be abandoned if the former was no longer an issue. The absence of evidence for this finding of fact is contrary to a reasonable outcome (*Valencia* at para 27).

[29] Following *Vavilov*, the reasons given by administrative decision makers have taken on a greater importance and are now the starting point for the analysis on an application for judicial review. They are the primary mechanism by which administrative decision makers show that their decisions are reasonable, both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They serve to state "how and why a decision was made," demonstrate that "the decision was made in a fair and lawful manner," and shield against "the perception of arbitrariness in the exercise of public power" (*Vavilov* at para 79). In short, it is the reasons that establish the justification for the decision, and the reviewing courts must read them "holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in

which they were given" (*Vavilov* at paras 97, 103; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 15).

[30] Here, I am of the view that the RAD's reasons do not provide a transparent and intelligible justification for the Decision (*Vavilov* at paras 81, 136). At paragraph 102 of *Vavilov*, the Supreme Court held that the reviewing court "must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived'." Here, there is simply no line of analysis to trace or to follow and the Decision does not bear the hallmarks of reasonableness, which are justification, transparency, and intelligibility (*Vavilov* at para 99). In other words, I cannot properly assess the reasonableness of the RAD's reasoning process given the lack of reasons on the issues mentioned above (*Vavilov* at para 103). While a reasonable decision allows the reviewing court to "connect the dots on the page" (*Vavilov* at para 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11), in this case the gaps between the record and the RAD's reasons prevent some lines from being drawn.

[31] In light of the above conclusion, it is not necessary to deal with the second part of the IFA test since the RAD failed to consider all of the relevant evidence on the serious possibility of persecution or risk in the IFA locations. Accordingly, based on the first prong of the IFA test, I conclude that the Decision cannot be reasonable.

[32] It is true that the RAD's conclusions on the existence of an IFA are essentially factual and go to the very heart of its expertise in matters of immigration and refugee protection. It is

well established that the RAD takes advantage of the specialized knowledge of its members to assess evidence relating to facts that fall within its area of expertise. In such situations, the standard of reasonableness requires the Court to show great deference to the RAD's findings. It is not the task of a reviewing court to reweigh the evidence on the record, or to reassess the RPD's findings of fact and substitute its own (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). Rather, the Court must consider the reasons as a whole, together with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53), and limit itself to determining whether the conclusions are irrational or arbitrary. However, in the case of the Bhuiyans, I cannot conclude that the RAD's conclusion on the proposed IFAs has the attributes of a reasonable analysis, as I can find no evidence able to support its factual conclusion.

IV. Conclusion

[33] For the reasons detailed above, this application for judicial review is allowed and the matter is returned to the RAD for redetermination by a different panel.

[34] There are no questions of general importance to be certified.

JUDGMENT in IMM-1226-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, without costs.

2. The decision of the Refugee Appeal Division dated January 14, 2022, rejecting the applicants' refugee protection claim, is set aside and the matter is referred back to a differently constituted panel for reconsideration based on the Court's reasons.

3. There is no question of general importance to be certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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