

Federal Court



Cour fédérale

**Date: 20170727**

**Docket: IMM-350-17**

**Citation: 2017 FC 735**

**Ottawa, Ontario, July 27, 2017**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**DAMAR BAHADUR GAIRE CHHETRI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for leave and judicial review, under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2002, c 27 (“IRPA”), of a decision by the Refugee Appeal Division (“RAD”), dated December 27, 2016, which upheld a finding by the Refugee Protection Division (“RPD”), dated August 29, 2016, that the Applicant is neither a Convention refugee nor a person in need of protection.

II. Background

[2] The Applicant, Damar Bahadur Gaire Chhetri, is a citizen of Nepal. His family, including his wife and two children, currently reside in Nepal. He fears persecution because of his political opinions and his membership in a particular social group.

[3] The Applicant alleges that he has a history of problems with the Maoists in Nepal, which began in 2003. The Applicant is a member of the Nepali Congress Party and the Nepal Teacher's Association. In 2003, he campaigned for congress. As a result of his campaign, the Applicant states that the Maoists threatened him, and tried to force him to join their party and support their candidate.

[4] The Applicant claims that he felt unsafe because of the political situation in Nepal and, in August 2004, he left Nepal to work in Malaysia as a kitchen helper. The Applicant lived in Malaysia for four years, returning to Nepal in 2008.

[5] In Nepal, the Applicant worked as an assistant accountant at a school. He alleges that, in early 2010, Maoists came to the school, demanded that classes be suspended, and again tried to force him to join their party and support their political candidate. The Applicant states that he was threatened with abuse and death, and forced to go with the Maoists for 15-20 minutes. Subsequently, in March 2010, he left Nepal and went to Sharjah, UAE, to work as a security guard. He remained in the UAE until 2014.

[6] While working in the UAE, the Applicant returned to Nepal multiple times. In 2012, he returned for two months to visit his mother, who was sick. He visited again in 2013 to see his sick father. In January 2014, the Applicant learned that he could get a visa to work in Canada, after which he could apply for permanent residence. He applied for and received a work visa in June 2014.

[7] In December 2014, the Applicant's father suffered a stroke and the Applicant quit his job in the UAE so that he could return to Nepal. In March 2015, his father died and the Applicant's family held the traditional 13 days of rituals, during which the Applicant and his family opened up his father's home for family and friends to visit and pay their condolences. The Applicant alleges that the local Maoists leader came to pay his condolences and requested that the Applicant meet with him at the end of the ritual period. The Applicant states that he was afraid, so he left his village for Kathmandu on the evening of the 13th day of rituals and booked a ticket to Canada.

[8] The Applicant arrived in Canada on April 9, 2015. However, his work permit was no longer valid, due to the fact that the employer had no work. The Applicant applied for an open work permit, including in his request a letter stating his desire to remain in Canada because of the earthquake in Nepal. This application was refused.

[9] The Applicant made a third application, and obtained a work permit for an agricultural job, starting March 13, 2016, and ending March 13, 2018. However, the employer did not have sufficient work and the Applicant searched for alternate employment without success. On April

9, 2016, the Applicant travelled from Vancouver to Toronto. On June 16, 2016, he made a claim for refugee protection, with the assistance of a lawyer.

[10] The RPD refused the Applicant's claim on the basis that it found that the Applicant lacked credibility and subjective fear of persecution, as evinced by his multiple returns to Nepal and his delay in claiming refugee protection. On appeal, the RAD upheld the RPD's decision.

A. *The RPD Decision*

[11] The RPD held that the Applicant's delay in claiming refugee protection was indicative of a lack of subjective fear of persecution. It found that the Applicant's explanation for the delay, which was he did not know about refugee protection until he made his claim, lacked credibility because the Applicant is a highly educated individual. Therefore, the RPD stated that, if the Applicant truly feared persecution, it was reasonable to expect that he would have made inquiries regarding protection outside of Nepal as soon as he arrived in Canada.

[12] The RPD also concluded that the Applicant's multiple trips back to Nepal spoke negatively of his subjective fear. These trips were not short nor were they visits in which the Applicant kept a low profile. The RPD held that persons who truly feared persecution would not return to the place where their persecutors could find them for long periods of time, even if said returns were for the purposes of supporting their parents though illness.

[13] Regarding the threatening letter from the Maoists, sent July 2016 (the "Letter"), the RPD found that it was decidedly convenient and highly implausible that the Letter was sent within

days of the Applicant's claim for refugee protection. Further, the RPD considered evidence from Response to Information Requests, which indicated that the Maoists had stopped issuing threatening letters in 2006. Moreover, the RPD found the arrival of the Letter to be suspicious in the context of the fact that the Applicant had never, in the 13 years prior, received written threats from the Maoists. Finally, the fact that the deadline passed for the Applicant to present himself to the Maoists, without repercussions falling on his family, led the RPD to find that the Letter lacked credibility.

[14] Taken together, the RPD held that the Applicant's allegations were not credible and that the Applicant had not demonstrated that he had true fear for his life in Nepal.

B. *The RAD Decision*

[15] The RAD concurred with the RPD that the Applicant was neither a Convention refugee nor a person in need of protection. No new evidence was filed at the RAD and an oral hearing was not requested.

[16] The Applicant argued that the RPD erred in finding that his multiple returns to Nepal between 2003 and 2010 were reavailments. Considering the purposes of those visits and the contents of the Applicant's Basis of Claim form ("BOC"), the RAD held that the RPD's findings were correct. Further, the RAD found that it was not in the realm of reasonable expectation that the Applicant would return to Nepal and stay for extended periods of time on those occasions despite his fear of persecution.

[17] The RAD also concurred with the RPD that the Applicant's delay in making a claim for refugee protection was inconsistent with his allegations of fear and persecution. It held that the Applicant's efforts to seek employment in Canada reflected his desire and need to meet the requirements of his work visa, not subjective fear of returning to Nepal. The RAD agreed with the RPD's findings that a Convention refugee or a person in need of protection would have made inquiries into the possibility of getting protection soon after his or her arrival in Canada.

[18] Finally, the RAD reviewed the evidence in the record concerning the Letter and found that, because the Applicant does not have firsthand knowledge of its creation, the presumption of truthfulness does not apply to the Letter. It agreed with the RPD that the Letter: (i) which arrived after the Applicant made his refugee claim; (ii) after 13 years of the Applicant having not received any written threats, during which the he alleged problems with the Maoists; and (iii) ten years after the objective documentary evidence indicates that the Maoists stopped issuing written threats—is extraordinarily coincidental and thus not credible.

### III. Issues

[19] The issues are:

- A. Did the RAD make unreasonable findings about the Applicant's subjective fear of persecution?
- B. Did the RAD make unreasonable credibility findings and fail to conduct an assessment of the evidence?

IV. Standard of Review

[20] The applicable standard of review is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 30 to 35 [*Huruglica*]).

V. Analysis

A. *Did the RAD make unreasonable findings about the Applicant's subjective fear of persecution?*

[21] The Applicant argues that the RAD made unreasonable findings about his subjective fear of persecution because it considered all of his returns to Nepal to be reavailments. The Applicant submits that his return to Nepal in 2008 was not a reavailment, because he did not fear persecution at that time. While the RAD stated that there was no mention in the BOC that the Applicant thought it was safe to return because democracy had been restored in Nepal (paragraph 23 of the decision), in fact paragraph 8 of the BOC refers to such democracy returning in Nepal. Additionally, the Applicant asserts that the RAD did not appreciate that his returns to Nepal between 2010 and 2014 were due to pressing personal and family matters, including his mother's illness, and his father's illness and death. The Applicant also states that the RAD did not take into consideration the fact that he stayed in Butwal during his returns to Nepal, not his home village. Further, the Applicant argues that his actions upon coming to Canada were entirely consistent with someone who had a subjective fear of persecution.

[22] As well, the Applicant points out that the RAD erred in finding that there was no evidence that the Applicant kept a low profile when returning to visit his ill parents between

2012 and 2014, when actually the Applicant stated in his BOC that he did keep a low profile in 2012 and stayed with his in-laws during both of his returns in 2012 and 2013 (paras 12 to 13 of the BOC).

[23] The Respondent submits that the RAD properly considered all of the Applicant's returns to Nepal within the context of the details provided to them in his BOC. The Respondent also contends that the Applicant is simply reiterating the arguments that he made before the RAD, essentially requesting that the Court reweigh the evidence that was properly considered by the RAD.

[24] It is well established that it is not a function of this Court on judicial review to reweigh the evidence that was before the decision maker (*Aburime v Canada (Citizenship and Immigration)*, 2015 FC 194 at para 22). So long as the RAD's reasons for disbelieving the Applicant's claims of subjective fear are intelligible, transparent, and within a range of acceptable outcomes, the Court will not interfere.

[25] The RAD observed that the Applicant described in his BOC that it was unsafe for him in Nepal because of the Maoists threats starting from 2003 and that the political instability in the country continued after his return to Nepal in 2008, including disturbances on his campus by Maoists student allies in the All Nepal Independent Student union (Revolutionary). It further discussed the fact that the Applicant described his early returns as holidays and visits to see his family. In the context of the Applicant's written and oral evidence, the RAD found that it was appropriate to consider the Applicant's early returns to Nepal to be reavailments.



[26] Regarding the Applicant's returns because of his parents' health, the RAD noted that these visits were all long in duration and there was no evidence that the Applicant kept a low profile while in Nepal. While that is an error, as referred to above, the RAD also held that, because the Applicant is well educated, his explanation for the delay in claiming refugee protection—that he did not know that refugee protection was available for an entire year after coming to Canada—was not credible. When the evidence is viewed contextually as a whole, and given the long periods of visits made, the RAD inferred that the Applicant did not have a subjective fear of persecution.

[27] The burden of showing that the inferences drawn by the RAD could not reasonably have been drawn rests on the Applicant (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA)). I find that the Applicant has not met the burden of showing that the RAD's conclusions regarding his subjective fear of persecution are unreasonable. The RAD clearly laid out why it found elements of the Applicant's story to be inconsistent with a subjective fear of persecution in Nepal and is reasonable, given the repeated long periods of visitation and delay in claiming refugee protection, notwithstanding the error concerning his profile during his visit in 2012.

B. *Did the RAD make unreasonable credibility findings and fail to conduct an assessment of the evidence?*

[28] The Applicant asserts that the RAD made its finding regarding the Letter in outright defiance of the presumption of truthfulness, and that the presumption of truthfulness is not automatically vitiated when a document is written by a third party. The Applicant also argues

that the RAD did not conduct an independent analysis of his credibility and ambiguously concluded that an inconsistency in his testimony “might well” have caused the RPD to draw a negative inference.

[29] The Respondent submits that the presumption of truthfulness, as expressed in *Maldonado v Canada (MEI)*, [1980] 2 FC 302 [*Maldonado*] does not apply to the Letter because the Applicant is not in a position to have knowledge of its providence. Further, the Respondent asserts that the RAD had evidence rebutting the presumption of truthfulness. Lastly, the Respondent states that the RAD did not have to come to a definitive finding regarding the RPD’s conclusion that the Applicant’s oral evidence lacked credibility, because the Applicant’s demeanor and the inconsistency in his oral evidence were not determinative factors in the RAD’s decision.

[30] *Maldonado*, at paragraph 5, states that “when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness”. I find that the RAD was not incorrect in holding that the presumption of truthfulness does not apply to the Letter. The Applicant received the Letter from his wife; therefore, he cannot swear to the truth that she received it from the Maoists. Moreover, I agree with the Respondent that both the country documents, which state that the Maoists ceased issuing written threats in 2006, and the fact that the Applicant had never previously received a written threat from the Maoists, reasonably rebut the presumption of truthfulness. Thus, I find that the RAD reasonably concluded that the Letter is not credible.

[31] Finally, the role of the RAD is to determine, independent of the RPD, whether the Applicant is at risk of persecution and substitute its conclusions if it does not agree with the RPD's findings (*Huruglica* at para 103). The RAD acknowledged that the RPD made sweeping statements regarding the Applicant's oral testimony; however, it found that the RPD did not err. Moreover, the RAD determined that the Applicant failed to demonstrate true subjective fear of persecution, based upon evidence that was not dependent on the RAD making a clear finding with regards to the inconsistencies in the Applicant's oral testimony. As such, I do not find that the RAD's treatment of this evidence was unreasonable.

[32] The RPD held that the Applicant had inconsistent testimony with regards to whether he had contact with the Maoists during any of his visits before 2014. The Applicant stated that he had not, but in his BOC he stated that he was forced to go with the Maoists during an incident at his school in 2010. The Applicant argued that he did not consider his return to Nepal (between 2008 and 2010) to be a "visit". The RPD found that this argument was coaxed by leading questions and that the Applicant was inconsistent in his testimony (RPD decision at paras 15 to 17).

[33] The RAD's decision was not dependent on the details of his encounters with the Maoists and the RAD did not use this inconsistency as evidence that the Applicant did not have subjective fear.

**JUDGMENT in IMM-350-17**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-350-17

**STYLE OF CAUSE:** DAMAR BAHADUR GAIRE CHHETRI v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 25, 2017

**JUDGMENT AND REASONS:** MANSON J.

**DATED:** JULY 27, 2017

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