Federal Court  Cour fédérale

Date: 20200917

Docket: IMM-5375-19

Citation: 2020 FC 905

Montreal (Quebec), September 17, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

BALRAJ SINGH RANDHAWA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Balraj Singh Randhawa, is a citizen of India. He challenges a decision rendered on August 20, 2019 [Decision] by an officer of the Immigration Division [ID] of the Immigration and Refugee Board of Canada [Officer]. In that Decision, the Officer found Mr. Randhawa inadmissible on grounds of serious criminality, pursuant to paragraph 36(1)*c*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], as he concluded that there

were reasonable grounds to believe that Mr. Randhawa had committed an act that is an offence in India and that would also be a criminal offence in Canada, namely to drive a vehicle in a dangerous manner causing bodily harm or death.

[2] Mr. Randhawa vehemently denies having been involved in any criminal incident or accident. He claims that he was falsely accused of murder by the authorities of the city of Chandigarh in India, following an alleged car accident that resulted in the death of Mr. Akansh Sen, the nephew of the Chief Minister of Himachal Pradesh, a state in northern India. Mr. Randhawa maintains that he is the victim of a corrupt system under the influence of an important political figure.

[3] In his application for judicial review challenging the Officer's Decision, Mr. Randhawa relies on three major arguments. First, Mr. Randhawa claims that the Officer misinterpreted his testimony and based his Decision on erroneous findings of fact. Second, Mr. Randhawa argues that the Officer erred in disregarding and failing to address evidence he had submitted and which directly contradicted the Officer's conclusions. Third, Mr. Randhawa submits that the Officer erred in his analysis of equivalency between the applicable provisions of the *Indian Penal Code*, Act. No. 45, 6 October 1860 and the Canadian *Criminal Code*, RSC 1985, c C-46. Mr. Randhawa therefore asks the Court to quash the Decision and to return the matter to the ID so that a different member conduct an admissibility hearing and make a new evaluation of his case in accordance with the Court's reasons.

[4] For the following reasons, Mr. Randhawa's application for judicial review will be granted. Having considered the Officer's reasons, the evidence before him and the applicable law, I am not satisfied that the Decision meets the standard of reasonableness. In my view, the Decision does not contain any meaningful equivalency analysis and the reasons do not allow me to understand the rational basis for the Officer's conclusion on this front. This constitutes sufficient grounds to justify the Court's intervention. I must therefore send the matter back for redetermination. Given that conclusion, I do not have to deal with Mr. Randhawa's other arguments challenging the reasonableness of the Decision.

II. Background

A. *The factual context*

[5] On February 8, 2017, Mr. Randhawa attended a dinner reception at the residence of Mr. Deep Sidhu, accompanied by his friend and ex-partner, Mr. Harmehtab Singh Rarewala. Among other guests, Mr. Akansh Sen and a certain Mr. Shera were present. Mr. Randhawa had never met Mr. Akansh Sen or Mr. Shera prior to the dinner reception but his partner Mr. Harmehtab was an acquaintance of Mr. Shera.

[6] Over the course of the reception, Mr. Harmehtab and Mr. Shera engaged in a heated argument. Mr. Randhawa was not implicated in the confrontation. Even though the host, Mr. Deep Sidhu, felt compelled to call the police, the argument resolved itself and the police did not need to intervene. The reception went on uneventfully until the early morning hours. At around 5 a.m., Mr. Randhawa left Mr. Deep Sidhu's residence followed by Mr. Harmehtab who was then

followed by Mr. Shera. Mr. Randhawa noticed a suspicious vehicle parked on the opposite side of the road and, immediately after Mr. Harmehtab joined him in the street, four men armed with baseball bats and what resembled iron bars exited the suspicious vehicle and started running in Mr. Randhawa's direction while uttering insults.

[7] Both Mr. Randhawa and Mr. Harmehtab had sufficient time to get into Mr. Randhawa's vehicle, a white BMW, before the group of assailants was able to reach them. Mr. Randhawa locked the doors of his vehicle, and the assailants resorted to pulling on the handles in an attempt to open the doors and to pounding on the car in order to put their hands on Mr. Randhawa and Mr. Harmehtab. It is unclear whether the assailants actually hit the car with their baseball bats and metal bars or whether they simply pounded on the car. The whole event happened very quickly, in a matter of seconds. Mr. Randhawa started his engine and drove away from the group of assailants. It however remains disputed amongst the parties whether or not Mr. Randhawa left at a reasonable speed and whether he hit someone with his car by accident or not.

[8] The same morning, at around 11 a.m., Mr. Randhawa was informed by his cousin that his name had been mentioned on the news. He then learned through the televised news that Mr. Akansh Sen was at the Post Graduate Institute of Medical Education and Research [Hospital] and severely injured. It was reported that the police were suspecting Mr. Randhawa and Mr. Harmehtab of being the main culprits in the attempted murder of Mr. Akansh Sen. On February 10, 2017, Mr. Akansh Sen succumbed to his head injury at the Hospital.

[9] According to the Chandigarh police's First Information Report, Mr. Randhawa hit and drove over Mr. Akansh Sen with his car intentionally and repeatedly, thrice to be exact, after being provoked and encouraged to do so by Mr. Harmehtab. Mr. Randhawa instead claims that the alleged incident was initially treated as an accident by the doctors and by witnesses who brought Mr. Akansh Sen to the Hospital.

[10] On February 9, 2017, after taking cognizance of the allegations of attempted murder on the Chief Minister's nephew pending against him, Mr. Randhawa went into hiding after consulting his grandfather, who encouraged him to leave India to avoid false imprisonment. Given that Mr. Randhawa believed the fabricated suspicions to be most likely politically motivated, he feared that the Chandigarh police would detain and torture him in order to extract a testimony so they could convict him. Mr. Randhawa's disappearance quickly became a public concern and was heavily mediatized in India. His fear became such that he felt compelled to flea his country. Mr. Randhawa therefore left India and arrived in Canada on October 24, 2017. He claimed refugee protection shortly after his arrival.

[11] Meanwhile in India, Mr. Harmehtab, co-accused in the criminal case against Mr. Randhawa, was charged under sections 302 and 34 of the *Indian Penal Code*, which respectively refer to murder and acts done by several persons in furtherance of a common intention. Mr. Harmehtab was arrested and, in November 2019, he was awarded a life sentence by an Indian District Court. Mr. Harmehtab has submitted an appeal to India's High Court, which was filed in January 2020.

[12] In light of the potentially incriminating facts he shared in his asylum claim about the murder charges, Mr. Randhawa was met and interviewed by an agent of the Canada Border Services Agency [CBSA] on September 24, 2018, and a statutory declaration of the said interview was produced. Mr. Randhawa then testified before the Officer at the admissibility hearing and submitted documentary evidence in support of his plea of innocence.

B. *The ID Decision*

[13] In his August 2019 Decision, the Officer found Mr. Randhawa inadmissible on grounds of serious criminality, pursuant to paragraph 36(1)*c*) of the IRPA.

[14] The Decision primarily relied on Mr. Randhawa's first testimony given in September 2018 before the CBSA. The Officer found that more weight and probative value should be given to this testimony as opposed to the version given before him during the admissibility hearing, because the latter lacked credibility. The Decision does however mention that the Officer nonetheless still took into account Mr. Randhawa's testimony at the admissibility hearing. Relying on *Ishaku v Canada (Citizenship and Immigration)*, 2011 FC 44, the Officer opted to give more weight to what Mr. Randhawa had said spontaneously during his initial statement to the CBSA, since a person's initial recall of event is often more reliable and should therefore be considered more credible. In his reasons, the Officer explained that the details given by Mr. Randhawa before the CBSA in September 2018 were credible and specific, in particular with regard to the confrontation that deteriorated and eventually turned into an incident or accident resulting into someone's death. Conversely, the Officer found that Mr. Randhawa's second

testimony given at his admissibility hearing lacked credibility, notably due to multiple contradictions in his testimony.

[15] In his Decision, the Officer mentioned that the alleged corruption of Indian police officials and investigators and their control by influential politicians, although within the realm of possibility, had not been demonstrated in this case, since the National Documentation Packages referring to this situation had not been submitted in evidence. The Officer however observed that he remained extremely careful when weighing evidence from the police and courts of other countries.

[16] In determining the equivalency of the offences under Indian and Canadian law, the Officer relied on the method that implies examining both the precise wording in each statute and the evidence adduced in order to establish the essential ingredients of the offences (*Hill v Minister of Employment and Immigration*, (1987) 73 NR 315 (FCA) [*Hill*]). The Officer resorted to this method, as he agreed that the evidence emanating from the documents of the Indian authorities raised certain concerns. In his Decision, the Officer established that the equivalent crime in Canadian law would be “driving in a dangerous manner causing bodily harm or death”, described at section 320.13 of the *Criminal Code*. Despite the fact that an equivalent wording did not seem to exist under Indian law, the Officer reiterated that, to his understanding, the events involving Mr. Randhawa would constitute a criminal offence in Canada punishable by a minimum of 10 years’ imprisonment.

[17] The relevant extracts of the Decision containing the Officer's equivalency analysis read as follows:

> [32] […] It is clear that under Canadian law, pursuant to section 320.13, it is an offence to drive in a dangerous manner causing bodily harm or death.
>
> [33] The equivalent wording in Indian law regarding dangerous driving is not available, but I think that, based on the facts as I understand them, what I gather from the documentary evidence is that this is… it would be a criminal offence in Canada that would be punishable by 10 years in prison.

[18] On that basis, the Officer concluded that there were reasonable grounds to believe that Mr. Randhawa had committed an offence in India that would also be an offence in Canada, and was therefore inadmissible on grounds of serious criminality. The Officer thus issued a deportation order against Mr. Randhawa.

C. *The standard of review*

[19] It is not disputed that reasonableness is the standard of review applicable to a decision finding a person inadmissible on grounds of serious criminality and to an officer's determination of equivalency under section 36 of the IRPA (*Liberal v Canada (Citizenship and Immigration)*, 2017 FC 173 [*Liberal*] at para 12; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 [*Nshogoza*] at para 21; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at para 61).

[20] That reasonableness is the appropriate standard has recently been reinforced by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019

SCC 65 [*Vavilov*]. In that judgment, the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of administrative decisions, holding that they should presumptively be reviewed on the reasonableness standard, unless either legislative intent or the rule of law requires otherwise (*Vavilov* at paras 10, 17). I am satisfied that neither of these two exceptions apply in the present case, and that there is no basis for derogating from the presumption that reasonableness is the applicable standard of review for the Decision.

[21] Regarding the actual content of the reasonableness standard, the *Vavilov* framework does not represent a marked departure from the Supreme Court's previous approach, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and its progeny, which was based on the "hallmarks of reasonableness", namely justification, transparency and intelligibility (*Vavilov* at para 99). The reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome", 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 paras 83, 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31).

[22] *Vavilov*'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review (*Canada Post* at para 26). Where a decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "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 reasons must be read holistically and contextually in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94, 97). However, "it is not enough for the outcome of a decision to be *justifiable* […] the decision must also be *justified*" (*Vavilov* at para 86).

[23] Before a decision can be set aside on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12-13). Reasonableness review is an approach anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). In other words, the approach to be followed by the reviewing court is one of deference, especially with respect to findings of facts and the weighing of evidence. Absent exceptional circumstances, the reviewing court will not interfere with an administrative decision maker's factual findings (*Vavilov* at paras 125-126).

III. Analysis

A. *The Officer's equivalency analysis*

[24] Mr. Randhawa submits that the Officer did not follow the requirements governing the equivalency analysis as set out in jurisprudence and that the Decision contains no specific analysis of the equivalency between the offences in India and in Canada, for neither of the

offences stated in the reasons (*Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235 (FCA) [*Li*] at paras 18-19; *Liberal* at paras 28, 32; *Kathirgamathamby v Canada (Citizenship and Immigration)*, 2013 FC 811 [*Kathirgamathamby*] at para 24). Mr. Randhawa argues that the Officer rendered a conclusion without justifying his reasoning that there were grounds to believe that the *actus reus* of the offence of dangerous driving was established or that it was accompanied by the required *mens rea*.

[25] I agree.

[26] Pursuant to paragraph 36(1)*c)* of the IRPA, a foreign national is inadmissible on grounds of serious criminality if there are reasonable grounds to believe that he committed an act that would constitute a crime in his country and that, if committed in Canada, would also constitute a crime punishable by a maximum term of imprisonment of at least 10 years. In the Decision, the Officer correctly stated that he needed to determine whether there are reasonable grounds to believe that Mr. Randhawa was involved in a criminal incident in India that would also amount to a criminal act in Canada.

[27] The Indian documents established that Mr. Randhawa was accused of committing an offence under sections 302 and 34 of the *Indian Penal Code* (namely murder and acts done by several persons in furtherance of a common intention). During the admissibility hearing, and in his Decision, the Officer opted to establish the equivalence with the Canadian offence of driving in a dangerous manner causing bodily harm or death (found at section 320.13 of the *Criminal Code*), stating that the equivalent wording in Indian law regarding dangerous driving was not available. Despite the fact that no equivalent wording seemed to exist under Indian law, the

Officer nonetheless observed that the facts, as he understood them, would constitute a criminal offence in Canada punishable by a minimum of 10 years' imprisonment.

[28] The Officer cannot be faulted for having used the wrong test in conducting his equivalency analysis. On the contrary, in his Decision, he rightly set out the well-recognized test articulated by the Federal Court of Appeal in *Hill*. In that decision, the Federal Court of Appeal held that the determination of the equivalency between offences can be established in three ways: 1) by comparing the precise wording in each statute through documents and, if available, through the evidence of experts in foreign law in order to determine the essential elements of the respective offences; 2) by examining the evidence, both oral and documentary, to ascertain whether that evidence is sufficient to establish that the essential elements of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provision in the same words or not; or 3) by a combination of the two previous methods (*Hill* at para 16).

[29] In this case, the Officer expressly opted for the third option. However, he did not conduct any analysis worthy of the name. It is useful to reproduce again the equivalency "analysis" made by the Officer in the Decision, which adds up to only a few lines. It reads as follows:

> [32] […] It is clear that under Canadian law, pursuant to section 320.13, it is an offence to drive in a dangerous manner causing bodily harm or death.
>
> [33] The equivalent wording in Indian law regarding dangerous driving is not available, but I think that, based on the facts as I understand them, what I gather from the documentary evidence is that this is… it would be a criminal offence in Canada that would be punishable by 10 years in prison.

[30] With respect, and even on a most generous reading, this falls well short of the mark for a proper and acceptable equivalency analysis. This passage is all but empty of any of the well-recognized requirements for an equivalency analysis under section 36 of the IRPA.

[31] An inadmissibility finding under paragraph 36(1)*c*) of the IRPA requires the decision maker to conduct an equivalency analysis between the foreign offences pondered and the equivalent suggested in Canadian legislation. To do so, the officer must conduct a review going beyond a "mere reference to the relevant provisions, followed by a brief statement regarding their equivalency" (*Liberal* at para 32; *Nshogoza* at para 28; *Kathirgamathamby* at para 24). The officer must at least describe the constituent elements of both offences and refer to the specific applicable provisions (*Liberal* at para 32). Such an analysis requires "a comparison of the definitions of those offences including defences particular to those offences or those classes of offences" (*Li* at para 19). This comparison must also be done regardless of the given names for the specific offences or words used to describe them in their respective countries (*Brannson v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (FCA) at para 38; *Nshogoza* at para 28). In sum, the officer must look at the essential ingredients of the two offences and be satisfied that they are comparable. In the absence of a review and comparison between the essential components of an offence abroad and its equivalent offence in Canada, an equivalency analysis is clearly incomplete and insufficient (*Timis v Canada (Citizenship and Immigration)*, 2007 FC 1303 at paras 26-27, 30).

[32] I accept that an equivalency analysis may be brief. However, at the bare minimum, the constituent elements of the foreign and Canadian offences must be described and the references to the applicable provisions must be specific enough.

[33] Here, the Officer referred to the offence of dangerous driving without knowing the essential elements of the comparable offence in the *Indian Penal Code*. The Officer even acknowledged that no equivalent wording was available in Indian law regarding dangerous driving. What is more, there is not even a description of the offence of dangerous operation of a vehicle in Canada. In other words, nothing in the Decision explains how the Officer reached his conclusion on the equivalency between the two alleged offences. As was the case in *Liberal*, the requirements for a proper equivalency analysis established by the Federal Court of Appeal are clearly not satisfied here, due to a lack of explanation, description or reasonable comparison in the Decision (*Liberal* at para 25).

[34] As problematic as what the Officer did in the Decision is the way he did it. The Officer failed to mention, let alone analyze, the *actus reus* and the *mens rea* of the offence as labelled in the *Criminal Code*. The *actus reus* for dangerous driving as set out in the *Criminal Code* must be analyzed in light of the manner of driving, and not simply in regards to the consequences of the driving (*R. v Roy*, 2012 SCC 26 at paras 33-35). This was not discussed at all in the Decision. Furthermore, nowhere in the Decision was the *mens rea* of the offence properly taken into consideration and analyzed. Intention is a requirement for any criminal offence. More specifically, it is well established that the *mens rea* component of the offence of dangerous driving requires a conduct that is a marked departure from the standard of care that a reasonable

person would observe in the accused's circumstances (*R. v Beatty*, 2008 SCC 5 at para 43; *R. v Ibrahim*, 2019 ONCA 631 at para 28). Again, not a single reference to Mr. Randhawa's criminal intention is found in the Decision. In fact, based on the evidence before the Officer, Mr. Randhawa's conduct arguably did not seem to depart from the applicable standard of care as it would have been probable that a reasonable person placed in similar circumstances, threatened by a group of assailants, would have left the scene as Mr. Randhawa did, trying to flee the threat. The Officer therefore entirely overlooked a crucial and essential component of the offence of dangerous driving causing bodily harm in Canada.

[35] I underline that Mr. Randhawa was found inadmissible on grounds of serious criminality pursuant to paragraph 36(1)*c*) of the IRPA. This provision applies to situations where a person has not yet been convicted of any crime. In the absence of a clear conviction from the Indian authorities or of formal accusations of dangerous driving, it was essential for the Officer to proceed to a thorough analysis of the alleged equivalent offences, more specifically the analysis of the *actus reus* and the *mens rea* of dangerous driving in light of all of the evidence submitted, and to determine whether Mr. Randhawa drove dangerously or not, whether the driving would be labelled as dangerous or not, and whether it would have been a criminal act or an accident.

[36] In *Vavilov*, the Supreme Court accepted that, as a practical matter, some decisions are less likely to survive reasonableness review because they are relatively more constrained (*Entertainment Software Assoc. v Society Composers*, 2020 FCA 100 [*Society Composers*] at para 25). When administrative decision makers are constrained by specifically worded statutory provisions or by settled decisions of the courts, as was the case here, their decisions may be set

aside if they ignore these constraints (*Vavilov* at paras 108-113; *Society Composers* at para 33). In this case, the Officer ignored the well-accepted requirements for a proper equivalency analysis, and simply expressed an unsupported conclusion. Applying the *Vavilov* framework and its approach to the standard of reasonableness, the Decision does not allow the Court to understand how the Officer reached his determination on the equivalency analysis.

[37] I recognize that the written reasons given by an administrative decision maker must not be assessed against a standard of perfection (*Vavilov* at para 91). An administrative decision maker's reasons do not need to be comprehensive or perfect. However, they need to be comprehensible and justified. The reasons provided by the decision maker must demonstrate that the decision under review was based on an internally coherent and rational chain of analysis and that it conforms to the relevant legal and factual constraints that bear on it and the issue at hand (*Canada Post* at para 30; *Vavilov* at paras 105-107). Here, we have a situation where the Decision fails the *Vavilov* test on many levels, and where the shortcomings and flaws in the Officer's equivalency analysis are sufficiently central or significant to render the Decision unreasonable (*Vavilov* at paras 96-97, 100). In other words, the shortcomings in the Decision are such that it cannot be said that it exhibits the requisite degree of justification, intelligibility and transparency.

[38] An administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). A decision will not be reasonable if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning

on a critical point (*Vavilov* at para 103). This is especially true where a decision has particularly harsh consequences for the affected individual, such as "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood" (*Vavilov* at para 133). In this matter, the consequences of an inadmissibility on grounds of serious criminality are particularly severe and harsh for Mr. Randhawa, and such a situation called for the Officer to "explain why [his] decision best reflects the legislature's intention" (*Vavilov* at para 133). I find that, in the circumstances of this case, the Officer has not done so.

[39] To once again echo the language of the Supreme Court in *Vavilov*, the multiple omitted aspects of the equivalency analysis cause me "to lose confidence in the outcome reached" by the Officer (*Vavilov* at para 122; *Canada Post* at paras 52-53).

B. *The contradicting evidence of Mr. Randhawa*

[40] Given my conclusion on the Officer's failure to provide a reasonable equivalency analysis, it is not necessary to address the other arguments put forward by Mr. Randhawa to challenge the Decision. I will however make the following additional remark on Mr. Randhawa's second argument.

[41] Mr. Randhawa submits that, in his reasons, the Officer overlooked several pieces of evidence directly contradicting his findings, without any explanation or justification. Mr. Randhawa more specifically singles out the following documents: 1) the two sworn affidavits from his uncles who attested to political pressure and corruption in the Chandigarh police; 2) the newspaper articles highlighting many discrepancies between the circumstances surrounding the

death of Mr. Akansh Sen and the murder charges levelled against Mr. Randhawa; 3) the Civil Writ Petition deposited by his mother to summon the High Court to order that the investigation of the criminal case be referred to the central bureau of investigation in order to obtain more impartiality and independence in the murder's investigation; and 4) his belated grandfather's summary and death certificate, whose death, Mr. Randhawa argued, was directly linked to the grandfather's mediatized denunciation of the false accusations pending against Mr. Randhawa. The Officer generally referred to the "documentary evidence" in his reasons, but he did not refer to the specific documents claimed to be contradictory and referred to by Mr. Randhawa.

[42] I do not dispute that a decision maker is not required to refer to each and every detail supporting his or her conclusion, or to every piece of evidence on the record. However, contradictory evidence should not be overlooked. This is particularly the case with respect to key elements relied upon by a decision maker to reach his or her conclusion (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 [*Cepeda-Gutierrez*] at paras 16-17). True, a decision maker is presumed to have weighed and considered all the evidence presented to him or her unless the contrary is shown (*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) (QL) at para 1). A failure to mention a particular piece of evidence in a decision does not mean that it was ignored (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Cepeda-Gutierrez* at paras 16-17). However, when an administrative decision maker is silent on evidence squarely contradicting his or her findings of fact, the Court may intervene and infer that the decision maker overlooked the contradictory evidence when making the decision (*Ozdemir v*

Canada (Minister of Citizenship and Immigration), 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez* at para 17). When omitted evidence is relevant to the disputed facts and contradicts some key findings of facts, the burden that relies upon the decision maker to explain why it was omitted increases. In such cases, a mere blanket statement by the decision maker that all evidence was considered cannot suffice (*Cepeda-Gutierrez* at para 17).

[43] I find that this is the situation here, as the unreasonable character of the Officer's conclusions on his equivalency analysis is compounded by the fact that the Officer failed to address many pieces of evidence singled out by Mr. Randhawa that directly pointed away from the impugned offences and their essential ingredients. The Officer does not explain in his Decision why this contradictory evidence was not retained. Although a reviewing court will only interfere with an administrative decision maker's factual findings in "exceptional circumstances", the Court's intervention will be justified when the decision maker has "fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 125-126).

C. *The confidentiality order*

[44] At the hearing, counsel for Mr. Randhawa made an unannounced request for a confidentiality order under Rule 151 of the *Federal Courts Rules*, SOR/98-106. The Minister has not consented nor opposed the request. I have considered the test set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*] at para 53, and I am not

satisfied that Mr. Randhawa has met his burden and provided the required evidence to support his request for a confidentiality order pursuant to Rule 151.

[45] Proceedings before the Court are open to the public. Generally, litigants are publicly identified by name. The openness of judicial proceedings is constitutionally guaranteed as a consequence of the freedom of the press (*Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326). The Court can of course issue confidentiality orders in certain circumstances but the need to protect the confidentiality of a proceeding, a person or a document must outweigh the public interest of open and accessible court proceedings. The onus is upon the party demanding a confidentiality order to establish a serious risk of harm which justifies a departure from the principle of an open and accessible court (*A.C. v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1452 at paras 18-19). I should add that consent from the other party to a motion for a confidentiality order is not sufficient for the Court to issue it, as any person seeking such an order must meet the criteria developed in the jurisprudence and provide the necessary evidence (*Bah v Canada (Citizenship and Immigration)*, 2014 FC 693 at para 18).

[46] Here, I can only observe that Mr. Randhawa has not provided any evidence to support his request for a confidentiality order, in his affidavit or otherwise. In those circumstances, I am not in a position to conclude that the *Sierra Club* requirements for a confidentiality order are met, and I must therefore decline Mr. Randhawa's request.

IV. Conclusion

[47] For the reasons stated above, Mr. Randhawa's application for judicial review is granted. I am not persuaded that the Officer's equivalency analysis is a reasonable outcome in the circumstances. On a reasonableness standard, the reasons detailed in the Decision had to demonstrate that the Officer's conclusion was based on an internally coherent and rational chain of analysis and that it is justified in relation to the facts and law that constrain the decision maker. They failed to do so. Therefore, I must allow Mr. Randhawa's application for judicial review and return it to the ID for redetermination by a differently constituted panel, in accordance with the Court's reasons.

[48] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-5375-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, without costs.

2. The August 20, 2019 decision concluding that there are reasonable grounds to believe that Mr. Randhawa committed an offence in India that would also be an offence in Canada and issuing a deportation order against him is set aside.

3. The matter is referred back to the Immigration Division of the Immigration and Refugee Board of Canada for re-determination on the merits by a different panel.

4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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