

Federal Court



Cour fédérale

Date: 20210604

Docket: IMM-934-20

Citation: 2021 FC 545

Ottawa, Ontario, June 4, 2021

PRESENT: Madam Justice Walker

BETWEEN:

**SHAMBHU SHARMA AND
BINITA DEVKOTA SHARMA
(AKA BENITA DEVKOTA SHARMA)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Shambhu Sharma, the Principal Applicant, and his spouse are citizens of Nepal. They seek judicial review of a January 16, 2020 decision of the Refugee Appeal Division (RAD) confirming the refusal of their refugee claims. The RAD agreed with the Refugee Protection Division (RPD) that the Applicants have a viable internal flight alternative (IFA) in Biratnagar, Nepal.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] The Principal Applicant fears persecution in Nepal due to his real and perceived political opinions and membership in the Nepali Congress Party (NCP).

[4] Prior to his departure from Nepal in 2006, the Principal Applicant was a teacher and member of the Nepal Teachers' Association, a subgroup within the NCP. Two schools at which he taught were forced by Maoists in Nepal to deduct a significant percentage from every teacher's salary and donate the funds to the Maoist cause. In 2001, all teachers at the Principal Applicant's school in Kathmandu received letters asking them to join the movement and teach Maoist ideologies, failing which there would be severe consequences. In 2005, the Principal Applicant and other teachers were kidnapped and forcibly required to take classes on Maoist principles and ideology.

[5] These events caused the Principal Applicant to leave Nepal for a job in Dubai in 2006, the same year the Maoist insurgency formally ended. He returned to Kathmandu in 2007 for an extended vacation and read of extortion and kidnappings across the country by the Young Communist League (YCL), the Maoists' student wing. The Principal Applicant returned to Dubai but married his wife in Nepal in November 2009. He alleges that the YCL maintained efforts to contact him in the ensuing years and demanded donations in increasing amounts. The Principal Applicant's wife joined him in Dubai in 2011.

[6] The Principal Applicant arrived in Canada on August 10, 2014 from Dubai. His wife returned to Nepal. She informed the Principal Applicant that she had come in contact with a YCL member and that the group continued to recruit the Principal Applicant and obtain donations. Following an attack by YCL members, the Principal Applicant's wife joined him in Canada in August 2015.

[7] In November 2015, the Principal Applicant came into contact with Nepalese refugees in Toronto who advised him of the possibility of making a refugee claim. He resigned from his job in Edmonton, moved to Toronto, and claimed refugee protection. The Principal Applicant alleges that the YCL continued to contact his parents in Nepal through January 2018 with threats of extortion and serious harm to the Applicants should they be found.

[8] The RPD held an oral hearing on March 1, 2018 and issued its decision rejecting the Applicants' refugee claims on April 5, 2018. The basis of the RPD's decision was the existence of a viable IFA for the Applicants in Biratnagar. The Applicants appealed the RPD decision to the RAD.

II. Decision under review

[9] The Applicants proposed three documents to the RAD as new evidence pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The RAD admitted two news articles that post-dated the RPD decision and were relevant to the appeal as they illustrated there had been activity by a Maoist faction in the proposed IFA. The

third item was already contained in the record and was not new evidence. The RAD did not hold an oral hearing.

[10] The RAD analysed the Applicants' evidence against both prongs of the IFA test in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) (*Rasaratnam*). On the first prong, the RAD concluded that there was insufficient evidence to establish that the Applicants would face a serious possibility of persecution or risk of harm from any Maoist faction in Biratnagar. The RAD referred to the Applicants' new evidence and stated that there was an attack by a breakaway Maoist faction, CPN-Biplav, on the Indian Consulate in Biratnagar but no reports of additional activity. The panel found that the evidence did not establish that the YCL has a significant presence in Biratnagar or that it is effectively networked with branches elsewhere. In the RAD's opinion, the Principal Applicant's profile as a card-carrying NCP member would not result in him being recognized or sought in the IFA. Finally, the RAD found little evidence to demonstrate inter-regional connections among Maoist groups or the sharing of information among factions. The RAD was not persuaded that the Maoist insurgents or any of the offshoots feared by the Applicants have the ability and reach to track and target them should they relocate to Biratnagar.

[11] With respect to the second prong of the test, the RAD considered the Applicants' education, work histories and prior resettlements, their ability to speak Nepali, English and Hindi, and the presence of family in Nepal. The RAD concluded that the Applicants could relocate and establish themselves in Biratnagar without significant issue. There were no serious social, economic or other barriers to such a move for the Applicants.

III. Issue and standard of review

[12] The issue in this application is whether the RAD committed a reviewable error in its assessment of a viable IFA for the Applicants.

[13] The parties submit and I agree that the RAD's reasons and conclusion regarding the availability of an IFA are subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at para 32). None of the situations identified by the Supreme Court in *Vavilov* for departing from the presumptive standard of review apply in this case.

[14] The Supreme Court in *Vavilov* set out guidance for reviewing courts in applying the reasonableness standard, emphasizing the importance of the decision maker's reasoning process and the outcome for the person affected by the decision (*Vavilov* at para 83). The hallmarks of a reasonable decision are an internally coherent and rational chain of analysis that is justified, transparent and intelligible in relation to the facts and law that constrain the decision maker (*Vavilov* at paras 85, 99; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 31). Such a decision is entitled to deference by a reviewing court.

IV. Analysis

[15] The concept of an IFA is inherent in the definition of a Convention refugee under section 96 of the IRPA. If a claimant can seek safe refuge anywhere within a country, typically their country of nationality, Canada is not required to extend protection. Further, a person in need

of protection under section 97 of the IRPA is someone who faces a risk of harm in every part of that country. It follows that the existence of a viable IFA is fatal to a claim made under either section 96 or 97 (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7).

[16] The test for determining if a claimant has a viable IFA was set out by the Federal Court of Appeal (FCA) in *Rasaratnam*. The decision maker must be satisfied on a balance of probabilities that:

1. the claimant will not be subject to a serious possibility of persecution or a section 97 risk in the proposed IFA; and
2. conditions in the part of the country proposed as an IFA are such that it would not be unreasonable in all the circumstances, including those particular to the claimant, to seek refuge there.

[17] The test has been cited many times in the jurisprudence of this Court. The onus rests on the claimant to demonstrate that they have defeated one or both prongs of the test (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA); *Obotuke v Canada (Citizenship and Immigration)*, 2021 FC 407 at para 16).

First prong of the Rasaratnam IFA test

[18] The Applicants submit that there is a serious possibility that they would be subject to persecution and risk of harm in Biratnagar because the CPN-Biplav faction of the Maoist insurgents is actively engaged in violence and extortion in the area, whether itself or through a YCL connection. They argue that the RAD's conclusion to the contrary is inconsistent with the evidence in the National Documentation Package (NDP) and their new evidence and cannot withstand the Court's review.

[19] The Applicants rely foremost on their submission that the RAD misread the objective evidence regarding the CPN-Biplav's continuing extortion activities in the IFA. The Applicants argue that the RAD committed a determinative error in citing a Response to Information Request (RIR) in the NDP that indicates that the CPN-Biplav faction targets the area "outside of Kathmandu in the Terai area" in support of its conclusion that the faction is not actively engaged in extortion in Biratnagar. They emphasize that Biratnagar is in fact located in the Terai region in Nepal.

[20] The Applicants also submit that the RAD erred in concluding that the evidence does not establish that the YCL has a significant presence in the IFA or they are effectively networked with other YCL branches, and in distinguishing the new evidence regarding the CPN-Biplav's 2018 bombing in Biratnagar. Finally, the Applicants argue that the RAD's finding that state protection is available in the IFA area to combat violence and extortion ignores the fact that such protection is generally brought to bear in high-profile cases due to political pressure.

[21] I do not find the Applicants' submissions persuasive. When read in its entirety, the RAD's decision accurately summarizes relevant portions of the documents in the NDP and reasonably addresses the Applicants' new evidence.

[22] The RIR citation the Applicants rely on in support of their primary submission is contained in the following sentence, which is included in full in the decision:

Biplav and Baidya factions have "mainly target[ed] the business community and some NGOs, mainly outside of Kathmandu in the Terai area ... and in some districts in the Western region of Nepal" for extortion.

[23] Immediately following this excerpt, the RAD distinguishes Biratnagar, stating, “[w]hereas the proposed IFA location is some 400 km east (10 hours travel by vehicle) from Kathmandu”.

[24] The Respondent submits that the reference to “mainly outside” of Kathmandu must be read in context with the additional information set out in the same section of the RIR. The section states that the extortion activities of the Biplav faction have occurred outside of Kathmandu and particularly in the Midwest and Far-West region with a few cases in the Western region.

[25] The RAD’s reliance on the fact that Biratnagar is located 400 km east of Kathmandu to distinguish the locations in the Terai region where the CPN-Biplav is active is consistent with the evidence in the RIR. The faction’s extortion efforts occur largely in the Western region of Nepal. In my opinion, it was open to the RAD to interpret the RIR as it did. There is no indication in the decision that the RAD was under any misapprehension as to the geographic reach of the CPN-Biplav’s activities or the location of the proposed IFA. I note that the RAD continues its review of the documentary evidence regarding the prevalence of extortion in the next paragraph of the decision. The panel states that the evidence reveals a series of episodes of extortion in 2015 but that none of those events took place in any community close to Biratnagar. I find no reviewable error in this section of the RAD’s analysis.

[26] The Applicants’ remaining submissions each reference a distinct paragraph or portion of the decision to state that the RAD erred in its consideration of the evidence before it as a whole.

First, the Applicants argue that the panel's analysis of the new evidence that speaks to the CPN-Biplav's 2018 bombing of the Indian consulate in Biratnagar discounts the faction's links to the IFA. I disagree. In the paragraph in question, the RAD acknowledges the attack on the Indian consulate but concludes that there is no persuasive evidence of any additional activity in the area by the group. This finding is reflected in the documentary evidence. The bombing was a one-time event that was part of the faction's campaign against Indian establishments throughout the country. The bombing does not suggest a particular focus on the IFA area. Contrary to the Applicants' argument, the RAD then assessed other NDP documents regarding the CPN-Biplav's national extortion and other activities.

[27] Second, the Applicants argue that the RAD failed to reasonably assess the mixed evidence regarding the CPN-Biplav's connections with the YCL and the ability of the YCL to network across the country.

[28] I find that the RAD considered the interplay between the CPN-Biplav and the YCL both within the IFA area and more generally. In addition, the RAD reviewed the YCL's ability to track individuals and related that ability to the Applicants. The RAD concluded that, while there is objective evidence that the YCL has a nationwide network, there is no additional information about the ability of various Maoist factions to communicate and share information in circumstances similar to those of the Applicants. There is no basis on which the Court should interfere with the RAD's conclusions on the CPN-Biplav and YCL's ability to locate the Applicants in Biratnagar.

[29] The Applicants base their fear on the possibility of extortion but, as the RAD stated, there is no evidence of extortion activity by the CPN-Biplav in Biratnagar. This conclusion and the RAD's statements that safety is increasing in the area and extortion decreasing nationwide, and that active state protection is available, are consistent with the information in the NDP. The documentary evidence lists incidents in which broader 'requests' for donations are made, sometimes accompanied by threats, but none of the incidents occurred in the IFA.

[30] The RAD considered a number of other aspects of the Applicants' submissions in reaching its conclusion that they had not produced sufficient evidence to satisfy the first part of the IFA test. The RAD found that the fact the Principal Applicant had held an NCP membership card for a number of years with little evidence of active involvement in the party did not establish a profile that would make him a target for extortion. The RAD also observed that the Applicants had been absent from Nepal for a number of years which diminished the chances of them being tracked and targeted based on any perceived political association.

[31] The RAD's assessment of the first prong of the *Rasaratnam* test for a viable IFA is detailed and consistent with the evidence in the record. Its findings demonstrate that the panel considered the evidence before the RPD and the Applicants' new evidence. The panel did not ignore documentary evidence as argued by the Applicants. The RAD acknowledged the decreasing incidence of violence and extortion in Nepal generally and Biratnagar specifically, and related its findings to the Applicants' personally and the possibility of persecution or other risk to them in the IFA. The RAD's analysis was transparent and intelligible, and justified against the evidence and relevant statutory and jurisprudential constraints.

Second prong of the Rasaratnam IFA test

[32] The second prong of the *Rasaratnam* test asks whether it would be unreasonable in the circumstances for the Applicants to seek refuge in Biratnagar. The threshold a claimant must meet to satisfy the second prong is high and requires actual and concrete evidence of “nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area” (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 2118 (CA) at para 15).

[33] The Applicants submit that the RAD’s analysis of their ability to reasonably relocate to the IFA is flawed in two respects. First, the RAD did not consider their argument on appeal that the RPD committed an error in relying on the Principal Applicant’s ability to establish himself in Canada as a factor in favour of Biratnagar as a viable IFA (*Utoh v Canada (Citizenship and Immigration)*, 2012 FC 399 at para 17 (*Utoh*)). Second, the Applicants submit that the RAD’s analysis was internally inconsistent as between the first and second prongs of the test. In the course of its analysis of their fear of persecution in the IFA, the RAD stated that the Applicants do not have long-standing associations and family members in Biratnagar, a city located far from their prior problems with the YCL. In contrast, in considering the reasonableness of the city as an IFA, the RAD observed that the Applicants have multiple family members in Nepal.

[34] I find no reviewable error in the RAD’s assessment of Biratnagar as a major urban centre to which the Applicants may reasonably relocate. The Applicants take issue with specific aspects of the RAD’s consideration of their personal circumstances but this section of the decision is

comprehensive, weighs appropriately the Applicants' personal profiles and ability to establish themselves in different countries, and is not internally inconsistent in any material aspect.

[35] In terms of the Applicants' appeal submission and the RPD's reliance on the Principal Applicant's establishment in Canada, the RAD did not recount the specific submission but appropriately addressed the Applicants' ability to relocate by noting that they had previously and successfully relocated to Dubai, Alberta and Ontario. This is a different situation to that in *Utoh*, where Justice Rennie, then of this Court, stated that the sole finding by the RPD had been that the applicant had established herself in Canada. The RPD had not addressed the applicant's testimony that she faced significant social, economic and cultural challenges in relocating alone to a new city. In this case, the RAD considered the Applicants' personal circumstances in some detail.

[36] With regards to the Applicants' argument of internal inconsistency, the RAD's observations regarding the Applicants' family in Nepal do not contradict each other in a manner that undermines the panel's analysis. The RAD's statement that the Applicants did not have family members or longstanding associations in Biratnagar was made in the context of the YCL's ability to track and target them to the IFA. Its reference to the Applicants' family in Nepal as a positive factor in their ability to relocate to the city is not inconsistent with the fact that they have family members in and around their prior locations, nor was it a significant factor in the RAD's analysis.

[37] In summary, the RAD made no reviewable error in concluding that the Applicants had not submitted sufficient evidence to establish, on a balance of probabilities, that they would encounter serious social, economic or other barriers in relocating to Biratnagar.

V. Conclusion

[38] The application is dismissed.

[39] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-934-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-934-20

STYLE OF CAUSE: SHAMBHU SHARMA AND BINITA DEVKOTA
SHARMA (AKA BENITA DEVKOTA SHARMA) v
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