Federal Court Cour fédérale

Date: 20210730

Docket: IMM-1175-20

Citation: 2021 FC 810

Ottawa, Ontario, July 30, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

VARINDER SINGH;
BALJINDER KAUR
(A.K.A. BALJINDAR KAUR);
SIMRANPREET KAUR;
YUVRAJ SINGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants are a husband, the principal applicant (PA) and his wife, the associate applicant (AA) as well as their two minor children (collectively, the applicants).

[2] The applicants are all citizens of India. They seek judicial review of a decision made by the Refugee Appeal Division (RAD) on January 24, 2020. The PA and his wife also have a child who was born in Canada.

[3] The RAD confirmed the decision of the Refugee Protection Division (RPD) that found the applicants had an internal flight alternative (IFA) in Mumbai therefore they were neither Convention refugees nor persons in need of protection (the Decision).

II. **Relevant Facts**

[4] The applicants are from Amritsar in the province of Punjab. They allege they cannot return to India because they fear being mistreated or killed by the Principal Applicant's uncle, Sarbjit Singh Gumtala, due to a land dispute.

[5] The PA testified that his uncle offered to purchase his portion of their joint business, which involved converting farm land into subdivisions for individual sale. The price offered was well below what the land was worth. The PA's evidence was that his portion of the business was worth 70 million rupees but his uncle only offered him 10 million rupees.

[6] The applicants came to Canada in December, 2017. They claimed refugee protection in July 2018.

[7] On May 17, 2019 the RPD rejected their refugee claims. On January 24, 2020 the RAD confirmed the RPD decision.

III. **Decision under Review**

[8] The RAD found the determinative issue was the existence of an IFA.

[9] The RAD conducted an independent review of the entire record including listening to the recording of the proceeding before the RPD. The RAD identified and applied the test set out in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], which is discussed below.

[10] The PA submitted as new evidence to the RAD an affidavit sworn on August 16, 2019. The RAD admitted only paragraph 9 of the affidavit as it referred to matters post-dating the RPD hearing. The PA said he has received threatening and luring messages and calls from India since the RPD hearing. The RAD refused to admit the rest of the affidavit because it did not constitute new evidence pursuant to s.110(4) of *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

[11] The RAD found it was reasonable to assume that the PA could resolve his difficulties stemming from the land dispute with his uncle by giving up the joint venture, and for his personal means, retaining other lands he owned in his own name.

[12] The RAD also found that there was insufficient evidence to establish that the uncle has an extensive area of influence.

[13] With respect to the IFA test, the RAD concluded, on a balance of probabilities, that the applicants had not demonstrated that there was a serious possibility of harm, if they relocated to Mumbai.

[14] The applicants made no argument before the RAD with regard to the second prong of the IFA test being whether it would be unreasonable, in all the circumstances, including circumstances particular to them, that they seek refuge in Mumbai.

IV. **Issue and Standard of Review**

[15] The sole issue in this application is whether the RAD's IFA finding was reasonable.

[16] In *Huruglica,* the Federal Court of Appeal set out in some detail the nature of the role of the RAD when reviewing a decision of the RPD. The conclusion was that the RAD reviews the RPD decision on a standard of correctness.

[17] On judicial review, reasonableness is the standard to be applied by this Court to a decision of the RAD: *Huruglica* at paras 30 and 35.

[18] When applying the reasonableness standard while conducting judicial review, a Court is to refrain from deciding the issue afresh. The Court is to consider only whether the Decision, including the rationale for it and the outcome to which it led, is unreasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at paragraph 83.

[19] The requirements of a reasonable decision were re-stated in *Vavilov* as being one that possesses an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker. The reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov* at paragraph 85.

V. **The two-pronged IFA test**

[20] The applicants submit that the RAD erred in its application of the two-pronged test articulated in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at page 711:

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.

[21] The onus is on the applicants to defeat at least one prong of the two prong test: *Aigbe v Canada (Citizenship and Immigration)*, 2020 FC 895 at para 9.

[22] In carrying out this analysis, a decision-maker "must assume the claimant has a well-founded fear of prosecution in one part of the country and proceed to determine if that fear extends to the whole country": *Sendaheerage v Canada*, 2020 FC 968 at para 49.

[23] If there is a serious possibility of persecution to the applicants in Mumbai, or if it is not reasonable for them to move to Mumbai, then it is not a viable IFA. Whether an IFA is reasonable or not is determined objectively.

[24] The threshold for proving objective unreasonableness is very high. Actual and concrete evidence of the existence of conditions that would jeopardize the life and safety of the applicants in travelling or temporarily relocating to Mumbai is required: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (FCA) [*Ranganathan*] at para 15.

VI. **Did the RAD err in finding the Applicants will not be persecuted in Mumbai?**

[25] The applicants say the RAD erred in failing to consider their actual subjective fear of persecution in the analysis of the first prong of the IFA test.

[26] The PA claims a subjective fear of persecution by his uncle in Mumbai based on his objective well-founded claims: 1) his uncle sent goons with guns to the PA's house in Amritsar who threatened to kill him and his family creating a fear of his uncle and a fear of returning to India; 2) his uncle is an influential business person with a network of political connections and significant links to corrupt police and government authorities; and 3) the land dispute is not going to settle because the uncle's offer is far less than the true value of the property they owned jointly.

[27] With respect to the "goons with guns" allegation, this was not raised in the applicants' submissions to the RAD. As such, it cannot be considered on judicial review: *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 (*Kanawati*) at para 23.

A. *The uncle is an influential business person with links to corrupt police and authorities*

[28] The PA claimed that the RPD failed to take into account the profile of the uncle as the agent of persecution. The uncle was said by the PA to be an "influential businessperson with a network of political connections and significant links to corrupt police and the government authorities (. . .) extends throughout India, including Mumbai."

[29] The RAD found the PA had not provided sufficient evidence of the power and reach of his uncle. Considering that they were business partners from 2005 to 2017 the RAD found that the PA should have known his uncle well but the PA provided no details or documentary evidence to support his allegation.

[30] The RAD found that there was no evidence the RPD failed to consider the level of influence of the uncle, as alleged. Rather, the RPD reasoned that resolving the property dispute would eliminate the uncle's motivation to search for and harm the Appellants. Thus, if not motivated to harm the Appellants, the extent of his influence was not pertinent.

[31] The RAD reasonably came to these conclusions which the underlying record supports.

B. *The Land Dispute*

[32] It has been held that persons claiming to be in need of protection solely because of the nature of the occupation or business in which they are engaged in their own country generally will not be found to be in need of protection unless they can establish that there is no alternative occupation or business reasonably open to them in their own country that would eliminate the

risk of harm: *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 (*Sanchez*) at para 19.

[33] *Sanchez* involved a certified question concerning the factors to be considered when a person claims protection solely because of the occupation or business in which they are engaged in their country. The question was not answered by listing the factors as that was found not to be possible. The answer provided is nonetheless instructive:

> However, persons claiming to be in need of protection solely because of the nature of the occupation or business in which they are engaged in their own country generally will not be found to be in need of protection unless they can establish that there is no alternative occupation or business reasonably open to them in their own country that would eliminate the risk of harm.
>
> *Sanchez* at para 20.

[34] As instructed in *Sanchez*, the RAD considered whether there was another business reasonably open to the PA. The PA had testified that he owned other land in his own name that was not part of the joint venture with his uncle.

[35] The conclusion by the RAD that it is reasonable to assume the PA could resolve his difficulties by giving up the joint venture with his uncle and retaining some of his other land for further employment purposes is based on the evidence and the law. It is reasonable.

[36] The applicants also submitted that it was objectively unreasonable for the PA to sell his land for the price offered by his uncle to free himself from potential harm because the uncle will continue to pursue the PA after the sale. However, other than alleging that the dispute had

become a personal vendetta, the applicants failed to establish that selling the land would not eliminate the risk of harm.

[37] In fact, the PA testified in the RPD hearing that his uncle would not come after him if he sold the disputed land for 10 million rupees. This was also confirmed by Counsel who confirmed that the PA would be safe if he gave up the money at stake.

[38] The RAD was entitled to rely on the applicant's testimony that sale of the disputed land would end the conflict.

[39] In any event, it has been established that selling the land for less than the actual value would not be a basis for a refugee claim under the United Nations Convention relating to the Status of Refugees and section 96 of the *IRPA*: *Kenguruka v Canada* (MCI), 2014 FC 895 at para 6.

[40] The applicants' submissions to the RAD also argued that interpretation problems caused the RPD to misunderstand the PA as saying he would no longer be in danger if he settled the dispute with his uncle.

[41] The RAD found these assertions to be disingenuous: "[i]t was evident from listening to the recording of the hearing that Counsel was fluent in Punjabi and did raise errors in interpretation at the time they were occurring, encouraging the Member to rephrase questions when he perceived a problem. Yet, at the moment in question – no error in interpretation was

raised by Counsel, nor did Counsel raise any general problem with the adequacy of interpretation.": Decision at para 27.

[42] It has consistently been found in the jurisprudence that "[w]aiver of a right to object can be inferred from a party's conduct. Where a party, with knowledge of his or her rights, fails to object at the earliest opportunity, that will be construed as a waiver": *Lally v Telus Communications Inc*, 2014 FCA 214 at para 25.

[43] The RAD correctly found there was no problem with interpretation.

C. *The uncle made threatening and luring messages and calls after the RPD hearing*

[44] The applicants allege that RAD erred by not considering the evidence regarding threatening and luring messages and calls from the uncle made after the RPD hearing.

[45] This is not accurate.

[46] The RAD reviewed the August 16, 2019 affidavit that the applicants sought to introduce as new evidence. It specifically allowed paragraph 9 which outlined the threatening and luring messages from India.

[47] The Decision then referenced the threatening messages in its analysis under the first prong of the IFA test. The RAD found the statements were questionable, no copies of these

messages were provided, and the PA testified at his hearing to have received no threats since being in Canada.

[48] The RAD ultimately found whether or not such messages were received while in Canada would not be determinative of the applicants' claim since the IFA was the decisive issue.

D. *The applicants' subjective fear*

[49] The RAD noted that the applicants did not make submissions concerning their subjective fear under the second prong of the IFA test.

[50] The applicants rely on *Amit v Canada (Minister of Citizenship and Immigration)* 2012 FC 381 to now submit that there was no need to specifically address the subjective fear issue in the appeal to the RAD since fear had to be considered by the RAD as part of its review of the RPD decision.

[51] The RAD did not err by not assessing subjective fear. The RAD independently reviewed the evidence of the uncle's influence and reasonably found that it was vague. No documentary evidence or testimony was provided as to how or why the uncle would have any interests or influence outside of Punjab or that he has the connections alleged by the applicants.

[52] Even had the RAD failed to assess the subjective fear of the applicants, it has been held that subjective fear is not determinative when the issue is whether there is a viable IFA: *Onyeme v*

Canada (MCI), 2018 FC 1243 at paragraphs 36-37; see also *Haastrup v. Canada (Citizenship and Immigration*), 2020 FC 141, at para 32.

[53] For all the foregoing reasons I find that the applicants have not met their onus to establish that the RAD erred in finding they would not be persecuted in Mumbai.

VII. **Would it have been unreasonable for the applicants to relocate to Mumbai?**

[54] With respect to the second prong of the IFA test, the RAD noted that no argument had been made by the applicants regarding the second prong. The RAD then agreed with the RPD rationale as to why it would be reasonable, taking into account the applicants' personal circumstance, for them to relocate to Mumbai.

[55] In this application, the applicants submit that the RAD's failure to consider the undue hardship on the Canadian born minor child makes the Decision under the second prong of the IFA test unreasonable.

[56] The applicants did not raise this issue in submissions to the RAD. As a result, the applicants failed to meet their burden to show how relocation would cause undue hardship in light of their particular situation and objective information related to the proposed IFA location.

[57] The applicants failed to meet the very high threshold for proving objectively that it would be unreasonable for them to relocate to Mumbai. No actual and concrete evidence of the existence of

conditions that would jeopardize the life and safety of the applicants in travelling or temporarily relocating to Mumbai was put before the RAD.

[58] It is not up to the RAD to make the case for the applicants: *Hamid v Canada (Citizenship and Immigration)*, 2020 FC 145 at para 56.

VIII. **Conclusion**

[59] For all the foregoing reasons, I find the applicants have not shown that the RAD erred in any respect.

[60] The application is dismissed, without costs.

[61] There is no question for certification.

JUDGMENT IN 1175-20

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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