Federal Court  Cour fédérale

Date: 20210924

Docket: IMM-3088-20

Citation: 2021 FC 993

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 24, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AMRIK SINGH
KULDEEP KAUR

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision rendered by the Refugee Protection Division [RPD] on February 28, 2020. The application for judicial review is made by the Minister of Citizenship and Immigration [MCI] pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. An appeal to the Refugee Appeal Division [RAD] was dismissed for lack of jurisdiction. In fact, an appeal to the RAD is not available for

any claim referred to the RPD prior to August 15, 2012. No one is challenging the RAD's October 29, 2020 decision.

[2] As a result, the only recourse is by way of judicial review before this Court of the RPD's decision, which granted the respondents' claims for refugee protection in this case.

I. Issues and facts

[3] Two questions arise on this judicial review, as they did before the RPD. First, is the principal respondent excluded from the protection afforded to potential refugees under the IRPA? Second, if he is not excluded, is he entitled to such protection in the circumstances he alleges, which is persecution at the hands of the Indian police in his village? The co-respondent is only involved in the second question.

[4] The alleged facts giving rise to the allegations of persecution are as follows. Amrik Singh is a veteran of the Indian armed forces. He served in the Indian armed forces for 24 years, from February 1980 to March 2004, in an artillery regiment. He was stationed in various places in India. When he returned to his village to cultivate the land, he noticed that several young Sikhs were using drugs, and he tried to convince them to stop.

[5] A local "Congress" leader reportedly sought to have his wife elected to the position of Sarpanch in the May-June 2008 elections. Mr. Singh supported the candidate opposing her. There were allegedly heated exchanges between the principal respondent and the person seeking

to have his wife elected. The respondent alleged electoral fraud, to which he objected. He was then threatened by the local Congress leader.

[6] In early 2011, the principal respondent allegedly discovered that the local Congress leader was the one behind the drug dealing. The respondent then allegedly continued his campaign, telling the youth not to let the drug dealers into the village. The local Congress leader then took his revenge. On June 5, 2011, based on the denunciation of this same person, the principal respondent was arrested by the police and detained until June 7; during his arrest, his wife was pushed around. He said he was beaten with leather belts, sticks and gun butts. Police said he was accused of meeting Sikh activists at the Temple and offering them shelter, and that he was spreading false propaganda about the local Congress leader. [TRANSLATION] "Influential people" paid the police a sum of money and he was released two days after his arrest.

[7] A second similar incident occurred a few months later. Between the two incidents, the police had visited him at his home after he had unsuccessfully sought assistance from the Army board. The respondent was to file a complaint with the Deputy Commissioner on December 20, 2011. He was arrested with his wife on December 22, 2011. He was then questioned about the militants and their organizations. He was allegedly beaten again, and he states that his wife was also beaten and questioned, in addition to being raped. The police reportedly told him that he was being treated this way because he dared to oppose the local Congress leader. The latter was allegedly present during this period of incarceration when he was beaten. Arrested on December 22, the co-respondent was released on December 23, while the respondent was released on December 25. Again, a bribe was allegedly paid for the respondents' release. The respondent's

statement does not indicate why he was released two days after his wife if a bribe for both had to be paid for their release.

[8] The respondents went to another village after the second detention, but it was not possible to find permanent refuge there since their relatives were afraid because they learned that the police were looking for them. The respondents then decided to leave India and, with the help of a smuggler, obtained a visa to Canada.

II. Decision

[9] The decision for which judicial review is requested is short. It is barely six pages long.

[10] The first issue addressed is the exclusion of the principal respondent from refugee protection. For the RPD, the issue is whether the refugee protection claimant, by virtue of having spent 24 years in the Indian Army, establishes the commission of, or complicity in, a crime against peace, a war crime or a crime against humanity. Based on the 1,151 pages produced by the MCI, the RPD found that serious human rights violations were committed in two regions, Jammu and Kashmir, and were committed during the period the principal claimant was stationed there.

[11] Furthermore, the respondent, when questioned, made a general denial of such abuses, starting with his duties during his service, which were benign, to the threat from extremists, which he said did not exist in the areas where he was stationed. This raises the question of “what was the principal claimant’s individual responsibility as a member of the army” (RPD decision,

para 17). Without really explaining why, since the evidence is neither presented nor analyzed, the RPD states in paragraph 18 of its decision that the Minister has not discharged his burden of proving that "the principal claimant ordered, facilitated or encouraged the commission of the crimes". Simply put, it is not clear why the RPD is making this statement. It is certainly possible that it was justified. But we do not know the rationale.

[12] The RPD then turns to the possibility of complicity, on the basis of *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40; [2013] 2 SCR 678 [*Ezokola*]. Therefore, the next issue to be decided is whether the principal claimant "significantly, voluntarily and knowingly contribute[d] to the crimes committed by the Indian army" (RPD decision, para 19). Saying that the MCI relied on the Rome Statute concepts of criminal intent and knowledge, the RPD stated that these concepts imply that there must be conduct leading to consequences of which the claimant is aware. Using tautological reasoning, the RPD states that since the claimant did not commit a crime, "his intentions and knowledge of the circumstances of the crimes cannot reasonably be examined to establish individual responsibility" (RPD decision, para 20).

[13] Referring to the six criteria of the *Ezokola* decision that can assist in the evaluation of the contribution to the commission of crimes, the RPD lists four:

- The Indian army is not an institution dedicated to committing crimes such that anyone in it would be *ipso facto* complicit in crimes against peace, war crimes or crimes against humanity;
- Being a gunner in an artillery battalion does not make the soldier have "criminal knowledge, particularly given that learning to shoot is part of all military training" (RPD decision, para 23);
- Medals and ranks do not prove that the principal claimant was rewarded for committing these kinds of crimes;

- Neither the length of the career nor the method of recruitment leads the RPD to see any serious reason to believe that the principal claimant committed these crimes.

Thus, the RPD concludes that the principal claimant is not excluded from refugee protection.

[14] The RPD therefore turns to the merits of the respondents' refugee claim. In essence, the RPD makes a determination on the respondents' credibility. Where contradictions and inconsistencies arise (they are not detailed in any way), they are explained with a "psychological report", with the result that the RPD finds that depression and anxiety on the part of the principal claimant are significant.

[15] The RPD is satisfied that the violence perpetrated by the police, which the RPD does not describe, amounts to persecution: it is understood that what is being talked about is the detention suffered by the two respondents because it then speaks of torture and rape. The RPD rules out the possibility of an internal flight alternative because it is the Indian state that is guilty of these abuses against the respondents, not just the local police. The RPD blames it all on India's control of its national territory. The RPD writes: "Also, given its control over the national territory, there is no part of India where the claimants could safely relocate without the risk of blackmail, bullying and harassment from a corrupt and predatory police force" (RPD decision, para 29). Nowhere in the reasons did I find evidence that would support such a conclusion.

[16] The human rights situation in India is described as "disastrous" (RPD decision, para 30). At the very least, the RPD cites a passage from the National Documentation Package on India in support of its argument and states that the file contains abundant credible documentation. This

leads the RPD to conclude that there is a reasonable possibility of persecution upon return to India.

III. Arguments and analysis

A. *Arguments of the respondents*

[17] The Minister clearly bears the burden on this judicial review. The respondents' memorandum merely expresses agreement with the RPD's findings. It essentially repeats parts of the principal claimant's testimony and lengthy passages from the RPD decision.

[18] The respondents continue to rely on the test for establishing complicity in international crimes by quoting from *Ezokola*'s paragraph 8, and to revisit the principal respondent's general denial:

- He was in charge of food distribution (supply and shipping);
- There were no terrorism-related issues where he was stationed;
- He knew nothing about the human rights violations committed by the army in India.

It follows that the principal respondent could not have made a significant contribution to the commission of international crimes.

[19] As to the merits of the claim, the respondents are credible, and the inability to find an internal flight alternative is supported by the documentary evidence.

B. *Applicant's arguments*

[20] The legal framework within which this case must be considered is relatively straightforward. Section 98 of the IRPA provides for the exclusion from the refugee protection regime of a person described in section E or F of Article 1 of the United Nations' *Convention relating to the Status of Refugees* (Refugee Convention). Such a person cannot be a refugee or a person in need of protection. It is section F of Article 1 of the Refugee Convention that is applicable here:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F.** Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;	a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.	c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[21] The applicant argued that section 98 applied and that the principal claimant could not therefore be a refugee under section 98 of the IRPA. That section reads as follows:

Exclusion - Refugee Convention	**Exclusion par application de la Convention sur les réfugiés**

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

On the merits, the applicant argues that persecution upon a return to India has not been established. The analysis is superficial and seeks to obtain a given result. Thus, without ever exposing the contradictions and inconsistencies of the principal claimant, the RPD attributes them to depression and anxiety, stating that it goes without saying that the credibility of the principal claimant cannot be tainted because of the report regarding his psychological health. The RPD should have explained itself.

[22] The applicant also attacks the RPD's conclusion that the alleged persecution at the hands of the local police may give rise to a rejection of the presumption that a democratic state such as India can provide protection to its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at 724–25). There is no specific evidence to support such a conclusion. The analysis is completely flawed, making the conclusion unreasonable.

[23] The standard of review is that of correctness for the test for complicity in international crimes, while the standard of reasonableness applies to issues of assessing evidence and credibility (the latter of which is a subset of assessing evidence). A reasonable decision is one that is based on internally coherent reasoning and is justified within the factual and legal constraints of the circumstances.

C. *Analysis*

[24] Unfortunately, the RPD's decision does not meet the requirements of reasonableness under the Supreme Court of Canada's judgment in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], rendered two months before the RPD's decision in this case. It is the applicable law at the time of the RPD's decision. Suffice it to say that the Supreme Court in *Vavilov* emphasizes a culture of justification (*Vavilov,* para 14). Thus, the role of the reviewing court is to "consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov*, para 15). The focus of the reviewing court is on the decision itself, including the rationale, and not on the conclusion the reviewing court would have preferred to reach. The reviewing court does not substitute its preferred outcome for the administrative decision-maker's. If it did, we would arguably have slipped into the standard of review of correctness.

[25] The approach is focused on justification. Reasoned decisions are said to be the cornerstone because they support the legitimacy of institutions. More practically, the Federal Court of Appeal noted again recently in *Bragg Communications Inc. v Unifor*, 2021 FCA 59, that stating one's conclusion is no longer sufficient, especially in circumstances where no reasons are given on the important issues raised by the parties. It is then impossible for the reviewing court to understand the reasoning of the decision-maker to determine its reasonableness. The reasons do not have to be voluminous. But they must be sufficient to meet the test of reasonableness.

[26] The Supreme Court elaborated on this issue in *Vavilov*. Thus, the Court requires the reviewing court to understand the reasoning of the decision-maker to see if the decision as a whole is reasonable. The test in *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190, has not disappeared. A reasonable decision is one that possesses the characteristics of justification, transparency and intelligibility; a decision that is justified in the face of the relevant factual and legal constraints will be reasonable, even if the reviewing court would have come to a different conclusion. The reviewing court will only intervene if the deficiencies are so serious that it is not clear that the characteristics of justification, transparency and intelligibility are met. Fundamental deficiencies would be those that lack internal logic or where decisions are untenable. The reviewing court will consider a decision to be unreasonable where the reasons do not demonstrate a rational analysis, or where it is impossible to understand from the reasons the reasoning of the decision-maker on a central issue. Circular reasoning, false dilemmas, unfounded generalizations and absurd premises are all examples of deficient internal logic. As the Supreme Court says in paragraph 104 of *Vavilov*, does the decision-maker's reasoning "[add] up"? Not only do we look for inherently coherent reasoning, but we must also ensure that the decision is justified on the basis of the law and the relevant facts.

[27] That said, with respect, the RPD's decision falls short of the standard of reasonableness on both aspects of this case: on the principal respondent's alleged complicity in the commission of international crimes as a matter of law, and on the determination of the merits of the claim. However, I emphasize that this Court's decision on the RPD's reasons is not in any way related to the merits of the claim. The Court does not rule on the merits. It merely finds that the reasons given do not meet the requirements of *Vavilov*.

[28] Thus, as I pointed out at the judicial review hearing, it should not be inferred from the Court's decision that, but for the unreasonableness of the decision within the meaning of *Vavilov*, Mr. Singh would have been excluded from the refugee protection system under section 98 of IRPA. The Court's decision deals only with the reasonableness of the decision under *Vavilov*. Its rationale is flawed. The RPD's decision lacks the characteristics of justification, transparency and intelligibility. It does not establish whether or not the principal respondent should be excluded under section 98 of the IRPA. It is a lack of an acceptable rationale that makes the decision unreasonable.

[29] It will be up to a different panel of the RPD to decide on the application of section 98 of IRPA and, depending on the decision on the application of section 98, to consider whether Mr. Singh's claim for refugee protection should be granted. Whatever the decision in Mr. Singh's case, it will also be necessary to consider the claim made by Ms. Kaur, which is not the subject of a decision under section 98 of IRPA.

[30] First, concerning Mr. Singh's complicity, there is agreement that the applicable standard is articulated in paragraph 84 of *Ezokola*;

> [84] In light of the foregoing reasons, it has become necessary to clarify the test for complicity under art. 1F(a). To exclude a claimant from the definition of "refugee" by virtue of art. 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose.

The essential elements on which serious reasons must exist are:

- Voluntary contribution: recruitment and opportunity to leave should be taken into account when establishing the *voluntariness* of a contribution;

- Significant contribution: since the Court in *Ezokola* wants to avoid the possibility that complicity can exist by association with a group alone, the law requires a significant contribution, but it does not have to be a contribution to specific identifiable crimes; it can be to a broader common purpose. The challenge, of course, is to determine what constitutes a sufficiently significant contribution, "[g]iven that contributions of almost every nature to a group could be characterized as furthering its criminal purpose, the degree of the contribution must be carefully assessed" (para 88). The significant contribution requirement is crucial;

- Knowing contribution: two elements must be present. Being aware of the criminal intent of the organization and aware that the conduct will assist in the furtherance of the crime or criminal purpose.

[31] The Court in *Ezokola* identified considerations that may guide the decision-maker in determining whether the person voluntarily made a significant and knowing contribution to an international crime or criminal purpose. There are six such considerations:

1. the size and nature of the organization;
2. the part of the organization with which the individual was most directly concerned;
3. the duties and activities within the organization;
4. position or rank;
5. the duration of membership in the organization;
6. the method of recruitment and the opportunity to leave the organization.

[32] The RPD's decision does not provide an understanding of the decision-maker's reasoning. Participation in specific crimes appeared to be confused with significant contribution to the organization's purpose. Indeed, the RPD, while identifying the issue, does not even mention the significant and knowing contribution to the criminal purpose of the organization (if any). Thus, at paragraph 18 of the decision, the RPD concludes that the Minister has failed to meet his "burden of proof to demonstrate that the principal claimant ordered, facilitated or encouraged the commission of the crimes". This is not the test. In fact, these are modes of

commission of offences under the *Criminal Code*, RSC 1985, c C-46, s 21. Aiding and abetting under *Ezokola* is broader, but it has its limits. The Supreme Court in *Ezokola* is at pains to establish its parameters. It must be shown that there are substantial grounds for believing that the person voluntarily made a significant and knowing contribution to the criminal purpose of the organization.

[33] When the RPD turns to *Ezokola*, it identifies a new issue, but once again, the possibility of a significant, voluntary and knowing contribution to the criminal purpose of the organization is dismissed and only whether the principal claimant "significantly, voluntarily and knowingly contribute[d] to the crimes committed by the Indian army" is considered (RPD decision, para 19). This is not the scope of complicity in international crimes, however. It does not require that the contribution be directed towards the commission of specific identifiable crimes; the broader concept of common purpose suffices.

[34] The RPD continued to consider the case from the perspective of individual responsibility. It states at paragraph 20 of its decision that "the panel notes that since the claimant did not commit any crimes, his intentions and knowledge of the circumstances of the crimes cannot reasonably be examined to establish individual responsibility". I am very concerned that this reasoning is not inherently consistent because it confuses two distinct regimes, namely individual responsibility for the commission of crimes and aiding and abetting, where there must be substantial grounds for believing that the person voluntarily contributed in a significant and knowing way to the criminal purpose of an organization. The reasoning becomes tautological when the two regimes are conflated. This makes the RPD's decision in this regard unreasonable.

[35] On the issue of whether the respondents should be granted refugee status, the RPD's decision lacks a complete presentation of the established facts and an analysis based on those facts leading to a conclusion. Put another way, the decision is declaratory in nature, with no way for the reviewing court to determine whether the statement made may be reasonable. A lack of intelligibility and transparency makes justification impossible.

[36] For example, the RPD finds contradictions and inconsistencies in the principal respondent's testimony. No record is left to understand the content. Yet the RPD is satisfied with a "psychological report" that allegedly allowed the panel to blame it all on the respondent's anxiety and depression. Are these reasonable conclusions? There is no way for the reviewing court to know. There is no justification, transparency or intelligibility.

[37] Similarly, the RPD appears to have ruled out the possibility of internal flight alternative on the basis that the local police abused the respondents on two occasions in the village where the respondents were living. Based on what was accepted by the RPD and stated by the principal respondent in what became the Basis of Claim Form in 2012 (but was the "Personal Information Form" prior to that date), this was at best a conflict between the principal respondent and a local Congress leader. The RPD does not explain in any way how a local situation can grow to the magnitude that the panel presents. In *Vavilov*, the Supreme Court provided as an example of clear logical fallacies, affecting the intrinsic coherence of reasoning, the use of unsupported generalizations or absurd premises (para 104). This generalization made by the RPD is not supported by any evidence. It leads the RPD to conclude peremptorily that a state that cannot protect its citizens cannot be expected to provide any protection at all. The RPD states that

“given its control over the national territory, there is no part of India where the claimants could safely relocate without the risk of blackmail, bullying and harassment from a corrupt and predatory police force” (RPD decision, para 29). No information is offered by the RPD to support such generalizations.

[38] Here again, the RPD’s decision does not contain the requirements of a reasonable decision.

IV. Conclusion

[39] Both aspects of the issue under consideration are lacking in terms of reasonableness. As a result, the application for judicial review must be allowed. The case is returned to the RPD for reconsideration by a new panel. The parties agree that there is no question of general importance to be certified under section 74 of the IRPA.

JUDGMENT in IMM-3088-20

THIS COURT ORDERS AS FOLLOWS:

1. The application for judicial review is allowed.

2. The case is sent back to the Refugee Protection Division for reconsideration by a new panel.

3. No question of general importance is certified.

"Yvan Roy"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3088-20
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION and AMRIK SINGH AND KULDEEP KAUR
PLACE OF HEARING:	VIA VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO ET MONTRÉAL, QUEBEC
DATE OF HEARING:	AUGUST 30, 2021
JUDGMENT AND REASONS:	ROY J.
DATED:	SEPTEMBER 24, 2021

APPEARANCES:

Evan Liosis	FOR THE APPLICANT
Odette Desjardins	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Odette Desjardins Attorney Montréal, Quebec	FOR THE RESPONDENTS