Federal Court Cour fédérale

Date: 20211207

Docket: IMM-365-20

Citation: 2021 FC 1364

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SYNIDA SETNA
JERRY MICHAEL SETNA
MICHAEL EDWARD SETNA
ALAURA LEAH SETNA
ANDREA FAITH SETNA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Setna family seeks the judicial review of a decision of the Refugee Appeal Division (RAD) confirming the decision of the Refugee Protection Division (RPD). In both cases, the application to be granted refugee protection by virtue of sections 96 and 97 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA] was dismissed.

[2] The Applicants in this case are a family of five; they are citizens of Trinidad and Tobago and the mother, Synida Setna, is the Principal Applicant. There is a fourth child who was born in Canada and is not included in the refugee application.

I. Context

[3] The matter before the Court is a redetermination following a decision by the RAD to send the matter back to the RPD, as permitted by section 111 of the IRPA. The RPD originally heard the Applicants' claims in 2014. The claims had been rejected by the RPD in August 2014. The appeal to the RAD was successful, the RPD decision was set aside which brought about a new determination by the RPD on March 11, 2019. Again, the RPD found that the Applicants had not demonstrated that they were convention refugees or persons in need of protection. The second appeal to the RAD came on December 10, 2019. This time the RAD confirmed the determination made by the RPD on redetermination. It is from that decision of the RAD, dated December 10, 2019, that a judicial review application was launched by the Applicants. Leave to launch a judicial review application was granted on August 18, 2021, in accordance with section 72 of the IRPA.

II. The Facts

[4] The Principal Applicant was in the business of importing consumer goods for resale in Trinidad and Tobago. Her husband is said to have run a successful trucking business.

[5] Over a period of a few months, the Applicants allege having been the victims of disturbing events. In December 2013, one of the Applicants, daughter Alaura, received a phone call on her mobile telephone while she was at home. An anonymous caller is alleged to have said that he knew where the parents lived; he also made very inappropriate comments. Alaura gave the cell phone to her father and this anonymous caller is alleged to have told the father a number of obscene utterances in relation to his daughter. The father followed up by removing the SIM card and changing the number on his daughter's cell phone. No other phone calls seemed to have taken place.

[6] On March 15, 2014, the father was the victim of a robbery at an automatic teller machine (ATM); he had just withdrawn about one hundred and fifty dollars (Canadian) when two men approached him. One of them said, "Make this a robbery not a murder."

[7] On April 1, 2014, the Applicants returned home to find it had been broken into. The house's front door had been smashed and several items had been stolen. This is the third of three incidents implicating directly the Applicants that led the family to leave Trinidad and Tobago in May 2014.

[8] The Applicants have also included in the incidents that led them to leave their country of origin the sexual assault suffered by Alaura's friend from school on January 26, 2014. It appears that the police later killed the suspects in a confrontation. It seems that the suspects had invaded the home of the raped victim, having broken into the house.

[9] There are on the record two affidavits from the friends or acquaintances in Trinidad and Tobago who testified that in 2015 and 2017, Afro-Trinidadian and Indo-Trinidadian men approached one of the two affiants to ask, in a rather aggressive fashion, about the Setna family. In the other affidavit, it is stated that in 2016 and 2018 Afro-Trinidadian and Indo-Trinidadian individuals approached that person to ask about the possible return of the Setna family.

[10] For reasons that remain largely obscure, two of the Applicants offered amendments to their basis of claim form close to five years after the original basis of claim form was submitted (original basis of claim stamped June 24, 2014, and amendments stamped March 6, 2019).

[11] These additions were to the following effect:

- The individuals who raped Alaura's friend in January 2014 were said to be "three black men";
- The father of this young girl told the Principal Applicant's husband that the men who raped the young girl said something to the effect that "they were raping her because "you Indian people" have all the money";
- Following the break-in in their homes, the Principal Applicant received anonymous calls on her phone;
- The Principal Applicant says that "at first, the caller did not speak. However, the last time the caller spoke and said he knew where we lived and that they would come after us. The caller warned not to call the police. The caller was a male."

[12] The Applicants contend that the Refugee Appeal Division, in its decision of December 10, 2019, made an unreasonable decision in finding that the Applicants are not convention refugees or persons in need of protection.

III. Standard of review

[13] The parties are in agreement, and the Court concurs, that the standard of review is that of reasonableness. It follows that the Court is concerned with both the outcome of the decision and the reasoning process that led to that outcome. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that the reviewing court must adopt an appropriate posture of respect concerning the decisions made by administrative tribunals. That is counterbalanced by the adoption of a culture of justification on the part of those to whom there is that delegation of public power in deciding matters of importance. In *Vavilov*, paragraph 95 of the decision makes that point vividly:

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[14] The burden to show that a decision is unreasonable lies on the party challenging the decision. Indeed, it must be shown 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, para 100). It is not any alleged flaw that will result in a successful decision for an applicant. Shortcomings that fall in the category of merely superficial or peripheral will not suffice.

[15] The *Vavilov* court also gives indications as to what makes a decision unreasonable. First, there may be failure of rationality internal to the reasoning process which would make the decision unreasonable. Thus, a failure to show an internally coherent reasoning would be fatal. The line of reasoning has to lead the administrative tribunal from the evidence received to the conclusion arrived at. Furthermore, the reasons may show logical fallacies, such as circular reasoning, false dilemmas, unfounded generalisations or an absurd premise. In a word, the decision must "add up" (*Vavilov,* para 104). Another type of fundamental flaws is where the decision is untenable in light of relevant factual and legal constraints. At paragraph 106 of *Vavilov*, the majority offers a number of considerations that could bear when considering if a decision is untenable:

> [106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

With the general framework being presented, we go to the arguments offered in this case and the analysis that is made by the Court.

IV. Arguments and Analysis

[16] The Applicants argue that the RAD made an unreasonable decision. On section 96 of the IRPA, they complain more specifically about a failure of the RAD to account for a forward-looking risk of persecution in Trinidad and Tobago, based on their ethnicity. As for section 97, they allege that the RAD disregarded, or misapprehended, key evidence. The Respondent relied exclusively on the deference that is owed the RAD concerning findings made largely on the basis of its assessment of the facts on which the Applicants rely.

[17] It is certainly true that the reviewing court must adopt a "posture of respect" (*Vavilov*, para 14), which translates into judicial restraint owed to the administrative decision maker (*Vavilov*, para 13). In effect, the shortcomings must be serious, not merely superficial or peripheral. As the Court said in *Vavilov*, "the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (para 100).

[18] It is the decision of the RAD that is the subject of the judicial review application, not that of the RPD. The incidents that gave rise to leaving Trinidad and Tobago are limited in scope: an anonymous obscene phone call that was not followed by anything else; a robbery at an ATM and a break and enter offence at the family house while they were away. Although very much disturbing, those events did not produce the identification of the perpetrators. The RAD concluded that the evidence was insufficient to establish a nexus to a Convention ground (s 96 of the IRPA). On a more general level, the statistics presented in evidence were found to not

support a contention that Indo-Trinidadians face a greater incidence of persecution based on ethnicity in Trinidad and Tobago. The RAD wrote at paragraph 10:

> [10] As noted by the RPD, the population of Trinidad and Tobago is roughly equally made up of East Indian and African descent people, comprising 35 and 34% of the population respectively, and over 7% of the population has mixed African/East Indian heritage. The objective country condition evidence indicates that Trinidad and Tobago is a robust parliamentary democracy with a vibrant media and civil society, but that there is a high level of violent crime, much of which is linked to organized crime and drug trafficking. Materials about human rights concerns in the National Documentation Package for Trinidad and Tobago do not confirm the Appellants' claim that Indo-Trinidadians face persecution there based on their ethnicity, although there is evidence that ethnic identity is an important factor in politics, and racial disparities persist, but "with Indo-Trinidadians comprising a disproportionate percentage of the country's upper class." Regarding victimization, there is evidence that Indo-Trinidadians were actually less likely to be victims of crime than other groups (only 25.5% of victims over the preceding 10 years, although they make up 35% of the population,) although they are more likely to be victims of violent crime rather than property crime. In contrast, Trinidadians of African descent are disproportionately victimized (40.7% of victims, although they make up only 34% of the population), and are much more likely to be murder victims (73.7 % of murder victims were African descent, in comparison to l7.7% who were of East Indian descent). I therefore find that the evidence in the NDP does not support the Appellants' claim that they are have a well-founded fear of persecution based on their ethnicity or race.

[19] The rape suffered by daughter Alaura's friend, although tragic and not to be minimized, is of limited value in this case. This is an attempt to claim persecution based on race through one sexual assault. The Applicants seem to believe that this "single element" supports their contention that they are targeted because of their ethnicity.

[20] For the RAD, the evidence did not establish anything more than a series of alleged incidents which consist of random offences, and not that there exists a well-founded fear of

persecution based on their ethnicity or of being more particular Indo-Trinidadians. The burden on the Applicants was to show, on a balance of probabilities, that the conclusion was unreasonable, a burden the Applicants have not been able to discharge. It was reasonably open to the RAD to consider the evidence insufficient. This Court cannot find any failure of rationality, transparency or intelligibility that could lead to a lack of justification that the requirements of section 96 of the IRPA were not met.

[21] As for the allegation concerning the section 97 claim, the RAD reminds the readers that the person in need of protection must be someone who personally faces a risk to life or cruel and unusual treatment not faced generally by other individuals. To quote from paragraph 17 of the RAD decision, “If the risk is not personal, and is faced generally by other individuals in or from that country, they will not be a person in need of protection under s.97”. Not being able to establish who the perpetrators are, or even to establish a connection between the crimes, eliminates the possibility of establishing that the Applicants were personally targeted.

[22] The RAD addressed directly allegations that came later according to which the Principal Applicant received anonymous phone calls after the break-in of April 1, 2014, and two acquaintances received visits over the years from people questioning them about the Applicants. First, the Principal Applicant did not seem to find the anonymous phone calls to be particularly troubling as she did not even mention them in her testimony. The RAD concludes that it is insufficient to connect the incidents or to establish any pattern of some form of targeting as alleged. Second, the same may be said of the visits over the years to acquaintances. There is no evidence connecting the three incidents, where the identification of the visitors is unknown and

individuals who showed up did so in broad daylight. As the RAD notes at paragraph 23 of the RAD decision, “The statements do not provide any information about what the people wanted or that they made threats of any kind, except that Lalsingh stated that “some of the men also acted aggressively towards me” and Shaffeer stated that their “overall general attitudes” made him find the incidents “disturbing.””.

[23] The Applicants who rely on section 97 continue to support the same burden of satisfying the reviewing court that the decision is unreasonable because there are sufficiently serious shortcomings. A decision will be unreasonable where there is a “failure of rationality internal to the reasoning process” (*Vavilov*, para 101) or it is not “justified in relation to the constellation of law and facts that are relevant to the decision” (*Vavilov*, para 105), as the decision can be said to be untenable in view of the facts and the legal constraints. Contrary to the Applicants’ contention, the evidence was not fundamentally misapprehended or not taken into account. On a standard of reasonableness, where the reviewing court is instructed not to substitute its view to that of the administrative decision maker, there was ample evidence to conclude, as the RAD did, that the incidents as reported by the Applicants did not rise to the level required under section 97 of the IRPA, such that an intervention by the reviewing Court is inappropriate: “It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings” (*Vavilov*, para 125).

[24] The Applicants tried to link the offences for which they were the victims (robbery and burglary) to racially-motivated crimes. In view of the quality of the evidence, the RAD could well have found that there was not sufficiently proven evidence that there was any such

connection. The visits of unknown persons to acquaintances to find out about the whereabouts of the Applicants do not reveal much. There is no evidence about who these people were, what they were seeking and why. The nature of the enquiries is not revealed and they are quite distinct from the alleged robbery and burglary, together with the obscene phone call where the identification of the alleged perpetrators was kept hidden by the perpetrators on purpose.

[25] The Applicants contend that the rape of Alaura's friend was offered in evidence so that, in conjunction with the other incidents, that would help establish "a pattern of behaviour that, on a balance of probabilities, was demonstrative of personal ethnic targeting" (memorandum of fact and law of the Applicants, para 44).

[26] Given that the other three alleged incidents involving the Applicants directly offer insufficient evidence of being racially-motivated through, for instance, giving some evidence about the perpetrators, there cannot be any "pattern of behaviour" involving the Applicants. It is certainly true that the victim of that odious sexual assault indicated that her assailants were black, but that one crime did not involve the Applicants other than the victim being a friend of Alaura's. That does not constitute personal targeting and none should be inferred, contrary to the Applicant's assertion.

[27] Many arguments offered by the Applicants consist of disagreements with the analysis of the RAD on a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, para 54; *Vavilov*, para 102). For instance, concerning an article submitted by the Applicants, the

RAD concluded that it was anecdotic and focused on perceptions rather than statistics. The Applicants contended otherwise, claiming that the assignment of minimal weight was unreasonable. I have read the said article, by an anthropologist, on which the Applicants relied specifically: it is in my respectful view as portrayed by the SAR: anecdotic and without statistics in support. It refers once to statistics compiled in 2005 by another anthropologist who defined a profile of victims of kidnapping some two decades ago. The article does not purport to be any kind of statistical analysis. It is rather about observations made by some factory workers. The first three lines of this 2012 article read: “Drawing on participant observation in garment factories in Trinidad, West Indies, this article explores circulating discourses of crime among shop-floor workers, managers, and factory owners during a national 'epidemic' of kidnappings-for-ransom” (“Kidnapping go build back we economy”: discourses of crime at work in neoliberal Trinidad, Applicants’ Record, p. 346). The RAD gave this evidence “limited” relevance. It was entitled to reach that conclusion.

[28] The same can be said of another article from 2012 also discussed in the Applicants’ memorandum of fact and law. The RAD is right in characterizing the article as an “academic discussion”. It is not so much that there is something wrong with an academic discussion. It is rather that this article can only be of limited relevance. The document, said to be a working paper by another anthropologist, is called “Racialisation in Trinidad and Tobago”; it explores racialization more than 13 years ago (it can be found in the Applicants’ Record at page 366). It did not support the case at hand that is so fact-specific.

[29] As for section 97 of the IRPA, once again the Applicants claim that the conclusion of the RAD is unreasonable. However, they rely exclusively on their disagreement with the view taken by the RAD of the evidence, stating that the RAD disregarded key evidence or misapprehend evidence. I disagree. The *Vavilov* Court set the bar high: "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (para 126). There was disagreement, but the evidence was not fundamentally disregarded and it was not misapprehended.

[30] The RAD concluded that the Applicants were not personally targeted. The Applicants did not show that there was evidence that the identification or identity of the alleged perpetrators was known. That may not be required as such, but that does not either assist in showing that the risk faced is not general. The evidence fell short of showing a personalized risk and the RAD's finding was reasonable. To put it otherwise, there is simply no evidence that the risk faced is something other than the general risk faced in Trinidad and Tobago. The Applicants had to show that the risk they faced is not one faced by the population in general. The requirement stems from the words of subparagraph 97(1)(b)(ii):

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
…	[…]
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	**b)** soit à une menace à sa vie ou au risque de traitements ou

	peines cruels et inusités dans le cas suivant :
…	[…]
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country	**(ii)** elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas
[Emphasis added.]	[Je souligne]

On this record, that is a conclusion that was reasonably open to the RAD to reach and that should not be disturbed on judicial review based on a standard of review of reasonableness.

[31] The written statements from two acquaintances about people seeking information about the whereabouts of the Applicants does not fare any better. They simply do not demonstrate anything that could tend to show a risk to the life of the Applicants (or risk of cruel and unusual treatment or punishment). There was no indication of any threat and it was open to the RAD to consider that to be insufficient to establish the Applicants were personally at risk.

V. Conclusion

[32] In my view, the Applicants did not discharge their burden under sections 96 and 97 of the IRPA. They have not shown the decision as being unreasonable. It is justified, transparent and intelligible in relation to the relevant factual and legal constraints. As a result, the judicial review application must be dismissed. The parties agree that this matter does not generate a certified question. I share that view.

JUDGMENT in IMM-365-20

THIS COURT'S JUDGEMENT is that:

1. The judicial review application is dismissed.
2. There is no serious question of general importance to be certified

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-365-20
STYLE OF CAUSE:	SYNIDA SETNA and AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 9, 2021
ORDER AND REASONS:	ROY J.
DATED:	DECEMBER 7, 2021

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