

Federal Court



Cour fédérale

Date: 20220328

Docket: IMM-6374-21

Citation: 2022 FC 419

Vancouver, British Columbia, March 28, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

S.K.

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, a citizen of Fiji, seeks judicial review of an August 24, 2021 decision [Decision] of the Refugee Appeal Division [RAD], dismissing his appeal from a decision of the

Refugee Protection Division [RPD] that he is neither a Convention refugee nor a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] As explained in greater detail below, this application is dismissed, because the Applicant's arguments do not undermine the reasonableness of the RAD's conclusion that there is adequate state protection available to the Applicant if he were to return to Fiji.

II. **Background**

[3] The Applicant has claimed refugee protection in Canada on the basis of his Indo-Fijian ethnicity and his sexual orientation as a gay man. In rejecting his claim, the RPD found him credible but concluded that he had not rebutted the presumption that Fijian state authorities could protect him. On appeal, the RAD admitted new evidence, in the form of updated country condition evidence [CCE], but agreed with the RPD that the Applicant had not met his burden of rebutting the presumption of state protection.

[4] The RAD found that, although the CCE showed some deficiencies in the level of state protection, the Applicant had not provided clear and convincing evidence that adequate state protection was not available to him. After canvassing the CCE, the RAD found it established that the authorities in Fiji possess the ability to protect its citizens (including the Applicant) regarding complaints of persecution and discrimination, whether on the basis of sexual orientation or race.

[5] The RAD also considered whether the Applicant had approached the state for protection and whether he exhausted all available courses of action. It found that the Applicant sought

police assistance in relation to incidents of criminality but did not contact the police or any state authority in relation to discrimination due to his sexual orientation or because he is Indo-Fijian. The RAD concluded the evidence did not establish that the police response was inadequate or would be inadequate in the future. Finding the Applicant's concern, that authorities would be ineffective in responding to persecution, to be based on his subjective view and unsupported by the objective evidence, the RAD concluded that adequate state protection would be available if sought.

III. **Issue and Standard of Review**

[6] The sole issue the Applicant raises is whether the RAD's findings on state protection are reasonable. As suggested by this articulation of the issue, the applicable standard of review is reasonableness.

IV. **Analysis**

[7] In challenging the reasonableness of the Decision, the Applicant takes issue with the RAD's conclusion that he failed to rebut the presumption of availability of state protection, including the RAD's analysis of his failure to seek state protection. His submissions rely heavily upon the *Chairpersons Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* [the Guidelines], which address the challenges that particular categories of claimants, including those asserting claims involving sexual orientation, may face in presenting their claims. The Applicant argues that the RAD failed to conduct its analysis in a manner consistent with the Guidelines.

[8] In particular, the Applicant references the Guidelines' explanation of the unique challenges claimants may face in presenting evidence in cases involving sexual orientation, gender identity and expression, and sex characteristics [SOGIESC], the fact that SOGIESC claimants may conceal their identities due to mistrust or fear of repercussion by state and non-state actors or due to previous experiences of stigmatization and violence, and the fact that CCE on the treatment of such claimants can be limited or even nonexistent. The Guidelines identify that the intersection of SOGIESC with additional marginalization factors such as race or ethnicity may create both an increased risk of harm and distinct and specific risks of harm, including affecting a claimant's access to state protection. Also in relation to state protection, the Guidelines explain that, where SOGIESC claimants do not disclose their identities or report incidents of violence out of fear of further reprisal from the state or non-state actors, it may be unreasonable for them to approach the state for protection.

[9] Referencing the guidance in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99, that a Court's assessment of the reasonableness of an administrative decision requires consideration whether it is justified in relation to the relevant factual and legal constraints that bear on the decision, the Applicant submits that the Guidelines represent an important constraint that bear on the Decision in the case at hand. He also relies on the explanation in *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 at para 14, that persecution can be established by examining the treatment of similarly situated individuals, such that the claimant does not have to show that he has himself been persecuted in the past.

[10] Against that jurisprudential backdrop, the Applicant refers to his evidence of bullying and harassment to which he has been subjected and evidence of friends who experienced severe discrimination and violence due to their sexual orientation, resulting in suicide. He also emphasizes an incident in which he was chased from a bus stop, by an individual who called him a name referencing his ethnicity, and then entered a police station. The Applicant explains that the police did not believe he was being chased, notwithstanding that some officers had been outside the police station at the time of the Applicant's arrival and, in his view, must have seen his pursuer.

[11] The Applicant's counsel argues that these personal experiences, and those of his friends to which he was privy, combined to create a reasonable fear of discrimination and fear of Fijian authorities, such that it was reasonable for the Applicant not to make efforts to seek state protection against what he submits was persecution to which he was subjected based on his sexual orientation and ethnicity. The Applicant's counsel also emphasizes that the RPD found the Applicant's evidence about the events he experienced in Fiji to be generally credible.

[12] At the hearing of this application for judicial review, each party drew the Court's attention to elements of the CCE that favoured their position on the availability of adequate state protection in Fiji. Both parties recognized that the evidence is mixed. The Respondent submits that, because the evidence is mixed and the RAD canvassed the evidence and concluded that adequate state protection was available, the Decision is reasonable in accordance with the standard of review prescribed by *Vavilov* and there is no basis for the Court to interfere. The

Applicant recognizes that reasonableness is the applicable standard of review but raises particular concerns with the RAD's treatment of the evidence.

[13] Turning first to the incident in which the Applicant was chased from the bus stop, the Applicant takes issue with the RAD's treatment of his evidence surrounding that incident. The RAD found the evidence did not establish that the police response was inadequate or would be inadequate in the future. The RAD characterized the Applicant's description of this incident as confusing and declined to place any weight on the incident as indicating a poor or inadequate police response or that the Applicant was targeted due to his ethnicity or sexual orientation. The Applicant argues that this analysis is inconsistent with the RPD's favourable determination of his credibility, with which the RAD had no basis to disagree on appeal.

[14] I do not read this portion of the Decision as an adverse credibility determination. Rather, the RAD regarded the evidence as to what actually occurred to be unclear and therefore afforded the incident little weight in connection with either targeting of the Applicant or the availability of state protection. I find nothing unreasonable in this analysis.

[15] The Applicant also takes issue with the RAD's rejection of an argument that self-censorship of the press in Fiji prevents reporting of persecution based on ethnicity and sexual orientation and therefore diminishes the CCE that would identify that state protection against such persecution is unavailable. The RAD considered the CCE and found no support for this position. However, the Applicant argues that it is not intelligible to expect him to demonstrate the existence of such self-censorship, as censorship by its nature suppresses the

availability of such evidence. He submits that such an analysis is contrary to the Guidelines' recognition of the inherent difficulty in mustering certain types of evidence.

[16] On this point, the RAD considered the Applicant's argument but found no mention in the CCE of media self-censorship in relation to reporting of persecution based on ethnicity or sexual orientation. The RAD also noted that the Applicant's own documentary evidence consisted of Fijian news articles that reported on human rights and concerns specific to the LGBTQ community. I take the Applicant's point that the existence of some reporting does not mean that self-censorship of other potential reporting has not taken place. However, I agree with the Respondent's position that the RAD cannot be faulted for relying on the only evidence that is available to it.

[17] Next, in relation to CCE surrounding police misconduct, the Applicant notes the RAD's observation that slow judicial processes have contributed to an impression of impunity in police abuse cases. The RAD nevertheless concluded that the police misconduct is investigated and addressed. The Applicant argues that this analysis misses the point that, if slow judicial processes create an impression of impunity, then it would be reasonable for the Applicant to choose not to seek state protection because of fear of police misconduct.

[18] I find little merit to this submission. The RAD explains that the evidence of police abuse and misconduct was against accused persons and suspected criminals. It found there was no evidence that persons reporting crimes to the Fijian police (which is the situation of the Applicant) were subject to abuse or misconduct.

[19] In relation to the Fiji Human Rights and Anti-Discrimination Commission [FHRADC], the Applicant notes that the 2020 United States Department of State Report [US DOS Report] describes this tribunal as pro-government and generally disinclined to address politically sensitive human rights matters. The RAD found insufficient evidence that the FHRADC is operationally ineffective or that it would not respond to a discrimination complaint should the Applicant choose to file one. The Applicant argues that the RAD erred by relying on self-reporting by the tribunal to arrive at this conclusion.

[20] I find no reviewable error in the RAD's treatment of this element of the CCE. While the RAD considered the FHRADC's self-reporting, it also relied on the US DOS Report submitted by the Applicant and found that the latter did not contain significant criticisms related to the operational effectiveness of the tribunal. As the Respondent submits, there is nothing in the evidence upon which the Applicant relies which speaks directly to the tribunal being unprepared to address complaints of discrimination or persecution based on sexual orientation or race.

[21] The Applicant also argues that the RAD's analysis misses the point that this evidence adds credibility to his lack of confidence in the ability of Fijian authorities to protect him from discrimination rising to the level of persecution in Fiji. He submits that this evidence forms part of the CCE favourable to his position that, combined with his personal experiences, gives rise to his subjective fear of approaching state authorities for protection. The Applicant notes Justice Norris' explanation in *AB v Canada (Citizenship and Immigration)*, 2019 FC 1339 [AB] at para 20, that it would defeat the purpose of international refugee protection if the claimant was

required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

[22] In my view, this submission misses a fundamental element of the RAD's analysis, which is that the Applicant's subjective fear of state authorities is insufficient to rebut the presumption of state protection given the objective evidence that such protection is available. The RAD's analysis does not offend the principal expressed in *AB*, as the RAD concluded based on the objective evidence that, while the Applicant may have genuinely feared the authorities, he was not actually at risk in approaching them for protection that the RAD found on a balance of probabilities to be available.

[23] As previously noted, the Applicant's position relies significantly on the evidence of his personal experiences, including the tragic loss of his friends to suicide following discrimination and violence associated with their sexual orientation, combined with his fear of police brutality. However, while the RAD appears to have accepted the Applicant genuinely holds the view that the police and other state agencies would be ineffective in responding to persecutory discrimination, neither the personal evidence nor the CCE undermines the reasonableness of the RAD's conclusion that this subjective view is not objectively well-founded.

[24] Finally, while the Applicant did not significantly advance this point in oral argument, his written submissions assert that the RAD failed to assess the intersectional components of his claim (i.e., the fact that he fears persecution based on both his sexual orientation and his ethnicity), notwithstanding that such intersectionality was central to his position that state

protection was not available to him. However, as the Respondent submits, it is clear that the RAD was aware that the Applicant was claiming risk as a gay Indo-Fijian man and that it considered both aspects of his stated fears as well as the CCE relevant to both aspects of his claim. I agree with the Respondent's position that it is not clear from the Applicant's argument how he considers that the intersectional or cumulative nature of his claim reduces his ability to access state protection. I find no reviewable error arising from this argument.

[25] Having found no basis for a conclusion that the Decision is unreasonable, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6374-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Deanna L. Okun-Nachoff

FOR THE APPLICANT

Alexander Menticoglou

FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCrea Immigration Law LLP
Vancouver, British Columbia
Attorney General of Canada
Vancouver, British Columbia

FOR THE APPLICANT

FOR THE RESPONDENT