

Federal Court



Cour fédérale

Date: 20220511

Docket: IMM-7763-21

Citation: 2022 FC 701

Vancouver, British Columbia, May 11, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

HARWINDER PAL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a 37 year-old Indian citizen. His claim for refugee protection was refused by the Refugee Protection Division [RPD] for reasons of credibility. The Refugee Appeal Division [RAD] upheld the RPD's decision but did so on different grounds. The RAD found there to be serious reasons to consider the Applicant had committed a serious non-political crime outside of Canada, thereby excluding him from protection.

[2] In applying under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the RAD's September 29, 2021 decision, the Applicant raises two issues:

- A. Did the RAD fail to adhere to the principles of procedural fairness?
- B. Is the decision unreasonable?

[3] Having carefully considered the Applicant's oral and written submissions, I am not persuaded the Court's intervention is justified. The Applicant has failed to demonstrate a breach of procedural fairness and I am satisfied the RAD's decision was reasonable.

II. Background

[4] The Applicant reports he fears his father and uncles in India. He states he has been physically attacked in public as a warning to both him and his mother – they should not oppose his father in any legal proceedings relating to his father's efforts to obtain a divorce from his mother. The Applicant states his father is wealthy and has connections to Indian authorities.

[5] Despite having complained to police after being attacked, the Applicant reports the police refused to take action. The Applicant departed India in August 2018 and arrived in Canada on a visitor visa. He sought refugee protection in February 2019.

[6] On March 18, 2019, a First Information Report [FIR] was filed against the Applicant in India. This document accuses the Applicant of offences related to human trafficking. The Applicant allegedly lured three Indian men to Libya, where they were forced to work without

pay for four months. Indian authorities subsequently issued two arrest warrants for the Applicant, raided his house on multiple occasions and declared him a “proclaimed offender”.

[7] The Applicant asserts the statements contained within the FIR are false accusations and his father paid the three men who made the claims.

[8] In rejecting the refugee claim, the RPD found the Applicant submitted insufficient evidence to support his claims, his testimony and narrative were inconsistent and he failed to establish the FIR was based on false accusations.

III. Decision under Review

[9] The RAD upheld the RPD’s decision but did so on the basis that the Applicant is excluded from refugee protection pursuant to IRPA section 98 and Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*], which state:

***Immigration and Refugee Protection Act, SC 2001, c 27
Exclusion — Refugee Convention***

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.

Convention Relating to the Status of Refugees

***Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27
Exclusion par application de la Convention sur les réfugiés***

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.

Convention relative au Statut des Réfugiés

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

[...]

(b) he has committed a serious non-political crime outside the country of

refuge prior to his admission to that country as a refugee.

1F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

[...]

(b) qu'elles ont commis un crime grave de droit commun en dehors du pays

d'accueil avant d'y être admises comme réfugiées.

[10] The RAD found the allegations contained in the FIR would constitute human trafficking in Canada under sections 279.01(1)(b) and 279.02(1) of the *Criminal Code*, RSC 1995, c C-46.

These offences each carry a maximum sentence of at least ten years' imprisonment and presumptively constitute serious crimes.

[11] After assessing the factors set out in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, the RAD found the serious crime presumption was not rebutted.

Specifically, the RAD considered the elements of the crime, the mode of prosecution, the penalty prescribed, the underlying facts and mitigating and aggravating circumstances.

[12] The RAD found FIRs can be difficult to file in India and are only used for serious offences. The RAD described the FIR's allegations as "grave" and noted evidence indicating Indian authorities have made repeated attempts to locate the Applicant. The RAD acknowledged no penalty had been imposed as the Applicant had not been prosecuted and considered the Applicant's argument that he had not been charged with human trafficking specifically but with

lesser associated crimes. However, the RAD concluded a more rigorous investigation of the Applicant's actions had not yet been conducted (in part due to his absence), the events described in the FIR appear to constitute human trafficking as described in the Indian Penal Code and this charge could be added by authorities. In addition, the RAD found that even if the Indian Penal Code provisions relating to human trafficking did not apply, the Applicant had been charged with "criminal breach of trust", which also carries a maximum sentence of over ten years' imprisonment in Canada.

[13] The RAD found the cross-border nature of the allegations, the serious international problem presented by human trafficking and the international condemnation of this crime to be aggravating factors. Finally, the RAD noted there is no indication the alleged crime was political in nature.

[14] The RAD then found there were serious reasons to consider the Applicant committed the criminal acts in question. The FIR contains detailed allegations and includes several previously written applications filed by the three supposed victims with the Ministry of the Exterior requesting payment for their months spent working in Libya. A number of other Indian and Libyan government departments have been alerted to the accusations. The FIR claims the Applicant confirmed to the Libyan police that he participated in a forced labour scheme. There is some evidence Indian officials began investigating the Applicant even before the filing of the FIR. The RAD found there was insufficient evidence to indicate these departments and officials were colluding or had been influenced by the Applicant's father or uncles. Additionally, the dates provided by the Applicant regarding his time in Libya are consistent with the allegations in

the FIR. Although the Applicant presented affidavits from his wife, mother and a community leader stating he was falsely accused, the RAD gave this evidence little weight, holding the affiants had no direct knowledge of the events in question. The RAD noted the Applicant has made no effort to answer the charges, either from Canada or through his family or associates in India.

IV. Standard of Review

[15] The parties agree the RAD's decision is to be reviewed on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The onus is on the Applicant to demonstrate the decision is unreasonable. To set aside a decision on this basis, "the reviewing court must be satisfied 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* at para 100).

[16] Questions of fairness are reviewed by asking whether a fair and just process was followed having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). This review is "best reflected in the correctness standard," although no standard of review is actually being applied (*CPR* at para 54; see also *Grewal v Canada (Citizenship and Immigration)*, 2020 FC 1186 at para 5; *Sun v Canada (Citizenship and Immigration)*, 2020 FC 477 at para 27; *Taseko Mines Limited v Canada*

(*Environment*), 2019 FCA 319 at para 49; and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

V. Analysis

A. *There was no breach of procedural fairness*

[17] The Applicant argues that in refusing his claim, the RAD relied on information within its specialized knowledge. He submits the RAD was required to provide him with notice and an opportunity to make submissions before relying on such knowledge. These obligations are reflected in section 24 of the *Refugee Appeal Division Rules*, SOR/2012-257, and required by the principles of procedural fairness.

[18] In written submissions, the Applicant does not identify what “specialized” information or knowledge the RAD relied upon. In oral submissions, the Applicant argued the RAD appears to have relied on specialized knowledge in suggesting a more rigorous investigation is yet to be completed in India and the charges listed in the FIR may differ from those laid by a prosecutor. I disagree.

[19] The RAD’s comments arise in the context of the RAD responding to the Applicant’s argument that he had not been charged with a human trafficking offence in the FIR. In doing so, the RAD described the FIR as an initial criminal report and then notes, citing the National Documentation Package [NDP], that it is ultimately prosecutors, not the police, who decide, “which offences to pursue”. The RAD’s comments were grounded in the NDP evidence and

surrounding circumstances, including the Applicant's absence from India and the references to human trafficking in the FIR, not specialized information or knowledge.

[20] More broadly, the RAD ensured the Applicant had notice of and an opportunity to address the exclusion issue. First, the RAD advised the Applicant it was considering giving notice to the Minister on the issue of exclusion and invited the Applicant to make submissions. Having not received any response from the Applicant, the RAD then notified the Minister and the Applicant of the possible exclusion issue. The RAD again invited the Applicant to make submissions on the issue of exclusion and, more specifically, the Applicant's alleged involvement in human trafficking. The Applicant provided submissions that were considered and addressed by the RAD.

[21] I am satisfied that, in the circumstances, the process was fair and just.

B. *The RAD's decision is reasonable*

[22] The Applicant argues the Minister bore the onus of establishing the Applicant's exclusion and, because the Minister did not intervene or respond to the notification sent by the RAD, the Minister's onus was not met. In the absence of submissions from the Minister, the Applicant argues, the RAD could not have reasonably found the Applicant was excluded from refugee protection.

[23] The Applicant further submits the RAD erred by holding he had been accused of involvement in human trafficking pursuant to Indian law. The Applicant notes the charges

referred to in the FIR involved cheating and dishonesty, criminal breach of trust and recruiting without certification. None of the FIR charges allege human trafficking, which is prohibited under a separate section of the Indian Penal Code. The Applicant also argues there was no other evidence before the RAD to justify finding he had been or could be charged with human trafficking in India. The Applicant submits the RAD's conclusion to the contrary was speculative.

[24] The RAD is required to base its decisions on “evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances” (IRPA section 171(a.3)). In doing so, the RAD is required to carry out its own analysis of the record and finally determine the claim (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103). The RAD did so in this instance.

[25] In reviewing the evidence, the RAD addressed why it considered the FIR to be credible and trustworthy, noting, for example, the detailed nature of the allegations and the consistency between the Applicant's evidence and the timing of the events described in the FIR. The Applicant's suggestion that the Minister's decision not to intervene in the claim or respond to a notice from the RAD would dictate a result in this case, is not supported by any authority and inconsistent with the RAD's obligation to render a decision based on the evidence.

[26] In this instance, the RAD determined there was sufficient credible and trustworthy evidence on the face of the record to make an exclusion finding without the Minister's intervention. This evidence established “serious reasons to consider” the Applicant committed a

serious non-political crime before entering Canada, thus satisfying the standard for exclusion set out in IRPA section 98 and Article 1F(b) of the *Refugee Convention*.

[27] The Applicant takes issue with the RAD's conclusion because he was not charged with the offence of human trafficking in the FIR. The offences charged in a foreign jurisdiction, while relevant, are not determinative of a section 98 analysis. In this instance, the RAD acknowledged the Applicant was not charged with human trafficking. However, the RAD also explained a FIR is not itself a charge sheet but merely an initial report that triggers a criminal investigation into serious offences. The FIR states the Applicant's alleged victims have accused him of human trafficking and describes events that the RAD was satisfied would constitute human trafficking under the Indian Penal Code and sections 279.01(1)(b) and 279.02(1) of the *Criminal Code*.

[28] While the Applicant takes issue with the RAD's finding that human trafficking may be added to the Applicant's charges, this statement does not undermine the reasonableness of the RAD's decision. First, the true issue is how the alleged conduct is to be characterized under Canadian law, not what offence was or may be charged in a foreign jurisdiction. More importantly, the RAD's statement in this regard is grounded in the evidence and accounts for Indian criminal law procedure.

[29] The RAD's decision was reasonably open to it in light of the factual and legal context and is supported by reasons that are transparent and intelligible.

VI. Conclusion

[30] For the above reasons, the Application is dismissed. The parties have not identified a question of general importance for consideration and I am satisfied that none arises.

JUDGMENT IN IMM-7763-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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