

Federal Court



Cour fédérale

Date: 20220728

Docket: IMM-1765-21

Citation: 2022 FC 1133

Ottawa, Ontario, July 28, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ANISH KALAPPURAKKAL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Anish Kalappurakkal (“Mr. Kalappurakkal”) applied for refugee protection in Canada. His claim was refused by the Refugee Protection Division (“RPD”). Mr. Kalappurakkal appealed this refusal to the Refugee Appeal Division (“RAD”). The RAD dismissed his appeal on March 1, 2021. Mr. Kalappurakkal challenges the RAD’s dismissal in this judicial review.

[2] Mr. Kalappurakkal argues that the RAD stated and applied the incorrect legal test in assessing his claim under s 97 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA] by requiring that he demonstrate that he probably “will be tortured with state approval, killed or treated cruelly and unusually” instead considering whether he faced, on a balance of probabilities, a danger of torture or a risk to his life or a risk of cruel and unusual treatment.

[3] I agree with Mr. Kalappurakkal that the RAD applied the wrong test in evaluating his s 97 claim. I can see no basis to find, as the Respondent argued, that viewing the RAD’s reasons contextually, the RAD understood and applied the correct test. The RAD repeatedly stated the s 97 test incorrectly in their reasons and there is no evidence anywhere in the decision that the RAD was applying the correct test under s 97 of the *IRPA*.

[4] Given my determination on the s 97 issue, I have not considered Mr. Kalappurakkal’s second argument with respect to the RAD’s finding that there was no nexus to a ground of persecution under s 96 of the *IRPA*.

[5] Based on the reasons set out below, the judicial review application is granted.

II. Background Facts

[6] Mr. Kalappurakkal is a citizen of India. He made a claim for refugee protection in Canada in March 2019. He did not have counsel represent him at his hearing before the RPD. The claim was refused in January 2020 primarily on the basis that there was no nexus to a

ground of persecution under s 96 of the *IRPA*. The RPD did not consider his claim under s 97 of the *IRPA*.

[7] Mr. Kalappurakkal appealed the RPD's refusal to the RAD. The RAD agreed that the RPD had erred in not considering the claim for protection under s 97 of the *IRPA*. The RAD did this analysis under s 97 but ultimately dismissed the appeal.

III. Issues and Standard of Review

[8] As noted above, the only issue I am considering is whether the RAD stated and applied the incorrect legal test in considering Mr. Kalappurakkal's claim under s 97 of the *IRPA*. The parties agree that I should be reviewing the RAD's decision on the standard of reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

[9] The RAD stated the s 97 test incorrectly in their reasons. The RAD stated that a claimant must demonstrate, on a balance of probabilities, that they will face torture or will be killed or they will face cruel and unusual treatment. The language in s 97 (1)(a) refers to a "danger ...of torture" and s 97 (1)(b) refers to a "risk to their life or a risk of cruel and unusual treatment or punishment." By omitting the qualifying words "danger" with respect to a torture and "risk" with

respect to death and cruel and unusual treatment, the RAD fundamentally altered the statutory test the applicant was required to meet to be found to be a “person in need of protection.”

[10] The RAD makes this same error at two separate points in their reasons:

[30] Counsel writes that, “The test under s 97 is on the balance of probabilities a danger of torture and a risk of mistreatment or punishment.” While the wording of s. 97 might arguably have been read as requiring risk similar to that under s. 96, the Federal Court of Appeal has ruled to the contrary that a s. 97 claimant must establish that they probably will be tortured with state approval, killed, or treated cruelly and unusually.

[35] In sum, I find that the scenario Mr. Kalappurakkal depicted of a number of villains probably having him tortured, killed or otherwise cruelly treated with impunity, is not established.

[Emphasis in original]

[11] The Respondent argued that taking a contextual approach to evaluating the RAD’s reasons, it is clear that the RAD understood the correct test to apply under s 97 of the *IRPA*. I do not agree. There is no evidence of the RAD stating the correct test anywhere in the reasons.

[12] The Respondent pointed to RAD’s reference to the qualifiers of “danger of torture” and “risk of mistreatment or punishment” earlier in paragraph 30 of their decision. This does not assist the Respondent’s position. The reference to those qualifiers is only to quote the submissions of counsel and then in the next sentence, the RAD disputes this formation by omitting these qualifying words in describing what is required of claimants in making out a s 97 claim.

[13] There is no indication anywhere in the RAD's reasons that they properly understood and applied the correct test under s 97 (*Kedelashvili v Canada (Citizenship and Immigration)*, 2010 FC 465 [*Kedelashvili*] at para 9; *Rajadurai v Canada (Citizenship and Immigration)*, 2013 FC 532 [*Rajadurai*] at paras 34, 47-48). The application for judicial review is granted.

V. Certified Question

[14] Mr. Kalappurakkal requested the following question be certified:

Is the threshold of risk under s 97(1)(a) and (b) that the s 97 claimant must establish that they probably will be tortured with state approval, killed or treated cruelly and unusually?

[15] The Federal Court of Appeal has confirmed that in order to be certified, a question must be a serious question that (a) is dispositive of the appeal; (b) transcends the interests of the parties; and (c) raises an issue of broad significance or general importance (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46).

[16] The issue raised in the proposed question is not dispositive of this application and therefore does not meet the requirements for certification. As noted above, the RAD clearly applied the wrong test by omitting key words that are in the statute. This interpretation is not in accordance with the jurisprudence of this Court or the Court of Appeal (*Rajadurai* at para 34; *Kedelashvili* at para 9; *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 [*Li*]).

[17] Mr. Kalappurakkal argued at the further memorandum stage and in oral submissions that the s.97 test as articulated by the Federal Court of Appeal in *Li* needs to be revisited in light of international jurisprudence and that this was a basis to certify a question of general importance. The way the question was formulated does not address this issue. In any case, the argument about revisiting *Li* was not made to the RAD and I did not address this issue in my reasons.

JUDGMENT IN IMM-1765-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision of the RAD dated March 1, 2021 is set aside and sent back to be redetermined by a different member of the RAD; and
3. No question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1765-21

STYLE OF CAUSE: ANISH KALAPPURAKKAL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 16, 2022

JUDGMENT AND REASONS: SADREHASHEMI J.

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