Federal Court  Cour fédérale

Date: 20221220

Docket: IMM-8670-21
IMM-8671-21
IMM-8669-21
IMM-8667-21

Citation: 2022 FC 1764

Ottawa, Ontario, December 20, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

MAST SINGH, GURWINDER SINGH, SIMRANJEET KAUR AND KULDEEP KAUR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Mast Singh, his spouse Kuldeep Kaur, and their two children, are all citizens of India. They seek judicial review of a decision by the Refugee Appeal Division

[RAD], dated November 9, 2021, to dismiss the Applicants' appeal and confirm the decision of the Refugee Protection Division [RPD] to reject their claim for refugee protection, finding that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicants claim that they fear the Punjab and Haryana police because they will lay false charges against Mr. Singh, the Principal Applicant, and illegally detain, torture, or kill him for having criticized the local government and police for being involved in the drug trade. Moreover, they claim that the Principal Applicant was falsely accused of helping Sikh militants and being involved in the assassination of Hindu leaders in January and October 2017.

[3] The Applicants came to Canada in September 2017. They filed a refugee claim in July 2019.

[4] The determinative issues for the RPD were the existence of a viable Internal Flight Alternative [IFA] in New Delhi and the credibility of the Applicants as it relates to the IFA. The determinative issue for the RAD was the existence of an IFA.

[5] The Applicants submit that the RAD erred by: (i) requiring corroboration of the Principal Applicant's evidence as to the information provided by his brother; (ii) failing to apply the correct legal test when ascertaining whether there is a future risk in the IFA; and (iii) concluding that the Applicants have a viable IFA in New Delhi.

[6] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[7] The three issues in the present judicial review are:

A. Did the RAD err in its treatment of the testimony by the Principal Applicant that his brother was visited by the police?

B. Did the RAD err in its assessment of the reasonableness of the proposed IFA?

C. Did the RAD apply the correct legal test when assessing future risk?

[8] The parties agree that the applicable standard of review is that of reasonableness as set out in Canada (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the party challenging the decision who bears the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court 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", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[9] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). A reasonableness review also is not a "line-by-line treasure hunt for error," the reviewing court simply must be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102, 104).

III. Analysis

A. *Did the RAD err in its treatment of the testimony by the Principal Applicant that his brother was visited by the police?*

[10] The Principal Applicant testified that his brother was told by the police that they believed he was involved in the murder of a Hindu politician, but failed to obtain any evidence or a statement from his brother. When the RPD enquired as to why he did not obtain such a statement from his brother, the Principal Applicant testified that he did not know. The RAD concluded that it did not accept his explanation and that it was reasonable to expect that the Principal Applicant would obtain such a statement to show that he is actively sought by the police.

[11] The Applicants submit that there is no general requirement that a person provide corroborating evidence because to do so would reverse the well-known presumption of truthfulness established by the Federal Court of Appeal in *Maldonado v Canada (Minister of Employment and Immigration)*, 1979 CanLII 4098 (FCA) at 305 [*Maldonado*].

[12] The Respondent submits that the evidence was hearsay evidence and that the Applicants' reliance on *Maldonado* is misplaced given that the information did not come from the Principal Applicant. The Respondent further submits that evidence tendered by witnesses with a personal interest in the matter typically require corroboration.

[13] I agree with the Respondent. Uncorroborated statements made by persons with a personal interest in the outcome tend to have little probative value (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27; *Atafo v Canada (Citizenship and Immigration)*, 2022 FC 922 at para 19). In the present case, we do not even have such a statement.

[14] The Principal Applicant did not witness the interaction with the police and has no personal knowledge of it. He was at best simply repeating what he was told by his brother. This is the very definition of hearsay. The presumption of truth established in *Maldonado* finds no application here because the RAD does not doubt that the Principal Applicant spoke with his brother. Rather what is at issue is whether sufficient evidence had been adduced to demonstrate that the police had in fact been searching for him and the reasonableness of the explanation for failing to obtain a statement from his brother.

[15] I find no error in the RAD's treatment of the evidence that the Principal Applicant's brother was visited by the police regarding the murder of a Hindu politician in 2017.

B. *Did the RAD err in its assessment of the reasonableness of the proposed IFA?*

[16] The analysis of an IFA is based on the principle that international protection can only be offered to claimants in cases where the country of origin is unable to provide such claimants with adequate protection everywhere within their territory (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 26). It is well established that international protection is a measure of last resort, as such, if claimants can safely and reasonably relocate within their country of nationality, they are expected to do so rather than seek refugee protection in Canada (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7). Consequently, if a claimant has a viable IFA, this will negate a claim for refugee protection under either section 96 or 97 of the IRPA, regardless of the merits of other aspects of the claim (*Ibid*).

[17] The test for establishing the viability of an IFA is two-pronged. Both prongs must be satisfied in order to make a finding that a claimant has an IFA. The first prong consists of establishing, on a balance of probabilities, that there is no serious possibility of the claimant being subject to persecution in the proposed IFA. In the context of section 97, it must be established that the claimant would not be personally subjected to a section 97 danger or risk in the proposed IFA. The second prong requires that the conditions in the proposed IFA be such that it would not be unreasonable, upon consideration of all the circumstances, including of the claimant's personal circumstances, for the claimant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (FCA) at 597-598; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10-12; *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 9; *Mora Alcca*

v Canada (Citizenship and Immigration), 2020 FC 236 at para 5 [*Mora Alcca*]; *Souleyman v Canada (Citizenship and Immigration)*, 2020 FC 708 at para 17).

[18] It is a refugee claimant, and not a respondent or the RAD, who bears the onus of demonstrating that the IFA is unreasonable (*Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106 at para 21). As stated by Justice René LeBlanc in *Mora Alcca*, the onus is an exacting one:

> [14] I am well aware that the onus of demonstrating that an IFA is unreasonable in a given case, an onus that rests with the claimant, is an exacting one. In fact, it requires nothing less than demonstrating the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions.
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> [Citations omitted.]

[19] The Applicants submit that the RAD erred in concluding that the Punjab and Haryana police have the means and motivation to locate them in the IFA. The Applicants plead that their credibility was not at issue, and therefore the RAD cannot simply ignore the Principal Applicant's evidence that the police are in fact motivated to find him based on their past interaction with him. The Principal Applicant submits that he has been accused of a serious political crime, the involvement with the death of two Hindu politicians, one in January 2017 and one in October 2017, and is clearly at risk if he returns to India.

[20] The Applicants argue that the RAD failed to meaningfully engage with the Principal Applicant's testimony that the police threatened to lay a false charge against him if he left the area without notifying them. The Applicants submit that this was a "legal condition" which they

breached, and as such the RAD ought to have expressly considered this issue when assessing the Principal Applicant's profile.

[21] The Respondent submits that the RAD reasonably concluded that the police had neither the motivation nor the means to locate the Applicants in the IFA based on their profiles. The Applicants' evidence was that the Principal Applicant was released upon the payment of a bribe, there were no charges laid, arrest warrants, or First Incident Reports, and he continued to operate his business in the area unmolested for months afterwards. He also had no further interactions with the police for several months prior to his departure to Canada. Simply put, according to the Respondent, the RAD was correct to find that the police did not consider the Principal Applicant to have the profile of a terrorist and a militant as they did not treat him as such.

[22] The Respondent objects to the Applicants raising the issue of the "legal condition". The RPD found that there was no evidence that the warning by the police "not leave his village and to report to the station every month was a legal condition that, if breached, could result in local or national charges or that such a condition was registered anywhere." In their submissions to the RAD, the Applicants did not contest this finding by the RPD nor did they raise this issue. In response, the Applicants plead that the RAD should have raised it and considered it of its own motion.

[23] With respect to the argument concerning "legal condition", I do not find that the RAD erred by not expressly addressing the issue. First, the RAD's reasons were responsive to the submissions made to it. The RAD can hardly be faulted for not considering a submission that

was not put to it (*Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14; *Enweliku v Canada (Citizenship and Immigration)*, 2022 FC 228 at para 42). I therefore disagree with the Applicants as to their contention that the RAD ought to have considered the issue of a "legal condition" despite it not having been raised by them.

[24] Second, this Court has consistently held that it is inappropriate to grant judicial review based upon a ground not raised before the RAD (*Tcheuma v Canada (Citizenship and Immigration)*, 2022 FC 885 at para 27; *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 24; *Ogunmodede v Canada (Citizenship and Immigration)*, 2022 FC 94 at paras 23-30).

[25] As to the remainder of the Applicants' submissions on the first prong of the IFA test, I am not persuaded that the RAD's assessment of the IFA is unreasonable. I am mindful that the RAD's findings on the IFA are essentially factual, are based on its assessment of the evidence, are within its area of expertise and thus require a high degree of deference from this Court (*Singh v Canada (Citizenship and Immigration)*, 2021 FC 459 at para 23). Moreover, this Court has said many times that it is not in the business of re-weighing evidence (*Vavilov* at para 125). I have carefully considered the record before the RAD, and find that it was not unreasonable of the RAD to assess the Applicants' profile as it did and conclude that: (a) they are not perceived by the Indian authorities as militants or terrorists or involved with assassinations; and (b) had not demonstrated that the police had the means or motivation to locate and harm them in the IFA.

C. *Did the RAD apply the correct legal test when assessing future risk?*

[26] The Applicants submit that the RAD applied the incorrect test in that the RAD applied a balance of probabilities threshold to the risk assessment. The Respondent submits that the RAD applied the correct test in that the Applicants had to establish, on a balance of probabilities, that they would face a serious possibility of persecution in the proposed IFA or that they would face a risk under section 97 of the IRPA.

[27] I am not persuaded that the RAD misunderstood or misapplied the applicable legal standard. There is a distinction between the evidentiary standard upon which facts are established (balance of probabilities) and the requisite legal standard for a finding of persecution (a serious possibility of persecution). Having considered the language used by the RAD in its decision, it is clear, in my view, that the RAD used the correct legal test with respect to its analysis of whether the Applicants face a serious possibility of persecution or a risk of harm in the IFA.

[28] My colleague Justice Elizabeth Walker considered the same argument in *Bolivar Cuellar v Canada (Citizenship and Immigration)*, 2022 FC 641, and I find her reasoning equally applicable to the matter at hand.

> [14] The applicants argued that the RAD erroneously imposed the burden of proof to assess the ability and motivation the applicants' agents of persecution to pursue them at the proposed IFA. They noted the RAD's conclusion that "on a balance of probabilities" the evidence failed to demonstrate that the group that targeted them in Neiva had the means or motivation to hunt them down in Bogotá. The applicants referred to the distinction between the burden of proof on a balance of probabilities with respect to the facts that had to be established and the serious possibility that applies in the risk assessment.

> [15] After a careful review of the decision in its entirety and in context, I find that the RAD's reasons demonstrate that it applied the correct standard of proof on a balance of probabilities to the facts that the applicants were required to establish and the appropriate legal test in assessing prospective risk (*Bakare v Canada (Citizenship and Immigration)*, 2021 FC 967 at para 28). Contrary to the applicants' arguments, the RAD did not impose the burden of proof on a balance of probabilities in its assessment of the risks faced by the applicants, but rather in assessing the sufficiency of their evidence to support the motivation and means of their agent of persecution to track them in Bogotá.

IV. Conclusion

[29] For the foregoing reasons, I am not convinced that the RAD's decision is unreasonable. Accordingly, this application for judicial review is dismissed.

[30] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-8670-21

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed; and

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-8670-21, IMM-8671-21, IMM-8669-21 AND IMM-8667-21
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