Federal Court  Cour fédérale

Date: 20230321

Docket: IMM-3593-22

Citation: 2023 FC 384

Ottawa, Ontario, March 21, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

NAVDEEP SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated March 31, 2022, affirming a decision of the Refugee Protection Division [RPD], which found that the Applicants were either Convention refugees nor persons in need of protection due to the existence of a viable three Internal Flight Alternative [IFA] in elsewhere in India.

II. Background facts

[2] The RAD proceeded on the basis of the following material facts.

[3] The Principal Appellant [PA] worked for his political party and made attempts to expose political corruption and spoke out about a local politician's exploitation of poor farmers. I will refer to the local politician as the "agent of persecution". In January 2016, the PA was approached by two members of the agent of persecution's political party and told to either join their party or stop his criticism of the agent of persecution and their party's policies.

[4] Ten armed men entered the PA's home in November 2016, and assaulted him because he had not stopped his political work as instructed. This resulted in the PA's hospitalization for several days. The PA attempted to make a police report after his release from the hospital, but officers refused to take the complaint.

[5] In mid December, he began receiving frequent threatening phone calls from the agent of persecution 'goons' and he noticed he was being followed.

[6] He was subsequently arrested and detained January 15, 2017.

[7] Six police officers viciously assaulted him for ignoring warnings to stop making trouble for the agent of persecution. He lost consciousness.

[8] The PA continued his work because of its importance, but after an attempt was made to set their apartment building on fire in May 2017, they knew they were not safe in India. His wife told him he could not continue his political work as it had put the family in jeopardy, and they relocated to the home of a relative, and obtained visas so they could flee the country.

III. Decision under review

[9] In broad strokes, the RAD agreed with the RPD that the Applicants have IFAs elsewhere in India. Because I am granting judicial review, I will not comment on the findings except on what I consider the determinative issue, which is an unreasonable assessment of the first prong of the IFA analysis in terms of motivation.

IV. Issues

[10] The parties agree the issue on this application is whether the RAD's decision was reasonable.

V. Standard of Review

[11] The applicable standard of review is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

VI. Analysis

[12] It is well known that there is a two-part test for assessing an IFA, a legal proposition drawn from the Federal Court of Appeal's decision in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA): the tribunal must be satisfied, on a balance of probabilities (1) that there is no serious possibility of the claimant being persecuted in

the IFA, which involves an assessment of the means and motivation of the agent of persecution to pursue the claimant in the IFA, and (2) that, in all the circumstances including circumstances particular to him, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there.

[13] While the fundamental flaw in the RAD's Decision addressed below was not advanced by the parties, the Court considers itself obliged to grant judicial review *proprio muto*, that is, on the Court's own motion.

[14] In its assessment on the issue of motivation, the RAD concluded:

> [44] I find that the Principal Appellant does not have an important political profile such that [the agent of persecution] would be motivated to find him if he were to relocate to another area. I acknowledge that [the agent of persecution] used the local police in 2017 to make an example of the Principal Appellant. However, considerable time has passed; about 4.5 years, and the circumstances have changed as the Principal Appellant is no longer politically active, and he is no longer interfering in DC's business and political dealings, which was the genesis of the problems between them. While [the agent of persecution]'s 'goons' have searched for the Appellants recently in their old area, I find that this does not translate into a willingness to travel across the country to harm them further, particularly as the Principal Appellant has been silent, he is not politically active and did not express that he intends to return to politics or to his criticism of [the agent of persecution]. As such, I find that the Principal Appellant is not a significant opponent or an obstacle to [the agent of persecution] as he once was, such that [the agent of persecution] would put additional time and resources into searching for and pursuing the Appellants elsewhere.
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> [Emphasis added]

[15] With respect, the Court is unable to permit this Decision to stand because it has imbedded within it a fundamental flaw that contravenes central and constraining refugee protection law and therefore offends principles of judicial review.

[16] In reviewing this conclusion and the facts of the case, it seems to me the RAD is either requiring the PA to give up his political activities upon his return to the IFA, or possibly endorsing an equally impermissible determination, that to obtain protection from the agent of persecution the PA must go into "political hiding" in the IFA.

[17] Notably, the RAD made a finding that the agent of persecution used the local police in 2017 to make an example of the PA. To recall, in 2017 the PA was arrested and detained on January 15, 2017. Six police officers viciously assaulted him for ignoring warnings to stop making trouble for the agent of persecution. The PA was beaten so badly he lost consciousness.

[18] Moreover, in May 2017, an attempt was made to set their family's apartment building on fire.

[19] This extremely violent attack on the PA and potentially murderous attempted targeting his family by the agent of persecution was discounted by the RAD as proof of motivation. While the length of time was one factor, others stated by the RAD were that the PA is no longer politically active, and that he is no longer interfering in the agent of persecution's business and political dealings. These are listed in the first part of the paragraph just referred to.

[20] The RAD did not leave this matter there. Instead, the RAD went on to repeat and amplify the conditions under which it considered the Applicants safe to return. The RAD set out these conditions and determined there agent of persecution had no motivation, and I quote: "particularly as the Principal Appellant has been silent, he is not politically active and did not express that he intends to return to politics or to his criticism of [the agent of persecution]. As such, I find that the Principal Appellant is not a significant opponent or an obstacle to [the agent of persecution] as he once was, such that [the agent of persecution] would put additional time and resources into searching for and pursuing the Appellants elsewhere."

[21] It seems to me the RAD lost sight of a fundamental of refugee protection, namely that a claim based on political persecution may not be rejected on condition the claimant withdraw from that political activity. To do so defeats the purposes of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, and Canada's adherence to it through the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the objectives of which are to offer international protection against political persecution.

[22] Risk assessment in an IFA is forward-looking. I am not satisfied the RAD's assessment was forward looking. To the extent it was, and while perhaps unintended, the RAD appears to have accepted and approved placing impermissible conditions on the Applicants' return to an IFA, namely that after they arrive in the IFA the PA remain silent, is not politically active and does not return to politics or to criticism of the agent of persecution.

[23] In my respectful consideration, these conditions may not be imposed on a refugee claiming protection arising from political persecution in their home country, nor may they be conditions of an IFA.

VII. Conclusion

[24] This application for judicial review will be granted.

VIII. Certified Question

[25] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3593-22

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted decision maker, no question is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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