

Federal Court



Cour fédérale

Date: 20230411

Docket: IMM-8758-21

Citation: 2023 FC 510

Ottawa, Ontario, April 11, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

NIR BAHADUR KHADKA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Nir Bahadur Khadka, seeks judicial review of the Refugee Appeal Division's ("RAD") decision dated October 29, 2021, confirming the determination of the Refugee Protection Division ("RPD") that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 (“IRPA”). The RAD found the determinative issue to be the availability of an internal flight alternative (“IFA”) in Kathmandu.

[2] The Applicant submits that the RAD failed to apply both prongs of the IFA test and misapprehended the evidence, rendering the decision unreasonable.

[3] For the reasons that follow, I find that the RAD’s decision is reasonable. This application for judicial review is dismissed.

II. Facts

A. The Applicant

[4] The Applicant is a 44-year-old citizen of Nepal.

[5] The Applicant’s family supports the Nepali Congress Party (“NCP”). In 2007, he became a member of the NCP and began actively engaging in political activities. In 2009, the Applicant was appointed as Board Member of Jana Jyoti Youth Club in Itahari.

[6] The Applicant fears persecution by the Maoist Biplavs, a political offshoot of the Communist Party of Nepal. The Communist Party’s youth wing, the Young Communist League (“YCL”), is known for forceful recruitment and committing extortion.

[7] In February 2010, local YCL leader, Raj Kumar Shrestha (Mr. “Shrestha”) solicited the Applicant for 100,000 rupees as a donation for YCL training and asked the Applicant to join the Maoist party. The Applicant claims he paid Mr. Shrestha off with 50,000 rupees and refused to join.

[8] Frustrated with the political climate in Nepal, the Applicant allegedly traveled through Russia and Estonia to get to Portugal in May 2010, where he worked as an agricultural worker for almost two years. He claims that he then paid someone approximately 4000 Euros to help him obtain a temporary permit but they disappeared with the money. He left Portugal in June 2012 for Germany, where he sought asylum. His claim was denied.

[9] When the NCP gained a majority in the 2013 general election, the Applicant returned to Nepal to help his aging father and support his family. In May 2014, he married Sirjana Pokharel and they had one child together. His wife and child currently live in Kathmandu.

[10] In October 2014, the Applicant opened Khadka Khadya Store, a grocery store. In January 2015, the NCP appointed the Applicant as a member of the Municipal Committee for Itahari sub-Metropolitan City.

[11] In July 2016, the Applicant claims that Mr. Shrestha and two other Biplav Maoist members came to the Applicant’s store, demanding 500,000 rupees. The Applicant negotiated the price down and paid 300,000 rupees, fearing for his safety and his business. In June 2017, the Applicant claims he was campaigning with his team when three Biplav members violently

confronted the Applicant's group. One of the Biplav members was Maoist leader, Padam Tamang (Mr. "Tamang").

[12] In October 2018, Mr. Shrestha returned to the Applicant's store and again tried to recruit the Applicant to join the Maoists. The Applicant refused and Mr. Shrestha threatened to take action. The next month, Mr. Tamang and other Biplav Maoists overcame the Applicant while he was transporting food in his truck and seized approximately 300,000 rupees worth of goods.

[13] The Applicant reported the incident to the police and the NCP. The NCP issued a press release, but neither it nor the police took further action. The Applicant received further threats from Biplavs. A few days after the incident, the Applicant received a threatening phone call from Mr. Tamang for reporting the incident to the police.

[14] In January 2019, Mr. Tamang and four other Biplav Maoists again blocked the Applicant's way home. The group physically attacked the Applicant, who suffered injuries. The Applicant decided to close his store due to the escalating violence and fled for Kathmandu. The Applicant continued receiving threatening calls from Mr. Tamang and changed his telephone number in February 2019.

[15] The Applicant paid an agent 500,000 rupees for a Canadian visa. His wife and son moved to Kathmandu in May 2019 and the Applicant sold his store in June 2019. The Applicant's wife claims that Maoists were still asking about the Applicant and going around the

village looking for him. The Applicant claims that the Maoists can locate him anywhere in Nepal due to their wide network.

[16] The Applicant arrived in Canada in June 2019 and made a refugee claim.

[17] In a decision dated April 22, 2021, the RPD refused the Applicant's claim and found that he is neither a Convention refugee nor a person in need of protection. The RPD also found that the Applicant's persecution was not well founded and that he had a viable IFA in either Biratnagar or Kathmandu.

B. *Decision Under Review*

[18] In a decision dated October 29, 2021, the RAD upheld the RPD's decision. While the RAD did not uphold all of the RPD's findings, the RAD agreed there was a viable IFA in Kathmandu.

[19] The Applicant submitted 19 pieces of new evidence before the RAD, all of which were news articles regarding the country conditions in Nepal. The RAD only admitted three items because they post-dated the RPD's decision. The RAD found the remaining documents inadmissible.

[20] Two issues were raised on appeal to the RAD: whether the RPD erred in assessing the Applicant's fear of persecution and whether the RPD erred in finding viable IFAs. On the first point, the RAD agreed with the Applicant that the RPD had no reason to doubt the Applicant's

credibility. The RAD found that the RPD ignored many of the Applicant's allegations at the core of the Applicant's claim. Therefore, the RAD found that the RPD erred on this point.

[21] As for the IFA analysis, the RAD agreed with the RPD's reasons, particularly with respect to the viability of Kathmandu as an IFA. The RAD then applied the two-prong test to determine whether a viable IFA existed in the Applicant's case.

[22] At the first prong, the RAD found little evidence of recent attacks by the Biplav faction against individuals or to demonstrate a risk of harm from any other Maoist groups. Kathmandu is over 350 kilometres away from the Applicant's home and over one million people reside there. Biratnagar, on the other hand, is only 25 kilometres away, although there are over 240,000 inhabitants. The Applicant submitted that the Biplav Maoists have significant reach across Nepal. The RAD disagreed.

[23] The RAD also noted the Applicant's reliance on outdated evidence regarding the strength of the YCL. The RAD determined that many of these fringe Maoist groups were not the same entities that existed 10 years ago, nor were they cohesive or unified. Mr. Shrestha, albeit originally affiliated with the YCL, joined the Biplav faction by at least 2016. This suggests that the Applicant would only face persecution at the hands of the Biplav faction proper. Furthermore, the RAD found the evidence regarding the strength and size of the YCL unpersuasive.

[24] Regarding the Biplav faction, the RAD determined that their power base is reportedly located in western Nepal, where the Nepali government struggles to maintain control. There is little information about the fringe group's structure and organization. While the faction has some presence in other parts of Nepal, the evidence indicates that it mainly targets poor, rural municipalities, where police and army forces are not present. The evidence also suggests that the faction targets individuals mainly outside of Kathmandu and their violent acts were sporadic, and failed to establish that the group maintains a nationwide network used to track targets for extortion. The RAD found no evidence to indicate that Biplavs have located the Applicant's wife and son in Kathmandu. The RAD was satisfied that the Applicant could continue his political activities upon returning to Kathmandu, finding no serious possibility of persecution against NCP members in Kathmandu, from the Biplav faction or other Maoist parties.

[25] At the second prong of the IFA test, the RAD noted the RPD's consideration of the Applicant's education, experience, and proven resourcefulness by traveling and working abroad. The RAD then considered *Gurung v Canada (Citizenship and Immigration)*, 2019 FC 622 ("*Gurung*"), finding the facts in that case distinct from the Applicant's case. In *Gurung*, the RAD accepted that the YCL had a nationwide network capable of tracking the applicant, which rendered both prongs of the test unreasonable. In this case, the RAD found there was a different agent of persecution altogether. Therefore, the RAD agreed with the RPD's analysis on the second prong, noting the high threshold to be met. The RAD agreed with the RPD that no obstacles prevented the Applicant from relocating to Kathmandu, especially since his family currently lives there without issue. The Applicant completed high school and worked in both Nepal and internationally, meaning that he has diverse work experience and can likely obtain

employment. The RAD ultimately agreed with the RPD's conclusion, finding a viable IFA in Kathmandu. The RAD found this dispositive of the Applicant's claim for refugee protection.

III. Issue and Standard of Review

[26] The sole issue in this application is whether the RAD's decision is reasonable.

[27] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). I agree.

[28] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

IV. Analysis

[29] The Applicant submits that the RAD's decision is unreasonable and contrary to the evidence. The Applicant submits that he only needed to provide clear and convincing evidence

of a “serious possibility” of persecution in the proposed IFA, citing *Sokol v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1257 and *Chowdhury v Canada (Citizenship and Immigration)*, 2008 FC 18 (“*Chowdhury*”) at paragraph 30. The Applicant then cites *Gurung* for the same proposition he had articulated before the RAD, that the agent of persecution poses a risk to the Applicant throughout Nepal due to its broad network.

[30] The Applicant submits that he does not need to establish how the “nationwide network” operates. He need only demonstrate that the agents of persecution can “potentially” maintain a risk to him throughout Nepal, which he claims is demonstrated by the NDP evidence. The Applicant asserts that, based on the RAD’s analysis, the Biplav faction (which, for the Applicant, includes the YCL and other factions) already has an extensive network and reach across Nepal. Although violent attacks by the Biplavs are sporadic, there is still a serious risk to the Applicant, especially since he had been marked as a target. The Applicant maintains that there is an existing network of Maoists capable of targeting the Applicant across Nepal. The Applicant submits that the RAD unreasonably found no serious possibility of persecution against active Biplav members or from other Maoist parties more generally. The Applicant submits that the RAD misapplied the applicable standard.

[31] The Applicant submits that the RAD’s analysis was unreasonably limited in its scope and contends that by considering factions beyond the Biplavs, there is a much higher risk of persecution to the Applicant. The Applicant submits that the agents of persecution are not limited to the Biplavs, but includes the YCL because Mr. Shrestha was a YCL leader before

joining the Biplavs and it is not unreasonable to find that Mr. Shrestha has connections to the YCL as a former YCL leader.

[32] Additionally, the RAD used the fact that the Applicant and his family were not discovered in Kathmandu as evidence demonstrating that Maoists were unable to find him, which he claims is unsubstantiated. The Applicant was only living in Kathmandu from January to June 2019 and maintained a low profile. The Applicant submits that the Maoists may well have had a period of inactivity, and that the Maoists have the resources and capability to find him. Furthermore, the agents of persecution did not target the Applicant's family, and therefore they do not face the same risks as he does. Per *Gurung*, the fact that the Applicant's family members have not experienced problems does not mean that the Applicant would not face persecution upon his return (para 10).

[33] As for the second prong of the IFA test, the Applicant submits that the RAD erred by only considering the Biplav faction in its consideration of the agents of persecution. The Applicant maintains that, despite the fact that Mr. Shrestha is now a member of the Biplavs, this does not negate Mr. Shrestha's power and influence. Furthermore, the YCL is a youth faction of the Maoists and is therefore not entirely distinct from the party.

[34] Finally, the Applicant argues that the RAD itself has been internally inconsistent regarding the identity of the agent of persecution and its decision is therefore unintelligible.

[35] The Respondent maintains that the RAD's decision is reasonable. The Respondent submits that the Applicant is effectively rearguing his position and taking issue with the RAD's fact-finding. The RAD's reasons pay regard to the documentary evidence and the Applicant's submissions, finding that the Biplav faction did not have a "nationwide network" to track adversaries.

[36] As for the Applicant's submissions on *Gurung*, the Respondent notes that the Applicant relies on the same case made before the RPD and the RAD. The Respondent agrees with the RAD that the evidentiary record differed in *Gurung*, where the evidence showed that the agent of persecution had the organizational capacity and interest to pursue the applicant across the country, which is not the case here.

[37] The Respondent submits that the Applicant's claim that the RAD erred in only considering the Biplav faction as the agents of persecution has no merit. The Respondent notes that the Applicant himself describes the persons targeting the Applicant in Nepal as members of the Biplav faction. Therefore, the RAD was entitled to characterize and assess the Applicant's claim along these lines. The Respondent further submits that, on the issue of the Applicant's wife and son in Kathmandu, the RAD was also entitled to rely on the evidence that the harassment and contact ceased upon the wife and son's relocation to Kathmandu.

[38] I agree with the Respondent that the Applicant failed to meet his onus, and that the proposed IFA in Kathmandu is reasonable. The RAD paid significant attention to the Applicant's claims, seeing as the RAD disagreed with the RPD on numerous points. The RAD's

decision is based on an internally coherent reasoning and justified in light of the legal and factual constraints bearing on the decision (*Vavilov* at para 101).

[39] Regarding the first prong of the IFA test and the “serious possibility” of persecution, I agree with the RAD that the Biplav faction did not have the means to locate the Applicant in Kathmandu. As articulated in *Chowdhury*, “serious possibility” is a personalized assessment (para 24).

[40] The RAD reasonably found little evidence to suggest that the Biplavs have a nationwide network, or the motivation and capacity to track the Applicant in Kathmandu. The RAD also notes that, although many Maoist groups are similar in name, they are not the same entities that existed in the past and these groups are neither cohesive nor unified. While the Applicant may disagree with this finding, the RAD’s decision is logical, rational, and supported by the evidence.

[41] The Applicant submits that he does not need to establish how the “nationwide network” operates or works. I do not find the RAD placed an undue onus on the Applicant to demonstrate the operations of the Biplav network. The RAD assessed the party’s structure and organization to determine whether the faction had the power, influence, and means to pursue the Applicant in Kathmandu. This is relevant and reasonable given that the party’s operations directly relate to the RAD’s assessment on the first branch of the IFA test.

[42] As for the utility and relevance of *Gurung*, I note this Court’s decision in *Magar v Canada (Citizenship and Immigration)*, 2021 FC 1053 (“*Magar*”), where this Court found that

the RAD reasonably addressed the evidence and the existence of IFAs, despite factual similarities to *Gurung*. *Magar* states at paragraphs 27-28:

With respect to the Applicant's argument that I should apply *Gurung* based on the similarity in facts, I would first note that each case must be assessed on its own merit. In *Gurung*, Justice Campbell noted there was "authoritative nationwide network evidence placed on record and confirmed by the RAD" which constitutes "evidence of a nationwide risk to the Applicant." In this case, as noted above, the evidence of such a nationwide network is far from clear.

The Applicant also relies on *Gurung* for his position that a conclusion on his welfare in the potential IFAs may not be drawn from the fact that the Applicant's family members have not had problems. While I agree with this position as a general principle, I note that the Applicant appears to have made his family's problems a relevant part of his refugee claim as well as his IFA submissions. As the RAD noted, at para 50:

[50] The Appellant's Basis of Claim states that he fears that the Maoists will target his family members and possibly kidnap his son. Yet, the Appellant testified at the RPD 2018 hearing that his wife has been living in Kathmandu since January 2016 and she did not have any problems with the Maoists. He did not speak of any harm or problems concerning his children. His sister also lives in Kathmandu and has not had any problems with the Maoists.

[43] The same reasoning can be applied to the case at hand. Despite factual similarities to *Gurung*, the Applicant's case should be assessed on its own merit and on the basis of a separate and distinct evidentiary record. The RAD's decision in the Applicant's case accords with the evidence available.

[44] I also disagree with the Applicant's argument that the RAD confused the Biplavs with the Maoist party more broadly, and that he is at risk of harm by the YCL. While the Applicant does

refer to the YCL in his Basis of Claim form, when Mr. Shrestha first tries to recruit him in February 2010, all other incidents described by the Applicant involve the Biplav Maoists. Although Mr. Shrestha may have been a powerful YCL leader, this does not equate to the YCL targeting the Applicant personally across the country. Furthermore, as noted by the RAD, Mr. Shrestha has been a member of the Biplav Maoists since sometime in 2016. The RAD limited their scope to the Biplavs because this is the Maoist faction identified by the Applicant as a threat. The RAD made no factual error on this point. The Applicant did not lead any evidence that he experienced continual threats by the YCL proper, only by Mr. Shrestha, who is now a member of the Biplavs. In fact, excluding incidents involving Mr. Shrestha, there is no evidence whatsoever that the YCL have acted as agents of persecution.

[45] I also find the Applicant's argument regarding his wife and child not being contacted or approached in Nepal relevant. Given that the Applicant's wife experienced harassment by the Biplavs prior to leaving for Kathmandu, and this harassment ceased upon moving, this factor is relevant to the RAD's determination. The Applicant argues that the Biplavs may have been inactive for a period of time, which explains why he did not receive threats when living in Kathmandu. This is highly speculative.

[46] Finally, I agree with the Respondent that much of the Applicant's submissions, particularly on the second prong of the IFA test, simply repeat the Applicant's earlier arguments. The Applicant effectively asks this Court to reweigh the evidence, which is not the role of a reviewing Court on judicial review (*Vavilov* at para 125). I find that the RAD did not overlook or misapprehend the evidence, and the overall decision is therefore reasonable.

V. Conclusion

[47] This application for judicial review is dismissed. The RAD's assessment of the IFA issue is responsive to the evidence and the overall decision is reasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-8758-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8758-21

STYLE OF CAUSE: NIR BAHADUR KHADKA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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