

Federal Court



Cour fédérale

Date: 20230519

Docket: IMM-4973-22

Citation: 2023 FC 707

Ottawa, Ontario, May 19, 2023

PRESENT: Madam Justice Walker

BETWEEN:

HARKIRAT SINGH BASRA

Applicant

And

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of India who fears persecution as a gay man should he return to his country of origin. He seeks judicial review of an April 13, 2022 decision of the Refugee Appeal Division (RAD) confirming the refusal of his refugee claim by the Refugee Protection Division (RPD). The RAD found that the Applicant has a viable internal flight alternative (IFA) in Mumbai and concluded that he is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] For the reasons that follow, I find that the Applicant has not demonstrated that the RAD's IFA analysis is unreasonable and will dismiss this application for judicial review.

I. Background

[3] The Applicant began a relationship with a male classmate, HS, in 2016. In April 2017, HS's father, who is a police officer, caught them together and beat the Applicant with his baton. The Applicant was taken to the police station and released only after payment of a bribe. He alleges that the police took his fingerprints and forced him to sign a blank piece of paper.

[4] The Applicant continued his relationship with HS and both men were later expelled from school.

[5] Following threats from HS's father, the Applicant went to live with his uncle. He travelled to the United States and then to Canada where he filed a refugee claim.

[6] The RPD dismissed the Applicant's claim on December 1, 2021. The panel had some doubt as to the Applicant's allegations but found that he is a gay man who experienced persecution in India at a time when homosexual acts were illegal. However, noting the decriminalization of same-sex acts in India in 2018, the RPD concluded that the Applicant has a viable IFA in Mumbai.

[7] The Applicant appealed the RPD's decision to the RAD.

II. Decision under review

[8] The RAD first noted that it was guided in its decision by the *Chairperson's Guideline 9: Proceedings before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* (SOGIESC Guidelines).

[9] The Applicant stated that he would not be relying on new evidence in his appeal but included three new documents in his appeal record:

- (a) A 2004 report entitled *Comprehensive Discussion of the Internal Flight Option for Punjabi Sikh Survivors of Political Rape and other Forms of Institutionalized Violence* (IFA Report);
- (b) A 2004 letter to the Immigration and Refugee Board entitled *No Safe Haven: The Myth of the Internal Flight Alternative in India for Returned Sikh Asylum Seekers* (2004 Letter); and
- (c) Decision of United Nations Committee Against Torture (*Nirmal Singh v Canada*, CAT/C/46/D/319/2007, CAT, 46th Sess, 30 May 2011).

[10] The RAD stated that the third document was admissible as jurisprudence but rejected the first two. Neither the IFA Report nor the 2004 Letter were before the RPD and the Applicant had not requested that the two documents be included as new evidence pursuant to subsection 110(4). The RAD concluded therefore that the IFA Report and the 2004 Letter were not part of the evidentiary record on appeal.

[11] The RAD's IFA findings were as follows:

- (1) The Applicant had not adduced sufficient credible evidence to establish that HS's father, the police, or any other agent of persecution has the motivation and means to locate him in Mumbai. The Applicant alleged that HS's father and the police visited his home after his departure from India to determine whether he had returned. However, the Applicant's affidavit evidence (from his father, uncle and

a municipal councillor) lacked detail regarding such visits and, in certain respects, the uncle's affidavit copied that of his father.

- (2) There was no evidence in the record that the Applicant's agents of persecution had made any attempts to locate him outside of his local area. In addition, the Applicant provided no evidence of any threats against him since July 2017.
- (3) The RAD addressed the Applicant's argument that the police could use technology, including the government's central Crime and Criminal Tracking Network and Systems (CCTNS), to pursue him to Mumbai. The panel stated that the CCTNS was used in serious cases and that, in the present case, there was no evidence that the Applicant had been charged with any crime or is connected to any "cases of national security and allied matters".
- (4) The Applicant had not provided actual and concrete evidence of conditions in the proposed IFA that satisfy the stringent requirement of jeopardy to his life and safety sufficient to satisfy the second prong of the IFA test (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 at para 15 (*Ranganathan*), citing *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589).
- (5) The objective documentary evidence establishes that persons whose sexual orientation is other than heterosexual experience discrimination in India but does not support a conclusion that, in general, the discrimination experienced by SOGIESC persons rises to the level of persecution.
- (6) The Applicant had not provided evidence of personal circumstances that would make an IFA in Mumbai unreasonable.

[12] For these reasons the RAD concluded that the Applicant has an IFA in Mumbai and dismissed the appeal.

III. Analysis

[13] The RAD's reasons and conclusions regarding the viability of an IFA in India for the Applicant and the admission of his new evidence are subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Melaj v Canada (Citizenship and Immigration)*, 2023 FC 92 at para 33).

The Applicant's new evidence

[14] The Applicant submits that the RAD unreasonably disregarded the IFA Report and 2004 Letter. He states that the two documents were not submitted as new evidence within the meaning of subsection 110(4) of the *IRPA* but as doctrine that should have been considered on appeal.

[15] The Applicant's argument is not persuasive. The IFA Report and 2004 Letter are not legal doctrine. They are neither authorities in law, nor do they interpret the law. Their content is factual in nature, containing discussion and opinion based on research and experience. I agree with the Respondent that the documents are analogous to many documents typically contained in a national documentation package. Indeed, in his own appeal submissions, the Applicant referred to the documents as objective evidence in support of his factual assertions and not as jurisprudence or expressions of law. Accordingly, I find that the RAD made no error in rejecting the two documents.

Was the RAD's IFA analysis reasonable?

[16] In determining whether a viable IFA exists for a refugee claimant, the RAD must be satisfied that (1) the claimant will not be subject to a serious possibility of persecution or to a section 97 danger or risk in the proposed IFA; and (2) in all the circumstances, including the particular circumstances of the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there. Once the possibility of an IFA is raised, the claimant bears the onus of establishing that they do not have a viable IFA (*Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1333 at para 16).

[17] In the present case, the Applicant submits that the RAD unreasonably (a) discounted his affidavit evidence in assessing the motivation of his agents of persecution to locate him in Mumbai; and (b) ignored the objective evidence in concluding that conditions in Mumbai for him as a gay man would amount to discrimination and not persecution.

[18] The RAD made the following findings regarding the three affidavits in question:

- (1) Affidavit of Applicant's father: The affidavit from the Applicant's father stated that, "my son called me every day from Canada and I told them police and unidentified people and even [HS's] father came many times to our house to confirm if my son return home." The RAD gave this affidavit little weight in establishing that the Applicant would face a forward-looking risk in Mumbai because the father does not provide details regarding when the police and other people came to his house or explain how he knows of these visits.
- (2) Affidavit of Applicant's uncle: The uncle stated in his affidavit that, "my son called me every day from Canada and I told them police and unidentified people and even [HS's] father came many times to our house to confirm if my son return home." The RAD gave no weight to the uncle's affidavit in establishing ongoing threats to the Applicant. The uncle describes a threat to his son and not to his nephew and uses the same phrase from the father's affidavit.
- (3) Affidavit of the municipal councillor: The municipal councillor stated that, even after the Applicant left India, "the police and even [HS's] father visited his house [] looking for him and when they [knew], he went abroad then they [asked] for his date of return to India". The councillor repeated that HS's father was mad at the Applicant and visited his home from time to time. The RAD gave little weight to this affidavit in establishing that the Applicant would face a forward-looking risk in Mumbai as, like the father's affidavit, it lacked detail regarding dates of the police visits and gives no explanation as to how the councillor knew of the visits.

[19] The Applicant submits that the three affidavits corroborate the material aspects of his refugee claim and were not vague or lacking in detail. He argues that the RAD erred in faulting the affidavits for what they do not say contrary to the jurisprudence of this Court (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 49).

[20] I do not agree with the Applicant and find no reviewable error in the RAD's analysis of the affidavit evidence. The Applicant's argument that the affidavits corroborate material aspects of his claim centre on the information in the affidavits that describes the persecution he suffered in 2017. The argument fails to recognize that the RAD considered the three affidavits as part of its assessment of the motivation of the Applicant's agents of persecution to pursue him to Mumbai. This assessment looks forward: is there a serious possibility that the Applicant will be subject to a serious possibility of persecution or to a section 97 danger or risk in Mumbai?

[21] To this end, the RAD clearly looked to the paragraphs in the affidavits that spoke to ongoing or recent threats and searches for the Applicant as indicators of continuing motivation. The panel's assessment properly centred on the question of probative value: what did each affiant say in their respective affidavit that established any ongoing motivation on the part of the Applicant's agents of persecution to search for him in Mumbai (*Magonza* at para 21)? The RAD stated that the father's affidavit makes no reference to threats against the Applicant since 2017 and provides only vague statements regarding police visits to the family home. This statement accurately describes the content of the affidavit and fully supports the RAD's decision to give the affidavit little weight "in establishing that the [Applicant] would face a forward-looking risk in Mumbai". I make the same finding regarding the RAD's treatment of the municipal councillor's affidavit.

[22] I also find no error in the RAD's determination that it would place no weight on the uncle's affidavit which is similarly vague. More critically, the uncle's affidavit simply lifts substantive statements from the father's affidavit word-for-word, including the use of the word

“son” rather than “nephew”, and adopts those statements as the uncle’s own observations. The Applicant’s submission that the RAD ignored the cultural context underlying the uncle’s use of the word “son” has no merit. His reliance on Justice McHaffie’s statements in *George v Canada (Citizenship and Immigration)*, 2019 FC 1385, regarding implausibility and circular reasoning are not helpful.

[23] Turning to the second prong of the test, the Applicant submits that the RAD’s conclusion that it would not be unreasonable for him to seek refuge in Mumbai ignores material sections of one of the two IFA reports cited in the decision and is unintelligible. He also submits that the RAD appears to conflate the two reports such that a reader may infer that the excerpts are in fact taken from the same report.

[24] With respect to the latter submission, I find no lack of clarity in the RAD’s references to the two reports. The excerpts in question are set out in separate paragraphs in the decision. The first paragraph begins with the words, “A report by a panel of eminent jurists finds that ...”, followed by four paragraphs from the report describing discrimination and harassment against LGBTQ persons in India. The introductory words of the second paragraph are “A UK Home Office document *Country Police and Information Note. India: Sexual orientation and gender identity and expression* dated April 2021 states ...”, followed by an excerpt from the report. The excerpts from each report are accompanied by footnotes identifying the source of the excerpt. In my view, the structure and identification of the two reports in the decision make it very unlikely that a reader would confuse the two as being one report.

[25] The RAD acknowledged the broad range of discriminatory acts and behaviours against SOGIESC persons that persist in India. The Applicant's position that the RAD ignored sections of the first report fails to identify any contradictory information in those sections that undermines the information set out in the included excerpts. Rather, the additional sections provide more details of the described discrimination. The Applicant's argument is effectively a request that the Court require the decision maker to add detail to its decision. As a result, I find no reviewable error in the RAD's reliance on the reports referenced in the decision.

[26] The Applicant argues with conviction that the RAD erred in concluding that the documented discrimination and human rights abuses suffered by SOGIESC persons in India "does not support a conclusion that [such discrimination] rises to the level of persecution".

[27] While cumulative acts of discrimination can amount to persecution (*Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840 at paras 9-10), the dividing line is often difficult to establish. The analysis of a claimant's personal circumstances and the relevant documentary evidence in each case falls within the specialized expertise of the RPD and the RAD (*Kaisar v Canada (Citizenship and Immigration)*, 2017 FC 789 at para 19) and their conclusions following that analysis should not be lightly disturbed by the Court.

[28] Here, the RAD considered and unequivocally accepted the widespread nature of the discriminatory behaviours and attitudes towards SOGIESC persons that exist in India. It did not overlook contradictory evidence or downplay the situation in India. The RAD looked to the

Applicant's personal circumstances but noted that he had "not provided evidence of factors that, in his personal circumstances, would make an IFA in Mumbai unreasonable".

[29] The Respondent correctly notes that the Federal Court of Appeal in *Ranganathan* requires actual and concrete evidence from a claimant that their life or safety would be in jeopardy. In this case, the Applicant has provided no personalized evidence that he has or would suffer such risk (*Kiranov v Canada (Citizenship and Immigration)*, 2023 FC 320 at para 26). The Applicant's argument that he may suffer discrimination in housing and employment (as described in the objective country reports) is not concrete evidence that his safety would be at risk in Mumbai. I find that it was open to the RAD, based on the evidence in the record, to conclude that the Applicant had failed to establish that his life or safety would be at risk in relocating to Mumbai.

IV. Conclusion

[30] The application will be dismissed. The RAD's finding of an IFA for the Applicant in Mumbai, India is reasonable in light of the evidence and the accepted test for a viable IFA. I find no error in the RAD's assessment of the means and motivation of the Applicant's agents of persecution to locate him in Mumbai that warrants the Court's intervention. The RAD also considered all of the evidence, including the incidents suffered by the Applicant in 2017 and the persistent discrimination in India against SOGIESC persons generally, and reasonably concluded the Applicant had not established that it would be unreasonable for him to relocate to Mumbai. Finally, I am not persuaded that the RAD erred in excluding the IFA Report and 2004 Letter from the appeal record.

[31] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-4973-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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