Federal Court  Cour fédérale

Date: 20240716

Docket: IMM-12203-22

Citation: 2024 FC 1109

Ottawa, Ontario, July 16, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

AMIT LAL
SILKY

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated June 17, 2022 [Decision] by the Refugee Appeal Division [RAD], confirming the decision of the Refugee Protection Division [RPD] that Amit Lal [Principal Applicant] and his wife, Silky [Associate Applicant], [collectively, Applicants], are neither Convention refugees under section 96 of the *Immigration*

and Refugee Protection Act, SC 2001, c 27 [IRPA], nor persons in need of protection under section 97 of the IRPA because there were viable internal flight alternatives [IFA] in India.

[2] For the reasons that follow, the application for judicial review is dismissed. The RAD reasonably assessed the Applicants' submissions and evidence against the accepted test for a viable IFA and reasonably found the Applicants had IFAs in India.

II. Background

[3] The Applicants are both Indian citizens from the Haryana State of India. The Principal Applicant lived and worked in Malaysia from March 2002 to March 2018, and the Associate Applicant joined him in Malaysia in 2009. They seek protection from persecution from the Bharatiya Janata Party [BJP] and the Haryana police because they donated an insufficient amount to the BJP and because of their alleged political opinions for an opposing political party.

[4] The Principal Applicant was arrested on June 17, 2018, and accused of speaking badly about the police. He was beaten while in detention and released the next day. While in detention, the police threatened to sexually assault the Associate Applicant. Upon the Principal Applicant's release, the Applicants investigated returning to Malaysia but were unable to do so.

[5] In September 2018, people associated with the BJP attended at the Applicants' home and requested that the Principal Applicant join their party. When he refused, these individuals beat the Principal Applicant, abused his parents, and made death threats. The Principal Applicant unsuccessfully attempted to report this incident to the police. The following month, the Principal

Applicant was stopped by the police who removed an opposing political party's sticker from his tractor and threatened to kill him. The police also threatened to falsely accuse the Principal Applicant of supporting anti-nationalists and put him in jail forever.

[6] After this incident, the Applicants moved to Delhi and lived with the Principal Applicant's sister until they left for Canada on December 9, 2018. They made a claim for protection in June 2019.

III. Decision Under Review

[7] Citing the correct test for IFA, the RAD found that there were viable IFAs in India. The RAD noted that the Applicants' argument for why any IFA in India is unreasonable is that the Crime and Criminal Tracking Network Systems [CCTNS], the tenant verification system, and border alert mechanism are established enough to make the whole of India unsafe and any IFA unreasonable.

[8] The RAD recognized that the population size and distance alone are not indications of safety, but it was the Applicants' burden to establish the IFAs were unsafe and they did not explain how this was so. The RAD noted the Principal Applicant was not charged with a crime or subject to a First Information Report [FIR], which are the usual grounds for being flagged by the CCTNS, tenant verification system, and border alert mechanism, and the Applicants had not explained how they would otherwise be captured by these systems. Likewise, the suggestion that the Principal Applicant's fingerprints or signature have made their way into these systems is speculative and unsupported by evidence.

[9] With respect to inconsistencies in the evidence, the RAD noted the Applicants claimed they were the result of his interpreter. While the RAD did not make findings about these inconsistencies, they did find that the Applicants had insufficient evidence to substantiate their allegations and found that the Applicants had failed to establish that the police would be motivated to find them.

[10] With respect to the Aadhaar system, the RAD pointed to the fact that the police have no legal access to the Aadhaar data, and the Applicants did not explain how their agents of persecution might acquire improper access to this tightly controlled data. They made similar findings of a lack of explanation and evidence for the Applicants' allegation that they would be detained or flagged at the airport upon return to India.

[11] In analyzing the reasonableness of the IFAs, the RAD analyzed the employment prospects, languages spoken, shared religion, and medical circumstances of the Applicants in the IFAs. They found that the Applicants had failed to establish that the IFAs were unreasonable, especially in light of the lack of evidence or explanation to that effect, and the significant level of education of the Principal Applicant.

IV. Issue

[12] The Applicants only raise one point in issue, which is whether the RAD was unreasonable in finding a viable IFA.

V. Relevant Law

A. *Standard of Review*

[13] The Supreme Court of Canada has established that when conducting a judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23).

[14] The reasonableness standard "requires that a reviewing court defer" to a decision that is based on "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85 and 99). In assessing whether a decision is reasonable, the Court will assess whether the decision is appropriately justified, transparent and intelligible. Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[15] As there is no breach to the procedural fairness duty at issue, the Court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is "an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov* at para 13).

[16] The decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[17] Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

[18] Finally, the onus is on the party challenging the decision to prove that it is unreasonable.

B. *Viable Internal Flight Alternative*

[19] A Convention refugee and a person in need of protection must be found to face the identified risk in every part of their country of origin. A viable IFA, if found to have met both prongs of the IFA test, will negate a claim for refugee protection under either section 96 or 97, regardless of the merits of other aspects of the claim (*Olusola v Canada (MCI)*, 2020 FC 799 at para 7 [*Olusola*]).

[20] The test for finding a viable IFA was set out by the Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706 (CA) [*Rasaratnam*], and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 at 597 (CA) [*Thirunavukkarasu*]. This test requires a claimant to satisfy the Board of a well-founded fear of persecution in their

part of the country, and, in finding the IFA, the Board must be satisfied, on a balance of probabilities, of two things:

1) There is no serious possibility of the claimant being persecuted or subject to a section 97 danger or risk in the part of the country to which it finds an IFA exists; and

2) Conditions in that part of the country must be such that it would not be unreasonable in all the circumstances including circumstances particular to him, for the claimant to seek refuge there.

Rasaratnam at 711; *Thirunavukkarasu* at 592.

[21] When discussing an IFA, it is important to consider that an IFA is "inherent in the definition of a Convention refugee" (*Rasaratnam* at 710). This is because an IFA is not a legal defence or doctrine, it is merely a "short-hand way of describing a fact situation in which a person may be in danger of persecution in one part of a country but not in another" (*Thirunavukkarasu* at 592). An IFA can only exist if the claimants have established a serious possibility of persecution under a Convention ground (*IRPA* section 96) or if removal to their country exposes an applicant to a risk of torture or other enumerated risk, and that such risk exists throughout the country (*IRPA* section 97(1)(b)(ii)). If no serious possibility of persecution or the aforementioned risk exists throughout the country, there is no reason to advance to an IFA analysis.

[22] The key element of the first prong of the IFA test, a serious possibility of persecution or risk, can only be found if it is demonstrated that the agents of persecution have the probable means and motivation to search for an applicant in the suggested IFA (*Saliu v Canada (Citizenship and Immigration)*, 2021 FC 167 [*Saliu*] at para 46, citing *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 43).

[23] In addition, the tribunal must also be satisfied that, in all the circumstances, including the Applicants' particular circumstances, the conditions in the proposed IFA are such that it is not unreasonable for the Applicants to seek refuge there (see *Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164 (FCA) [*Ranganathan*] at para 15). The threshold to establish unreasonableness is very high, requiring "nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area" (*Ranganathan* at para 15).

VI. Analysis

[24] The Applicants focused their submissions in the oral hearing on the motivation and capacity of the Haryana state police to track down the Applicants, and indicated this was the determinative issue. The Respondent felt similarly, and so this analysis shall concentrate primarily on this issue. To this effect, the Applicants lean on two key concerns:

a. The RAD erred in interpreting the police's interest in pursuing the Principal Applicant with respect to the evidence submitted to show their interactions with the police; and
b. The RAD erred in its assessment of the police's capacity to track the Applicants upon return to India.

[25] The parties agree the standard of review is reasonableness.

A. ***Police's Interest in Pursuing***

[26] Based on the evidence before them, including the Applicants' testimony, the RAD found the lack of charges or being subject to an FIR, the police's threat of false accusations, and the circumstances of the Principal Applicant's arrest and subsequent release all amounted to there being no suggestion that the police are interested in the Applicants, let alone to such a high degree the Applicants would be found in a criminal database like the CCTNS.

[27] The Applicants argue that the RAD erred because they neglected to consider the Principal Applicant's interactions with the police, including that the police illegally detained them at the behest of six men associated with the BJP to intimidate and extort them. The Respondent argues that the RAD did not neglect to consider the Applicants' submissions and evidence on this point, but the inconsistencies between the evidence, the Applicants' testimony, and their narrative in their Basis of Claim [BOC] raised concerns about the reliability of the evidence they submitted. I agree with the Respondent. A few illustrative examples of the inconsistencies found by the RAD are provided below.

[28] In the Principal Applicant's narrative, he stated that, in April 2018, six members of the BJP demanded a donation and then left without the donation when they were unhappy with the amount. However, when questioned by the RPD and his own counsel, the Principal Applicant stated that the six BJP men called the police and reported him, and he gave them a larger donation because he was scared of them. When questioned about the inconsistency, the Applicant claimed that the interpreter made mistakes with his responses.

[29] Likewise, the RAD noted that there were also inconsistencies in the Applicant's evidence about his interactions with the police in June 2018. In his narrative, the Principal Applicant stated that he was stopped by a police inspector who accused him of speaking against the Hindus, and the inspector arrested the Principal Applicant when he denied the allegation and threatened to report the inspector to higher officials. However, in his testimony, the Applicant claimed that he was stopped by the police, accused of saying negative things about the police and of having connections with drug dealers.

[30] The RAD found it difficult to establish that the police were interested in the Principal Applicant for two reasons. First, the inconsistencies made it confusing to understand which series of events is the truth. Second, neither series of events appears to amount to the police pursuing the Principal Applicant, supported by the fact that he was illegally arrested so he could be extorted and there is no evidence of any FIR, criminal charge, or investigation.

[31] The Applicants contend that the lack of an FIR, criminal charge, or investigation cannot be used as evidence that the police are not interested in pursuing them simply because the police are "not on lookout" for them. With respect, the Applicants' view of the evidentiary burden is backwards. It is not the RAD's role to prove or disprove the Applicants' claim based on the evidence or lack thereof. Rather, it is the Applicants' role to prove their claim based on the evidence. The RAD found that the police are not interested in the Applicants because there is no evidence of any FIR, criminal charge, investigation, or of the Applicants being taken before a judge or magistrate and found that the Applicants had not established with sufficient credible evidence that the police were or remain interested in pursuing them. The RAD's assessment of

the evidence with respect to the Principal Applicant's interactions with the police was not unreasonable.

[32] As illustrated above, the RAD's finding that the Applicants had not established a motivation to pursue them was reasonable.

B. *Police's Capacity to Track*

[33] The Applicants claim the "pillar" of their case is that they can be tracked by security agencies and the police through CCTNS, the border alert mechanism at airport security, the Aadhaar card system, and the tenant verification system. I will deal with these in two groups: the CCTNS, tenant verification system, and border alert mechanism together, followed by the Aadhaar system.

(1) CCTNS, Tenant Verification System, and Border Alert Mechanism

[34] In light of their findings that the police did not suspect or accuse either of the Applicants of a crime of a sufficiently serious nature as to be entered into a criminal database, the RAD went on to find that the Applicants' non-appearance in such databases fundamentally means the Applicants had not established they could be tracked through such systems.

[35] This Court, including myself, has dealt with the same meritless argument about claimants being tracked by the CCTNS, tenant verification system, border alert mechanism, and similar databases in India numerous times (see for example *Kumar v Canada (Citizenship and*

Immigration), 2024 FC 288 at para 37; *Singh v Canada (Citizenship and Immigration*, 2023 FC 1758 [*Singh 2023*] at paras 30-31; *Khosla v Canada (Citizenship and Immigration)*, 2023 FC 1557 at paras 40-42; *Kumar v Canada (Citizenship and Immigration)*, 2023 FC 1462 at paras 21-22).

[36] When challenging the reasonableness of an IFA, but also in claiming refugee protection generally, the claimant bears the burden of proving the facts they allege on a balance of probabilities (see *Olusola* at paras 7-9; see also *Thirunavukkarasu* at 594-595). The Applicants have not led any evidence of a criminal charge against them, of being persons of interest in an active or discontinued investigation, or an FIR regarding their interactions with the Haryana state police or a complaint made by or against the Applicants. Even accepting, which I do not, their argument that the absence of these things cannot support a finding that the police *are not* interested in them, I must agree with a comment the Respondent made during oral submissions that the Applicants likewise cannot benefit from the absence of evidence.

[37] The challenge with these arguments about the CCTNS, tenant verification system, and the border alert mechanism is that the Applicants continue to frame this as an issue of "these things exist and I am scared of them" when their refugee protection claims require at least some element of "these things exist, *they apply to me*, and I am scared of them." As is often the case, the Applicants rely on the NDP and their own supplementary evidence to support the fact that the CCTNS, tenant verification system, and the border alert mechanism exist, they have the functionality to identify individual applicants, and can relay their locations to the police. These are all facts I can accept based on the evidence. However, what is not found in the evidence is

how these Applicants *in particular* would be identified or located by these systems when these databases are recognized as only storing data on individuals who are the subject of a criminal charge against them, persons of interest in an active or discontinued investigation, or an FIR regarding their interactions with police or a complaint made by or against them.

[38] The Applicants should be well aware of the contents of the NDP and the consistent findings of this Court supporting RAD determinations that claimants would only appear in and be flagged by the CCTNS, tenant verification system, or the border alert mechanism if they are the subject of a criminal charge against them, a person of interest in an active or discontinued investigation, or an FIR regarding their interactions with police or a complaint made by or against them.

[39] Evidence is required to establish on a balance of probabilities that a claimant is the subject of a criminal charge against them, a person of interest in an active or discontinued investigation, or an FIR regarding their interactions with police or a complaint made by or against them. There was no evidence before the RAD or overlooked by the RAD that the Haryana or Indian police will exhaust considerable resources to hunt down the Applicants using criminal tracking systems when there is nothing in the evidence to suggest they are even in a police database. Such an argument by the Applicants in the evidentiary circumstances of this case is meritless.

[40] As far as they relate to the CCTNS, tenant verification system, and the border alert mechanism, without evidence to establish on a balance of probabilities that there is a link

between the Applicants' personal circumstances and profiles and India's various databases, the Applicants' submissions, with respect, continue to be without merit, and are not a sufficient basis to overturn otherwise reasonable findings of the RAD.

(2) Aadhaar System

[41] The RAD dealt with the Applicants' submissions on the Aadhaar system separate from the databases and tracking systems. The RAD found that, recognizing the police have no legal access to Aadhaar data, the Applicants had not established how their agents of harm could locate them using the information contained on their Aadhaar cards.

[42] I will start by saying the Applicants' submissions regarding the Aadhaar system are of the same unsubstantiated nature as their submissions on the CCTNS, tenant verification system, and the border alert mechanism. Where they diverge is that these submissions are meritless because the Applicants have failed to establish, on a balance of probabilities, that the police or other agents of persecution are somehow able to get access to the Applicants' Aadhaar system's biometric data despite the fact that such access is strictly prohibited by law (see for example *Sandhu c Canada (Citoyenneté et Immigration),* 2024 CF 262 at para 22, citing *Singh 2023* at para 31; *Kumar v Canada (Citizenship and Immigration)*, 2023 FC 1279 at para 10; *Singh v Canada (Citizenship and Immigration),* 2023 FC 64 at paras 22-23).

[43] To repeat what I found in *Singh 2023*, the argument that the police or other state actors *are so interested* in pursuing a claimant that they would go through the lengths of illegally acquiring access to a biometric database the Indian government has explicitly prohibited them

from having access to, either by bribery or by other illicit means, amounts to a baseless conspiracy theory. Without evidence to establish on a balance of probabilities that the police have such a level of interest in the Applicants and such a degree of corruption as to go through these extraordinary means, any argument that the police or other state actors *could* and *would* go through such great lengths as to illegally acquire access to the Aadhaar system are similarly without merit, and certainly are not a sufficient basis to overturn otherwise reasonable findings of the RAD.

C. *Other Alleged Errors*

[44] The RAD dealt with the Applicants' remaining submissions on the viability of the identified IFAs thoroughly, canvassing alleged scrutiny upon arrival in India, the conditions the Applicants might face in the identified IFAs in respect of employment, language barriers, the practice of religion, and medical circumstances. On a balance of probabilities, the RAD found the Applicants had failed to establish the IFAs would be unreasonable even after these considerations.

[45] In their written submissions the Applicants advanced several errors which, though they conceded were not determinative in this matter, will nonetheless be succinctly addressed. They allege the RAD did not conduct its own IFA assessment but deferred to the RPD's findings, the RAD ignored evidence that India is generally unsafe despite its large population, the RAD improperly interpreted information in the NDP, and the RAD "came into a wrong finding" that the Principal Applicant cannot be tracked.

[46] Upon review of the evidence and having the benefit of the parties' written and oral submissions, it is clear these alleged errors are not errors at all but merely the Applicants' protests that the RAD did not agree with them. A great many of their submissions and the way they framed the alleged errors consisted of bald statements that the Applicants submitted "realistic evidence" and their mere statements amount to a serious possibility of persecution. Unfortunately, the Applicants' submissions assert many arguments as facts, which they proceed to build other arguments on top of, without illustrating how the evidence supports the arguments they allege as facts or even mentioning what evidence can support these alleged facts. Without such evidence, any arguments built off the Applicants' mistaken assertions must fail in this judicial review.

VII. Conclusion

[47] In my view, the Decision was reasonable. The Applicants had failed to establish with sufficient, credible evidence that there is a link between their circumstances and profiles and the scope of individuals the police would have the interest and capacity to track outside of Haryana. The RAD reasonably found the Applicants had not met their burden to demonstrate that they face a serious possibility of persecution or risk contemplated by s. 97 in the proposed IFAs. The Applicants have further failed to demonstrate that the IFAs are unreasonable.

[48] For the reasons set forth above, this Application is dismissed.

[49] No serious question of general importance for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-12203-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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