Federal Court  Cour fédérale

Date: 20240913

Docket: IMM-6980-23

Citation: 2024 FC 1444

Ottawa, Ontario, September 13, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

BABITA SHARMA
AMIT KUMAR
ARMAN SHARMA

Applicants

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Babita Sharma [Principal Applicant], Amit Kumar [Associate Applicant], and their son Arman Sharma [Minor Applicant], [collectively, Applicants], make this application for judicial review of the May 11, 2023 decision [Decision] by the Refugee Appeal Board [RAD] confirming the refusal of their refugee claim by the Refugee Protection Division [RPD], finding

that the Applicants have viable Internal Flight Alternative [IFA] locations in India, and that they would not be either Convention refugees or persons in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*].

II. Background

[2] The Applicants are citizens of India from the state of Haryana. Their issues began in May 2019 when the Associate Applicant refused to assist the Bharatiya Janata Party [BJP] with a political campaign, leading to his beating and the police refusing to take his complaint. In June 2019, the Principal Applicant was sexually harassed by "BJP goons", who also damaged her hair salon and threatened the Associate Applicant.

[3] In July 2019, the Applicants' house was raided by the police under the suspicion of obtaining Canadian visitor visas fraudulently, resulting in the police taking their passports and brutally manhandling the Principal Applicant and the Associate Applicant. In October 2019, the Principal Applicant and Minor Applicant were kidnapped and the Principal Applicant was sexually assaulted by BJP goons. Subsequently, the police again refused to file a missing persons' complaint and instead threatened the Associate Applicant. The Applicants retrieved their passports with the help of legal counsel and the payment of a bribe and left India for Canada on November 2, 2019.

III. Decision under Review

[4] At the outset, the RAD rejected the admission of three documents (a UN High Commissioner for Refugee [UNHCR] Guidance note and two articles from a social worker and

from a non-profit ENSAAF addressed to the Immigration and Refugee Board [IRB]) submitted on appeal by the Applicants as legal doctrine. The RAD determined that these documents constituted new evidence, rather than legal doctrine. The RAD held that the Applicants referred to "legal doctrine" rather than "legal authority" and improperly relied upon Rule 3(3)(f) of the *Refugee Appeal Division Rules* (SOR/2012-257), which provides that the appellant's record must contain "any law, case law or other legal authority that the appellant wants to rely on in the appeal." The RAD found that "legal authority" in Rule 3(3)(f) referred to some legal authority such as Order in Council or other legislative instruments. Moreover, the RAD held that some of the concepts discussed in the three documents have already been incorporated into the test for IFA, the Gender Guidelines, and the Immigration and Refugee Board national documentation package. It therefore found that the three documents were not legal authority and would have to be assessed under the new evidence test. Subsection 110(4) of the *IRPA* requires that "(o)n appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection." The RAD held the three documents did not meet the test for acceptance of the new evidence since they predated the RPD's decision, were reasonably available to the Applicants at the time of the RPD decision and the IFA is an integral part of the Convention refugee definition that the Applicants could reasonably have been expected to have presented. The RAD rejected the new evidence.

[5] The RAD upheld the RPD's decision that the Applicants were neither Convention refugees nor persons in need of protection, agreeing with the RPD's conclusion that the

Applicants had viable IFAs, which undermined their claim for refugee status. Before the RAD, the Applicants only challenged three of the RPD's findings related to the IFA analysis:

A. The RPD did not properly consider the Haryana police's and the BJP goon's combined interest to find the Applicants through family;

B. The RPD erred in finding that the Applicants will not be tracked through the tenant verification system in India; and,

C. The RPD did not adequately consider the Chairperson Guideline 4: *Women Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines] in its assessment of the viability of the IFA locations.

[6] The RAD corrected the RPD's errors, particularly noting that refugee claimants are not obligated to go into hiding to be safe in the IFA location, and that refugee claimants are also not expected to cease communications with their family. The RAD also recognized the psychological impact on the Principal Applicant as a victim of sexual assault and the need to assess her ability to travel to the IFA locations. The RAD corrected these errors by analyzing the issues in light of the evidence submitted on these issues and following the necessary framework for their consideration.

[7] The RAD analyzed the motivation and capacity of the alleged agents of persecution to track the Applicants. The RAD noted that, even if they accepted the Applicants' argument that the Haryana police or the BJP goons could learn of the Applicants' whereabouts from their family members, the agents of persecution are not motivated to pursue them to the IFA locations.

The Applicants had offered insufficient evidence to establish that either the police or the BJP goons would go through such lengths to track down the Applicants. The only evidence that was offered was testimony from the Associate Applicant's father that detailed three incidents where the police and BJP goons came to their house to ask about the Applicants, and separately that the father had received anonymous calls threatening to kill the Associate Applicant. The RAD noted that the police's and BJP goons' search was limited to the states of Haryana and Utar Pradesh where the Associate Applicant's parents stayed, and did not extend to the Principal Applicant's parents. In respect of the police's capacity to track the Applicants, the RAD found that there is no evidence that the Applicants had been criminally charged, or that a summons, an arrest warrant, or First Information Report had been issued against them. The RAD determined that the Applicants would not be tracked by the police through the tenant verification system or their usage of their cellular phones given there was no evidence the Applicants had the required profile, namely were the subject of any police investigation or had posted comments on any social media platform critical of the state or central government. The RAD also determined the Applicants had not established the BJP goon's capacity to track them through these electronic means. The RAD also determined the Applicants had not established that they could be tracked through the usage of their bank cards as the Applicants had not provided any evidence on how either agent of persecution would have access to the users' bank cards.

[8] Additionally, the RAD found that the Applicants would not face undue hardship in relocating to the IFA locations. It evaluated factors such as the family's education, work experience, religion, and language ability, and determined that these would not cause significant difficulties in the IFA locations. The RAD noted the Gender Guidelines specify that decision-

makers must consider whether and how the religious, economic and cultural factors would affect the woman in the IFA locations. The RAD agreed with the Applicants that the RPD had erred in not assessing the Principal Applicant's ability to travel to the IFA locations and the psychological impact on her as a victim of rape in its assessment of whether the IFA locations are objectively reasonable. The RAD noted the Principal Applicant was married and would be travelling to the IFA locations by air with her husband and son and was not presented with any evidence from the Applicants of any hardship she would endure travelling to the IFA locations. The RAD acknowledged the Principal Applicant's fears of being alone and being victimized again and emphasized that the Principal Applicant's emotional support from her husband would continue in the IFA locations, mitigating the psychological impact of her past sexual trauma and minimizing the social stigma of rape as she was married and being supported emotionally by the Associate Applicant. In the absence of any evidence regarding services the Principal Applicant and the Minor Associate Applicant would require in the IFA to address the psychological impact of the traumas they had both endured, the RAD was unable to find that the relocation to the IFA locations would be objectively unreasonable.

IV. Issues & Standard of Review

[9] The Applicants raise three issues in this application for judicial review:

A. Was it reasonable to ignore doctrine and treat it as new evidence?

B. Was it reasonable to ignore or minimize personal and documentary evidence of the Applicants and then provide reasons that state that there is no evidence on the matter?

C. On the issue of the Gender Guidelines, was it reasonable to sustain that the Principal Applicant would be unable to relocate despite accepting the Principal Applicant as a victim of sexual assault and having her testimony as evidence of trauma and psychological pain?

[10] The parties agree the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25).

[11] To avoid intervention on judicial review, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision-maker misapprehended the evidence before it (*Vavilov* at paras 125-126). 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).

[12] A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be “more than merely superficial or peripheral to the merits of the decision”, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[13] The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

A. *"Doctrine" as evidence*

[14] The Applicants allege the RAD erred in not considering the legal "doctrine" they submitted and qualifying it as evidence. The Applicants submit it is clear that the UNHCR Guidance note is an international jurisprudential guideline set to help decision-makers in the reasoning of their decisions and respond to the criteria of Rule 3(3)(f) of the *Refugee Appeal Division Rules*.

[15] I agree with the Respondent that it was reasonable for the RAD to conclude that these three aforementioned documents did not constitute legal authority. The RAD reasonably found that "legal authority" in Rule 3(3)(f) referred to some legal authority such as an Order in Council or other legislative instruments that are legally authoritative. The RAD also noted after a review of the three documents that some of the concepts discussed therein have already been incorporated into the test for IFA, the Gender Guidelines, and the IRB national documentation package.

[16] The IRB decisions cited by the Applicants in support of their argument that the three new documents are legal authority, for example *X (Re), 2015 CanLII 105865 (CA IRB)*, are not

relevant as the documents therein are different in nature, as they are legal texts written by Canadian scholars on, *inter alia*, immigration law, which properly constitute legal doctrine.

[17] The Applicants did not otherwise challenge, in this judicial review, the RAD's conclusion that the three documents were not admissible as new evidence as per subsection 110(4) of the *IRPA.* The three documents constituted new evidence that was inadmissible pursuant to subsection 110(4) of the *IRPA* and to the factors laid out by the Federal Court of Appeal in *Singh v. Canada (Citizenship and Immigration),* 2016 FCA 96; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385.

B. *RAD did not ignore or minimize evidence in concluding the Applicants had a viable IFA*

[18] The Applicants allege that the RAD either ignored or minimized evidence concerning the motivation and capacity of the police to track the Applicants and that the family is in ongoing danger from the Haryana and Punjab police.

[19] The RAD based its finding that the Haryana police and the BJP goons would not have the motivation to track the Applicants to the IFA locations on the evidence in the record, which showed that the search for the Applicants had been limited to the state of Haryana. There was no evidence showing the agents of persecution had any interest in tracking the Applicants to the IFA locations.

[20] As for the capacity to track, the Applicants' arguments are that the Indian police can use the tenant verification system, the Crime and Criminal Tracking Networks and Systems

[CCTNS], and similar such databases to track the Applicants. However, the Applicants have not addressed the fact that the Applicants would only be able to be tracked by such systems if they were subject to a criminal charge, a summons, an arrest warrant, or a First Information Report, of which there is no evidence in the record. See for example *Singh v Canada (Citizenship and Immigration)*, 2023 FC 1758 at para 30; *Sandhu v Canada (Citizenship and Immigration)*, 2024 FC 262 at para 21; *Kumar v Canada (Citizenship and Immigration)*, 2024 FC 288 at para 37; *Singh v Canada (Citizenship and Immigration)*, 2024 FC 614 at para 32; *Athwal v Canada (Citizenship and Immigration)*, 2024 FC 672 at para 29).

[21] While the Applicants assert that they are still targeted by the police and that extrajudicial arrests are kept in a database that the police can share, they have offered no evidence in support of this proposition. To the contrary, it has been found that extrajudicial arrests are not recorded in any database (see for example *Kumar v Canada (Citizenship and Immigration)*, 2023 FC 1462 at paras 21-22).

[22] The remainder of the Applicants' submissions on this point is predicated on the police tracking the Applicants using systems that they have not established the Applicants would be in, or that the police would illegally use cell phone data or banking information to track their locations. The Applicants have not offered any evidence that this is a possibility. The RAD's detailed findings summarized above at paragraph 7 are reasonable.

C. *Gender Guidelines were considered*

[23] With respect to the Applicants' claim that the Gender Guidelines were not accounted for or applied, this is not a case where the RAD merely mentioned their observance of the Gender Guidelines but failed to apply the same (see for example *Munir v Canada (Citizenship and Immigration)*, 2024 FC 153 at para 20; *Del Carmen Aguirre Perez v. Canada (Citizenship and Immigration)*, 2019 FC 1269 at para 17). In the Decision, there are, by my count, at least seven paragraphs explicitly discussing the circumstances that may be applicable to the Gender Guidelines. It seems disingenuous at best for the Applicants to allege the RAD erred in not applying the Gender Guidelines when they clearly and thoroughly considered them, identifying and correcting the RPD's error on this point, and conducting a fulsome analysis applying the Gender Guidelines to the facts of this case.

[24] The RAD found that the RPD had not assessed the Principal Applicant's ability to travel to the IFA location and did not consider the psychological impact on the Principal Applicant as a victim of rape in the assessment of the IFA's reasonableness. The RAD applied the Gender Guidelines and noted the Principal Applicant was married and had received emotional support from the Associate Applicant, which would continue in the IFA locations. While the RAD recognized the Principal Applicant as a victim of rape, the evidence on the record did not show that the IFA locations would be objectively unreasonable either due to the psychological impact of the trauma or the social stigma associated with the rape. I have not been convinced that the RAD's analysis is not transparent, intelligible and justified in light of the applicable law and upon the evidence in the record.

[25] The Applicants argue that if the submitted legal doctrine had been accepted and the decision-maker would have read or considered the elements of the doctrine combined with the principles set out in the Gender Guidelines and the facts and evidence submitted in the current case, it could have changed the outcome of the decision. It would be inappropriate for this Court to reweigh the evidence on the Applicants' disagreement with how the RAD applied the Gender Guidelines in the circumstances of this case.

VI. Conclusion

[26] For these reasons, this application is dismissed. The parties confirmed that there were no questions of general importance for certification, and I agree.

JUDGMENT in IMM-6980-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

STEWART ISTVANFFY	FOR THE APPLICANTS
JEANNE ROBERT	FOR THE RESPONDENT

SOLICITORS OF RECORD:

STEWART ISTVANFFY MONTRÉAL (QUÉBEC)	FOR THE APPLICANTS
ATTORNEY GENERAL OF CANADA MONTRÉAL (QUÉBEC)	FOR THE RESPONDENT