Federal Court Cour fédérale

Date: 20241030

Docket: IMM-11128-22

Citation: 2024 FC 1723

Ottawa, Ontario, October 30, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

JASWINDER SINGH

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant has applied to this Court under s 72(1) of the *Immigration and Refugee Protection Act* [IRPA] to judicially review the decision of the Refugee Appeal Division [RAD] upholding the rejection of his refugee claim by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB].

[2] The Applicant is a citizen of India who alleges a serious fear of persecution at the hands of the Indian authorities for his pro-Sikh rights activities, and the authorities' belief that he is associated with pro-Khalistan activities as well with the Pakistani intelligence.

[3] The RPD heard the claim on January 28 and May 20, 2022 and rejected it on credibility and availability of an internal flight alternative [IFA] on May 24, 2022. The RAD largely upheld the RPD credibility findings and dismissed the appeal. As a result, the RAD did not need to analyse the RPD's IFA analysis. The Applicant is now judicially reviewing the decision of the RAD.

II. Issues and Standard of Review

[4] The standard of review applicable to refugee determination decisions is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1645 at para 13; *Shah v Canada (Citizenship and Immigration)*, 2022 FC 1741 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). The reviewing court must ensure that the decision is justifiable, intelligible, and transparent (*Vavilov* at para 95). Justifiable and transparent decisions account for central issues and concerns raised in the parties' submissions to the decision maker (*Vavilov* at para 127).

III. Analysis

A. *Legal Framework: Credibility Findings*

[5] There is generally a great degree of deference given to the credibility findings of an expert administrative tribunal. Generally, this Court will not interfere with a decision if the evidence before the Board, taken as a whole, would support its negative assessment of credibility, if its findings were reasonable in light of the evidence, and if reasonable inferences were drawn from that evidence (*Tsigehana v Canada (Citizenship and Immigration)*, 2020 FC 426, at paras 33-35).

[6] However, credibility assessment is a fact-finding exercise. The decision-maker can accept or reject the facts on a balance of probabilities. Facts that the decision-maker accepts or rejects are then linked to their rationally connected legal consequence. If the claimant's testimony cannot be relied upon, and that there is no independent evidence to corroborate the facts relevant to the claim, the decision-maker is left with insufficient credible evidence to find that the fact is established to support the claim. Therefore, the starting point is to understand and consistently use well-defined concepts such as credibility, probative value, relevance, materiality, weight and sufficiency. My colleague Justice Grammond has offered guidance on this in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 that I will not repeat here. Concisely, by understanding and using concepts related to accepting or rejecting evidence consistently, administrative decision-makers increase the likelihood of rendering reasonable decisions.

[7] The formal rules of evidence, which make irrelevant or immaterial evidence inadmissible to a court proceeding, do not apply to an administrative tribunal such as the IRB. However, this

does not mean that all facts, irrespective of their relevance, probative value or materiality, are equal. Even though nearly all evidence is admissible at the RPD, and that new evidence before the RAD is subject to the restrictions in section 110(4) of the IRPA, relevance and materiality remain key to the weight of the evidence. Therefore, generally speaking, an exercise in making credibility assessment of individual facts, irrespective of how they matter in the context of the refugee case, in and of itself may not support an overall reasonable decision. This is because a decision where the member refers to all facts as equal, irrespective of their relevance and materiality in the context of the refugee claim, could lose the logical chain of reasoning contemplated by *Vavilov*:

> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a **whole is reasonable.** As we will explain in greater detail below, 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. The reasonableness standard requires that a reviewing court defer to such a decision.
>
> **(**emphasis added**)**

[8] Putting it differently, likening the situation to puzzle pieces, individual credibility findings represent fragments of evidence. Each piece might be accurate on its own, but without assembling and examining the complete puzzle, the overall picture – the comprehensive credibility assessment – may fail to reflect the true nature of the case. It underscores the necessity of a holistic approach to ensure the integrity and accuracy of the decision-making process. Without it, the chain of reasoning is lost and the reasons are no longer intelligible (*Patel v Canada (Citizenship and Immigration)*, 2024 FC 28 at para 24.

B. *Legal Framework: sur place*

[9] A *sur place* claim is one in which a claimant alleges that they have a well-founded fear of persecution because of events that occurred after they left. This may be because of their actions in Canada, a change in the circumstance of their country of nationality or former habitual residence, or because of a significant intensification of pre-existing factors since their departure (see *Ghazizadeh v Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 465, 154 N.R. 236, 40 A.C.W.S. (3d) 957).

C. *Was the RAD decision reasonable?*

[10] The Applicant submits that the RAD's decision is unreasonable for the following reasons:

a) the RAD did not admit the new evidence. The Applicant argued that this impacted the reasonableness of the RAD *sur place* as well its credibility assessment;

b) the RAD's credibility assessment, in and of itself was unreasonable.

(a) *Reasonableness of rejecting the new evidence*

[11] The Applicant attempted to file photographs of his participation during a rally in June 2022 in Ottawa that commemorated the 1984 massacre of Sikhs in India. The RPD decision was made on May 24, 2022, so the event leading to the evidence took place after the RPD had rejected the claim.

[12] New evidence before the RAD is subject to the restrictions in section 110(4) of the IRPA:

> Evidence that may be presented
>
> **110 (4)** On 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.

[13] The RAD must also determine whether the evidence is relevant and credible before it accepts it (see *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96; *Raza v Canada (Citizenship and Immigration)*, 2007 FC 385.) If the new evidence would not change the outcome of the appeal, the RAD's analysis on admission would not necessarily lead to a reviewable error.

[14] In rejecting the new evidence, the RAD provided the following rationale:

> [14] The photographs submitted as new evidence are of the Appellant attending the June 14, 2022, remembrance rally in honour of Sikhs who died in a massacre in 1984. In the materials before the RPD, the Appellant had submitted photographs of himself attending the same remembrance rally in 2021. The only difference is the 2021 remembrance rally also honoured indigenous children in Canada. These photographs establish that the Appellant attends rallies commemorating the attack on the Golden Temple in 1984. This evidence was already before the RPD and therefore it is not new and may not be accepted.

[15] From this, one would reasonably infer that the reason for rejecting the new evidence was its lack of probative value in light of what was already in the record from 2021 and analysed by the RPD. With respect to the Applicant's attendance at the 2021 event, the RAD's analysis is as follows:

> Late addition of Khalistan support activities
>
> [30] The RPD found that the late addition of pictures of the Appellant attending Khalistan rallies were meant to bolster his evidence and undermined his credibility. The Appellant argues that the RPD erred in its analysis of his sur place claim.

> [31] In his written evidence, the Appellant did not claim to be an active supporter of Khalistan movement. In fact, he claimed to be accused of being a supporter…
>
> [33] The Appellant's evidence evolved from being persecuted based on imputed militantism and Khalistan support to being persecuted because of his bona fide support for Khalistan independence. The earliest evidence submitted by the Appellant of his support for Khalistan is a photograph of him attending a June 2021 remembrance rally for indigenous children and victims of a 1984 massacre. Further, this evidence was not submitted until the day before his hearing in 2022 along with a copy of his Khalistan Referendum card which he claimed to receive the day before his hearing. It was only shortly before his hearing that his claim for protection was based on his actual political affiliation as opposed to an imputed political affiliation.
>
> [34] Even the Appellant's testimony in this regard was internally inconsistent

[16] In short, the RAD did not accept the new evidence of the Applicant's participation in a 2022 rally, because it offered nothing new when there was evidence of his participation in a similar rally in 2021. In analysing the 2021 rally, the RAD accepted that the Applicant attended, but conflated its' *sur place* analysis with the credibility of the level of his commitment to the Sikh cause. In short, the entire analysis was from the perspective of the Applicant, which the RAD found to be inconsistent, and not from the perspective of the agents of persecution. It appears that the RAD was not alert or alive to the *sur place* test, which mainly focuses on the prospective risk from the perspective of the persecutor.

[17] Some of the older jurisprudence of this Court point to the relevance of motive in assessing the subjective component of a well-founded fear in cases where the claimants themselves were responsible for creating the circumstances leading to their *sur place* claims (for example see *De Corcho Herrera v Canada (Minister of Employment and Immigration),* [1993]

FCJ No 1089, [1993] ACF no 1089, 70 FTR 253, 44 ACWS (3d) 771, [1993] FCJ No 1089 at para 10 where Noël J upheld the Board's conclusion that the claimant had no subjective fear and was not a *bona fide* refugee because the basis for his alleged fear, namely speaking out against the Cuban regime after claiming refugee status in Canada, was a self-serving act intended to facilitate his refugee claim).

[18] In the majority of the jurisprudence, the Court has held that a decision-maker should not reject a *sur place* claim solely on the basis that the claimant was acting for an improper motive without examining the potential risk to the claimant upon return to their country of origin. For example in *Su v Canada (Citizenship and Immigration),* 2015 FC 666, the Court noted that the RPD is permitted to conduct its *sur place* analysis in view of its concerns regarding the original authenticity of a claim but must nevertheless determine whether the applicant, due to events that have transpired since his departure from his country of origin, has become a member of a persecuted group and whether he would now face persecution upon his return. In similar cases relied on by the Respondent such as: *Zang v Canada (Citizenship and Immigration),* 2016 FC 765; *Sule v Canada (Citizenship and Immigration),* 2023 FC 610 and *Li v Canada (Citizenship and Immigration),* 2018 FC 877 the Court upheld the rejection of an applicant on credibility where there was also insufficient evidence that the agents of persecution had learnt about the applicant’s activities in Canada. In other words, the Court found that the applicants would not face a serious possibility of persecution on their return because it was unlikely that a non-genuine activist/practitioner would continue with the dangerous activities when the agents of persecution did not know about the Canadian activities.

[19] More recently, in *Singh v Canada (Citizenship and Immigration)*, 2024 FC 1020, I allowed the judicial review where the IRB had not assessed the credibility of the claimant's political opinion. This was relevant in the context of the likelihood of continuing their religious and political activities on return and the prospective nature of the refugee test.

[20] I also note that in *Ngongo v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8885 (FC), the Court cited with approval the following passage from Professor Hathaway's *The Law of Refugee Status:*

> It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad (James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 39).

[21] Also, in *Ghasemian v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1266, this Court held that once the Board accepted that the claimant had converted to Christianity while in Canada and now risked severe punishment in Iran as an apostate, it had to consider whether the claimant would be viewed as an apostate regardless of the motive for her conversion. The Board had misconstrued the claimant's evidence regarding her alleged lack of fear of reprisals and applied the wrong test by rejecting her claim on the basis that it was not made in good faith, i.e., she did not convert for a purely religious motive. The RAD's engagement with

the Applicant's degree of commitment to the Sikh cause is similar in this case. Moreover, by not accepting the evidence of the 2022 participation, the RAD could not engage with the credibility of the Applicant's ongoing participation, or whether the 2022 event in Ottawa, which was squarely on a highly charged Indian political event, would likely be brought to the attention of the Indian authorities.

[22] The genuineness of belief can certainly be relevant to the assessment of the likelihood of ongoing activism/practice on return to the country of origin. However, even if the RAD had reasonably rejected the Applicant's genuine activism, which I have not analysed here and will neither endorse nor deny, his attendance at pro-Sikh events in Canada should have been analysed from the perspective of the Indian authorities. This has two basic requirements that 1) whether on a balance of probabilities the agents of persecution (the Indian authorities in this case) have learnt about it; and 2) if so, would that knowledge expose the Applicant to a serious possibility of persecution on his return. The RAD did not engage with this. Instead, it ruled that the Applicant's knowledge on the behaviour of the authorities was speculative, and that since he was not a genuine activist, his sur place claim failed. It was unreasonable for the RAD to ignore the objective documentary evidence before it in its analysis of the likelihood of the Indian authorities learning about the activities and solely rely on the Applicant's opinion or belief.

[23] Moreover, the RAD did not explain why it thought that the 2021 and the 2022 demonstrations were identical, which was the basis for rejecting the 2022 photos. The 2022 was exclusively about an issue that attracts a lot of sensitivity in India, namely pro-Sikh rights, as

opposed to the 2021, which did not have a sole purpose and also engaged with Canadian issues, such as the treatment of indigenous children.

[24] When the RAD engaged with the likelihood of the Indian authorities learning about the 2021 event, it agreed with the RPD finding that the Applicant's belief was based on his speculation. This is based on the following exchange at the RPD hearing:

> **MEMBER:** And how do you know this [that the Indians have learnt about you]?
>
> **CLAIMANT:** Whenever there is anything against Indian nationalism, there are representatives that take these pictures and then they forward these. And I believe that my pictures have also been forwarded.
>
> **MEMBER:** But how do you know this is done, sir?

[25] The RAD never engaged in an independent assessment of the objective country documents to make a finding on the likelihood of Indian authorities learning about participation in pro-Sikh events. At the Judicial review hearing, counsel for the Applicant pointed to country documents before the RAD that spoke to the heightened interest of the Indian authorities towards pro-Sikh activities (both in Punjab and elsewhere in India). Counsel pointed to a reported case where the Indian authorities summoned a parent in India on the basis of their son's pro-Sikh activities in Canada. I appreciate that counsel for the Respondent stated that the document's focus was about the reach of the authorities in India, but the document is relevant to their motivation and interest, including the length in which they monitored the son's activities on social media. It is not for this Court to assign probative value to this objective documentary evidence. This was the job of the RAD. The RAD limited its analysis to the Applicant's possible speculation without assessing whether the totality of the evidence, on a balance of probabilities,

would support that the Indian authorities have learnt about the Applicant's participation in events in Canada. The RAD should have then looked at whether this knowledge, if established, would expose the Applicant to a serious possibility of persecution on his return. This would have been regardless of the Applicant's motivations for participation.

[26] Given that the event of 2022 took place after the RPD's decision and was exclusively on pro-Sikh rights, the photos of the Applicant in that event were relevant and material, because with a reasonable assessment of the *sur place* claim, they could potentially impact the result of the Applicant's refugee claims. It was unreasonable to reject them on the mistaken belief that they offered nothing new. The member then conflated her credibility findings with the *sur place* element of the claim in a manner that broke a logical chain of reasoning. This renders the entire decision unreasonable.

[27] Because of the above finding, I need not analyse the reasonableness of the RAD's credibility finding.

IV. Conclusion

[28] I find that the decision of the RAD was unreasonable. I grant the judicial review.

[29] The parties did not propose a certified question and I agree that none arises.

JUDGMENT IN IMM-11128-22

THIS COURT'S JUDGMENT is that

1. The Judicial Review is granted. This matter is sent back to the RAD to be decided by a differently constituted panel.

2. There are no questions to be certified.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11128-22
STYLE OF CAUSE:	JASWINDER SINGH v MCI
PLACE OF HEARING:	MONTRÉAL, QC
DATE OF HEARING:	OCTOBER 15, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	AZMUDEH J.
DATED:	OCTOBER 30, 2024

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