

Federal Court



Cour fédérale

Date: 20241107

Docket: IMM-8979-23

Citation: 2024 FC 1774

Ottawa, Ontario, November 7, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TARSEM SINGH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Tarsem Singh, seeks judicial review of the decision of the Refugee Appeal Divisions [RAD] dismissing his appeal from the Refugee Protection Division [RPD] and confirming that the Applicant is neither a Convention refugee nor a person in need of protection, pursuant to ss 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Applicant is a citizen of India. He claims that his brother was an active Shiromani Akali Dal Amritsar [SADA] member who was threatened and attacked many times by members of the opposing Bharatiya Janata Party [BJP]. The Applicant's brother fled India and claimed asylum in the United States. The Applicant claims that, after his brother's departure, BJP members made a false complaint to the police that his brother had joined the militants. The Punjab police then began to harass the Applicant and his family.

[3] The Applicant claims that he was attacked twice by unknown people suspected of being associated with the BJP. And, when he reported these attacks to the police, they did not help him. On November 22, 2018, the Applicant was assaulted again after BJP members discovered he went to the police. The Applicant fled to Mumbai.

[4] In early December 2018, police in Mumbai detained and questioned the Applicant about his brother. Upon his release on December 7, 2018, the Applicant went to Thailand, returning to India on December 18, 2018. On January 23, 2019, the Applicant tried to board a flight from New Delhi to Toronto but was denied boarding. He then took a flight from Delhi to Mumbai, arriving in Toronto on January 24, 2019, where he claimed asylum.

[5] On November 8, 2022, the RPD dismissed the Applicant's refugee claim. The RPD held that the determinative issue was credibility and found the Applicant to be generally not credible. The Applicant appealed to the RAD.

RAD's Decision

[6] The RAD found that the RPD was correct in determining that the Applicant lacked credibility, and that this issue was dispositive of the appeal. In its reasons, the RAD addressed each of the RPD's negative credibility findings as well as the Applicant's submission that the RPD erred by: failing to give more weight to the affidavit of the Namberdar (i.e. the village headman); by making adverse credibility findings that are erroneous and unsupported by the record and the jurisprudence; by conducting a microscopic analysis; and, by failing to conduct separate assessments under ss 96 and 97 of the *IRPA*.

Issues and Standard of Review

[7] The sole issue in this matter is whether the RAD's decision was reasonable. The parties submit and I agree that the applicable standard of review is reasonableness. On judicial review the court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

Analysis

Preliminary matter – Procedural Fairness

[8] As a preliminary matter, I note that the Applicant submits that the RAD breached the duty of fairness. The Applicant argues that “the decision is unreasonable as the adjudicator

breached its duty to act fairly” and that “officers do not act unfairly if they rely on guidelines. However, guidelines which fetter the officer’s discretions is improper and application of the guidelines to one’s application will lead to a breach of the requirement of fair process”. Further, that the RAD “got the facts wrong at the fundamental level and appears to have ignored the facts of fundamental importance to the case, which is against procedural fairness.”

[9] However, in identifying the issues arising in this matter, the Applicant does not suggest that procedural fairness is one of them. In any event, these submissions are misplaced. Regarding the submission referring to guidelines and fettered discretion, it is not apparent how this applies to the present case. There is nothing in the record to suggest that the RAD or the RPD based their decisions on prescribed guidelines. Further, the Applicant does not specify which guideline he is referring to, nor does he explain how the RAD fettered its discretion with respect to its application. As to the Applicant’s statement that the RAD got the facts wrong or ignored the facts, this does not speak to procedural fairness, but to reasonableness. Accordingly, I will not further address the Applicant’s submissions as they relate to procedural fairness.

RAD’s credibility findings

[10] The RAD assessed the specific credibility findings made by the RPD.

[11] The RAD first considered the RPD’s negative credibility inference, which the RPD based on an inconsistency between the Applicant’s testimony and his Basis of Claim [BOC] narrative regarding whether the police beat him on November 15, 2018. Ultimately, the RAD found that the Applicant did not seem to specifically contest this finding. The RAD stated that it had

independently assessed the evidence and found no error. It agreed with the RPD's finding and came to the same conclusion.

[12] On judicial review, the Applicant does not assert that the RPD or the RAD erred in their conclusion that there was an inconsistency in the evidence. Instead, he asserts that the RAD unreasonably relied on the RPD's finding and did not make an independent assessment of the evidence.

[13] It is well established that, because the RAD must apply the correctness standard when evaluating decisions appealed from the RPD, it must conduct its own independent assessment of the refugee claimant's file to determine whether or not it ought to intervene (*Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93, at paras 78–79, 103 [*Huruglica*]). As such, the RAD cannot simply endorse the RPD's findings. However, agreement with the RPD does not necessarily indicate that the RAD did not conduct its own assessment of the issues (*Ademi v Canada (Citizenship and Immigration)*, 2021 FC 366 at para 28). In this case, the RAD explicitly stated that it had reviewed the record before the RPD with respect to the negative credibility inference. And, as will be seen below, it is apparent that the RAD did review the record with respect to the RPD's credibility findings. While the RAD should perhaps have provided more detail as to how it reached its conclusion on this particular credibility finding, it is significant to again note that both before the RAD and on judicial review, the Applicant did not actually challenge the correctness of this impugned finding. Nor was this the only negative credibility finding.

[14] The RAD also addressed the RPD's drawing of a negative credibility inference with respect to the Applicant seeking protection from the police, given his evidence that he had feared the police since 2017 because they worked under pressure from the government, and because the police were abusing and harassing him and his family. The RAD noted that the Applicant again did not seem to specifically contest this negative credibility finding. However, the RAD had independently reviewed the evidence and found that the RPD erred in making an implausibility finding. The RAD explained why the RPD erred but concluded that the error was not fatal to the decision in light of the RAD's assessment of the RPD's other credibility findings.

[15] With respect to this finding, the Applicant argues that the RAD overlooked the totality of the evidence before it, reasserts his allegations of risk, and submits that the RAD merely endorsed and unreasonably relied on the RPD's credibility findings without weighing the evidence on record, including his oral testimony. However, the RAD did not endorse or rely on the RPD's credibility findings with respect to the Applicant's fear of the police – it rejected them and stated its reasons for doing so. Further, the Applicant does not specify what circumstances the RAD overlooked or what evidence it failed to weigh. The onus is on the Applicant to demonstrate that the RAD erred. That onus is not met by broad, general statements. Moreover, the Applicant does not acknowledge and address the RAD's reasoning for finding that the RPD's error was not fatal. In other words, he does not challenge that finding.

[16] In its reasons, the RAD next addressed the RPD's negative credibility inference arising from the Applicant's delay in leaving and his subsequent return to India. The RPD had noted the Applicant's statement that he began to fear for his life in October-November 2017, but did not

leave India permanently until January 2019. Further, that the Applicant returned to India (his country of persecution) many times after he alleged fearing for his life there. His passport, issued on December 15, 2017, notes eight entry stamps to India dated February 1, February 17, March 3, March 22, May 24, June 12, July 17, and December 18, in 2018. The Applicant held travel visas to China, Thailand, the United Arab Emirates, and Indonesia. The RPD found that his actions of repeatedly returning to his country of alleged persecution demonstrated a lack of subjective fear and it drew a negative inference in that regard. The RAD found that this undermined the credibility of the Applicant's allegations that his life is in danger in India.

[17] The RAD rejected the Applicant's arguments that he had first tried to hide in India and that any delay in filing a refugee claim or leaving his country should not impact his credibility. The RAD stated that having independently assessed the evidence, it found that the RPD was correct. The RAD stated that it had considered the Applicant's explanations for his delay in leaving India, and agreed with the RPD that his answers were not reasonable. While the Applicant explained that he did not leave India until the Mumbai Police arrested him and informed Haryana Police of this in late 2018, he did not account for the time he remained in India from when he claimed he was first fearful of the BJP and the police in 2017. The RAD found that a two-year delay in leaving India was an unreasonable amount of time, in the Applicant's circumstances, especially considering that he was working during most of this time and was not living in hiding. The RAD also found that the Applicant's travel and return to the country of persecution was not compatible with a subjective fear of persecution. Both of these factors undermined the Applicant's credibility with respect to his subjective fear.

[18] The Applicant does not take issue with this significant negative credibility finding by the RAD.

[19] In my view, and contrary to the Applicant's submissions, the credibility findings of the RPD, upheld by the RAD, were not microscopic inconsistencies. They were significant concerns that went to the heart of his claim. Further, given the RAD's negative credibility findings and the Applicant's failure to substantively engage with them, the RAD's reasoning in this regard is reasonable.

Assessment of documents

[20] The RAD also noted that the RPD considered three supporting documents provided by the Applicant to establish the central elements of his allegations: press articles describing the criminal charges against a fake guru; his brother's driver's licence and work authorization in New York State; and photographs of the Applicant with his brother and family. The RPD accepted the Applicant's allegation that a religious impostor held blasphemous speeches against the Sikh religion that outraged the Applicant, but found that this allegation was not at the heart of the claim. The RPD also indicated that it had no reason to doubt that the Applicant has a brother now living in New York; however, this did not speak to the persecution the Applicant experienced and the fear for his life in India. The RPD also reviewed the affidavit from the Namberdar, who attests to knowing the family well. It found, essentially, that the author repeats the allegations at the heart of the Applicant's claim. The RPD gave little weight to this document and found that it did not overcome its previous credibility findings.

[21] Before the RAD, the Applicant argued that the RPD should have given more weight to the Namberdar's affidavit. The RAD stated that it had independently assessed the documents and the RPD's findings and found no error in the RPD's analysis. The RAD found that the RPD correctly assessed the weight of the Namberdar's affidavit and agreed with the RPD that it essentially repeats the Applicant's allegations, and, therefore has low probative value. The RAD disagreed with the Applicant's claim that the RPD overlooked the threats and danger that he faced. Having reviewed the evidence, including the transcript of the RPD hearing, the RAD found that the RPD correctly assessed the material elements of the Applicant's claim, including the risk to life he alleged. The RPD also correctly assessed his supporting documentation but gave the affidavit little weight in supporting his material allegations.

[22] On judicial review, the Applicant submits that he provided "sufficient evidence" in support of his submissions, including his oral and written testimony, the Namberdar's affidavit and "other documents" but that the RAD "ignored and discounted" this evidence. However, the RAD specifically addressed the three documents addressed by the RPD and the Applicant does not specify what other evidence was overlooked or ignored. The RAD also indicated that it had reviewed the transcript of the hearing before the RPD. In fact, the Applicant does not actually take issue with the RAD's finding with respect to the Namberdar's affidavit. And, in any event, it was open to the RAD to afford it low probative value. It is not the role of this Court to reweigh the evidence. In my view, no reviewable error arises from the RAD's treatment of the documents that were before the RPD.

Applicant's circumstances

[23] The RAD also addressed and rejected the Applicant's argument that the RPD failed to consider his unique circumstances and that the RPD used a "Canadian paradigm" to judge his situation in India, especially in the context of the police in Haryana, who are corrupt. It found that the RPD correctly assessed the credibility of the Applicant's allegations and found that, due to inconsistencies and negative inferences related to his credibility, the presumption of truth was rebutted.

[24] While in this application for judicial review the Applicant asserts that this finding by the RAD was unreasonable, he offers no explanation for why this is so. Similarly, the Applicant states that the RAD unreasonably disagreed with him that the RPD emphasized tiny details, did not consider the threats that existed, and conducted a microscopic analysis of the claim. Instead, the RAD found that negative inferences drawn by the RPD concerning essential elements of his claim – namely the contradiction regarding the incident with the police on November 15, 2018, and his subjective fear of persecution relating to his delay in leaving and returning to India – were correct. The Applicant again provides no basis for his assertion that this finding was unreasonable and, in my view, it was not.

Support of Khalistan movement in Canada

[25] The RAD noted the Applicant's position that, because he is a supporter of the Khalistan movement, his life will be at risk at the hands of the BJP and Indian police if he is removed to

India, but that this point was not considered by the RPD. The Applicant requested that the RAD consider his new evidence and then analyze his credibility.

[26] The RAD acknowledged that the RPD did not specifically consider the Applicant's support of the Khalistan movement, which he had raised in his narrative addendum. However, because of the contradictions and inconsistencies in his evidence and due to his behaviour, which was deemed incompatible with subjective fear, the RPD had found the Applicant to be generally not credible. The RAD found that this finding by the RPD encompassed the allegations included in the Applicant's narrative addendum. Additionally, as the RAD had already noted, the evidence submitted by the Applicant was not new as it formed part of the record before the RPD.

[27] I note that the transcript of the RPD hearing discloses that on the eve of the hearing, the Applicant submitted and the RPD accepted a one-paragraph narrative addendum and two photographs. The narrative addendum states that while the Applicant has been in Canada, the police have been harassing his family and friends about the Applicant and his brother and are falsely alleging that he and his brother are working for the Khalistani militants from abroad. The Applicant states that his family are safe with the help of influential people and bribes, although the harassment restarts when a new police officer takes charge. The Applicant also states that his life is now in more danger if he returns to India because of his involvement in Khalistani events and because he encourages others to vote for the Khalistan referendum. The photographs submitted by the Applicant to the RPD are of a Punjab Referendum Khalistan "Voter Registration Card" issued by Sikhs for Justice, in Washington, DC, and what appears to be a photo of the Applicant in front of a vehicle with a display indicating that voting for a Khalistan

referendum (Punjab independence referendum) was available on September 18 in Brampton, Canada.

[28] On judicial review, the Applicant asserts that the RAD overlooked material evidence, citing a number of National Documentation Package [NDP] articles, and failed to consider his forward-looking risk based in his participation in the Khalistan movement in Canada.

[29] In effect, by way of his narrative addendum the Applicant raised a *sur place* claim. This Court has held that, where a *sur place* claim is premised upon the same alleged activities which were found not credible when allegedly conducted abroad, the RPD or the RAD is entitled to import concerns about an applicant's credibility and genuineness into the evaluation of that claim. Thus, it was open to the RPD and the RAD to find that the evidence said to support the *sur place* claim was insufficient to overcome their negative credibility findings, causing the *sur place* claim to fail (*Hu v Canada (Citizenship and Immigration)*, 2022 FC 828 at para 34, citing *Jiang v Canada (Citizenship and Immigration)*, 2012 FC 1067 at paras 27–28 [*Jiang*]; see also *Towolawi v Canada (Citizenship and Immigration)*, 2020 FC 245 at para 29, citing *Jiang* at paras 27–28; *Li v Canada (Citizenship and Immigration)*, 2012 FC 998 at para 32; *Sanaei v Canada (Citizenship and Immigration)*, 2014 FC 402 at para 64; *Gong v Canada (Citizenship and Immigration)*, 2020 FC 163 at para 52.

[30] The difficulty here is that the RPD did not address that evidence or make that assessment. The RAD acknowledged that the RPD did not specifically consider the Applicant's support of the Khalistan movement as mentioned in his narrative addendum (regarding his in-Canada

activities) but found that the RPD's "generally not credible" finding encompassed those allegations. In my view, the RAD erred in that finding. This is because it is not possible to ascertain from the RPD's decision that it actually reached the conclusion attributed to it by the RAD. Thus, the RAD's finding is speculative. That said, it was open to the RAD to itself assess the evidence pertaining to the *sur place* claim and, in light of the negative credibility findings, determine if the Applicant had met the a raised evidentiary burden to demonstrate that the *sur place* claim truly existed. However, the RAD did not conduct its own analysis of the issue.

[31] The Respondent submits that Federal Court of Appeal has held that where the RPD "makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence" (*Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3; see also *Kabba v Canada (Citizenship and Immigration)*, 2023 FC 117 at para 28; *Zamor v Canada (Citizenship and Immigration)*, 2021 FC 672 at para 8). Again, however, the difficulty is that neither the RPD nor the RAD assessed whether the evidence pertaining to the *sur place* claim was sufficient to overcome the prior negative credibility findings.

[32] Accordingly, I find that that the RAD's decision as it pertains to the *sur place* claim is unreasonable. While the RAD's credibility findings are otherwise sound, the matter must be returned to re-determine the *sur place* claim.

JUDGMENT IN IMM-8979-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted, in part;
2. The RAD's finding with respect to the Applicant's *sur place* claim is set aside and only that issue shall be remitted to a different RAD member for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: NOVEMBER 7, 2024

APPEARANCES:

Amit Vinayak FOR THE APPLICANT

Asha Gafar FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor FOR THE APPLICANT
Brampton, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario