

Federal Court



Cour fédérale

Date: 20211223

Docket: IMM-6053-20

Citation: 2021 FC 1472

Ottawa, Ontario, December 23, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

PURNA BAHADUR GURUNG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Purna Bahadur Gurung, is a citizen of Nepal who alleges a fear persecution due to his real and perceived political opinions. In this application for judicial review, Mr. Gurung seeks to overturn a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada that dismissed his appeal, and confirmed the Refugee Protection Division's (RPD) determination that he is neither a Convention refugee nor a person

in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Although the RPD had made several negative credibility findings that Mr. Gurung challenged on appeal, the RAD did not address them. The determinative issue on appeal was the availability of an internal flight alternative (IFA) within Nepal. A refugee claimant bears the onus of establishing that a proposed IFA is not viable, and can discharge the onus by defeating at least one prong of the two-prong IFA test. The RAD found Mr. Gurung had not discharged his onus to establish (i) a serious possibility of persecution in the proposed IFA of Biratnagar, or (ii) that it would be unreasonable to relocate to Biratnagar, considering all the circumstances.

[3] Mr. Gurung alleges the RAD's analysis under the first prong of the IFA test—whether he would face a serious possibility of persecution in Biratnagar—is unreasonable. For the reasons below, I agree. Accordingly, this application for judicial review is allowed.

II. Issues and Standard of Review

[4] Mr. Gurung asserts that the RAD made five reviewable errors that taint its conclusion under the first prong of the IFA test. He asserts the RAD erred by: (i) failing to consider that, despite previous relocations within Nepal, the agents of persecution were able to find him; (ii) finding that the agents of persecution are not state actors; (iii) assuming that the agents of persecution are not part of a criminal and violent political faction; (iv) finding that Mr. Gurung's profile would not make him a target; (v) finding that the agents of persecution do not have a nationwide "network" or the ability to locate him in Biratnagar.

[5] Mr. Gurung submits that the RAD's decision is reviewable according to the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[6] The respondent agrees, but argues that the RAD's factual inferences leading to findings of fact and the factual findings themselves are subject to the standard of "palpable and overriding error": *Aldarwish v Canada (Minister of Citizenship & Immigration)*, 2019 FC 1265 at paras 24-30 [*Aldarwish*]. Therefore, the Court should only review such findings for errors that are so obvious that they are easily seen or known: *Housen v Nikolaisen*, 2002 SCC 33 at paras 3-6, 10-25, 36 [*Housen*], as applied in *Aldarwish*. The respondent submits that this approach does not steer away from the "essence of the reasonableness enquiry" in *Vavilov*, but rather, is subsumed within it: *Xiao v Canada (Minister of Citizenship and Immigration)*, 2021 FC 386 at paras 7-9 [*Xiao*]. Also, the approach respects the language of paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7, which empowers the Court to set aside a tribunal's decision if it is satisfied that the tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] I note that *Aldarwish* is a pre-*Vavilov* decision. In *Xiao*, the Court rejected the contention that a different standard should apply to the RAD's factual inferences, and instead applied the reasonableness standard: *Xiao* at paras 7-10; see also *Liao v Canada (Minister of Citizenship and Immigration)*, 2021 FC 857 at paras 21-22.

[8] To the extent that the respondent urges an approach that would apply a different standard of review to aspects of the RAD's decision, I find this approach to be inconsistent with the guidance in *Vavilov*. The presumed standard of review is the reasonableness standard, absent an exception. One exception, which does not apply to this case, is where there is a statutory appeal mechanism for an administrative decision and the reviewing court should apply appellate standards of review following the *Housen* framework: *Vavilov* at para 37. Where the reasonableness standard applies, it is a single standard of review that accounts for context, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court: *Vavilov* at paras 88-90.

[9] To the extent that the principles in *Aldarwish* and *Housen* are subsumed in the guidance for conducting a reasonableness review as set out in *Vavilov*, then the applicable principles can be drawn from the *Vavilov* decision itself.

[10] When reviewing the merits of an administrative decision, the reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether the decision is justified in relation to the relevant factual and legal constraints that bear on it: *Vavilov* at para 99. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. RPD and RAD Decisions

[11] Mr. Gurung's refugee claim is based on his membership in the democratic Rastriya Prajatantra Party and its youth wing, the National Democratic Youth Organization which he

joined in the late 1990s, in secondary school. Its members have been threatened by members of the United Communist Party of Nepal-Maoist and its youth wing, the Young Communist League.

[12] Mr. Gurung alleges that in 2002-2003, he was approached by Maoists to join their party, and he refused. He also alleges that in 2004, he was physically attacked by Maoist youths and hospitalized for his injuries.

[13] In 2005, Mr. Gurung obtained a visa to work in Dubai and worked there until 2013, returning to Nepal a number of times during this period.

[14] Mr. Gurung came to Canada in March 2014 on a work visa. Mr. Gurung states that he returned to Nepal in April 2015 because his father was ill. While there, on June 30, 2015, he alleges that five Maoist cadres threatened, physically attacked, and robbed him and his family members in Kathmandu. He returned to Canada in July 2015, and applied for refugee status in November 2015.

[15] The RPD found that Mr. Gurung was not credible regarding a number of elements of his claim. The RPD acknowledged that when a claimant swears that certain facts are true, there is a presumption that those facts are indeed true unless there is reason to doubt their veracity. The RPD considered Mr. Gurung's testimony and found, given credibility concerns for which reasonable explanations were not provided, that the presumption of credibility had been rebutted. The RPD observed the following:

- i. Mr. Gurung could name very few Maoist parties and groups in Nepal. As an educated man who was politically involved for many years, the RPD expected Mr. Gurung to know the political opponents of his own party. Furthermore, Mr. Gurung did not know which party was targeting him. The RPD found it reasonable to expect the agents of persecution, who had allegedly gone to great lengths to force him to join their Maoist party, would have identified their party. These points “raised concerns” about the credibility of events having occurred as Mr. Gurung alleged.
- ii. Mr. Gurung’s Schedule A (background/declaration) form stated that he has never been refused a visa from any country, when in fact he had applied for a U.S. work visa during his trip to Nepal in 2015, and the visa was refused in May 2015. The RPD found Mr. Gurung was attempting to prevent Canadian immigration authorities from learning that the information in the U.S. visa application was inconsistent with the information in his Canadian immigration forms, including:
 - a. where Mr. Gurung has lived in Nepal, and importantly, whether he was living in Kathmandu or Pokhara at the time of the alleged June 2015 attack by Maoists in Kathmandu; Mr. Gurung’s Schedule A form completed in November 2015 states that he was living in Kathmandu since September 2013, while the U.S. visa application that he completed during the 2015 trip to Nepal states that he was living in Pokhara at the time, and had not lived anywhere else since he was 16 years old;
 - b. whether he was involved in social organizations, which was material because an element of his refugee claim was that he had been an active member of certain social organizations, and a reason for the Maoists’ interest in him was that he was

well-known due to his active social profile, and their belief that he could bring other members from these organizations to the Maoist party; and

- c. whether he had given money to Maoists, which was material because an element of his refugee claim was that he had been extorted and forced to pay money to the Maoist party.
- iii. The delay in leaving Nepal, and the fact that he had made a number of return trips after allegedly fleeing the country in fear for his life were inconsistent with Mr. Gurung's alleged subjective fear, and detracted from his credibility.
- iv. Mr. Gurung provided conflicting and inaccurate information to various Canadian government authorities about where he was living in Canada, detracting from his credibility.
- v. When Mr. Gurung re-entered Canada in July 2015, he did not mention the alleged attack in Kathmandu in June 2015 to the immigration authorities, or a fear of returning to Nepal. Furthermore, his work permit did not authorize re-entry, was restricted to one specific employer, and did not authorize Mr. Gurung to work in any other capacity. The RPD did not accept Mr. Gurung's explanation that the Canadian immigration officer did not ask him a single question upon re-entering Canada, and found that the failure to inform immigration authorities of the significant change in his circumstances detracted from his credibility.

[16] Despite making these negative credibility findings, the RPD did not state that it disbelieved the basis for Mr. Gurung's fear of persecution, find that any of the alleged events did not, in fact, occur, or reject Mr. Gurung's refugee claim based on a lack of credibility. Instead,

the RPD considered the determinative issue for rejecting Mr. Gurung's refugee claim to be the availability of a viable IFA in Biratnagar.

[17] On appeal to the RAD, Mr. Gurung argued that the RPD's determinative IFA finding was confusing, given that the IFA analysis came after a series of adverse credibility findings. Mr. Gurung stated that he "was left to assume that by the time the RPD considered the availability of an IFA, it had accepted his credibility", and if the RPD was not satisfied as to the credibility of his allegations about being targeted by Maoists, then its engagement in an IFA assessment made little sense. Among other jurisprudence, Mr. Gurung relied on *Karim v Canada (Minister of Citizenship and Immigration)*, 2015 FC 279 at paragraph 24 [*Karim*]:

[24] ...It is also not clear whether the IFA analysis depends on the credibility finding, or whether it is an alternative to the credibility finding. If it depends on the credibility finding, that is, it starts from the premise that there was no risk after December 2012, it is not really an IFA finding at all, but rather a mere restatement of the credibility finding. If it is an alternative, that is, it takes all the allegations as true and assumes he was still targeted after 2012, it fails to take into account the Applicant's testimony about why he felt targeted after 2012.

[18] Mr. Gurung's written submissions to the RAD divided his criticisms of the RPD's IFA analysis into two parts. First, Mr. Gurung alleged that the RPD erred in its analysis of objective country condition documentation, overlooking evidence that indicated there is no viable IFA for him in Biratnagar or any other city in Nepal. Second, to the extent the RPD's assessment was influenced by its adverse credibility findings, Mr. Gurung argued that those findings were unsustainable. In the second part of his submissions, Mr. Gurung alleged that the RPD had made a series of untenable credibility findings, and set out his reasons for challenging each of the negative credibility findings listed above except (v.) the failure to inform immigration authorities

of the significant change in his circumstances upon re-entry to Canada. In addition, Mr. Gurung argued that the RPD made an “overarching and determinative error” by failing to consider or even mention any of the corroborative documentation that he had filed in support of his refugee claim. These documents included sworn statements, hospital records, police records, and letters from the Maoists.

[19] In its decision dated November 9, 2020, the RAD dismissed the appeal on the basis that Mr. Gurung has an IFA in Biratnagar.

[20] The RAD addressed the arguments in the first part of Mr. Gurung’s written submissions. In this regard, the RAD rejected Mr. Gurung’s arguments that the current government is Maoist, and therefore the agents of persecution are effectively state actors with nationwide reach. The RAD found that “mainstream” Maoists have stopped issuing extortion threats since they joined the government, and recent incidents of threats, extortion and violence are led by splinter groups, particularly the Biplav Maoist group that was banned by the Maoist government in 2019. Furthermore, the RAD found that such incidents have decreased significantly since 2006, and the targets for extortion are individuals with money, not opposing political party members. The RAD found, on a balance of probabilities, that Mr. Gurung had not met the burden of establishing that he faces a serious possibility of persecution in the proposed IFA.

[21] Although Mr. Gurung had not alleged an error in the RPD’s analysis under the second prong of the IFA test, the RAD reviewed the record and agreed with the RPD that Mr. Gurung would not face undue hardship if he were to relocate to Biratnagar.

[22] The RAD did not address Mr. Gurung’s arguments challenging the RPD’s credibility findings—perhaps because Mr. Gurung introduced the second part of his written submissions with the words “in the alternative”, and the RAD did not consider it necessary to address alternative arguments if the determinative issue was an IFA.

IV. Analysis

[23] The test for assessing an IFA is set out in *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 706, 140 NR 138 (CA) at 711 [*Rasaratnam*]:

[...] the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in [the IFA] and that, in all the circumstances including circumstances particular to him, conditions in [the IFA] were such that it would not be unreasonable for the appellant to seek refuge there.

[24] As noted above, Mr. Gurung submits the RAD erred in its analysis under the first prong of the test by: (i) failing to consider that, despite previous relocations within Nepal, the agents of persecution were able to find him; (ii) finding that the agents of persecution are not state actors; (iii) assuming that the agents of persecution are not part of a criminal and violent political faction; (iv) finding that Mr. Gurung’s profile would not make him a target; (v) finding that the agents of persecution do not have a nationwide “network” or the ability to locate him in Biratnagar.

[25] Of these five alleged errors, the RAD’s finding that the agents of persecution are not state actors is not affected by the failure to address the RPD’s negative credibility findings that Mr. Gurung had challenged on appeal. I am not satisfied that the RAD’s finding or analysis on point

(ii) is unreasonable, and I will address point (ii) separately, below. In my view, the remaining four points are affected by the same error, and I will address them together, before turning to point (ii).

[26] Mr. Gurung submits the RAD did not address his credibility and did not question his evidence. As such, it was an error for the RAD to disregard the fact that Maoist agents of persecution continued to look for him in Pokhara and Kathmandu after he left Nepal, and were able to locate him and his family in Kathmandu where he was attacked in June 2015. Mr. Gurung argues that it was incumbent on the RAD to explain why he would be safe in Biratnagar when the agents of persecution were able to find him in at least two other cities in Nepal, and the RAD failed to do so.

[27] In addition, Mr. Gurung argues that it was unreasonable for the RAD to: (i) assume that the Maoists who targeted him are not part of the Biplav Group or another Maoist faction that continues to carry out criminal activities, (ii) find that he lacks sufficient profile to make him a target, and (iii) find that the agents of persecution do not have a “network” that would enable them to find him in Biratnagar.

[28] According to the respondent, Mr. Gurung mischaracterizes the RAD’s reasons and attempts to reverse the burden of proof. Not all Maoist factions are violent, coercive or extorting. Mr. Gurung failed to establish which faction was pursuing him, and he failed to establish that certain factions that may have been dangerous and allegedly targeted him when he was living in Nepal many years ago would remain a threat to his safety today. The respondent

argues that Mr. Gurung has not identified an error in the RAD's findings or chain of analysis. Instead, he points to country condition evidence that allows an alternative conclusion, which amounts to an improper request for this Court to reweigh the evidence.

[29] The respondent contends that Mr. Gurung has not previously correlated the fact that Maoists found him in Kathmandu and Pokhara with their ability to find him in Biratnagar. Before the RPD and the RAD, Mr. Gurung's fear of being found in Biratnagar was based on the Maoist's "country-wide network" as described in objective country documentation. By raising this point for the first time on judicial review, the respondent contends that Mr. Gurung seeks to transform the judicial review into a second appeal, and he is asking the Court to draw inferences without the benefit of the RAD's viewpoint. The respondent notes that an appellant bears the onus of raising grounds of error on appeal to the RAD, thereby defining the scope of the RAD's independent assessment. The reasonableness of the RAD's decision cannot normally be impugned on the basis of an issue that was not put to it: *Broni v Canada (Minister of Citizenship and Immigration)*, 2019 FC 365 at para 15.

[30] In any event, the respondent submits that Mr. Gurung's argument does not demonstrate that the RAD's chain of analysis is illogical.

[31] I disagree with the respondent's submission that Mr. Gurung is raising this issue for the first time on judicial review. In oral submissions before the RPD, Mr. Gurung's counsel argued that the June 30, 2015 incident was "pivotal", that the Maoists were able to locate Mr. Gurung at his residence in Kathmandu, and that they were armed, threatened him, and attacked him. In

fact, counsel's main argument was that the analysis under the first prong of the IFA test depended on whether the RPD believed Mr. Gurung's evidence:

In my view, your assessment of the viability of Biratnagar as a safe locale is tied in part and parcel with your assessment of the credibility of the evidence before you.

Mr. Gurung's evidence is that he's learned from his mother that Maoists have been inquiring about his whereabouts in Pokhara. Furthermore, consider the evidence before you that the claimant initially had problems in his village in 2004, he was once again targeted in June of 2015.

[The] claimant has this history of enmity with the Maoists. He has this profile being an individual who worked with an opposition political party and there's this belief that somehow the claimant provided information that led to the killing of a Maoist cadre who had threatened and warned him in 2004.

If you believe the claimant's evidence about what's happened to him, back in 2004, more importantly in June, 2015, if you believe the claimant's evidence about the continuing inquiries that continue to be made about his whereabouts, you need to factor that in with the objective country evidence which speaks of Nepal being a chronically unstable political situation where Maoists from various factions continue to perpetrate acts of violence...

...Is there more than a mere possibility that Mr. Gurung would be persecuted in Nepal today? In my view, that question is answered based on your assessment of the credibility of the evidence before you.

[32] As noted above, despite making a series of negative credibility findings, the RPD did not state that it disbelieved the basis for Mr. Gurung's fear of persecution, find that any of the alleged events did not occur, or reject Mr. Gurung's refugee claim based on a lack of credibility. Contrary to the submissions of Mr. Gurung's counsel at the RPD hearing, the RPD rejected the refugee claim based on an IFA analysis that was divorced from the negative credibility findings.

[33] Furthermore, Mr. Gurung did raise this issue on appeal to the RAD. Relying on *Karim* among other jurisprudence, he argued that the RPD's determinative IFA finding followed a series of adverse credibility findings, and yet the RPD's engagement in an IFA assessment made little sense if it was not satisfied as to the credibility of his allegations about being targeted by Maoists. Whether Mr. Gurung lived in Kathmandu was a credibility finding, and he challenged almost all of the RPD's negative credibility findings, but the RAD did not address these arguments.

[34] In my view, the RAD's decision is unreasonable because, like the RPD, it did not state that it disbelieved the basis for Mr. Gurung's fear of persecution, find that any of the alleged events did not occur, or reject Mr. Gurung's refugee claim based on a lack of credibility. However, if the RAD assumed that Mr. Gurung's allegations were true, then its IFA analysis is not transparent, intelligible or justified. If Mr. Gurung's oral testimony and documentary evidence were believed, then the RAD failed to adequately explain why Mr. Gurung would find safety in Biratnagar from members of a Maoists faction that violently attacked him in 2004 and 2015, extorted and targeted him despite his lack of wealth, continued to look for him after he left Nepal, and tracked him down in different cities, as recently as 2015.

[35] I agree with the respondent that it is insufficient for an applicant to simply point to country condition evidence that supports an alternative conclusion to the one that was reached by the RAD. Doing so could amount to an improper request for this Court to reweigh the evidence on judicial review. However, in this case, Mr. Gurung had challenged the RPD's "confusing" approach to the IFA analysis on appeal, and he challenged most of the RPD's negative credibility

findings. If the RAD was not prepared to accept Mr. Gurung's version of events, then it was incumbent on the RAD to address his arguments and make the requisite findings that the events did not happen as he alleged. The RAD did not do so. Therefore, while the RAD's assessment of the country condition documentation itself may have been reasonable (it is not necessary to decide that point for the purposes of this judicial review), Mr. Gurung's evidence about what happened to him specifically, which the RAD did not question, conflicted with the generalized information in the country condition documentation. The RAD did not address the conflict.

[36] Turning to point (ii) (as listed in paragraph 24 above), Mr. Gurung takes issue with the RAD's finding that "mainstream" Maoists no longer engage in extortions, and the Maoists who targeted him are not state actors. He argues: (i) there was no evidentiary basis for the RAD to assume that the Maoists who targeted him are not part of the Nepali government; and (ii) the RAD selectively considered the evidence in the country documentation, ignoring evidence that although criminal activity has decreased, some Maoists who have joined the government continue to send threatening letters and ask for money.

[37] I agree with the respondent that Mr. Gurung's argument reverses the onus onto the RAD to disprove a hypothesis of his claim—that the unknown Maoists targeting him are from the ruling faction. Mr. Gurung alleged that he does not know the specific group of Maoists targeting him. It was open for the RAD to find that the agents of persecution are not state actors based on country documentation that describes the factional splits amongst Maoists and ascribes most of the violent or criminal activities to members of the non-ruling, Biplav faction. The RAD engaged with Mr. Gurung's submission that the Prime Minister had encouraged the youth wing

for the United Communist Party of Nepal-Maoist to retaliate against “rightists” and noted that this former Prime Minister was no longer in power. The RAD examined the media articles filed by Mr. Gurung, and found that the acts of violence were caused by the Biplav faction, which was banned by the government in 2019. As a result, the RAD found the Biplav faction to be in direct conflict with the mainstream Maoist government, and the RAD was not satisfied that, on a balance of probabilities, the current Maoist government is the agent of persecution.

[38] The RAD’s analysis of whether the agents of persecution are government actors is reasonable. The RAD was alert to Mr. Gurung’s submissions and considered his arguments in light of the country documentation. The RAD’s findings did not conflict with Mr. Gurung’s evidence, as he testified that he does not know which faction has targeted him in the past.

V. **Conclusion**

[39] Mr. Gurung has established that the RAD’s determination under the first prong of the IFA test is unreasonable. This is sufficient to render the decision unreasonable because IFA was the determinative issue, and a viable IFA must meet both prongs of the test in *Rasaratnam*. Accordingly, this application for judicial review is granted. The RAD’s decision is set aside, and the matter will be returned for redetermination by a different panel.

[40] Neither party raised a question for certification, and in my view there is no question to certify.

JUDGMENT in IMM-6053-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The RAD's decision is set aside, and the matter shall be remitted to a different RAD panel for redetermination.
3. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6053-20

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