Federal Court  Cour fédérale

Date: 20220713

Docket: IMM-6151-21

Citation: 2022 FC 1039

Ottawa, Ontario, July 13, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SABANA BINEESH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant applies under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") for review of a Refugee Appeal Division ("RAD") decision. The RAD upheld the initial decision by the Refugee Protection Division ("RPD") that the Applicant is not a Convention refugee or person in need of protection.

II. Background

[2] The Applicant is a 40-year-old Indian citizen.

[3] While she was born into Hinduism, the Applicant secretly converted to Islam during her time at college. With her husband's encouragement, she began openly practicing in December 2017.

[4] The Applicant claims she was kidnapped on June 8, 2018, after leaving her mosque. The kidnappers told her they knew she had betrayed Hindu deities by converting to Islam. She states that they beat and raped her for two days before abandoning her at a dump near her home. She alleges that her husband attempted to file a missing persons report, which the police refused to register.

[5] Two days after the Applicant's return, she claims her husband received an anonymous phone call demanding that he force the Applicant to return to Hinduism, and stating they would kill the Applicant, her husband, and their family if she continued practicing Islam. The Applicant states her husband received threatening calls on a regular basis after this that emanated from individuals affiliated with the Indian government.

[6] The Applicant said her brother's friend was killed for selling beef and cows.

[7] The Applicant applied for a Canadian visitor's visa on June 19, 2018. She received the visa and arrived in Canada on August 7, 2018. She filed a refugee claim in June 2019.

[8] The RPD refused the Applicant's claim on February 15, 2021, finding she had available Internal Flight Alternatives ("IFAs") in the cities of Chennai, Bardhaman (West Bengal) and Bangalore. The RPD found that the Applicant failed to provide non-speculative evidence that the agents of persecution had the means or motivation to locate her in these cities, or evidence that others in the IFAs would discover that she had converted to Islam from Hinduism. The RPD acknowledged that Muslims face discrimination in India but found this does rise to the level of persecution throughout the country. In analyzing the second prong of the IFA test, the RPD found it would not be unreasonable for the Applicant to relocate to the IFAs because the Applicant is educated, multilingual, adaptable and resourceful.

[9] The RAD found some credibility issues, stating the Applicant's testimony contained omissions and contradictory information to what was set out in her corroborating evidence. Furthermore, the RPD expressed concern that the Applicant delayed in departing India and claiming refugee protection once she arrived in Canada.

[10] On August 17, 2021, the RAD dismissed the Applicant's appeal. The RAD confirmed the determinative factor was the availability of an IFA in Bardhaman (West Bengal).

[11] The RAD declined to accept a document submitted as new evidence: an email purportedly from the Applicant's husband in India discussing the current state of affairs for

himself and his and the Applicant's son. The RAD rejected this piece of evidence because the Applicant did not provide any supporting documentation to establish her husband wrote the email.

[12] The RAD found the RPD adequately supported its findings about the level of discrimination and violence faced by Muslims in India. The RPD appropriately relied on the evidence in the National Documentation Package ("NDP") and the test set out by the United Nations High Commissioner for Refugees to determine the level of discrimination was not uniform and did not rise to the level of persecution throughout India.

[13] The RAD dismissed the Applicant's claim that the RPD made a determination about her credibility. The RAD found the RPD "based its decision entirely on the availability of a viable IFA."

III. Issue

[14] The issue is whether the RAD's decision is reasonable.

IV. Preliminary Issues

[15] The Applicant had attached documents at Appendix A of her Affidavit that were not before the decision-maker. The parties agree that the Appendix A will be struck, relying on the authority of *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at paragraph 18.

[16] Counsel at the hearing was not responsible for drafting the Memorandum of Fact and Law as he took over the file from another counsel. No further memorandum was filed. After the Applicant's argument, it was brought to his and the Court's attention by the Respondent that a number of his oral submissions were new arguments and had not been argued in his written materials, thus prejudicing the Respondent with these "surprise arguments." Clearly, this was not the intention of the Applicant, but nevertheless, it is the case that new arguments were made that both the Court and the Respondent were not prepared for.

[17] Despite the difficulty involved when taking on a new files, it goes without saying that Counsel taking over a new file must be aware of the written arguments submitted to the Court, and stay within those arguments. To do otherwise is unfair to the Respondent and to the Court. Though a court can, in some cases, exercise their discretion to hear these new arguments, I am not prepared to do so here. The new oral submissions were, for instance, detailed arguments regarding factual findings which in a large Certified Tribunal Record ("CTR") such as this would be impossible for the Respondent to respond to orally after hearing them for the first time at the hearing (*Qureshi v Canada (MCI)*, [2000] FCJ 1300 at paras 10-11; *Huong v Canada (MCI)*, 2004 FC 73 at para 10; *AB v Canada (MCI)*, 2021 FC 1206).

[18] In these circumstances, given no further memorandums of argument had been filed, it would have been preferable for the Applicant to, say, request an extension of time given that he had recently taken over the file, reviewed the arguments made in the initial memorandum of argument, and submitted a further that was representative of the oral argument he intended to make. None of this is intended to be critical of the Applicant's advocacy capabilities or style, as

he was put in a difficult position and did nothing underhanded; rather, it is merely a way of ensuring that the judicial review occur in the fairest possible way.

V. Standard of Review

[19] The applicable standard of review is reasonableness. As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." I see no reason in this case to deviate from this general presumption. As such, the standard of review in this case is reasonableness.

[20] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov* at para 13). When conducting reasonableness review, the court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99). A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

VI. Analysis

[21] Three of the Applicant's arguments allege the RAD erred by ignoring her evidence or failing to consider some aspect of her circumstances that will allow her persecutors to locate her.

[22] First, the Applicant argues the RAD erred by distinguishing the earlier RAD case about India's information databases. The Applicant claims that she will inevitably face charges for converting to Islam and her persecutors will then be able to locate her. The Applicant pointed to the fact that the RAD did not find credibility issues regarding the rape and kidnapping to if that happened then why could it not happen in the IFA.

[23] Next, the Applicant submits the RAD erred by failing to consider the Applicant has already committed a crime because she converted to Islam in a state that prohibits such action. For this reason, the Applicant will attract police attention and her persecutors will be able to locate her. A nuance of the written argument was that the RAD erred in they used objective evidence about the violence to converts when in fact it was just for cow protectors so it was not relevant and was an error to use.

[24] Finally, the Applicant declared that the RAD erred by failing to consider her persecutors will be able to locate her because she has a Hindu surname that will attract significant attention.

[25] The Applicant claims the RAD erred by stating she did not take issue with the RPD's analysis on the second prong of the IFA test. The Applicant submits she disputed the RPD's

analysis in her affidavit before the RAD. The Applicant said the RAD's conclusion suggests it did not consider the totality of the evidence.

[26] The Applicant failed to provide evidence in her record that she challenged the RPD's second prong analysis before the RAD. The CTR contains what I believe to be the affidavit in question at pages 48-50. The affidavit does not claim the RPD erred in its evaluation of the second prong of the IFA test. I do not believe the RAD erred by stating the Applicant did not take issue with that aspect of the analysis.

[27] The Applicant claims the RAD was biased, engaged in speculative reasoning and improperly made negative credibility findings.

[28] I am not convinced by the Applicant's argument that the RAD failed to consider she will "inevitably" be charged for converting to Islam and her persecutors will then be able to locate her through India's information databases. The Applicant argues this parallels another earlier RAD case and explains she is certain to face such charges because India has anti-conversion laws. However, as the RAD noted, the suggested IFA is located in a state without anti-conversion laws. The RAD also found this state has a substantial Muslim population and Muslims face a low level of discrimination. Some of the Applicant's arguments at the hearing pointed out that the IFA city is a small city as well as pointed out a lack of support for the findings of the Officer while at the same time pointing to contrary evidence or inferences. Counsel referred to it as a "phantom city".

[29] In the end, there is often conflicting objective evidence. The Applicant is asking me to weigh the evidence differently, and of course that is not the role of the Court (*Vavilov* at para 125). Nor is it unreasonable for the RAD to not follow another person's RPD decision given the factual difference almost always present. The Officer did not ignore evidence regarding the states that had anti-conversion laws, as well as other objective evidence about the IFA city.

[30] The Applicant claims she took issue with how the RPD conducted the second prong of the IFA examination in an affidavit and that the RAD disregarded this argument. The Applicant fails to identify any error in the RPD or RAD's second prong analysis. This argument cannot be substantiated and was not advanced at the hearing.

[31] The Applicant argues the RAD failed to consider she will be targeted by police because she committed the crime of converting in a state that deems it an illegal act. The Officer found that this conversion is unlikely to draw negative attention to the Applicant because she was not previously charged and the anti-conversion laws in India do not appear to be strictly enforced.

[32] Additionally, the Applicant did not make this argument before the RAD. The RAD should not be faulted for failing to consider an argument that was not put forward (*Adams v Canada (Citizenship and Immigration)*, 2018 FC 524 at para 28 (not cited by the parties)). Even if the argument was to be considered, I am of the view that the Officer was not unreasonable in their assessment.

[33] Nor am I convinced by the Applicant's argument that the RAD erred by failing to consider she will be targeted because of her Hindu surname. The RAD addressed the surname issue in its decision at paragraph 23. The RAD, relying on the documentary evidence, noted the low level of discrimination faced by Muslims in the IFA and found "the [Applicant] has not established how she would be imperilled in [the IFA] because of her surname." The Applicant failed, in my view, to establish that this conclusion is unreasonable.

[34] The Applicant cites a long list of jurisprudence but fails to link facts or principles to her case. This section of her memorandum does not establish any error on the part of the RAD.

[35] The Applicant does not identify the portions of the RAD decision that caused her to believe the RAD was biased, engaged in speculative reasoning, and made negative credibility findings. Having reviewed the decision, I am unable to discern any part that reflects bias or speculation or casts aspersions about the Applicant's credibility. Furthermore, I note the section of the Applicant's memorandum containing these allegations (paras 62-78) is essentially copy-pasted from the Applicant's submissions to the RAD regarding the RPD (see CTR pages 182-186). This, to me, casts doubt on whether the Applicant genuinely perceives the RAD to have made these errors. It also concerns me that Applicant's former counsel may be indifferent to the gravity of an accusation of bias. This was not an argument advanced at the hearing by the new counsel.

[36] The Applicant seeks the unusual relief of asking the Court to set aside the RPD decision and find she is a Convention refugee and/or a person in need of protection. Alternatively, the

Applicant requests her claim be remitted back to the RPD for redetermination. The Applicant submits the evidence establishes she has a well-founded fear of persecution in every city in India and there is a serious probability she will face persecution should she return to the country.

[37] Even if the Applicant was successful in this application, I would not grant the relief sought and would only have sent it back to the RAD to be re-determined.

[38] I find the application to be reasonable, and will dismiss the application

[39] There were no certified questions raised.

VII. Conclusion

[40] I will dismiss the application

[41] No question will be certified.

JUDGMENT IN IMM-6151-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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