Federal Court

Cour fédérale

Date: 20230511

Docket: IMM-6620-22

Citation: 2023 FC 669

Vancouver, British Columbia, May 11, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

SUNNY VERMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sunny Verma asserts he was denied procedural fairness before the Refugee Appeal Division [RAD] because of the incompetence of the immigration consultant who represented him. He asks this Court to set aside the RAD's decision to remedy that unfairness. For the reasons that follow, I conclude that Mr. Verma has not met the test for showing unfairness due to

incompetent representation, since he has not established there is a "reasonable probability" the result before the RAD would have been different but for the alleged incompetence.

[2] This application must therefore be dismissed.

II. Analysis

A. *Mr. Verma's refugee claim*

[3] Mr. Verma's claim for refugee protection was based on his relationship with a young Sikh woman in Punjab. The woman's cousin, a gangster involved in drug trafficking, disapproved of the relationship since Mr. Verma is of a different religion (he is Hindu) and caste. The cousin and some of his friends beat Mr. Verma and threatened to kill him if they saw him again. Although Mr. Verma was no longer in a relationship with the woman at the time of his hearing before the Refugee Protection Division [RPD], he asserted the cousin still wanted to kill him because of the prior relationship.

[4] In a decision dated August 13, 2021, the RPD found Mr. Verma had a viable internal flight alternative [IFA] in Mumbai, Kolkata, or Delhi. The RPD found there was insufficient evidence to demonstrate the cousin would be sufficiently motivated or capable of locating Mr. Verma in the IFA cities. The RPD also found it would be reasonable in all of the circumstances for Mr. Verma to relocate to the proposed IFA cities. It therefore concluded Mr. Verma was not a Convention refugee or a person in need of protection within the meaning of

sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and denied his refugee claim.

B. *Mr. Verma's appeal to the RAD and new evidence*

[5] Mr. Verma retained an immigration consultant to represent him on appeal to the RAD (he had been represented by a lawyer before the RPD). An appeal was filed, but the RAD dismissed it in October 2021 for failure to perfect the appeal. In March 2022, the consultant filed an application to re-open the appeal, which the RAD granted. The consultant filed submissions on the appeal, but no new evidence.

[6] In an affidavit sworn in support of this application, Mr. Verma states that he obtained new evidence and provided it to the consultant's "contact point," a Punjabi translator through whom Mr. Verma had also paid the consultant's retainer. The evidence consisted of an income tax return from 2017–2018; a letter from a lawyer from Punjab regarding India's tenant registration system; and three affidavits from, respectively, Mr. Verma's parents, a neighbour, and the village Sarpanch. I discuss this new evidence further below.

[7] Mr. Verma states that the translator advised him she would provide these documents to the consultant. However, the translator never provided the documents to the consultant, so they were never filed with the RAD.

[8] The RAD dismissed Mr. Verma's appeal on June 10, 2022, affirming the findings of the RPD. It is clear from the RAD's decision that the panel was familiar with the immigration

consultant who represented Mr. Verma. The RAD made a number of observations in its reasons that can only be described as critical of the quality of the consultant's submissions. For example, the RAD noted the consultant had requested an oral hearing "[a]s she does in all cases," even though no new evidence had been filed. The RAD suggested the consultant "would do well to review the conditions for the holding of hearings by the RAD" in subsection 110(6) of the *IRPA*. The RAD also observed that the consultant had made no arguments challenging the RPD's finding on motivation, and that she had simply "cut and pasted the arguments that she regularly makes regarding how Punjabi police are allegedly able to track claimants" through India's tenant registration system, despite the fact that the agent of persecution was a cousin and not the Punjabi police.

[9] Mr. Verma argues the consultant was incompetent in her representation of him. He argues that the use of a "contact point" who was neither an employee nor an immigration consultant resulted in the new documents not being received by the consultant and not being put before the RAD. As a result, the consultant's submissions to the RAD did not refer to the documents. In particular, the consultant could not and did not make arguments regarding the admissibility of the documents pursuant to subsection 110(4) of the *IRPA*, and could not and did not use the documents as the basis to request that the RAD hold an oral hearing. Mr. Verma also argues the consultant did not provide competent advice directly to him with respect to obtaining new evidence to be filed with the RAD, although it is clear he understood that he could obtain new evidence and did so. Mr. Verma further points to the RAD's various negative observations regarding the consultant's submissions, which he submits highlight the flaws in the consultant's representation of him.

C. *Mr. Verma has not demonstrated procedural unfairness*

[10] The parties agree that to demonstrate a procedural unfairness arising from the incompetence of a former counsel or immigration consultant, an applicant must establish three things: (i) the representative's acts or omissions constituted incompetence, without the wisdom of hindsight; (ii) there is a "reasonable probability" that, but for the alleged incompetence, the result of the original hearing would have been different; and (iii) the former representative was given notice of the allegation and an opportunity to respond: *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 84; *Siddique v Canada (Citizenship and Immigration)*, 2022 FC 964 at para 30; *Zakeri v Canada (Citizenship and Immigration)*, 2023 FC 421 at para 19; see also *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022) at paras 46–54.

[11] Mr. Verma's consultant was given an opportunity to respond to Mr. Verma's allegations. She responded by stating she had not received any new evidence from the translator; that the translator was not her employee or agent; that Mr. Verma had her contact information but did not contact her about the new evidence or send it to her; and that despite her requesting documents for the appeal (in the form of his basis of claim form and the exhibits from the hearing) and having spoken to Mr. Verma on a few occasions, he never provided her with the documents or mentioned that he had new evidence to provide.

[12] It is clear that Mr. Verma and his former immigration consultant have differing views on who is responsible for the new documents not reaching the consultant and thus not being filed with the RAD. I conclude that I need not, and should not, address whether the consultant's actions constituted incompetence, termed the "performance component" of the analysis, since I am not satisfied Mr. Verma has demonstrated there is a "reasonable probability" the new evidence he has identified would have changed the RAD's decision: *Obasuyi v Canada (Citizenship and Immigration)*, 2022 FC 508 at para 44, citing *Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 44.

[13] The onus is on the applicant to demonstrate to the Court that there is a reasonable probability the outcome would have been different but for the incompetence of their former representative: *Guadron* at para 17; *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at paras 3, 21. Mr. Verma's arguments on this point are based exclusively on the new documents he sent to the translator after the RPD hearing. In argument and evidence before this Court, he has not identified any other information, documents, or evidence that he might have obtained, but that was not put before the RAD owing to the consultant's incompetence: *Obasuyi* at para 45. Further, while Mr. Verma points to the RAD's adverse comments about the consultant's submissions, he does not identify any further or different arguments that could or should have been made that were reasonably probable to change the outcome, other than submissions based on the new documents.

[14] In these circumstances, for Mr. Verma to show a reasonable probability the RAD's decision would have been different but for the consultant's alleged incompetence, he must show

there is a reasonable probability the documents he provided to the translator would have affected the outcome. For the documents to have potentially affected the RAD's decision, they must, at least, have been admissible before the RAD and have had a material bearing on the determinative issues. In other words, if the documents were inadmissible, or did not bear on the determinative issues, any incompetence that resulted in them not being put before the RAD could not have prejudiced Mr. Verma. To be admissible on appeal to the RAD, evidence must have (i) arisen after the RPD's rejection of the claim; (ii) not been reasonably available; or (iii) not been evidence the appellant could reasonably have been expected to have presented: *IRPA*, s 110(4); *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at paras 34–35.

[15] As noted above, the documents in question are an income tax return, a letter from a lawyer from Punjab, and three affidavits. As Mr. Verma does not rely on the income tax return, the issue turns on the letter and the three affidavits.

[16] The lawyer's letter. The letter from the lawyer is dated after the RPD hearing. It contains, in a brief one-sentence paragraph, the lawyer's certification that "as per Indian Rules and law," anyone renting a home in India must furnish proof of their permanent address to the owner of the house, who must furnish it to the local police. As the Minister submits, despite the date of the letter, the information in the lawyer's letter did not arise after the RPD's decision: *Marku v Canada (Citizenship and Immigration)*, 2019 FC 991 at paras 28–29, citing *Singh* at paras 44–49 and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 16. Rather, it consists of a general description of the Indian tenant registration system, which could have been obtained prior to the RPD's decision. Mr. Verma made no argument and filed no evidence regarding

reasonable availability or reasonable expectation. There is no reasonable probability that the lawyer's letter would constitute admissible new evidence before the RAD.

[17] In any event, the lawyer's letter simply confirmed the information already before the RPD and the RAD regarding the tenant registration system. The RPD referred to the objective evidence in the national documentation package regarding the tenant registration system, recognizing that "tenant registration is mandatory." However, the RPD also referred to the operational realities and limitations of the system, and the fact that the information in the system is not available to the general population, such as the cousin who was the agent of persecution. The RAD adopted these findings, noting there was insufficient evidence to establish the cousin had sufficient connections to the Punjabi police for them to advise him of Mr. Verma's relocation. There is no reasonable probability that a lawyer's general statement regarding the existence of mandatory tenant registration would have affected these conclusions in any way.

[18] The neighbour's affidavit. The affidavit from the neighbour appears to have been affirmed in November 2021, after the RPD's decision in August 2021. However, again, there is no indication that it relates to evidence arising in the three-month period after the RPD decision, or that the evidence could not have been obtained before the RPD decision. Rather, the neighbour states generally that he noticed people searching for Mr. Verma in the area, and that on one occasion (unspecified and undated), some gangsters stopped him to ask about Mr. Verma. I am not satisfied there is a reasonable probability that this affidavit constitutes new evidence admissible before the RAD.

[19] In any event, the affidavit effectively just repeats evidence already before the RPD and the RAD. As the RPD noted, Mr. Verma testified that "his friends told him that the agent of harm has repeatedly inquired about him in his village, asking when the claimant was coming back." The RPD concluded that the evidence as a whole indicated this was a "local matter" and that the individuals lacked the motivation to pursue Mr. Verma to the IFA cities. The RAD agreed. There is no reasonable probability that a repetition by the neighbour that the agent of persecution was asking after Mr. Verma, even if it were admissible, would change the RAD's decision.

[20] The parents' affidavit. The affidavit from Mr. Verma's parents is undated and the record before the Court does not indicate when it was affirmed. However, even assuming it was affirmed around the same time as the neighbour's affidavit, it again primarily addresses events from well before the RPD decision, including a 2018 attack and a resulting complaint to the police. None of this is new evidence admissible before the RAD. As Mr. Verma points out, the parents' affidavit does include a statement that "still now," the woman's family was searching for Mr. Verma and openly threatening to kill him. This broad statement gives no detail as to when these threats were made. However, even assuming they post-dated the RPD decision, they are of precisely the same nature as the continued threats about which Mr. Verma had testified. Again, given the RAD's reasoning on the issue, even if the evidence were admissible, there is no reasonable probability that it would have changed the outcome of the RAD's IFA analysis.

[21] The Sarpanch's affidavit. The same is true of the Sarpanch's affidavit which, like that of the parents, is undated. Other than the Sarpanch's broad statement that Mr. Verma "still now"

faces a risk to his life at the hands of the cousin, there is no evidence in the affidavit that could meet the newness requirement of subsection 110(4) of the *IRPA*. In any event, even if admissible, the Sarpanch's affidavit simply repeats the same allegations regarding the cousin that were already part of the record. The RPD and the RAD accepted these allegations, but concluded Mr. Verma nonetheless had a viable IFA. The Sarpanch's affidavit could not have affected this conclusion.

[22] Mr. Verma points to the Sarpanch's statement that the woman's family was "very rich and [has] political relations." He argues this was relevant evidence that indicates that the police in Punjab would tell the cousin when Mr. Verma's information appeared in the tenant registration system. Again, however, this information was already in the record before the RPD and the RAD. As the RPD noted, Mr. Verma testified the cousin was a "gangster and has links to political leaders [and] the police," and that he was "very rich." The RPD and the RAD found that such evidence was not sufficient to conclude the cousin was so powerful that he could locate Mr. Verma in the IFA cities. The fact that someone else has repeated the same information, even if the evidence were admissible, cannot raise a reasonable probability that this conclusion would change.

[23] Mr. Verma argues that even if the affidavits were repetitive of his own testimony, this additional evidence would have bolstered his credibility, and therefore could reasonably have affected the outcome. I cannot agree. Neither the RPD nor the RAD questioned Mr. Verma's credibility or his evidence regarding the cousin, the cousin's status, or the threats. The RAD's

concerns regarding the insufficiency of the evidence as it related to the key issues of means and motivation are in no way affected by others repeating the same allegations.

[24] Finally, Mr. Verma argues that if the new evidence had been put before the RAD, a competent representative could have used that evidence to argue for an oral hearing before the RAD, at which the issues could have been further canvassed. I cannot agree. For the RAD to hold an oral hearing, there must be new and admissible documentary evidence that raises a serious issue with respect to the credibility of the person who is the subject of the appeal, that is central to the decision with respect to the refugee claim, and that, if accepted, would justify allowing or rejecting the claim: *IRPA*, s 110(6); *Singh* at para 48. As noted above, very little, if any, of the evidence presented by Mr. Verma would have been admissible before the RAD as new evidence. In any event, Mr. Verma has not satisfied me that any of it relates in any way to his credibility. Even if the evidence had been put before the RAD, and even if the RAD had admitted it, I see no reasonable probability that the RAD could have or would have held an oral hearing, regardless of any submissions to that effect made by Mr. Verma's representative.

III. Conclusion

[25] For these reasons, I conclude there is no reasonable probability that any of the evidence Mr. Verma says was not put to the RAD because of the consultant's incompetence would have affected the RAD's IFA analysis or the outcome of the appeal. Even if I were to assume the consultant was incompetent, and the new evidence sent to the translator was not put before the RAD for this reason, I conclude Mr. Verma suffered no prejudice to his refugee claim as a result.

Since there must be such prejudice before this Court will set aside a decision on the basis of incompetent representation, this application for judicial review must be dismissed.

[26] Neither party proposed a question for certification and I agree that no question meeting the requirements for certification arises in the circumstances of this case.

<u>JUDGMENT IN IMM-6620-22</u>

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6620-22
STYLE OF CAUSE:	SUNNY VERMA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 8, 2023
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MAY 11, 2023

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