Federal Court  Cour fédérale

Date: 20240628

Docket: IMM-6971-23

Citation: 2024 FC 1020

Ottawa, Ontario, June 28, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

JARNAIL SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA], the Applicant is seeking a Judicial Review of the rejection of their refugee protection appeal by the Refugee Appeal Division ["RAD"] of the Immigration and Refugee Board of Canada ["IRB"]. The Judicial Review is granted for the following reasons.

[2] The Applicant is a citizen of India and of the Sikh faith. He alleges to have attended a congregation to commemorate the attack on the Golden template in June 2018. Soon after, he was called by the local police in Punjab who accused him of withholding information regarding a targeted killing. Two months later, the police called him again and questioned him about cybercrime-related irregularities and accused him of being involved with pro-Khalistan activities under an assumed identity. Four weeks later, when the Applicant was returning from a holiday in Malaysia, the police at the Amritsar Airport detained him and accused him of meeting with anti-national elements in Malaysia. He also had significant cash in his luggage that the police confiscated. The Applicant was never formally charged or prosecuted with any crime but alleges to have been contacted by the police, and that the Punjab counter-intelligence team raided and searched his house, they took him to an unknown location and accused him of being involved in narco-terrorism, arm smuggling and they beat him to extract a confession. They released him after he paid a bribe.

[3] The Applicant has also alleged that since coming to Canada, he has been active in the referendum for an independent Khalistan, which he supports.

[4] The RPD rejected the claim on the availability of an internal flight alternative (IFA) in Mumbai, and the RAD upheld the decision. They both found that the Applicant did not face formal charges, that his activities in Canada are probably not known to the Indian authorities, and that the Punjab police lacks the means or motivation to expose him to a serious possibility of persecution in Mumbai.

II. Decision

[5] I grant the Applicant's judicial review application because I find the decision made by the RAD to be unreasonable.

III. Standard of Review

[6] The parties submit, and I agree with them, that the standard of review in this case is that of reasonableness (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 (CanLII), [2018] 3 FCR 75 [*Vavilov*]).

IV. Analysis

A. *Legal Framework*

[7] The two-prong test for an IFA is well established. An IFA is a place in an applicant's country of nationality where a party seeking protection (i.e., the refugee claimant) would not be at risk – in the relevant sense and on the applicable standard, depending on whether the claim is made under section 96 or 97 of the IRPA – and to which it would not be unreasonable for them to relocate.

[8] When there is a viable IFA, a claimant is not entitled to protection from another country. More specifically, to determine if a viable IFA exists, the RAD must be satisfied, on a balance of probabilities, that:

a. the claimant will not be subject to persecution (on a "serious possibility" standard), or a section 97 danger or risk (on a "balance of probabilities" standard) in the proposed IFA; and;

b. in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there.

[9] Once IFA is raised as an issue, the onus is on the refugee claimant to prove that they do not have a viable IFA. This means that to counter the proposition that they have a viable IFA, the refugee claimant has the burden of showing either that they would be at risk in the proposed IFA or, even if they would not be at risk in the proposed IFA, that it would be unreasonable in light of the circumstances for them to relocate there. The burden for this second prong (reasonableness of the IFA) is quite high as the Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration) (C.A.)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164 [*Ranganathan*] has held that it requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. For the IFA test generally, see *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA); *Ranganathan*; and *Rivero Marin v Canada (Citizenship and Immigration)*, 2023 FC 1504 at paragraph 8.

B. *Was the RAD decision reasonable?*

[10] Quite surprisingly, the Applicant argued that the RAD's decision on analysing the first prong was reasonable. They argued that they conceded that his past persecution by the local Punjab police would probably not expose him to a serious possibility of persecution or on a balance of probabilities, to a personal risk of harm in Mumbai. However, the Applicant pointed out that the RPD or the RAD never analyzed the Applicant's prospective risk in Mumbai. This is because the Applicant's pro-Khalistan political opinion was also demonstrated through his activities in Canada. However, this evidence was only analysed in the context of his *sur place* claim, and the RAD found that on the balance of probabilities, the Indian authorities, have not learnt about it.

[11] The RAD never engaged with whether the Applicant would be able to express his political opinion on the support of an independent Khalistan freely and publicly in the IFA without a serious possibility of persecution. The Applicant argued that the claim should succeed under the second prong of the IFA, the reasonableness of the IFA, because if he never expresses his political opinion, he would not face a serious possibility of persecution, but that being forced to maintain silence against his true conscious or opinion, or to pretend that he has a different political opinion, would render the IFA unreasonable.

[12] The Respondent argued that the RAD was not obligated to entertain this argument because the Applicant had not clearly presented it. I disagree. The Applicant record clearly points to the arguments made about the Applicant's opinion and activities in Canada, and that being forced into silence would be unreasonable. Even though the burden of proof rests on a

claimant to show that they meet the requirements to be accorded protection, this does not mean that they are obliged to frame their case using the terminology of refugee law or by citing particular cases or statutory provisions. The Board "has a duty to consider all potential grounds for a refugee claim that arise on the evidence, even when they are not raised by the applicant" (*Viafara v Canada (MCI)*, 2006 FC 1526, at para. 6; *Gutierrez v Canada (MCI)*, 2011 FC 1055, at para. 35.) Cases should be decided based on all of the law that binds the Board, not just the law that the parties happen to put in front of a panel (Canada (Citizenship and Immigration) et al. v The Canadian Council for Refugees et al., 2021 FCA 72, para. 125).

[13] In this case, the Applicant had provided not only evidence of their activities in Canada, but he had also argued that he would not be able to continue with those activities in India. As an administrative tribunal, the RPD is a board of inquiry and has a duty to assess all of the relevant evidence in the context of the grounds under both sections 96 and 97 of IRPA. The RAD has the jurisdiction to review the decision on the correctness standard (*Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 (CanLII), [2016] 4 FCR 157). Evidence of political activities in Canada should be considered by the panel in any way that is legally relevant (see *Moradi v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8507 where the Court held that the evidence of political activities in Canada should be considered by the panel whether or not the claimant had specifically raised a *sur place* claim).

[14] While I agree with the Applicant that they may be able to live safely in the IFA if they maintain their silence on their political opinion, I disagree that the first prong contemplates one to live against their conscience or opinion to avoid persecution.

[15] The objective country documents (NDP Item 12.8) before the RAD clearly pointed to the serious possibility of persecution against Sikhs who expressed a pro-Khalistan:

> 6. Treatment of Suspected Separatists or Khalistan Supporters Outside of Punjab
>
> According to the WSO representative, "suspected supporters of Khalistan are not safe outside of Punjab, anywhere in India" (Representative 12 May 2022). The same source added that "no Sikh can openly be an advocate for or support the creation of Khalistan" and doing so results in "harassment by the police, false cases and also hatred of those who do not support Khalistan"; the government portrays anyone supporting separatism as "an extremist or terrorist and as an 'anti-national' that can be legitimately targeted for violence" (Representative 12 May 2022). The Associate Professor stated that Sikhs who display separatist beliefs face "persecution" by government authorities and "possible retribution" from the "majority community outside of Punjab" (Associate Professor 4 May 2022). The Associate Professor further stated that Sikhs living outside of Punjab "generally" do not experience "noticeable" issues with health care, education or employment, but Sikhs with separatist beliefs would have "negative interactions" in education and employment, […]

[16] The RPD or the RAD never made a finding on the credibility of the Applicant's political opinion to answer whether he could express it safely in the IFA. They simply never engaged with the question of prospective risk in the IFA. The Applicant concedes that he does not consider himself an activist, but the RPD and the RAD had to engage in an analysis of whether the Applicant could engage in an expression of political opinion, in a manner that is aligned with his conscience and opinion, without a serious possibility of persecution or a personal risk of harm. Regardless of whether the Applicant argued this point under the first or the second prong, it was the member's duty to engage with it because safety in the IFA does not contemplate one's forced self-censorship.

[17] The claimant does not have to belong to a political party (*Armson v Canada (Minister of Employment and Immigration).* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.), at 153; *Arocha v M.C.I.,* 2019 FC 468 [*Arocha*]) nor does the claimant have to belong to a group that has an official title, office or status (*Hilo v Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.), at 203) nor does the claimant have to have a high-profile or be an activist (*Surajnarain, Doodnauth v M.C.I* 2008 FC 1165) in order for there to be a determination that the claimant's fear of persecution is by reason of political opinion. A claimant's risk of future persecution linked to political opinion may be established by documentary evidence of similarly situated persons even if the claimant cannot demonstrate that past incidents invited persecution. For example, in A*rocha*, both the RPD and RAD had found the claimant in this case to be credible regarding his open opposition to the ruling party in Venezuela while he worked for a state-run company, but found that the main incident in the claim, a home invasion, was not politically motivated. Instead of considering whether the claimants had a nexus to a Convention ground, and then analyzing whether any such nexus could result in persecution going forward, the Court found the RAD unreasonably limited the scope of the Applicant's fears of future persecution based on the past incident.

V. Conclusion

[18] The Application for Judicial Review is therefore granted.

[19] There is no question to be certified.

JUDGMENT IN IMM-6971-23

THIS COURT'S JUDGMENT is that

1. The application for Judicial Review is granted.

2. There is no question for certification.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6971-23
STYLE OF CAUSE:	JARNAIL SINGH. v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VIDEOCONFERENCE
DATE OF HEARING:	JUNE 18, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	AZMUDEH J.
DATED:	JUNE 28, 2024

APPEARANCES:

Jonathan Gruszczynski	FOR THE APPLICANT
Sonia Bédard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Immigration Team Montréal, QC	FOR THE APPLICANT
Department of Justice Canada Montréal, QC	FOR THE RESPONDENT