Federal Court  Cour fédérale

Date: 20241004

Docket: IMM-12742-23

Citation: 2024 FC 1560

Ottawa, Ontario, October 4, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

KARANDEEP

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Karandeep [the Applicant] seeks judicial review of a decision of the Refugee Appeal Division [RAD] dated September 12, 2023, upholding the Refugee Protection Division's [RPD] decision dated November 22, 2022. The decision under review concluded that the Applicant was 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 2002, c 27 [IRPA] because a viable Internal Flight Alternative [IFA] was available to him in Mumbai.

[2] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, I find that the Applicant has discharged his burden and demonstrated that the RAD's decision is unreasonable. For the reasons that follow, this application for judicial review is granted.

II. Background Facts

[3] The Applicant is a citizen of India who resided in Punjab. In December 2018, two of the Applicant's friends fled from a police check point, leaving weapons behind them. The police searched the Applicant's house and questioned him about his friends' whereabouts, claiming that they worked for criminals and militants. Afraid for his safety, the Applicant sought the assistance of an agent to leave India.

[4] In February 2019, the police detained the Applicant and took his photograph, fingerprints, and signature. The police then beat him when he denied knowing the whereabouts of his friends. He was released three days later upon the payment of a bribe and on the condition that he report to the police on a monthly basis.

[5] Following his release, the Applicant lived with his aunt in Delhi and then other locations with his agent until a visa could be secured. The Applicant claims that the police raided his aunt's home and beat his brother when looking for him.

[6] The Applicant fled India and made an inland claim for protection in June 2019, and was heard by the RPD in October 2022. The RPD rejected his claim because he had a viable IFA in Mumbai. He appealed the decision to the RAD, attempting to submit new evidence for his claim. The RAD did not admit the new evidence and affirmed the RPD's conclusions.

III. Decision Under Review

[7] The RAD agreed with the RPD's conclusion that the Applicant has a viable IFA in Mumbai.

[8] The RAD determined that there is no serious possibility of persecution or risk of harm to the Applicant in Mumbai, because the Applicant did not establish that the local Punjab police has the means and motivation to locate him in that location. The RAD based its conclusion on the lack of evidence indicating that the Applicant is a person of interest to the police, has been charged with an offence, or is subject to a warrant for his arrest. Moreover, the RAD found that it was reasonable for the Applicant to relocate to Mumbai, given his education, age, work experience, language skills, and religion.

[9] On appeal, the Applicant made a *sur place* claim for protection on the basis of his support for an independent Khalistan. He asked the RAD to admit new evidence of pro-Khalistan social media posts made after the RPD hearing. The posts were made on November 26, 2022, November 27, 2022, November 28, 2022, and December 4, 2022 (the RPD's decision is dated November 22, 2022), and are in reference to the Khalistan referendum organized by a group called "Sikhs for Justice," an organization deemed to be a terrorist group by India.

[10] The RAD refused to admit the posts or messages as new evidence, and consequently rejected the Applicant's *sur place* claim of risk because of his support for Khalistan. It found that the posts, though made after the RPD hearing, were of pictures taken on the same day in September, prior to the rejection of his claim. The RAD cited the Applicant's testimony before the RPD to the effect that he had made pro-Khalistan posts on social media before and that these posts included pictures of himself. Since evidence of the Applicant's social media activity was before the RPD, the evidence was deemed not to be new.

[11] In determining that Indian authorities would not be motivated to look for the Applicant in Mumbai, the RAD reviewed country condition evidence and concluded that it "[did] not support the [Applicant's] assertion that everyone who supports Khalistan is seen as a terrorist" (RAD Decision at para 40). It noted that "[s]upporting an independent Khalistan is not illegal in India" and that pro-Khalistan supporters have political representation on a national level (RAD Decision at para 38). His recent support for the movement would therefore not be of interest to Indian authorities.

IV. Issues and Standard of Review

[12] The issues before this Court are the following:

A. Is the RAD's decision to refuse to admit the new evidence submitted by the Applicant reasonable?

B. Is the RAD's conclusion that Mumbai is a viable IFA reasonable?

[13] The standard of review in this case is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v*

Canada (Citizenship and Immigration), 2023 SCC 21 at paras 7, 39–44 [*Mason*]). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99; *Mason* at para 59). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125–126; *Mason* at para 73). Reasonableness review is not a "rubber-stamping" exercise, it is a robust form of review (*Vavilov* at para 13; *Mason* at para 63). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

A. *The RAD unreasonably ruled that the social media evidence was inadmissible*

[14] Any new evidence submitted before the RAD must satisfy one of the criteria listed at subsection 110(4) of the IRPA, which provides the following :

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[15] If the new evidence meets one of the criteria above, the evidence must then also meet the conditions of admissibility identified in the jurisprudence, being credibility, relevance, newness and materiality (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at paras 38, 43–47; see also *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13).

[16] In this case, the RAD rejected the new evidence because the social media posts, though made after the RPD hearing, were of pictures taken prior to the rejection of his claim. Moreover, the Applicant testified before the RPD of having made pro-Khalistan posts on social media. The RAD consequently held that the evidence was not new.

[17] In my view, it was unreasonable for the RAD to rule that the social media posts did not constitute new evidence. Before the RPD, the Applicant only submitted pictures of himself participating in the pro-Khalistan referendum (Exhibit "C", Applicant's Record at 57–58). Before the RAD, the Applicant submitted evidence of social media posts dated November 26, 2022, November 27, 2022, November 28, 2022, and December 4, 2022, along with different pictures. While the pictures may pre-date the RPD's decision, the social media posts clearly took place after the RPD refusal (Exhibit "C", Applicant's Record at 59–62). The social media activity, on which the Applicant relies in asserting his risk of persecution, is new evidence insofar as it arose after the rejection of the claim, and could therefore not have been presented to the RPD.

[18] The specific date when the photos were taken is not determinative; it is the fact that the Applicant posted on social media pictures of his participation in the Khalistan referendum after the decision of the RPD that is relevant to the *sur place* claim. That evidence ought to have been considered by the RAD in its determination of the Applicant's risks of persecution on that ground. Social media activity, as opposed to pictures merely submitted to the RPD, is what made the Applicant's support for Khalistan potentially known to Indian authorities and what creates a potentially dangerous situation for him upon his return to India.

[19] The RAD's failure to engage with this new evidence renders its analysis unreasonable. To reach the conclusion that it did, the RAD needed to be satisfied that the *sur place* allegations did not subject the Applicant to a serious possibility of persecution upon returning to India. The RAD's conclusion (RAD Decision at para 40) that the Applicant had not established a profile that would be of interest to the Indian authorities or would motivate them to search for him had to be made on the basis of the entire evidence. While it was open for the RAD to conclude that even though the Applicant advocates for an independent Khalistan, his activity or stature within the movement is too marginal to subject him to such a risk of persecution, the RAD could not come to that conclusion without considering the key evidence of his *sur place* claim – namely his pro-Khalistan views made public through his social media activity.

[20] The RAD therefore omitted to analyze the Applicant's *sur place* claim on the basis of the social media posts submitted and the new documentary evidence before it. It is for the RAD to determine if this evidence establishes that the Applicant is sufficiently involved with the movement so as to raise a serious possibility of persecution upon return to India. The decision must therefore be remitted for reconsideration by a different member.

B. *The RAD's conclusion on a viable IFA needs to be reassessed*

[21] The test for determining whether there is an IFA was developed in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, 1991 CanLII 13517 (FCA), and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, 1993 CanLII 3011 (FCA) [*Thirunavukkarasu*]. The test is two-pronged: the claimant has an IFA when (1) they will not be subject to a serious possibility of persecution nor to a risk of harm under

section 96 and section 97 of the IRPA in the proposed IFA location; and (2) it would not be objectively unreasonable for them to seek refuge there, taking into account all the circumstances. Both prongs must be satisfied in order to make a finding that a claimant has an IFA (*Thirunavukkarasu* at 597–598).

[22] On the first prong of the test, the applicant bears the onus of demonstrating that the proposed IFA is unreasonable because they fear a possibility of persecution throughout their entire country. In order to discharge their burden, a claimant must demonstrate that they will remain at risk in the proposed IFA from the same individual or agents of persecution that originally put them at risk. The risk assessment considers whether the agents of persecution have the "means" and "motivation" to cause harm to the claimant in the IFA (*Singh v Canada (Citizenship and Immigration)*, 2023 FC 996 at para 8). The applicant must establish that the agents of persecution have both elements: the means and the motivation to cause harm (*Ortega v Canada (Citizenship and Immigration)*, 2023 FC 652; *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 13). This assessment must be made by the decision maker, is a prospective analysis, and is considered from the perspective of the agents of persecution, not from the claimant's perspective (*Vartia v Canada (Citizenship and Immigration)*, 2023 FC 1426 at para 29; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 21; *Aragon Caicedo v Canada (Citizenship and Immigration)*, 2023 FC 485 at para 12). The onus is therefore on the applicant to adduce sufficient evidence or facts to discharge their burden of proof and demonstrate, on a balance of probabilities, that the agents of persecution have the means and motivation to locate them in the proposed IFA and that therefore, they will be subject to a serious possibility of persecution under section 96, or to a likelihood of a section 97 danger

or risk in the proposed IFA (*Singh v Canada (Citizenship and Immigration)*, 2023 FC 1623 at para 17 [*Singh* 2023 FC 1623]; *Bassi v Canada (Citizenship and Immigration)*, 2024 FC 910 at para 17 [*Bassi*]; *Chatrath v Canada (Citizenship and Immigration)*, 2024 FC 958 at para 20 [*Chatrath*]; *Singh v Canada (Citizenship and Immigration)*, 2024 FC 1080 at para 17 [*Singh* 2024 FC 1080]).

[23] For the second prong of the test regarding the reasonability of the refuge in other parts of the country, the threshold is very high and an applicant for asylum must present actual and concrete evidence of the existence of conditions that would jeopardize their life or safety if they were to attempt to relocate to that part of the country (*Ranganathan v Canada (Minister of Citizenship and Immigration)* (CA), 2000 CanLII 16789 (FCA); *Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106 at paras 20–21; *Singh* 2023 FC 1623 at para 18; *Bassi* at para 18; *Chatrath* at para 21; *Singh* 2024 FC 1080 at para 18).

[24] In this case, the RAD's assessment failed to take into account the *sur place* claim of the Applicant on the basis of his political opinion and evidence of support for Khalistan. Therefore, any assessment of a viable IFA requires that the RAD reconsider the agent of persecution, it potentially no longer being limited to the Punjab police. To the extent that the agent of persecution now extends to other government agencies, it may be that a proposed IFA is not viable because the Applicant fears a serious possibility of persecution or risk of harm throughout the entire country.

[25] Moreover, on the matter of objective documentary evidence, the RAD failed to consider and weigh contradictory evidence available to it in the relevant National Documentation Package [NDP]. First, the claim that "[s]upporting an independent Khalistan is not illegal in India" (RAD Decision at para 38) is incomplete. The assessment required of the RAD is not whether supporting Khalistan is illegal in India under applicable laws, but whether there is a genuine and serious possibility of persecution or risk of harm upon return to India. Persecution may occur in extra-legal forms, including for the advocacy of political opinions, a ground specifically protected by the *Convention* (*Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 arts 1(2), 33(1) (entered into force 22 April 1954, accession by Canada 4 June 1969)) and section 96 of the IRPA.

[26] While the NDP passages upon which the RAD relies mention the existence and official recognition of a political party whose goal is the creation of a separate Sikh Khalistan (Shiromani Akali Dal (Amritsar) [SAD-A]), and that harassment of SAD-A members in India is not "systematic or constant mistreatment" (RAD Decision at paras 38-39), there is also objective contradicting evidence to the effect that "government, civil society and media vilify Sikhs advocating for Khalistan as extremists and militants by default," that "[a]ccording to sources, the police 'keep track of' or 'monitor' Khalistan supporters," or that "individuals who attend SAD(A) speeches will be tracked by the police and Khalistan activists who participate in activities such as demonstrations, meetings or posting on social media will be monitored" (references omitted) (NDP item 12.8; Applicant's Record at 257).

[27] The RAD did not justify in a transparent and intelligible manner why that contradictory evidence was not given any weight, leaving one with an accordingly incomplete sense of how it assessed the country condition evidence in relation to the Applicant's claims (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), [1999] 1 FC 52 at para 17). It is open for the RAD to determine that the Applicant's advocacy is not sufficient to render him a person of interest for Indian authorities, but it must conduct this analysis in light of all the evidence before it.

[28] Absent of such analysis by the RAD, the Court cannot "substitute its own reasons in order to buttress the administrative decision" (*Vavilov* at para 96). These omissions from the RAD's analysis cause this court to lose confidence in the administrative decision-making process and therefore, the decision is unreasonable and must be sent back for redetermination.

VI. Conclusion

[29] The application for judicial review is granted. The RAD's decision is set aside and the matter remitted for redetermination before a different member.

[30] The parties have not proposed questions for certification and I agree that none arise in this case.

JUDGMENT in IMM-12742-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.
2. The RAD's decision is set aside and the matter is remitted for redetermination before a different member.
3. There is no question for certification.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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