Federal Court  Cour fédérale

Date: 20241007

Docket: IMM-10738-23

Citation: 2024 FC 1568

Toronto, Ontario, October 7, 2024

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

MAHESH DATT KALAUNI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mahesh Datt Kalauni, a citizen of Nepal, seeks judicial review of a July 25, 2023 decision [Decision] of the Refugee Appeal Division [RAD], dismissing his claim for refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RAD upheld the decision of the Refugee Protection Division [RPD] finding the Applicant enjoyed surrogate protection in India as a result of the *1950 Treaty of Peace and Friendship Between the Government of India and Government of*

Nepal [Treaty] and as such, that he was excluded from refugee protection on the basis of Article 1E of the Refugee Convention.

[2] The Applicant argues that the Decision was unreasonable as the RAD erred in its analysis of whether the Applicant had surrogate protection in India, and in particular access to social services. As set out further below, I find the RAD's analysis includes inconsistencies and material gaps, which render it unintelligible and as such the application is allowed.

I. **Background**

[3] The Applicant alleges that he and his family support the Nepal Congress party and that this affiliation caused the Applicant to be targeted by Nepalese Maoists and the Biplav Maoist group. To escape this targeting, the Applicant fled to Hyderabad, India in 2006 where he lived and worked until 2017, visiting Nepal only occasionally.

[4] In 2017, the Applicant travelled to Canada on a work permit but returned to Nepal in 2019 and 2021 to deal with his mother's illness. He asserts that when in Nepal he was again threatened by Maoists and as a result, fled to Canada to seek refugee protection.

[5] On November 29, 2022, the RPD dismissed the Applicant's refugee claim on the basis of Article IE of the Refugee Convention. The decision was upheld by the RAD on July 25, 2023.

II. **Issue and Standard of Review**

[6] The sole issue on this judicial review is whether the Decision was reasonable. That is, whether the Decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

III. **Analysis**

[7] Article IE of the Refugee Convention is an exclusion clause that precludes refugee protection from being conferred on an individual if the individual has surrogate protection in a country where the individual enjoys substantially the same rights and obligations as nationals of that country.

[8] The test to determine whether Article 1E of the Refugee Convention applies was set out by the Federal Court of Appeal in *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*] at paragraph 28:

> [28] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or

> involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[9] In *Shamlou v Canada (Minister of Citizenship and Immigration)*, (1995) 103 FTR 241 (TD) at paragraphs 35-36, the Court set out four factors to be verified when conducting an analysis of the "basic rights" that must be enjoyed by a person excluded under Article 1E, namely: 1) the right to work without restrictions; 2) the right to study; 3) the right to have full access to social services; and, 4) the right to return to the country of permanent residence.

[10] The Applicant asserts that the RAD erred in finding he has status in India conferring substantially the same rights as its nationals. He refers to Article 5.26 of the Australian Department of Foreign Affairs and Trade [DFAT] Country Information Report Nepal, dated March 1, 2019, which states that "[i]n order to participate formally in Indian society (e.g. gain formal employments, access formal health and education services, purchase property, etc.) Nepalis must, like Indian citizens and other nationalities resident to India, obtain an identification card, known as 'PAN card' (PAN stands for 'Permanent Account Number')."

[11] According to the definition of "resident" found in the National Documentation Package for India (July 7, 2023), item 3.3, The Aadhaar (*Targeted Delivery of Financial and Other Subsidies, Benefits and Services*) Act, 2016, India, an individual cannot obtain a PAN card unless they have resided in India "for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment".

[12] The Applicant asserts that he did not have the right to social services at the time of the RPD hearing as he did not have a PAN card or an Aadhaar card. Further, as he left India in 2017, he did not meet the 182-day residency requirement for obtaining a PAN card or an Aadhaar card, which would enable him to access social services.

[13] In the Decision, the RAD set out a framework of analysis for determining whether Article 1E of the Convention applied to the Applicant, which was based on decision MB8-00025, identified by the Immigration and Refugee Board [IRB] on December 22, 2020 as a *Jurisprudential Guide*. The framework was as follows:

> (1) At the date of the RPD hearing, did the claimant hold a status in a country of residence that confers on them substantially the same rights and obligations that are attached to the possession of the nationality of that country?
>
> a. If the answer to question 1) is no, the RPD and/or RAD must consider whether the claimant previously held such a status and lost it or had access to such a status and failed to acquire it. If so, the RPD and the RAD must consider and balance the factors set out by the Court of Appeal in the last part of paragraph 28 of the *Zeng* decision. [*Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 ("*Zeng*") at paragraph 28.]
>
> b. If the answer to question 1) is yes, the next question is whether the claimant's country of residence is unsafe for them in the sense that they face a serious possibility of persecution on a Convention ground or, the likelihood of being subjected to a danger of torture, a risk to like, or a risk of cruel and unusual treatment or punishment for which they have no state protection or internal flight alternative.
>
> i) If the claimant's country of residence is unsafe for them, they are not excluded from refugee protection and the decision maker must consider whether they are a Convention refugee or a person in need of

protection in respect of their country of nationality.

ii) If the claimant's country of residence is safe for them, they are excluded from refugee protection by the combined effect of Article IE and section 98 of the IRPA.

[14] Setting out to apply the analysis, the RAD states that "the RPD was correct in finding that the [Applicant] has the status in India that confers substantially the same rights as the nationals and therefore in response to question "1a" above, the answer is "yes"." It notes that the "[Applicant] resided and worked in India from 2006 to 2017 before he travelled to Canada" and that the "RPD correctly based its findings that the [Applicant] has substantially the same rights as Indian nationals based on the 1950 *India-Nepal Treaty* which provide for the reciprocal treatment, national treatment and privileges of nationals to citizens of the other country."

[15] The RAD did not agree with the Applicant's submission that he would not be able to access education, medical and social services in India because, as a non-citizen, he would be unable to obtain Aadhaar or PAN cards. The RAD notes the Applicant's evidence that he did not attempt to access such services while in India and that he never attempted to apply for an Aadhaar card. However, the RAD states that the objective evidence indicates that he would be able to obtain a PAN card or an Aadhaar card that would enable him to access social services.

[16] The RAD refers to the Australian DFAT document and the requirements to obtain a PAN card, stating that the legislation behind the Aadhaar system defines resident "as someone who has resided in India for 182 days or more".

[17] In my view, there are several problems with the RAD's analysis, which render it unintelligible. First, it is unclear how the RAD applied the framework arising from the *Jurisprudential Guide*. If the RAD followed "(1) a." of the framework as it states, it would be concluding that the claimant previously held status in India and lost it or had access to such status and failed to acquire it. However, the RAD answers the question in the present tense asserting that the Applicant "has" status in India, relying on the Treaty and noting that the Applicant had previously resided and worked in India from 2006 to 2017. It does not conduct an analysis of the last part of paragraph 28 of the *Zeng* decision as paragraph "1a" requires. Rather, the reasons suggest that the RAD considered the Applicant to have status in the present tense and accordingly to fall under paragraph "1b" of the analysis.

[18] Second, the RAD refers to the definition of resident in the legislation behind the Aadhaar system "as someone who has resided in India for 182 days or more" without noting the qualification that the 182 days must be *in the twelve months immediately preceding the date of application for enrolment*. The Applicant who left India in 2017, which was more than 12 months before the date of the RPD hearing, would not have satisfied the definition of resident as of the date of the RPD hearing. Thus, while the RAD concludes that the Applicant would be entitled to a PAN card, it is unclear if the RAD has considered the qualification in the timing associated with the 182 days when evaluating the Applicant's entitlement to a PAN card (and to social services). Accordingly, it is unclear what access to social services (immediate or otherwise) the RAD considers the Applicant to have as of the date of the RPD hearing.

[19] In my view, the Decision lacks clarity, is internally inconsistent, and is unintelligible as written. Accordingly, I will allow the application, set aside the Decision as unreasonable, and return the matter for redetermination by a differently constituted panel.

[20] There was no question for certification proposed by the parties and I agree none arises in this case.

JUDGMENT IN IMM-10738-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, the July 25, 2023 decision is set aside and the matter is sent back to be redetermined by a differently constituted panel of the RAD.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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