Federal Court  Cour fédérale

Date: 20210416

Docket: IMM-14-20

Citation: 2021 FC 336

Ottawa, Ontario, April 16, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

PARMINDER SINGH
AMANDEEP KAUR
ARSHVIR SINGH
HARDAMANPREET SINGH

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, citizens of India, are Sikhs from Ludhiana, Punjab, who practice Islam despite not having converted. They allege a fear of persecution by a corrupt politician who falsely accused them of converting Sikhs to Islam. In this proceeding, the applicants seek judicial review of a decision of the Refugee Appeal Division (RAD), confirming the Refugee

Protection Division's (RPD) determination that they are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], as there are viable internal flight alternatives (IFAs) in Mumbai and New Delhi.

[2] The applicants submit the RAD's decision is unreasonable, based on two errors: an alleged error of law in refusing to admit a news article published after the RPD hearing, reporting that the politician was criminally charged and denied bail, and an alleged error of mixed fact and law with respect to the RAD's finding that the politician would not be motivated to pursue the applicants in Mumbai or New Delhi.

[3] For the reasons below, the applicants have not established that the RAD's decision is unreasonable, and accordingly, this application is dismissed.

II. **Issues and Standard of Review**

[4] The issues on this application for judicial review are:

(1) Did the RAD err in refusing to admit the news article as new evidence on appeal?

(2) Did the RAD err by conducting a microscopic analysis of the country condition documentation?

[5] The parties agree that both issues on this application are reviewable according to the revised framework for reasonableness review as set out in the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. See also:

Akinyemi-Oguntunde v Canada (Citizenship and Immigration), 2020 FC 666 at para 15; *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at para 31; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 17.

[6] Reasonableness review requires a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. **Analysis**

A. *Did the RAD err in refusing to admit the news article as new evidence on appeal?*

[7] The applicants fear persecution from a member of the legislative assembly (MLA) in the state of Punjab.

[8] In 2015, the MLA demanded that Mr. Singh close an Islamic prayer space that was generating significant interest among Sikhs and Hindus, and that he leave the area. Mr. Singh refused. As a result, the applicants claim they were subjected to persecution by the MLA, who took action against them out of fear that the spread of Islam would cause voters to support Muslim political candidates and jeopardize the MLA's chances of re-election as a Sikh. The applicants believe that the MLA was behind a motorcycle accident involving Mr. Singh and his

wife, and that the MLA prevented an administrator from accepting their children's registration at school. The applicants also believe the MLA orchestrated 25 people to make false accusations that Mr. Singh attempted to convert them to Islam. According to the applicants, the police illegally detained Mr. Singh on the basis of the false accusations, and abused him physically and verbally before releasing him upon the payment of a bribe.

[9] On appeal to the RAD, the applicants sought to admit a news article titled "[District] judge: Being MLA no license to misbehave" that was posted to an online Indian news service on September 19, 2019, reporting that the MLA was facing charges of threatening and obstructing government officials in multiple cases and that he had been denied bail the previous day. The RAD refused to admit the article on the basis that it did not meet the statutory conditions of section 110(4) of the *IRPA* because: (i) it pre-dated the RPD's decision of September 23, 2019, and therefore did not arise after the rejection of the applicants' claim; (ii) it was reasonably available to the applicants since it was obtained from a publicly available source; and (iii) the applicants did not argue and did not provide evidence to establish that they could not reasonably have been expected to present the article at the time of the RPD's rejection of their claim.

[10] The applicants submit the RAD's refusal to admit the article is unreasonable, and does not accord with the principles for the admission of new evidence established in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] as confirmed in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [2016] 4 FCR 230 [*Singh (FCA)*]. While the applicants concede that the news article was not evidence that arose after the rejection of their claim, they argue that the article should have been admitted on the basis that it meets another statutory

condition of section 110(4), being evidence that "was not reasonably available" at the time of the rejection. The article post-dated the RPD hearing of August 22, 2019, pre-dated the RPD's decision by only about 2-3 days accounting for different time zones, described an event that post-dated the RPD hearing, and the applicants were in Canada at the time. The applicants maintain these are the same factors that led the Federal Court in *Ogundipe v Canada (Citizenship and Immigration)*, 2016 FC 771 [*Ogundipe*] at paragraph 26 to conclude that the RAD had unreasonably excluded evidence in that case.

[11] According to the applicants, the RAD must consider all evidence that is not properly excluded under the *Raza* test. They argue that the news article is not excluded under the *Raza* test because it satisfies the third and fifth *Raza* factors:

> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.
>
> …
>
> 5. Express statutory conditions:
>
> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.

> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).
>
> *Raza* at para 13.

[12] Since the news article relates to a fact that was unknown to them at the time of the RPD hearing, and proves an event that occurred after the RPD hearing, the applicants submit it satisfies these *Raza* factors. Also, they submit the news article satisfies the express statutory condition under section 110(4) of the *IRPA* because it was published after the RPD hearing and 2-3 days before the RPD's decision, and thus it "was not reasonably available" at the time of the decision. As such, the applicants argue that the evidence must be considered unless it is rejected due to a lack of credibility, relevance, newness or materiality: *Raza* at para 13.

[13] Furthermore, the applicants submit the RAD erred in stating that the applicants had not argued, and there was no evidence to support a finding, that they could not reasonably have been expected to have presented the evidence at the time of the rejection of the claim. They submit that seven paragraphs in their appeal memorandum were devoted to the news article, and that they had argued they could not have reasonably been expected to present the article to the RPD.

[14] In my view, the RAD did not err in refusing to admit the news article. The Federal Court of Appeal's decision in *Singh (FCA)* is the leading authority on this issue. In *Singh (FCA)*, the Court explained that the legislative framework for an appeal to the RAD reflects Parliament's clear intention to narrowly define the introduction of new evidence (para 51). The basic rule is that the RAD must proceed on the basis of the record of the proceedings before the RPD, and since section 110(4) departs from that rule, it must be narrowly interpreted (para 35).

Importantly, the Federal Court of Appeal held that the explicit conditions set out in section 110(4) must be met: on appeal to the RAD, an applicant may present only new evidence that arose after the RPD's rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection (para 34). The Court held that the section 110(4) conditions are inescapable and leave no room for discretion on the part of the RAD (para 35), although the RAD has the freedom to apply the conditions of section 110(4) with more or less flexibility, depending on the circumstances (para 64).

[15] I disagree with the applicants that the RAD was required to admit the news article based on the *Raza* factors. Furthermore, I disagree with the applicants' submission that the RAD must admit evidence that meets the section 110(4) criteria. Indeed, in *Singh (FCA)*, the Federal Court of Appeal rejected a similar argument by one of the interveners (at para 56). It is clear from the Court's decision in *Singh (FCA)* that the RAD has no discretion to accept evidence that does not meet the statutory requirements of section 110(4), but the RAD may refuse to admit evidence that meets the statutory requirements, based on the *Raza* factors (paras 37-38). For example, the RAD may refuse to admit evidence that is not credible (para 44) or not relevant (para 45). The Federal Court of Appeal noted in *Singh (FCA)* that the *Raza* factors are modified somewhat in the context of section 110(4) of the *IRPA*, including the third *Raza* factor of "newness", as it is redundant and does not add to the explicit requirements of section 110(4) (para 46).

[16] The applicants concede that the news article did not arise after the rejection of their claim. On this application for judicial review, the applicants argue that the news article meets

the section 110(4) condition of “not reasonably available” at the time of the rejection because the article post-dated the RPD hearing of August 22, 2019, pre-dated the RPD’s decision by a few days, described an event that post-dated the RPD hearing, and the applicants were in Canada at the time.

[17] In my view, the language of section 110(4) of the *IRPA* is clear: the criteria for admissibility of new evidence are considered as of the date of the rejection of the claim, and not the date of the RPD hearing. This is consistent with Rule 43 of the *Refugee Protection Division Rules*, SOR/2012-256, which permits an applicant to submit new evidence to the RPD after a hearing and before a decision takes effect.

[18] The explanation the applicants provided to the RAD regarding how the article meets the requirements of section 110(4) was, “The appellants have submitted a news article that post-dates their refugee hearing held on August 22, 2019, and which they thus could not have been reasonably expected to have presented.” Therefore, the applicants did not assert that the article was not reasonably available, and it was open to the RAD to find that the article was reasonably available since it was obtained from a publicly available source. The seven paragraphs in the appeal memorandum, which the applicants assert were devoted to the news article, relate to its relevance, not its admissibility under section 110(4) of the *IRPA*. In *Singh (FCA)*, the Federal Court of Appeal rejected arguments that the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of section 110(4). In other words, the RAD may reject credible evidence on the ground that it is “technically inadmissible” from

the failure to meet the express statutory requirements under section 110(4): *Singh (FCA)* at paras 36 and 37.

[19] Moreover, since the applicants had simply asserted that the article post-dated the RPD hearing, it was accurate for the RAD to state that the applicants had not argued and there was no evidence to support a finding that they could not reasonably have been expected to have presented the evidence at the time of the rejection of their claim.

[20] I am not persuaded that this Court's decision in *Ogundipe* compels a different conclusion. In *Ogundipe*, it appears that the RAD refused to admit the news articles in question because they described events that pre-dated the rejection of the applicants' claim. The applicants in that case argued that the RAD failed to consider whether the applicants could have reasonably been expected to present the news articles at the time of their rejection. Although the decision in *Ogundipe* does not provide details of the applicants' evidence or their submissions to the RAD regarding the admissibility of the articles, a clear point of distinction is that the RAD in the present case did consider all three section 110(4) factors. Furthermore, *Vavilov* makes it clear that the reasonableness of a tribunal's decision is contextual—the decision must be justified "in relation to the constellation of law and facts that are relevant to the decision": *Vavilov* at para 105. Also, the RAD's reasons must be read in light of the history and context of the proceedings in which they were rendered, including the submissions of the parties and how the applicants framed their appeal: *Vavilov* at paras 94. In my view, the decision in *Ogundipe* was based on the evidence that was before the RAD and the RAD's reasons in that case. It does not follow from

the reasons in *Ogundipe* that evidence pre-dating the RPD's decision by a short period of time will necessarily meet the section 110(4) criteria in every case.

[21] Lastly, the applicants argue the RAD's failure to admit the news article resulted in an incomplete analysis of the applicants' risk in the IFAs, as the article would have confirmed the MLA's "extensive criminal history and background" and his motivation to pursue the applicants outside of the state of Punjab. The respondent counters that it is speculative to say the MLA's criminal background establishes his motivation to pursue the applicants, particularly since the article merely confirms the applicants' allegations before the RPD that the MLA was corrupt. I agree with the respondent. I fail to see how an article reporting that the MLA was charged for criminal conduct and denied bail would increase the applicants' risk of persecution from this corrupt MLA in the proposed IFAs. Thus, in addition to my finding that the RAD reasonably refused to admit the article on the basis of the section 110(4) statutory criteria, which is a complete answer to the applicants' position, I am not satisfied that the failure to admit the news article resulted in an incomplete analysis. In my view, the absence of this evidence was not sufficiently material so as to constitute a sufficiently serious shortcoming that would render the RAD's decision unreasonable: *Vavilov* at para 100.

[22] In conclusion, the RAD did not err by refusing to admit the news article as new evidence.

B. *Did the RAD err by conducting a microscopic analysis of the country condition documentation?*

[23] The applicants submit the RAD erred in its IFA determination by engaging in a selective assessment and microscopic analysis of the country condition documentation in the National

Documentation Package (NDP) for India, pertaining to corruption in the Punjab police force. Specifically, the applicants refer to IND104369.E, a report titled, “India: Situation of Sikhs outside the State of Punjab, including treatment by authorities; ability of Sikhs to relocate within India, including challenges they may encounter” (Report).

[24] The applicants rely on *Hamdar v Canada (Citizenship and Immigration)*, 2011 FC 382 at para 58, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) [*Cepeda-Gutierrez*] at paragraph 17 for the proposition that a tribunal must consider the totality of the evidence and refrain from selectively assessing the evidence. The applicants submit that, contrary to the principle in *Cepeda-Gutierrez*, the RAD erred in rejecting their argument that the MLA could secure the help of the Punjab police to locate them anywhere in India. According to the applicants, the RAD selectively singled out one statement in the Report, indicating that the ability of the Punjab police to track suspects requires a court order and help from other states’ police forces, which results in the police using this method only in “extreme” cases. The applicants argue that the statement was subsequently qualified and challenged by multiple sources in the NDP.

[25] Also, the applicants rely on the unadmitted news article to demonstrate that the agent of persecution is not only corrupt, but also a criminal.

[26] In my view, the RAD did not err in engaging in a selective assessment or by conducting a microscopic analysis of the country condition documentation. The RAD did not ignore relevant objective documentation so as to contravene the principles set out in *Cepeda-Gutierrez*. None of

the sources cited by the applicants support their argument that the MLA would be motivated or have the ability to seek the applicants in another state. One source describes the legal obligation of the police to pursue an individual in another state, if the individual is wanted for crime. Another source indicates that the Punjab police would pursue individuals to another state if they are "people who are fighting for the rights of the victims of the 1984-85 violence against Sikhs, people who criticize the police or government for their activities, and members of Sikh youth organizations". In this case, the applicants are not wanted for any crimes, and they do not fall into this listed group of individuals. A third source cited by the applicants concerns the arrests of individuals who are suspected of having links with Babbar Khalsa. The applicants are not suspected of having links to this group.

[27] In my view, it was reasonable for the RAD to consider the country condition documentation that indicated the Punjab police would require a court order to track suspects and receive help from another state's police, and that this method is only used in "extreme" cases. The RAD reasonably concluded that the MLA would not be motivated to go to such lengths to locate them in other parts of India, given his profile as a state-level politician interested in his voter base in Punjab, and his demands that the applicants close their prayer space and leave the area. There was no evidence to establish the MLA would be motivated to pursue the applicants across the country. For the reasons noted above, the news article was properly excluded and in any event, did not establish that the MLA would be motivated to pursue the applicants outside of Punjab.

[28] Finally, the applicants are not being pursued by the police, and the evidence does not show that the MLA would have the ability to utilize the police force to his advantage in pursuing the applicants in Mumbai or New Delhi.

[29] As the respondent correctly states, the weighing of evidence is within the jurisdiction of the RAD. The RAD was entitled to rely on relevant evidence most consistent with the profiles of the applicants and their agent of persecution: *Marchant Andrade v Canada (Citizenship and Immigration)*, 1997 CanLII 16778 (FC); *Tekin v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 357 at para 17. I am not persuaded that the RAD engaged in a selective assessment of the evidence, and the RAD's conclusion that the MLA would not have the motivation to seek the applicants in another state was reasonable.

IV. **Conclusion**

[30] The applicants have not established that the RAD committed a reviewable error by refusing to admit new evidence, and they have not established that the RAD's determination of viable IFAs in Mumbai and New Delhi were unreasonable. Accordingly, this application for judicial review is dismissed.

[31] The parties did not propose a question for certification. In my view, no question for certification arises in this case.

JUDGMENT in IMM-14-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question for certification.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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