Federal Court  Cour fédérale

Date: 20211214

Docket: IMM-1661-21

Citation: 2021 FC 1410

Ottawa, Ontario, December 14, 2021

PRESENT: THE CHIEF JUSTICE

BETWEEN:

DILAWAR SINGH, SINDER KAUR, ASHMEET KAUR

Applicants

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants are citizens of India. They claimed refugee status in this country based on their fear of harm at the hands of members of the Shiv Sena political party.

[2] In support of their claims, the principal Applicant (Dilawar Singh) and his spouse (Sinder Kaur) state that they were attacked by members of Shiv Sena on multiple occasions, in or near their home village of Karnal, Haryana and in Hasur, Maharashtra. On two of those occasions, the lives of Ms. Kaur and their minor daughter (Ashmeet Kaur) [**Ashmeet**] were threatened. On another occasion, they were the victims of an attempted kidnapping. Mr. Singh attributes those attacks, threats and attempted kidnapping to the fact that he refused to join Shiv Sena and sell drugs on its behalf. Instead, he continued to work for a Sikh-based political party, Shiromani Akali Dal.

[3] The Refugee Protection Division [the **RPD**] of the Immigration and Refugee Board of Canada [the **Board**] found the adult Applicants to be credible witnesses but dismissed their claims for refugee protection on the ground that they have an internal flight alternative [**IFA**] in Mumbai and Delhi. Their appeal to the Refugee Appeal Division [the **RAD**] was not successful.

[4] On this Application for judicial review, the Applicants allege that the RAD erred in finding that they had not established either of the two prongs of the test for an IFA. They also claim that the RAD erred by failing to explicitly address the particular interests of Ashmeet and her Canadian-born younger sister, as children. I disagree. For the reasons that follow, this Application will be dismissed.

II. **Issues**

[5] The Applicants raise three issues, which are best restated as follows:

i. Was the RAD's assessment of the first prong of the IFA test unreasonable?

ii. Was the RAD's assessment of the second prong of the IFA test unreasonable?

iii. Was it unreasonable for the RAD to have failed to explicitly address the interests of Ashmeet and her sister, in their capacity as children?

III. **Standard of review**

[6] The three issues raised by the Applicants are reviewable on a standard of reasonableness. In assessing whether a decision is reasonable, the Court will assess whether the decision is appropriately justified, transparent and intelligible. To meet these requirements, the decision must reflect "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 85 and 99 [***Vavilov***].

IV. **Assessment**

A. *Was the RAD's assessment of the first prong of the IFA test unreasonable?*

[7] The test for an IFA has two parts. In the context of section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**], the first prong of the test requires the person applying for protection to demonstrate, on a balance of probabilities, that there is serious possibility of persecution in the area alleged to constitute an IFA: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 at p 593 (FCA)

[***Thirunavukkarasu***]. In the context of section 97, the claimant must demonstrate that they would likely be personally subjected to a danger described in paragraph 97(1)(a), or to a risk described in paragraph 97(1)(b). For the purposes of both section 96 and section 97, it must be established that the agents of persecution have the probable means and motivation to pursue the Applicants in the suggested area(s) of IFA: *Saliu v Canada (Citizenship and Immigration)*, 2021 FC 167 at para 46.

[8] The Applicants submit that the RAD erred in its assessment of the first prong of the IFA test by failing to consider the absence of state protection. They maintain that having established their subjective fears and the inability of the Indian government to assuage their fears, the RAD should have concluded that those fears were well-founded. They add that the Board's National Documentation Package [**NDP**] pertaining to India reinforces their position.

[9] I disagree. It is not sufficient to simply establish a subjective fear of persecution and a subjective fear of the government's inability to provide state protection. It is also necessary to establish that the fear is "well-founded in an objective sense": *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 723 [***Ward***].

[10] Therefore, even where a refugee applicant's subjective fears are found to be credible, it is still necessary to establish whether those fears are "objectively justifiable": *Ward*, above at p 723. This requires overcoming the presumption that a state is capable of protecting its citizens, except where there is a complete breakdown of the state's apparatus, or where the agents of persecution are representatives of the state.

[11] To displace that presumption, an applicant must demonstrate, with clear and convincing evidence, and on a balance of probabilities, that the state is unable to provide adequate state protection at the operational level: *Ward*, above, at pp 723–725; *The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at para 30; *Cosgun v Canada (Citizenship and Immigration)*, 2010 FC 400 at para 52; *Komatsia v Canada (Citizenship and Immigration)*, 2017 FC 695 at paras 12–13; *Camargo v Canada (Citizenship and Immigration)*, 2015 FC 1044 at para 26; *Brzezinski v Canada (Citizenship and Immigration)*, 2019 FC 25 at para 20.

[12] In submitting that the RAD was obligated to go beyond the issues raised on appeal and proactively address the issue of state protection, the Applicants are effectively attempting to shift the applicable burden. Once the RAD identified Mumbai and Delhi as IFAs, the onus was on the Applicants to overcome the presumption of adequate state protection in those cities with clear and convincing evidence: *Thirunavukkarasu*, above, at pp 594–595. Given the evidentiary record, the RAD's conclusion that they failed to meet this burden was not unreasonable.

[13] The focus of the RAD in assessing the first prong of the IFA test was upon the specific arguments that were advanced by the Applicants. Those arguments related exclusively to the alleged risks they would face in Mumbai and Delhi at the hands of members of the Shiv Sena party. On the evidence that was before the RAD, it was reasonably open to it to conclude that (i) the members of Shiv Sena who had persecuted them in the past were local members of that party who were acting without the knowledge and authority of the party at large, and (ii) the Applicants had not met their burden of demonstrating that those members would be motivated to pursue them to Mumbai and Delhi.

[14] The Applicants have not identified any evidence in the NDP or elsewhere in the record that was before the RAD to substantiate their allegations that they would not likely be able to avail themselves of adequate state protection in Mumbai or Delhi.

[15] The Applicants submit that where a person has been the victim of past persecution in their country of nationality, then as a matter of law the person must be found to have a well-founded fear of persecution unless there is reason to conclude that the fear is no longer well-founded because, for example, conditions in the person's country of nationality have changed. In this regard, they rely on *Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91 at para 12 [***Fernandopulle***]. However, there, the Federal Court of Appeal was summarizing its understanding of the appellants' argument on this point. The Court ultimately rejected this position. In so doing, it agreed with the trial judge that the only issue to be determined in assessing a refugee claim was the factual question of whether, at the time of hearing the claim, there was a well-founded fear of persecution in the event of return: *Fernandopulle*, above, at para 23. In answering the certified question, the Court specifically stated that persons who have suffered from past persecution do not benefit from any presumption in their favour: *Fernandopulle*, above, at para 25.

[16] The Applicants also maintain that their sworn testimony regarding the likelihood of being pursued to Mumbai or Delhi by members of Shiv Sena ought to have been accepted by the RAD. In support of this, they rely on *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) at para 5. There, the Court enunciated the general principle that "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those

allegations are true unless there be reason to doubt their truthfulness." However, this presumption does not apply to inferences, conclusions a witness may draw from the facts, or speculation regarding future events. Likewise, it does not apply to fears that are not sufficiently substantiated by the objective evidence: *Araya Atencio v Canada (Minister of Citizenship and Immigration)*, 2006 FC 571 at paras 8–10; *Hernandez v Canada (Minister of Employment and Immigration)* (1994), 79 FTR 198 at para 6; *Derbas v Canada (Solicitor General)*, [1993] FCJ No 829 (TD) at para 3.

[17] In summary, for the reasons set forth above, the RAD's assessment of the first prong of the IFA test fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Vavilov*, above, at paras 85–86. The conclusions it reached were appropriately justified, transparent and intelligible. They were also supported by an internally coherent and rational chain of analysis.

B. *Was the RAD's assessment of the second prong of the IFA test unreasonable?*

[18] For the purposes of both section 96 and section 97 of the IRPA, the second prong of the IFA test requires the Applicants to demonstrate that it would not be objectively reasonable for them to be required to seek refuge in the IFA area, having regard to all of the circumstances, including the Applicants' particular circumstances: *Thirunavukkarasu*, above, at p 597. In this regard, the threshold for objective unreasonableness is "very high" and "requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to" the area where a potential IFA has been identified: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (FCA) at

para 15. Such conditions must be established based on actual and concrete evidence. Conversely, it is not sufficient “for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there”: *Thirunavukkarasu*, above, at p 598.

[19] The Applicants submit that the RAD erred in assessing the second prong of the IFA test because it did not reasonably consider their personal circumstances or the situations of similarly situated individuals. Instead, the RAD confined its analysis to the general risks faced by people of Sikh ethnicity. The Applicants assert that the RAD should have specifically assessed whether Mr. Singh, who is a baptized Sikh and a vocal supporter of Khalistan, faced a serious possibility of being persecuted in Mumbai and Delhi.

[20] I disagree.

[21] Before the RAD, the Applicants submitted that it would be unreasonable for them to relocate to Mumbai or Delhi for three reasons: (i) the serious possibility that Shiv Sena “goons” would track them down and kill them, particularly given that Mr. Singh is a committed supporter of the Shiromani Akali Dal political party, (ii) the “drugs mafia” is very strong in India, and (iii) they would be subject to other “unduly harsh and inhuman treatment”, that they did not in any way explain or support.

[22] The first two of these submissions were explicitly addressed by the RAD, which made additional findings that reasonably permitted it to find that Mumbai and Delhi are acceptable IFA areas for the Applicants.

[23] Specifically, the RAD noted that the RPD did not err in reaching its conclusion with respect to the second prong of the IFA test, because it cited the objective evidence in the NDP in support of the following findings:

i. There are large Sikh communities in Delhi and Mumbai;

ii. Sikh minorities living outside the Punjab region have access to housing, employment, healthcare and education, and are free to practise their religion; and

iii. Sikh's do not face difficulty relocating to other areas of India.

[24] The RAD also observed that the NDP does not reference a "drugs mafia" in either Mumbai or Delhi. In addition, it noted that the RPD found that the adult Applicants have the education, skills and experience necessary to find work in a new location. The RAD noted that this was explicitly acknowledged in the Applicants' written submissions. The RAD further noted that the RPD had found that the Applicants are capable of moving and adjusting to life in a new location.

[25] Given the foregoing, the RAD's conclusion with respect to the second prong was appropriately justified, transparent and intelligible. It was also supported by "an internally coherent and rational chain of analysis" and fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Vavilov*, above, at paras 85–86.

C. *Was it unreasonable for the RAD to have failed to explicitly address the interests of Ashmeet and her sister, in their capacity as children?*

[26] The Applicants assert that the RAD erred by failing to specifically address the interests of Ashmeet and her sister, in their capacity as children. They maintain that those interests should have been explicitly considered because Mr. Singh and his spouse each testified about the attempted kidnapping of Ashmeet and about their fears for their daughters' lives, if they were required to return to Mumbai or Delhi.

[27] The Applicants maintain that this error in the RAD's analysis was compounded by its failure to take into consideration (i) the Board's *Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues* [the **Board Guidelines**], and (ii) the *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009, issued by the United Nations High Commissioner for Refugees [the **UNHCR Guidelines**]. Specifically, they submit that the RAD failed to follow the principle set forth in both sets of guidelines that the best interests of the child should be a primary consideration in assessing refugee claims. The Applicants add that the RAD also ignored the UNHCR's guidance that such assessments be sensitive to various forms of child abuse.

[28] In my view, it was not unreasonable for the RAD to have omitted to explicitly refer to the interests of Ashmeet and her sister in the course of its assessment. Apart from the Applicants' brief summary of the relevant "background" facts, which were accepted as credible by the RAD, the Applicants' submissions to the RAD focused entirely on their common fears and on issues that affected them as a group. Those issues were their allegations that the RPD erred by failing to consider certain documentary evidence and by rejecting some of their testimony, in the course of concluding that there was an available IFA in Mumbai and Delhi.

[29] Nowhere in their arguments to the RAD did the Applicants make any mention of their daughters, let alone how their daughters' interests might be relevant to an assessment of the two prongs of the IFA test.

[30] In this context, the RAD was not required to explicitly address any unidentified interests of Ashmeet or her sister, in their capacity as children. Throughout its analysis, the RAD addressed the various issues that the Applicants as a group had raised before it and before the RPD. These included their fears and the reasons why they considered it would be unduly harsh and inhumane to require them to relocate to Mumbai or Delhi. Implicit in this analysis was the RAD's assessment of those same considerations, as they related to Ashmeet and her sister.

[31] My conclusion in this regard is reinforced by the fact that Sinder Kaur testified before the RPD that the "main threats" from the people she feared were against her husband. When asked whether there were other reasons why the family could not live in Mumbai or Delhi, she replied "these are our enmities [*sic*], we don't know where they might kill us …": Transcript, at p 24.

Having essentially relied entirely on Mr. Singh's basis of claim, it was not unreasonable for the RAD to focus on his claim (*Morales Esquivel v Canada (Citizenship and Immigration),* 2009 FC 468 at para 26) and on the claims of the Applicants as a group.

[32] I acknowledge that Mr. Singh mentioned his Basis of Claim Form that Ashmeet had been traumatized by the attempted kidnapping and that this had resulted in her being admitted to hospital for treatment. I also acknowledge that Mr. Singh expressed a fear of his spouse and daughter being raped at the time of their attempted kidnapping and in the future, should they be required to return to India. However, in the absence of any submissions regarding these specific considerations, or other particular interests of Ashmeet and her sister, it was not unreasonable for the RAD to fail to specifically address them in its assessment.

[33] My conclusion in this regard is reinforced by the fact that there was no evidence whatsoever before the RAD to substantiate (i) that Ashmeet's mental state would decline, let alone to the degree contemplated by the second prong of the IFA test, (ii) that she or her sister would face a real risk of physical harm, or (iii) that it would otherwise be objectively unreasonable to require them to live in Mumbai or Delhi, specifically.

[34] In this context, it was also not unreasonable for the RAD to have failed to expressly mention the Board Guidelines or the UNHCR Guidelines. I will add for the record that the RPD explicitly stated that it considered the Board Guidelines and the RAD then specifically observed that its role was "to look at all the evidence and decide if the RPD made the correct decision." It can be inferred from this that the RAD considered the Board Guidelines in making its decision.

V. **Conclusion**

[35] For the reasons set forth above, this Application will be dismissed.

[36] I agree with the parties' position that the legal and factual matrix of this Application does not give rise to a serious question of general importance for certification.

JUDGMENT in IMM-1661-21

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed.

2. The legal and factual matrix of this Application does not give rise to a serious question of general importance for certification.

"Paul S. Crampton"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Aman Sandhu	FOR THE APPLICANTS
Mara Selanders	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sandhu Law Office Surrey, British Columbia	FOR THE APPLICANTS
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT