

Federal Court



Cour fédérale

Date: 20221118

Docket: IMM-5988-21

Citation: 2022 FC 1583

Ottawa, Ontario, November 18, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

SHERSAHIB SINGH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Shersahib Singh seeks judicial review of a decision of the Refugee Appeal Division (RAD), rejecting his refugee claim on grounds of credibility.

[2] Despite the deference that must be given to credibility assessments, I conclude the RAD made material analytical errors in its credibility determinations that require the decision to be set

aside. In particular, the RAD assessed Mr. Singh's credibility on a central issue, namely his allegation that his brother had disappeared after being threatened by groups militating for the independence of Punjab, without considering the corroborative evidence on the issue, and then dismissed that very corroborative evidence on the basis that the credibility finding had already been made. The RAD also erred in making adverse inferences about Mr. Singh's credibility because he had not obtained corroborative documentary evidence from the police, without adequately explaining why it considered it was reasonable for Mr. Singh to obtain such evidence from one of the very agents of persecution from which he claimed to need protection.

[3] I also conclude that, contrary to the Minister's arguments, the RAD did not make a determinative decision with respect to the existence of an internal flight alternative (IFA) within India. The RAD's statements regarding an IFA therefore do not render the analytical errors with respect to credibility non-determinative.

[4] The application for judicial review will therefore be allowed and the matter remitted to the RAD for redetermination.

II. Issues

[5] This application for judicial review raises the following issues:

- A. Did the RAD make a determinative finding with respect to the existence of an IFA?
- B. Did the RAD err in its findings regarding Mr. Singh's credibility?

III. Analysis

A. *The RAD did not make a determinative finding with respect to the existence of an IFA*

[6] This issue arises not from Mr. Singh's application itself but from the Minister's response to it. The Minister argues that statements made by the RAD regarding the existence of an IFA are determinative of the application, since the existence of an IFA is sufficient to reject a refugee claim: *Sanabria Osuna v Canada (Citizenship and Immigration)*, 2011 FC 588 at para 15; *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at paras 45–46.

[7] I agree with the Minister that if the RAD did make a determination that Mr. Singh has an IFA, this would be sufficient to dispose of this application, since Mr. Singh has not challenged the RAD's reasons with respect to the IFA. However, for the reasons below, I conclude the RAD did not make a determinative IFA finding. On this issue, which goes to *whether* the RAD made an IFA determination and not to the *merits* of that determination, no standard of review is applicable.

[8] The Refugee Protection Division (RPD) dismissed Mr. Singh's refugee claim, finding the main issues to be credibility and the existence of an IFA. With respect to the former, the RPD identified a number of credibility issues regarding Mr. Singh's claim and evidence, and found on a balance of probabilities that he had not been persecuted as he had alleged. The RPD then went on to conclude, in the alternative, that even if it had found Mr. Singh's allegations credible, he has an IFA in Bangalore, Chandigarh, or Delhi.

[9] On appeal to the RAD, Mr. Singh challenged both the RPD's credibility findings and its conclusion that he had an IFA. With respect to the IFA, Mr. Singh made lengthy written submissions raising a number of arguments based on the country condition evidence and his allegations of persecution.

[10] At the outset of its decision, the RAD noted that the RPD had based its decision on both credibility and, alternatively, the existence of an IFA. The RAD then stated that “[b]efore the [RAD], only the issue of credibility will be addressed” [emphasis added].

[11] In a single paragraph at the end of its decision, the RAD briefly revisited the issue of an IFA, stating the following:

I find it unnecessary to revise the IFA portion of the RPD decision. Suffice i[t] to say that, after having reviewed the RPD analysis and conclusions in that regard, as well as the Appellant's submissions on appeal, I believe that the RPD correctly found that the Appellant would benefit from an IFA in all three cities suggested, as he failed to demonstrate that he possesses a profile that would prompt the police authorities of the IFA cities to communicate his location to the police authorities of Punjab. On this issue, I would like to add that the Appellant had reported no problems to board an international flight when travelling to Canada with his own passport, when the objective evidence shows that, if he were in a police database or on a wanted persons' list, he would have likely been spotted by the authorities, especially having allegedly been labelled as a terrorist.

[Emphasis added.]

[12] The Minister argues that despite having stated that it would not address the issue and that it was unnecessary to “revise” the IFA portion of the RPD decision, the RAD nonetheless made a determinative IFA finding.

[13] I cannot agree. Considering the RAD's decision as a whole, and taking at face value its express statement that it would not be addressing the IFA and that it was unnecessary to do so, I cannot take the RAD's "suffice it to say" comments as rendering a decision dismissing Mr. Singh's various challenges to the RPD's IFA finding. Rather, the RAD appears to have intended simply to provide non-binding observations after having decided the one determinative issue it said it would decide.

[14] The RAD would have been aware that to render a determinative decision with respect to the IFA, it would be required to reasonably consider and address Mr. Singh's arguments regarding the evidentiary record and the RPD's reasons in a manner showing the requisite degree of justification, transparency, and intelligibility: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 99, 125–128. The RAD's brief "suffice it to say" comments, made after stating that it would not address the issue, can be contrasted with the RAD's approach to the issue it did decide, namely that of credibility, in which Mr. Singh's arguments, the relevant evidence, and the RPD's conclusions, were reviewed in depth.

[15] It was open to the RAD to conclude that credibility was the determinative issue and that it would only decide that issue. It was also open to the RAD to review both the credibility issues and the IFA issue, and render a decision on both of them, as the RPD did. In my view, the RAD's reasons read as a whole show that it adopted the former approach. By contrast, it would not have been reasonably open to the RAD to render a reasoned decision on the issue of credibility and then simply dismiss Mr. Singh's arguments on the IFA with a passing reference to having reviewed them. Yet this is the approach the Minister ascribes to the RAD. In my view,

the Minister cannot rely on this type of unanalysed observations by the RAD as having decided the IFA issue, particularly where the RAD has expressly said it would not be addressing it.

[16] As a result, the RAD's decision, and this application for judicial review, turn on the RAD's credibility findings with respect to Mr. Singh's refugee claim.

B. *The RAD erred in its findings regarding Mr. Singh's credibility*

(1) Standard of review

[17] The second issue goes to the merits of the RAD's decision and is therefore reviewable on the reasonableness standard: *Vavilov* at paras 16–17, 23–25. When conducting reasonableness review, the Court will not interfere with factual findings, including credibility determinations, absent exceptional circumstances: *Vavilov* at para 125. Nonetheless, credibility findings, like other factual findings, are not immune from review and will be set aside where they are not reasonable: *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 46; *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at paras 21–24; *Vavilov* at para 126. A credibility finding may be unreasonable where, for example, it is unexplained, it is not justified by the evidence, it depends on insignificant inconsistencies, it unreasonably discounts explanations, or it does not consider relevant information: *Kreishan* at para 46; *N'kuly* at para 24; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4; *Vavilov* at para 126.

(2) The RAD's credibility findings

[18] Mr. Singh's refugee claim was based on threats by Sikh militants, his mistreatment at the hands of police in Punjab, and his fear of persecution by police and militants should he return to India. The background to Mr. Singh's narrative was the disappearance of his older brother in 2017. The brother was said to have worked as a bus conductor, and to have been approached by militants wanting him to transport weapons. When the brother refused, the militants threatened and later abducted him in April 2017. The local police took no action in response to the family's reports, apparently concluding the brother had joined the militants.

[19] Following this event, Mr. Singh says he received a number of calls asking him to join the militants. One caller threatened that Mr. Singh would meet the same fate as his brother. When Mr. Singh and his father reported these threats to the police in July 2017, the police detained and questioned Mr. Singh, wanting him to confess that his brother was working with the militants. Mr. Singh continued to receive threatening calls. He moved to New Delhi, obtained a Canadian student visa with the assistance of an agent, and left India on January 29, 2018. He says his parents have received ongoing visits and harassment from the police, who accuse Mr. Singh and his brother of having joined the militants.

[20] The RAD identified several concerns with Mr. Singh's credibility: his lack of detailed knowledge about the particular militants said to have abducted his brother and threatened him; a contradiction between his study permit application and his narrative, as the former identified the

brother as an agriculturist while the latter was based on his brother being a bus driver; and the lack of corroboration for his brother's disappearance.

[21] For the reasons below, I find material analytical errors in the RAD's credibility findings that render its decision unreasonable.

- (3) The RAD unreasonably failed to consider corroborative evidence establishing the disappearance of Mr. Singh's brother

[22] The RAD first erred by failing to consider evidence that was presented to corroborate the brother's disappearance, then dismissing that corroborative evidence on the basis of a negative inference drawn from the purported lack of corroboration.

[23] Mr. Singh gave his own evidence with respect to his brother's disappearance. He also provided notarized letters from his father and sister, and an affidavit from the village Sarpanch, a local official. The father's letter states that his eldest son disappeared and that the police accused him of having joined militants. The sister's letter similarly also indicates that her eldest brother had disappeared. The Sarpanch affirms that he knew the father well and was aware that his eldest son had disappeared in April 2017.

[24] The RAD, however, made no reference to this evidence in criticizing Mr. Singh's lack of corroboration for his brother's disappearance. Rather, it adopted the RPD's conclusion that Mr. Singh "failed to submit any evidence to corroborate his brother's disappearance," and found the RPD was correct to draw a negative inference about Mr. Singh's credibility based on the

“lack of corroboration regarding his brother’s alleged disappearance or death.” A factual finding, including a credibility assessment, which ignores relevant evidence is unreasonable: *Vavilov* at para 126; *Kreishan* at para 46. The RAD’s credibility finding, and its consequent finding that Mr. Singh had not established that his brother disappeared, was made without referring to relevant corroborative evidence.

[25] This error was compounded when the RAD later referred to the three statements in its consideration of Mr. Singh’s fear of the police. In considering this issue, the RAD noted that “the affidavits of the village Sarpanch, along with those of his family members, are simply repeating his allegations that have already been undermined by credibility issues and are therefore not given any weight.” The result of this reasoning is that the RAD made an adverse credibility finding on the basis of there being no corroborative evidence, and then dismissed the very corroborative evidence that was put forward on the basis of there having been an adverse credibility finding.

[26] This type of circular reasoning shows a lack of “internally coherent reasoning” that undermines the reasonableness of the decision: *Vavilov* at paras 102–104. It is also contrary to the basic concept of corroborative evidence, which is to support or confirm the applicant’s evidence. As Justice Gascon aptly stated in *Vall*, “[d]etermining credibility and then looking into evidence submitted to corroborate a refugee claimant’s story would circumvent the purpose of corroborating evidence, which is precisely to support the story”: *Vall v Canada (Citizenship and Immigration)*, 2019 FC 1057 at para 31. As a result, the RAD must consider documentary evidence supporting an applicant’s story before reaching a conclusion on the applicant’s

credibility, rather than making a credibility finding without considering the corroborative evidence, and dismissing the corroborative evidence in consequence: *Vall* at para 31, citing *Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 at para 25 and *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 20.

[27] It is also difficult to understand the RAD's dismissal of the corroborative evidence as "simply repeating" Mr. Singh's allegations. While the statements do repeat some information that must have come from Mr. Singh, they also include direct evidence from those with personal knowledge. This includes the father and sister's statements about the brother's disappearance, of which they would have personal knowledge, as well as the father's statements regarding his interactions at the police station. This evidence does not repeat statements by Mr. Singh, and the fact that such corroborative evidence is consistent with Mr. Singh's evidence cannot be a ground to dismiss it.

[28] It may be that, as the Minister contends, the RAD's reference to a "lack of corroboration" was intended to refer to a lack of official or "independent" documentation such as "a police report, a missing person report or a statement as part of the investigation." Even if so, the RAD could not simply ignore the other corroborative evidence put forward in assessing Mr. Singh's evidence or his credibility. In any event, as discussed in the next section, the RAD gave no cogent reason for its conclusion that Mr. Singh could have obtained reports from the police even though they were identified as one of the agents of persecution, who had detained Mr. Singh and accused him of working with militants.

- (4) The RAD's conclusion that Mr. Singh failed to explain why he did not obtain corroborative evidence from the police was unreasonable

[29] The RPD found that it “would have been reasonable to expect a police report, a missing person report or the father’s statement as part of the investigation” into the brother’s disappearance. On appeal, Mr. Singh underscored the presence of the other corroborative evidence, raised above, and noted that it would have been difficult for him to obtain documents from the police given the problems he had had with the police.

[30] The RAD recognized that it could only require corroborative evidence if it could be reasonably expected to be available, citing Justice Grammond’s decision in *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at para 36. The RAD nonetheless found that “even if the family’s relationship with the police was difficult, the RPD correctly found that it was reasonable for [Mr. Singh] to submit independent evidence in support” of his brother’s alleged disappearance. Beyond the statement that they considered it so, the RAD gave no other rationale for finding it reasonable for Mr. Singh to obtain documents from the very agent of persecution that he alleges unlawfully detained him, accuse him of being a terrorist, and continue to harass his parents. The RAD’s single sentence is nothing more than a conclusion without any analysis. It does not bear the hallmarks of reasonableness, namely justification, transparency and intelligibility: *Vavilov* at para 99.

IV. Conclusion

[31] The foregoing findings were not the only concerns the RAD raised about Mr. Singh's credibility. However, in my view, they were sufficiently central to its assessment of Mr. Singh's credibility, and thus to its conclusion that he had not established the primary allegations in his refugee claim, that they undermine the reasonableness of the decision as a whole: *Vavilov* at para 100. I need not, therefore, address Mr. Singh's other arguments regarding the RAD's reasons.

[32] The application for judicial review is therefore allowed and Mr. Singh's appeal is remitted to the RAD for redetermination. Neither party proposed a question for certification and I agree that none arises.

[33] As a final matter, and on consent of the parties, the title of proceedings will be amended to identify the applicant as Shersahib Singh.

JUDGMENT IN IMM-5988-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the applicant's appeal is remitted to the Refugee Appeal Division for redetermination by a differently constituted panel.
2. The title of proceedings is amended to identify the applicant as Shersahib Singh.

"Nicholas McHaffie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5988-21

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