Federal Court  Cour fédérale

Date: 20221208

Docket: IMM-1235-22

Citation: 2022 FC 1692

Ottawa, Ontario, December 8, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

UNKNOWN RAJINDER SINGH
UNKNOWN SANDEEP KAUR
UNKNOWN AGAMJOT SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Rajinder Singh, his wife Sandeep Kaur, and their minor son Agamjot Singh, are citizens of India. Prior to arriving in Canada, they lived in the village of Bussowal in Punjab. The Principal Applicant and his wife state that they married for love in

January 2012, despite their different social status. As a result of this union, they allege they fear for their lives at the hands of Ms. Kaur's uncles and the police.

[2] Following the marriage, the couple fled the village of Bussowal. In July 2013, they returned to the village after having been assured that they would be safe. Their son was born in July 2016. The Applicants left for Canada in May 2017.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada found, and the Refugee Appeal Division [RAD] confirmed on appeal, that the Applicants are neither Convention refugees nor persons in need of protection. The determinative issue for both the RPD and the RAD was the finding that the Applicants have a viable Internal Flight Alternative [IFA] within India, that is in Chennai and Bengaluru. The Applicants seek judicial review of the RAD's decision dated January 19, 2022.

[4] The Applicants plead that the RAD committed a number of reviewable errors, namely: (i) failing to consider the prohibition of return to a substantial risk of torture; (ii) failing to consider Article 3 of the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Convention Against Torture]; (iii) failing to consider "the human rights situation in the home country for a full study of the risk of return"; (iv) erring in its assessment of the IFA and the applicable legal criteria; (v) erring by failing to consider the "Gender Guidelines regarding a victim of marrying men of a different social status in India" and of "domestic abuse"; and (vi) violating "fundamental rights guaranteed by our Charter of Rights and Freedoms" and "standards of international law".

[5] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is dismissed.

II. Issues and Standard of Review

[6] The Applicants have raised a number of issues, which I reformulate as follows:

A. Did the RAD err by failing to address Article 3 of the Convention Against Torture, the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [*Charter*], Canada's international obligations and the risk of torture should the Applicants be returned to India?

B. Did the RAD err in its assessment of the IFA?

C. Did the RAD err by not considering the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines]?

[7] The parties agree that the standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicants, the parties challenging the decision, who bear the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are

sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[8] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). A reasonableness review also is not a "line-by-line treasure hunt for error," the reviewing court simply must be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102, 104).

III. Analysis

A. *Did the RAD err by failing to address the Convention Against Torture, the* Charter*, Canada's international obligations and the risk of torture should the Applicants be returned to India?*

[9] In their written submissions, the Applicants spent a considerable amount of pages on arguments related to Article 3 of the Convention Against Torture, Canada's international obligations to comply with international instruments, and the risk of torture should the Applicants be returned. The Applicants cite a number of authorities including a judgment of the European Court of Human Rights (*Chahal v United Kingdom (1996)*, 23 EHRR 413 [*Chahal*]), a

decision of the Committee against Torture of the United Nations, and a decision of the International Court of Justice. The Applicants plead that they were threatened with death many times from 2012 until they left India in 2017, and as such it is clear that the agents of persecution will ensure they are killed upon their return to India. This is a form of torture and thus this substantial risk of torture ought to have been taken into account by the RAD in its decision. In addition, the Applicants submit this would also constitute a violation of their *Charter* rights.

[10] During oral argument, the Applicants briefly mentioned the human rights issues, but focused on the issues raised in subsections B and C of this judgment below.

[11] The Respondent submits that the arguments based on the above grounds are premature when the Applicants are not currently facing deportation.

[12] While the Applicants are correct to point out that removal to torture is contrary to the *Charter* and norms of international law, the Applicants have failed to show how these norms are applicable in the present case, namely an application for judicial review of a decision by the RAD. I agree with the Respondent that these arguments are premature. The Applicants are not currently facing removal. In fact, these very arguments have consistently been addressed and rejected numerous times by this Court (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 164 at para 11; *Singh v Canada (Citizenship and Immigration)*, 2021 FC 341 at paras 15-18; *Ogiemwonyi v Canada (Citizenship and Immigration)*, 2021 FC 346 at paras 38-39; *Davila Valdez v Canada (Citizenship and Immigration)*, 2022 FC 596 at paras 21-22).

B. *Did the RAD err in its assessment of the IFA?*

[13] The analysis of an IFA is based on the principle that international protection can only be offered to claimants in cases where the country of origin is unable to provide that person with adequate protection everywhere within their territory (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 26). It is well established that international protection is a measure of last resort, as such, if a claimant can safely and reasonably relocate within their country of nationality, they are expected to do so rather than seek refugee protection in Canada (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7). Consequently, if a claimant has a viable IFA, this will negate a claim for refugee protection under either section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, regardless of the merits of other aspects of the claim (*Ibid*).

[14] The test for establishing the viability of an IFA is two-pronged. Both prongs must be satisfied in order to make a finding that a claimant has an IFA. The first prong consists of establishing, on a balance of probabilities, that there is no serious possibility of the claimant being subject to persecution in the proposed IFA. In the context of section 97, it must be established that the claimant would not be personally subjected to a section 97 danger or risk in the proposed IFA. The second prong requires that the conditions in the proposed IFA be such that it would not be unreasonable, upon consideration of all the circumstances, including of the claimant's personal circumstances, for the claimant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (FCA) at 597-598; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at

paras 10-12; *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 9; *Mora Alcca v Canada (Citizenship and Immigration)*, 2020 FC 236 at para 5 [Mora Alcca]; *Souleyman v Canada (Citizenship and Immigration)*, 2020 FC 708 at para 17).

[15] It is a refugee claimant, and not a respondent or the RAD, who bears the onus of demonstrating that the IFA is unreasonable (*Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106 at para 21). As stated by Justice René LeBlanc in *Mora Alcca*, the onus is an exacting one:

> [14] I am well aware that the onus of demonstrating that an IFA is unreasonable in a given case, an onus that rests with the claimant, is an exacting one. In fact, it requires nothing less than demonstrating the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions.
>
> [Citations omitted.]

[16] In order to demonstrate that an IFA is unreasonable, the Applicants must provide actual and concrete evidence of the existence of conditions that would jeopardize their lives and safety in relocating to the IFA. The Applicants submit that they are not requesting that this Court re-weigh the evidence. Rather, they state that the RAD mischaracterized the evidence and unduly minimized the risk to the Applicants. The Applicants argue that the RAD erred in finding that they have only suffered "verbal intimidation" when in reality their lives have been threatened and these threats are violations of their fundamental human rights.

[17] The Respondent submits that the evidence demonstrates that the Applicants lived in the village of Bussowal from June 2013 through December 2017, a location known by the agents of

persecution (Ms. Kaur's uncles) and the police, and yet the situation never escalated beyond verbal intimidation. Moreover, despite the verbal threat of criminal charges, over four years later no criminal charges were in fact filed.

[18] I am not persuaded that the RAD erred as alleged by the Applicants. The RAD's findings on the IFA are essentially factual, are based on its assessment of the evidence, are within its area of expertise and thus require a high degree of deference from this Court (*Singh v Canada (Citizenship and Immigration)*, 2021 FC 459 at para 23). It is not unreasonable for the RAD to conclude that given no harm befell the Applicants beyond verbal threats during the several-year period in which they lived in Bussowal, the agents of persecution lack the motivation to act beyond the verbal intimidation to locate and harm them should they relocate to the IFA.

[19] The Applicants submit that the finding by the RAD that the information contained in the affidavits from Mr. Singh's father and the village Sarpanch is vague and unclear is unreasonable. The affidavits were filed following the RPD's decision and the RAD determined they were admissible. They refer to "goons" attending the house of Mr. Singh's father and "abusing" and "physically and mentally torturing" him on November 13, 2021. The RAD attributed low weight to the affidavits.

[20] Having considered the contents of the affidavits, I am not persuaded that the RAD failed to properly consider the evidence such that the decision as a whole does not meet the criteria set out in *Vavilov*. It is well within the RAD's discretion and expertise to weigh the evidence (*Vavilov* at paras 125-126). The burden is on the Applicants to show that there are sufficiently

serious shortcomings in the RAD's decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100). They have not, in my view, done so.

[21] The Applicants further submit that the RAD failed to consider the best interests of the child, the minor Applicant, in the context of its IFA analysis. The Applicants state that the minor Applicant faces an increased risk in the IFA in terms of the death threats from the agents of persecution because he will not be as careful or cautious as his adult parents will be. The Applicants allege that this failure is a "strong sign of insensitivity" on the part of the RAD, which is contrary to the teachings in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

[22] The Respondent submits that they have been taken by surprise by this argument and that it was not pleaded before the RAD or in the Applicants' written submissions in the present judicial review.

[23] This argument was not raised before the RAD. The Applicants' submissions to the RAD make no distinction between the minor Applicant and his parents. Moreover, there is no evidence or even mention in the record that the alleged risk to the minor Applicant differs in any way from the alleged risk to his parents from the agents of persecution. I disagree with the Applicants as to their contention that the RAD ought to have considered this issue despite it not having been raised by them.

[24] The Applicants further submit that the RAD's decision effectively asks them to go into hiding, including not contacting their family, in order to avoid discovery. The basis for this submission is a line in Mr. Singh's father's affidavit that states, "we have told the Police than when our children come back home, we would tell them." On this basis, the Applicants argue that a person who must hide from their persecutors does not have an IFA (*Sabaratnam v Canada (Minister of Employment & Immigration)*, 1992 CarswellNat 1182, [1992] FCJ No. 901 (FCA)).

[25] This argument concerning the line in Mr. Singh's father's affidavit was not raised in the submissions before the RAD, nor was it raised in the Applicants' written submissions in the present judicial review. It appears to have been raised for the first time at the hearing. This Court has consistently held that it is inappropriate to grant judicial review based upon a ground not raised before the RAD (*Tcheuma v Canada (Citizenship and Immigration)*, 2022 FC 885 at para 27; *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 24; *Ogunmodede v Canada (Citizenship and Immigration)*, 2022 FC 94 at paras 23-30). For this reason, the argument will not be entertained.

[26] With respect to the RAD's assessment of the IFA, while the Applicants state that they are not seeking to have this Court reassess and re-weigh the evidence, I find this is ultimately what they are requesting. As such, I decline to intervene.

C. *Did the RAD err by not considering the Guidelines?*

[27] The Applicants submit that Ms. Kaur was abused by her family as a child and entered into a marriage with a man of a different social status, with the result that the Guidelines must be taken into account.

[28] The Guidelines are used to ensure that gender-based claims are heard with sensitivity (*Munoz v Canada (Citizenship and Immigration)*, 2006 FC 1273 at para 33 [*Munoz*]). The application of the Guidelines in the context of judicial review has been summarized by my colleague Justice Jocelyne Gagné in *Boluka v Canada (Citizenship and Immigration)*, 2015 FC 37 [*Boluka*]:

> [16] The applicant is required to demonstrate a lack of understanding or insensitivity on the RPD's part to convince the Court that the Guidelines have not been applied (*Sandoval Mares v Canada (Minister of Citizenship and Immigration)*, 2013 FC 297 (CanLII) at para 43). Further, this Court has found that the RPD's failure to specifically refer to the Guidelines in its reasons does not, in and of itself, demonstrate insensitivity (*Akinbinu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 581 (CanLII)) and mere failure to consider the Guidelines is not fatal to a decision (*Higbogun*, above at para 65).

[29] The purpose of the Guidelines is to ensure that the decision maker is sensitive to the difficulties an applicant may face when testifying in the context of a gender-based claim (*Konecoglu v Canada (Citizenship and Immigration)*, 2021 FC 1370 at para 26 and the cases cited therein [*Konecoglu*]). The Gender Guidelines do not, however, serve to cure all deficiencies in an applicant's evidence (*Konecoglu* at para 26; *Yu v Canada (Citizenship and Immigration)*, 2021 FC 625 at para 22).

[30] In addition, the "spirit" of the Guidelines may be followed by means of active listening (*Iqbal v Canada (Citizenship and Immigration)*, 2012 FC 1338 at 40; *Munoz* at 33).

[31] Having reviewed the transcript, I note the RPD was sensitive to the state of Ms. Kaur at the hearing and followed the "spirit" of the Guidelines by actively listening. The RPD informed her if she ever felt unwell, she could take breaks. Ms. Kaur had raised the fact that she was pregnant, so when did in fact raise at one point that she felt unwell, the Member immediately called for a break, and even offered to postpone the hearing.

[32] At no point during the hearing, was the issue of Ms. Kaur's treatment at the hands of her family when she was a child raised. Rather, the only place in the record that this appears is in a document entitled "Appellant stories presented at RPD" appended to Mr. Singh's affidavit, wherein he mentions that his wife told him that as a child "she was beaten regularly as if she was a maid servant".

[33] The Guidelines are intended to ensure that gender-based claims are heard with compassion and sensitivity. There is nothing in the present record to indicate that this was not the case. Moreover, both the RPD and the RAD found Ms. Kaur to be a generally credible witness, who established her allegations on a balance of probabilities.

[34] In their written submissions, the Applicants submit that they are subject to "gender-based persecution because they belong to different social groups" and thus it was unreasonable for the RAD to conclude that they would be safe in India without considering the Guidelines. At the

hearing, the Applicants were unable to point the Court to any place in the transcript, the record, the RPD's decision or the RAD's decision where the Guidelines were not followed with respect to Ms. Kaur (or even both of the adult Applicants). The Applicants were also unable to point to a specific portion of the Guidelines that were not followed. Rather, the Applicants submit that the RAD erred by failing to mention the Guidelines. As noted above, a mere failure to mention the Guidelines is not fatal to a decision (*Boluka* at para 16).

[35] Furthermore, the Applicants never raised the Guidelines in the submissions to the RAD, nor did they refer to any gender-based factor affecting Ms. Kaur with respect to their arguments as to the IFA. The Applicants' arguments as to the IFA relate to the alleged risk from the agents of persecution affecting all Applicants, and their submissions as to the reasonableness of the IFA relate to Mr. Singh's employment and business opportunities and the languages spoken in the IFA. In the absence of any evidence in the record or submissions to the RAD as to how Ms. Kaur's gender affects the reasonableness of the IFA, I am unable to conclude that a failure to refer to the Guidelines or gender as a factor in the RAD's assessment of the evidence related to the IFA is a reviewable error.

IV. Conclusion

[36] For the foregoing reasons, I am not convinced that the RAD's decision is unreasonable. Accordingly, this application for judicial review is therefore dismissed.

[37] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-1235-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed;
2. The style of cause is amended to name the Minister of Citizenship and Immigration as the proper Respondent; and
3. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sibomana Emmanuel Kamonyo	FOR THE APPLICANTS
Edith Savard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Emmanuel S. Kamonyo Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT