Federal Court  Cour fédérale

Date: 20221219

Docket: IMM-798-22

Citation: 2022 FC 1753

Ottawa, Ontario, December 19, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

JASPAL SINGH MAHLI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Jaspal Singh Malhi, is a citizen of India. He seeks judicial review of a decision by the Refugee Appeal Division [RAD], dated January 7, 2022, to dismiss his appeal and confirm the decision of the Refugee Protection Division [RPD] to reject his claim for refugee protection, finding that he is neither a Convention refugee nor a person in need of

protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant alleges that he fears the Punjab police and members of the Congress and Akali Dal Badal parties. The determinative issue for both the RPD and the RAD was the availability of an internal flight alternative [IFA] in Mumbai or Bengalaru.

[3] The Applicant submits that the RAD's decision is unreasonable on the basis that the RAD (i) failed to provide adequate reasons, and (ii) microscopically analyzed and failed to address the subjective and objective evidence that the Applicant could be tracked and located in the proposed IFA.

[4] For the reasons that follow, this application for judicial review is dismissed.

II. Issue and Standard of Review

[5] The issue in the present proceeding is whether the RAD's decision is reasonable.

[6] The applicable 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 Applicant, the party challenging the decision, who bears 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).

[7] 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

[8] The issues raised by the Applicant relate to the RAD's analysis of whether the Applicant has a viable IFA. As such, it is worthwhile setting out the principles and applicable test for establishing the viability of an IFA. One must bear in mind that it is the Applicant who bears the burden of demonstrating that a proposed IFA is not viable.

[9] 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 IRPA, regardless of the merits of other aspects of the claim (*Ibid*).

[10] 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).

[11] 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]

[12] In order to demonstrate that an IFA is unreasonable, the Applicant must provide actual and concrete evidence of the existence of conditions that would jeopardize the life and safety of the Applicant in relocating to the IFA.

A. *The Failure to Provide Adequate Reasons*

[13] The first issue raised by the Applicant is an alleged failure by the RAD to provide adequate reasons. In this respect, the Applicant raises two sub-issues.

[14] The Applicant alleges that the RAD erred by failing to provide him with adequate reasons as to how the police raids in April 2019 and January 2021 were not sufficient to establish the motivation on the part of the agents of persecution. The Applicant further alleges that the RAD erred in minimizing and discounting the evidence of those two raids contained in an affidavit from the village Sarpanch. The RAD's findings are as follows:

> "[7] I do not accept the [Applicant's] representative's argument that the RPD failed to take into account the [Applicant's] testimony that the police had raided his house to arrest him in April 2019 and January 2021. The [Applicant's] information about these

> alleged raids came from the village Sarpanch who swore an affidavit in which he essentially repeated the claims set out in the [Applicant's] Basis of Claim narrative and stated, "the police still looking for him to arrest him and raided on 30-04-2019 and 05-01-2021."[] There is no information in the affidavit as to how the sarpanch became aware of these raids. In addition, I note that the [Applicant] gave inconsistent evidence about who he lived with in his home village before leaving India. He first testified that he lived with a friend and then said he lived with his father, mother, and brother.[] This despite the fact that, in his narrative, he claimed that his mother left his father due to abuse in 2015 and was never seen thereafter. In any event, even if I were to accept as credible for the purposes of this decision that the police decided to raid the [Applicant's] home over a year after his 2018 arrest and then two years later, these raids are not sufficient to establish that the Punjab police would have the motivation to track the [Applicant] down and persecute him in the IFA cities if he were to return there today."

[15] The Respondent submits that the onus was on the Applicant and it was well within the purview of the RAD to conclude that the Applicant had not demonstrated that someone of his profile could not safely live in the proposed IFA. The Respondent highlights that the Applicant was arrested twice, once in 2016 and a second time in 2018, for political activities, which he has since given up, but there is no evidence that the police registered a First Information Report [FIR] against him or charged him with any crime.

[16] As to the Sarpanch's affidavit, the Respondent submits that while the RAD rightly highlighted issues with the evidence, the RAD ultimately concluded that the evidence taken at face value would nevertheless be insufficient to establish that the Punjab police had the motivation to track the Applicant and persecute him in one of the IFAs.

[17] Having considered the evidentiary record before the RAD, including the Sarpanch's affidavit, I am not persuaded that the RAD committed a reviewable error in assessing the evidence of the motivation of the Punjab police to track the Applicant in the proposed IFA. 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 was not, in my view, unreasonable for the RAD to conclude, given the Applicant's profile, that there is no serious possibility that the Punjab police will pursue him in the proposed IFA.

[18] While the Applicant raises a number of objections as to the treatment of the Sarpanch's affidavit by the RAD, I find that they are ultimately immaterial. The RAD did express concerns about the affidavit, but nevertheless accepted, for the purposes of the decision, that the two raids happened, and found the raids insufficient to establish the required motivation on the part of the Punjab police.

[19] As to the alleged lack of justification in terms of the finding concerning the motivation of the Punjab police in the above-quoted paragraph, I do not find that it rises to the level of a reviewable error. While perhaps the RAD could have provided more detail in that paragraph, I find that the decision when taken as a whole, including the RAD's further consideration of the motivation of the agents of persecution in the paragraphs that follow, is reasonable in light of the record before it and exhibits the justification required by *Vavilov*.

[20] The Applicant also alleges that the decision lacks justification on the basis of the language in the following paragraph, and specifically the reference to the existence of jurisprudence where despite allegations of arrest and torture by the Punjab police, decisions on IFAs have been upheld:

> "[9] I also do not agree with the [Applicant's] representative that his allegations about being arrested twice, once in 2016 and again in 2018, are sufficient to establish that he cannot live safely anywhere in India. In a very large number of cases, both the RAD and the Federal Court have upheld RPD decisions in cases such as the present in which the [Applicant] has alleged being arrested, tortured by Punjab police and subjected to allegations of association with terrorists. In each case, it is necessary to examine all of the evidence to determine whether the [Applicant] has met their onus of establishing that there is a serious possibility that the alleged agents of persecution would track the [Applicant] down and persecute them in the IFA cities. In this case, I do not agree with the [Applicant's] representative that the [Applicant's] arrests in 2016 and 2018 are sufficient to establish that the police or anyone from the Congress or Akali Dal Badal parties would have the means or motivation to track him down and persecute him in the IFA cities if he returns there today."

[21] The Applicant submits that the RAD referred to jurisprudence but failed to cite the cases. As such, the Applicant is without the means to properly understand the analysis conducted by the RAD.

[22] The Respondent submits that it was open to the RAD to mention general principles, and if the Applicant believes that the statement was erroneous, the burden was on him to demonstrate it. The Respondent further submits that the reference to the jurisprudence was not part of the analysis and the RAD clearly explained why it rejected the allegations.

[23] I am mindful of the instructions of the Supreme Court of Canada in *Vavilov*, namely that the reviewing court should not approach the underlying decision with the intention of conducting a "line-by-line treasure hunt for error" (at para 102), but rather concern itself with whether "the decision as a whole is transparent, intelligible and justified" (at para 15).

[24] The paragraph as a whole was in response to the Applicant's submissions on appeal that because he was arrested twice it was simply not possible for him to be safe in the proposed IFAs. By way of introduction, the RAD notes that there are a large number of cases that have found otherwise. The RAD then states what it must do in each case, namely, examine all the evidence in order to determine whether an applicant has met their onus of establishing a serious possibility of being tracked down and subject to persecution in the IFA. The RAD then specifies its finding in the present case, with respect to the evidence before it.

[25] The fact that the RAD does not cite one or more cases by way of example does not, in my view, rise to the level of a reviewable error in the context of the above-cited paragraph and the decision as a whole. I find that the Applicant is ultimately engaging in a "line-by-line treasure hunt for error" (*Vavilov* at para 125). I agree with the Respondent, the RAD clearly indicated that it was the evidence in the record that it was basing its decision on.

[26] Furthermore, later in the context of its IFA analysis, the RAD cited three recent cases where claimants, threatened by the police in Punjab, were nevertheless found to have viable IFAs outside Punjab, elsewhere in India. In *Singh v Canada (Citizenship and Immigration)*, 2021 FC 341, the claimants were detained and tortured by the police and released upon a bribe. In *Singh v*

Canada (Citizenship and Immigration), 2021 FC 459, the claimant was held overnight, accused of terrorism, and released the next day. In *Kaur v Canada (Citizenship and Immigration)*, 2021 FC 1219, the claimant was assaulted by a public official and threatened by the police. The fact that the RAD did not reference the cases specifically in paragraph 9 of the decision, rather than later, does not render the decision unreasonable.

B. *Microscopic Analysis and Failure to Address the Evidence that the Applicant Could be Tracked in the IFA*

[27] The Applicant claims that the RAD microscopically analyzed and failed to address the subjective and objective evidence that the Applicant could be tracked and located in the IFA. The Applicant's arguments focus on the contents of the National Documentation Package [NDP], in particular documents 4.4 and 4.9. He submits that the RAD failed to address contradictory documentation in the NDP, relying on *Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1998] FCJ No 1425. The Applicant argues that the RAD erroneously concluded that the Applicant would not be tracked, given he had been arrested twice, and that the police keep lists of those who support or advocate for Khalistan (the name given by Sikh nationalists to an independent Sikh State).

[28] The Respondent pleads that the Applicant does not have the profile of someone of interest, as he was arrested twice and released on bribes but never charged with a crime, nor was a FIR ever issued. The Respondent highlights that the Applicant was able to leave India with ease on his own passport. The Respondent submits that the mention of a police list in documents 4.4 is not a reference to an additional national list that the RAD did not consider, rather the RAD

considered the existing databases and systems (namely the Crime and Criminal Tracking Network and Systems [CCTNS], the Central Monitoring System [CMS] and the tenant registration system) and reasonably found that the Applicant had not met his onus of establishing that there is a serious possibility that the police at issue would have the means or motivation to track him.

[29] I am not persuaded that the RAD failed to address contradictory documentation in the NDP such that the RAD's decision becomes unreasonable. The excerpts cited by the Applicant provide information regarding the treatment of party members and supporters by the authorities, and does mention "police lists", but on the whole it does not contradict the RAD's assessment of the NDP or its assessment of the specific circumstances of the Applicant's profile and the evidence he submitted. It is not for this Court, absent exceptional circumstances, to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). The RAD provided a detailed analysis of the CCTNS and CMS in light of the Applicant's profile, and I have not been persuaded that it erred in this regard.

[30] Similarly, the Applicant submits that the RAD erred by not concluding that he would be perceived as a terrorist, and thus tracked accordingly. The Respondent submits that the Applicant has not met his burden, and even if he did support an independent Khalistan, by his own admission he ceased his involvement in politics over five years ago.

[31] I am not persuaded that the RAD erred as alleged by the Applicant. 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). The RAD considered the evidence put forward by the Applicant and the resulting decision was reflective of the submissions made to the RAD and the record before it. I find no basis upon which to intervene.

IV. Conclusion

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

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

JUDGMENT in IMM-798-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed; and

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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