

Federal Court



Cour fédérale

**Date: 20221123**

**Docket: IMM-4422-20**

**Citation: 2022 FC 1611**

**Ottawa, Ontario, November 23, 2022**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**BINOD GURUNG**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] Binod Gurung [Applicant] seeks judicial review of the Refugee Appeal Division's [RAD] August 27, 2020 decision wherein the RAD agreed with the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection [Decision]. The determinative issue for the RAD was a viable Internal Flight Alternative [IFA] in Biratnagar, Nepal.

[2] The application for judicial review is allowed.

## II. Background

[3] The Applicant is a 39-year-old citizen of Nepal. The Applicant set out his fears of persecution in both a Basis of Claim Form and an Amended Basis of Claim Form. He claims persecution by Nepali Maoists and the Young Communist League [YCL], the dominant Maoist youth group.

[4] In October 2004, while in Budhathum, Dhading District, the Applicant was threatened for refusing to join the Maoists and provide services as an electrician. The Applicant fled to Dhading Beshi. In February 2005, while in Dhading Beshi, the Applicant was kidnapped, beaten, and forced to join a Maoist militia. After approximately one week, the Applicant convinced his captors to escort him back to Dhading Beshi to collect a debt. The Applicant escaped, reported the incident to police, and received treatment in the hospital.

[5] The Applicant moved into his sister's apartment in Kathmandu. A few days later, Maoists seized his house and farmland in Budhathum, forced his mother to leave the village, and threatened the Applicant for providing information to the police.

[6] In June 2005, the Applicant travelled to Dubai to work. While in Dubai, the Applicant learned of the improved situation with Maoist militias. When he travelled back to Nepal in 2007, 2009, 2011, and 2013 for vacations and visits with his family, the Applicant stayed in Kathmandu, as the Maoists continued to occupy his property in Budhathum.

[7] In October 2011, while visiting Kathmandu, the Applicant encountered two individuals from his village. Following the encounter, the Applicant received a threatening phone call and letter from a YCL member, accusing him of betraying the Maoists and demanding a 200,000 Rupee “donation”. The Applicant moved to a new apartment in another area of Kathmandu. The Applicant subsequently returned to Dubai in November 2011.

[8] In June 2014, the Applicant obtained a Canadian work visa. He moved to Edmonton and worked for approximately one year. While in Canada, the Applicant learned that an earthquake destroyed his house in Budhathum.

[9] In October 2015, the Applicant returned to Kathmandu to celebrate various religious festivals. The Applicant’s brother-in-law informed him that the Maoists affected by the destruction of his house were demanding the transfer of ownership of the property in order to claim financial relief from the government.

[10] In November 2015, the Applicant received a threatening phone call reiterating the demand. On November 8, 2015, his wife received a threatening demand letter at the Applicant’s home in Kathmandu. Shortly thereafter, the Applicant received another threatening call. The Applicant did not comply with any of the demands.

[11] On November 16, 2015, five Maoists visited the Applicant’s home in Kathmandu. There, they assaulted the Applicant, forced him and his mother to authorize the transfer of ownership

papers for his property, and stole approximately 200,000 Rupees worth of cash and valuables. They threatened to kill the Applicant if he told anyone.

[12] The Applicant relocated to the city of Bhaktapur, retained a lawyer to prepare a document outlining the forcible transfer of the property, and reported the incident to the police. The Applicant is unaware if the police followed up on the report. The Applicant returned to Edmonton on November 24, 2015 and resigned from his job. In December 2015, the Applicant travelled to Toronto. In January 2016, the Applicant initiated a refugee claim.

[13] In a letter dated January 29, 2018, the Applicant's wife informed the Applicant that, in October 2017, she received a visit from the Maoists/YCL and a threatening letter from Maoists [2017 Threat Letter]. The 2017 Threat Letter indicated that the Maoists knew the Applicant had "betrayed" them and demanded both the immediate transfer of ownership of his property in Dhading District and payment of 500,000 Rupees. The Applicant's wife reported the incident to the police. Approximately one week later, the Applicant's wife received a threatening phone call demanding that she withdraw the police report. The Applicant's wife, mother, and children relocated to another area of Nepal.

### III. The Decision

[14] The RAD refused the Applicant's appeal. The RAD did not consider the Applicant's challenges to the RPD's credibility findings. Instead, the RAD limited their focus to the existence of the IFA, as they agreed with the RPD that it was the determinative issue. The RAD found that the Applicant failed to establish that Biratnagar is an unsafe or unreasonable IFA.

[15] First, the RAD considered the National Documentation Package [NDP] evidence, which indicated that mainstream Maoist groups had ceased extorting “donations” since joining the government. Threats and extortion demands are largely made by splinter groups and directed at business and government officials. The RAD also noted that there was contradictory evidence concerning the frequency at which private individuals are targeted for extortion or whether threat letters are issued. Taken together, the RAD concluded that the Applicant’s agents of persecution are likely not state actors.

[16] Second, the RAD concluded that the Applicant’s profile does not make him a Maoist/YCL faction target. The Applicant is not a prominent businessman or government official, and is no longer an active member or supporter of the rival Nepali Congress [NC] party.

[17] Third, the RAD found that there was insufficient evidence that the Maoists/YCL could locate the Applicant. The NDP evidence indicated that the Maoists were in intense competition with opposing government parties at the ground level. There was also conflicting evidence as to the separation or disbandment of the YCL. These factors, combined with Nepal’s poor telecommunications infrastructure and low internet availability, suggested that the Applicant’s agents of persecution did not have a nationwide network that would allow them to locate the Applicant.

[18] Fourth, the RAD concluded that the Maoists/YCL lacked motivation to locate the Applicant. The RAD explained that, despite the Applicant’s failure to meet the YCL’s demands, such demands were fulfilled. The Applicant stopped being an NC member years ago. Moreover,

the Maoists/YCL seized the Applicant's property, transferred ownership of the property, and stole 200,000 Rupees. While the Applicant attempted to revert the ownership of his property by retaining a lawyer and reporting the incident to the police, there was no indication that he had succeeded in this regard. Further, the 2017 Threat Letter conflicted with the Applicant's testimony that he had previously transferred ownership of his property in 2015. Similarly, the Applicant's wife had not complied with the 2017 Threat Letter, yet there was no evidence that she had been harmed as a result.

#### IV. Issues and Standard of Review

[19] I agree with the parties that the only issue is whether the RAD's IFA analysis was reasonable.

[20] The standard of review for the merits of the Decision is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the

decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

(1) Applicant's Position

[21] The RAD did not consider the Applicant's multiple relocations in Nepal or the Maoists' ability to locate him and his family after each relocation. Given these relocations, the RAD failed to explain why the Applicant would be safe in Biratnagar.

[22] The RAD erred in finding that the Applicant's profile would not make him a target. The country condition evidence indicates that most sources of conflict involving youth wings include efforts to control political space, minor political disputes, and personal disputes, all of which apply to the Applicant's conflict with the Maoists/YCL.

[23] The RAD also erred in finding that the Applicant provided insufficient evidence to demonstrate the existence of a nationwide Maoist/YCL network that would allow them to locate the Applicant. The country condition evidence indicates that the YCL is the largest Maoist youth organization, with 700,000 members nationwide. Further, Maoists and the YCL have engaged in violence throughout Nepal, including areas near Biratnagar. The evidence cited by the RAD does not support the finding that Nepal's telecommunications infrastructure would inhibit the Maoists/YCL from locating the Applicant, particularly given the evidence of the YCL's size and reach.

[24] Lastly, the RAD erred in finding that the Applicant's agents of persecution lack motivation to find him because their demands were fulfilled. The facts indicate that the Maoists wanted the Applicant to join their party and pay a large sum of money, and that the Maoists have a vendetta against the Applicant because his police report resulted in the arrest of two of their members. Further, the 2017 Threat Letter illustrates the consequences of the Applicant's legal action contesting the forcible transfer of ownership of his property.

(2) Respondent's Position

[25] On the first prong of the IFA test, the RAD reasonably determined the Applicant failed to demonstrate that he would be at risk in Biratnagar or that his profile heightens his risk. The RAD considered the Applicant's previous relocations within Nepal, but agreed with the RPD that the Applicant's credibility was undermined by his frequent returns to, and delays from, leaving Nepal.

[26] The RAD acknowledged the evidence indicating that the YCL has a nationwide network, but also found that the YCL may have separated or disbanded altogether. As such, the evidence does not favour the Applicant's position that the YCL has a nationwide network.

[27] The RAD reasonably concluded that the Applicant's agents of persecution lack motivation to find him because their demands were fulfilled. The RAD considered the 2017 Threat Letter, finding that it conflicted with the Applicant's testimony that he had previously transferred ownership of his property in 2015 and was therefore speculative.



[28] This Court has upheld RPD and RAD decisions finding Biratnagar as a reasonable IFA for those fearing harm from the YCL (*Sharma v Canada (Citizenship and Immigration)*, 2021 FC 545 [*Sharma*]; *Bhandari v Canada (Citizenship and Immigration)*, 2019 FC 195 [*Bhandari*]).

[29] Turning to the second prong of the IFA test, the Applicant solely relies on arguments relating to the safety of the IFA; therefore, he has not met the high threshold of establishing the unreasonableness of the IFA.

(3) Conclusion

[30] A viable IFA refers to the ability of a person to seek refuge in one part of their home country other than where they faced persecution or risk of harm. The two-part test for finding a viable IFA was established in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, [1991] FCJ No 1256 (CA). Recently, in *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at para 37, Justice Pamel articulated the conjunctive two-part test to determine the availability of an IFA:

- 1) The Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the part of the country in which it finds an IFA exists; and
- 2) Conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimants, for the claimants to seek refuge there.

[31] The onus is on the Applicant to negate one of the two prongs. The Applicant has persuaded me that the RAD erred in its assessment of the first prong of the IFA test. The RAD

did not consider any of the Applicant's relocations within Nepal, other than to note briefly that the Applicant's wife relocated within Kathmandu after receiving the 2017 Threat Letter.

[32] The jurisprudence cited by the Respondent regarding the viability of Biratnagar as an IFA is distinguishable from the present case. In *Bhandari*, the Court found that the applicant relied exclusively on country condition evidence, providing no evidence of subjective risk or that the applicant's family in Kathmandu had been targeted (*Bhandari* at paras 17-26). In the present case, the Applicant provided significant evidence of subjective risk as well as evidence that his family was repeatedly targeted in Kathmandu.

[33] In *Sharma*, the RAD engaged in a significantly more detailed IFA assessment than in the present case. The Court noted that the RAD considered evidence of the Biplav Maoists' connection to the YCL; the extortive and violent activities of the Biplav Maoists and Baidya Maoists near Kathmandu; the geographic reach of the Biplav Maoists' activities; the lack of the Biplav Maoists' extortion activities in Biratnagar; the distance between Kathmandu and Biratnagar; and the applicants' absence from Nepal for a number of years (at paras 18-31). The Court acknowledged the RAD's finding that, "while there is objective evidence that the YCL has a nationwide network, there is no additional information about the ability of various Maoist factions to communicate and share information in circumstances similar to those of the [a]pplicants" (at para 28, emphasis added). In the present case, the RAD did not consider objective evidence concerning the YCL's level of establishment in Biratnagar or assign weight to evidence indicating that the YCL maintained a nationwide network. Rather, the RAD focused on

the possible separation within the YCL and Nepal's poor telecommunications infrastructure in concluding that the YCL could not locate the Applicant.

[34] The RAD's assessment of the Applicant's evidence regarding the YCL's reach was also unreasonable. The RAD acknowledged evidence indicating that the YCL has 700,000 members, yet dismissed it based on conflicting evidence surrounding its separation and disbandment. The existence of conflicting evidence does not obviate the RAD's duty to weigh evidence supporting the Applicant's claim. Similarly, the fact that there are multiple Maoist factions with competing interests is not, in itself, a basis to find the Applicant's agents of persecution lack the means or reach to locate the Applicant in Biratnagar. The RAD made no effort to analyze which Maoists were the Applicant's agents of persecution or the risk posed by the specific Maoist organizations.

[35] The RAD also did not sufficiently engage with the 2017 Threat Letter. Instead, the RAD dismissed the letter because it conflicted with the Applicant's testimony that he had previously transferred ownership of his property in 2015. However, this finding is not weighed against the Applicant's legal action contesting the forcible transfer of ownership of his property, nor against the police letter supporting the assertion that the Applicant's wife filed a police report. Similarly, the RAD does not weigh the Applicant's wife's relocation following the receipt of the 2017 Threat Letter with its finding that she had not been harmed for her failure to comply with the letter.

[36] Lastly, the RAD speculated in concluding that the agents of persecution lacked motivation to locate the Applicant. The Applicant's evidence indicates that, for more than a

decade, at least one Maoist group had threatened, harmed, kidnapped, robbed, and seized the property of the Applicant and his family. These actions continued regardless of whether the Applicant complied with demands, reported the incidents to the police, or relocated. To conclude that the agents of persecution are so reasonable that they will leave the Applicant and his family alone because they coerced the Applicant into transferring ownership of his property (which he has challenged) and stole 200,000 Rupees (despite evidence of an additional demand for 500,000 Rupees) amounts to mere speculation as to their motives. This is particularly so given that the Maoists were at least partially motivated to retaliate against the Applicant and his family for “betraying” them by filing police reports, and that the Applicant and his family continue to report matters to the police.

#### VI. Conclusion

[37] The RAD erred in its assessment of the first prong of the IFA test. The RAD did not consider the Applicant’s and his family’s multiple relocations within Nepal or meaningfully engage with the evidence concerning YSL’s reach and the 2017 Threat Letter. Further, the RAD’s finding that the agents of persecution lack motivation because their demands have been fulfilled is speculative.

[38] The parties did not propose a question for certification and I agree that none arises.

**JUDGMENT in IMM-4422-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed. The matter is remitted to a different member of the RAD for redetermination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4422-20

**STYLE OF CAUSE:** BINOD GURUNG v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** MAY 17, 2022

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** NOVEMBER 23, 2022

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