Federal Court  Cour fédérale

Date: 20230324

Docket: IMM-543-22

Citation: 2023 FC 409

Montréal, Quebec, March 24, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

BALWINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Balwinder Singh, is seeking judicial review of a decision dated December 23, 2021 [Decision], whereby the Refugee Appeal Division [RAD] dismissed his appeal and confirmed the Refugee Protection Division's [RPD] decision denying his asylum claim. The RAD rejected Mr. Singh's claim for refugee protection under either section 96 or 97

of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because he had not demonstrated a nexus to a Convention ground and because viable internal flight alternatives [IFAs] exist in Mumbai, Delhi, and Chennai in his country of citizenship, India.

[2] Mr. Singh asks the Court for an order setting aside the Decision. He submits that the RAD breached natural justice, misinterpreted section 96 of the IRPA, and erred in its assessment of viable IFAs in India.

[3] For the following reasons, I will grant Mr. Singh's application for judicial review. After considering the RAD's findings, the evidence presented and the applicable law, I find that, in the circumstances of this case, the RAD breached the rules of procedural fairness as it failed to give notice to Mr. Singh on the issue of a nexus to a Convention ground. In addition, the Decision on this point is unreasonable because the RAD failed to consider evidence that contradicted its conclusions. This is sufficient to warrant the Court's intervention. In light of the foregoing, I do not have to deal with Mr. Singh's arguments regarding the reasonableness of the RAD's conclusions on the IFAs.

II. Background

A. *The factual context*

[4] Mr. Singh is a citizen of India and a firefighter. He alleges that he was a victim of torture by the Punjab police because of his anti-drug activities.

[5] While in India, Mr. Singh filed complaints against a man named KKA, who is a member of the local Congress party who sells drugs to youth in the area where Mr. Singh lived. According to Mr. Singh, KKA was protected by corrupted police. In October and December 2017, Mr. Singh was attacked twice by KKA's goons after he filed police complaints.

[6] In January 2018, Mr. Singh complained to the District Commissioner's office about drugs being sold to youth, about the attacks, and about the police being involved in the drug business. A few days after, he was arrested and tortured for making false complaints against the police.

[7] When he was released, the police asked Mr. Singh to stop his anti-drug activities. He was also required to report on the first of every month starting March 2018. However, in February 2018, Mr. Singh went into hiding in New Delhi. He subsequently travelled to Canada in July 2018 and made an asylum claim upon his arrival.

[8] The RPD found that Mr. Singh was not credible and dismissed his claim.

B. *The RAD Decision*

[9] Mr. Singh appealed the RPD decision to the RAD. In its Decision, the RAD dismissed the appeal based on the existence of viable IFAs in Mumbai, Delhi, and Chennai. Although the RAD agreed that the RPD had "good reasons" to find Mr. Singh's allegations not credible, it decided that it did not need to address the issue of credibility as it found that the IFA issue was determinative in this case.

[10] Before discussing the IFAs, the RAD first determined that Mr. Singh's allegations did not have a nexus to any Convention grounds under section 96 of the IRPA, since he was targeted due to his anti-drug activism. Accordingly, the RAD found that Mr. Singh's refugee claim had to be determined under section 97 of the IRPA. The RAD did not give notice to Mr. Singh of the issue of a nexus between his asylum claim and a Convention ground.

[11] With respect to the IFAs, the RAD gave notice to Mr. Singh of the IFA issue and applied the two-prong test to determine whether viable IFAs existed.

[12] On the first prong of the test, the RAD found that there was no serious possibility that the alleged agents of persecution would pursue Mr. Singh if he relocated to the proposed IFA locations. The RAD determined that there was insufficient evidence to show that KKA or the Punjab police would have the motivation or the means to track him down. Besides Mr. Singh's assertions, the RAD concluded that there was no evidence to support his claims. The RAD looked at Mr. Singh's affidavit, the documentary evidence on interstate police communication, and the possibility that Mr. Singh's name would likely appear in police databases. Ultimately, the RAD ruled that the evidence was insufficient to show that the Punjab police would likely have the means or the motivation to locate Mr. Singh through the tenant registration process or the Central Monitoring System if he were to relocate anywhere in India. On the second prong of the test, the RAD stated that Mr. Singh did not make any submissions on the unreasonableness for him to relocate to Mumbai, Delhi, or Chennai.

C. *The standard of review*

[13] The Minister of Immigration and Citizenship [Minister] makes no submission on the applicable standard of review. Mr. Singh submits that the standard of reasonableness applies, except on the question of procedural fairness, where the standard of correctness should govern the Court's analysis.

[14] I agree that reasonableness applies to the merits of the RAD's findings on the existence of a viable IFA (*Valencia v Canada (Citizenship and Immigration)*, 2022 FC 386 [*Valencia*] at para 19; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 14; *Ambroise v Canada (Citizenship and Immigration*), 2021 FC 62 at para 6; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 17; *Kaisar v Canada (Citizenship and Immigration)*, 2017 FC 789 at para 11). It is well settled that reasonableness is the presumptive standard that reviewing courts must apply when conducting a judicial review of the merits of an administrative decision (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 17).

[15] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must therefore ask whether the "decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). Both the

outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[16] Such a review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with "respectful attention," and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[17] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. It must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

[18] However, a different standard of review applies on procedural fairness issues. While there is no unanimity on the approach to be taken to date, the Federal Court of Appeal has repeatedly held that procedural fairness does not require the application of standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18;

Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 [*CPR*] at para 54). Rather, it is a legal question that must be assessed in the circumstances of each case and the reviewing court must determine whether or not the procedure followed by the decision maker met the standards of fairness and natural justice (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54).

[19] The ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct." It is rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard as well as a full and fair opportunity to know the case they have to meet and to respond to it. No deference is owed to administrative decision makers on matters raising procedural fairness concerns.

III. Analysis

A. *Breach of natural justice*

[20] Mr. Singh submits that the RAD's failure to give him notice on the question of nexus to a Convention ground constitutes a breach of fundamental justice. According to Mr. Singh, the question of nexus was a new ground of appeal just as much as the IFA issue, for which the RAD did give him a notice. Therefore, Mr. Singh submits that his right to procedural fairness was denied because he did not have the opportunity to address the nexus issue properly. The Minister responds that the question of nexus to one of the Convention grounds is not a new question on

appeal, as it only represents an independent assessment of the evidence already on file and forms the basis of Mr. Singh's claim for protection pursuant to either section 96 or 97 of the IRPA (*Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 [*Sary*] at paras 27–31).

[21] With respect, I do not agree with the Minister.

[22] While the RAD can confirm a decision of the RPD on another basis (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 19), procedural fairness requires that the RAD give notice and provide an opportunity to make submissions when it pursues a new issue on appeal (*Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637 at para 77; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71). This Court repeated many times that "[a] 'new question' is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from" (*Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] at para 25).

[23] In Mr. Singh's case, the RPD had solely focused on the issue of credibility. The RAD's conclusions that Mr. Singh's allegations do not have a nexus to any of the grounds found in the refugee Convention was not an issue raised or considered by the RPD. Accordingly, it cannot be assumed that Mr. Singh knew he had to meet this case on appeal (*He v Canada (Citizenship and Immigration)*, 2019 FC 1316 at para 80). The only elements Mr. Singh knew would be at issue on his appeal were those of credibility, as assessed by the RPD, and viable IFAs, as notified by the RAD.

[24] If the Minister's argument — to the effect that the establishment of a Convention ground under section 96 of the IRPA is the basis of Mr. Singh's claim for protection — was accepted and therefore should not require further notice on appeal, the same could be said for any other matter arising from a claim for refugee protection. For example, an IFA stems directly from the statutory requirements under subsections 96 and 97 of the IRPA and from the evidence on the file (*Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 [*Sadiq*] at para 40). The same is true for other elements of the refugee definition, such as state protection (*Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 53). Nevertheless, both situations still require notice from the RAD when the RPD did not address them in its decision. The same logic must apply when the RAD refuses a claim for protection based on its finding that no nexus to a Convention ground existed, if such issue was not raised by and addressed by the RPD. As this Court held in *Sadiq* regarding the notice required for the IFA issue — and which can be extended to the nexus issue —, "[i]n this way, an issue that is implicit in the general tests for protection can be engaged explicitly in a given case" (*Sadiq* at para 41).

[25] I pause to point out that, at the hearing, counsel for the Minister was unable to refer to any precedent where the Court found that no notice was required on appeal when the RAD raised a question of nexus to a Convention ground that had not been considered by the RPD.

[26] Mr. Singh's situation differs from that in the *Sary* case cited by the Minister. In *Sary*, the RAD simply referred to additional evidence in the file which supported the RPD's findings on Mr. Sary's lack of credibility (*Sary* at para 31). In that case, the RAD did not raise the issue of credibility for the first time; it simply pointed to evidence that further supported and magnified

the RPD's conclusions on credibility. The situation would have been quite different if the RAD had raised the credibility issue for the first time without giving notice to Mr. Sary.

[27] In the same vein, the Minister's counsel at the hearing referred to *Qiu v Canada (Citizenship and Immigration)*, 2021 FC 166 [*Qiu*], where the Court referred to *Sary* in order to establish that "additional findings grounded in the record or derived from information known to an applicant is not a new issue in breach of procedural fairness" (*Qiu* at para 28). In that case, the Court found that "the alleged new issues were indeed raised expressly or derivative to the central determinations made by the RPD and advanced by the Applicant on appeal" (*Qiu* at para 30). The RAD's findings in *Qiu* were based on new findings regarding the credibility of the claimants, an issue that had already been decided by the RPD. Here, it is the opposite. While the link to a Convention ground is one of the central determinations made by the RAD, it does not follow from any of the determinations made by the RPD. This issue was not specifically raised by the RPD, nor does it arise from the central credibility determination it made.

[28] For these reasons, I find that the issue of nexus to a Convention ground was a new question raised by the RAD. In those circumstances, Mr. Singh should have been given the opportunity to address this matter as it was not part of the RPD's assessment of the evidence and was not a ground of appeal raised by Mr. Singh (*Kwakwa* at para 22).

[29] The lack of notice on the issue of nexus to a Convention ground is a fundamental breach of procedural fairness as it prevented Mr. Singh from being fully aware of the case he had to

meet on appeal to the RAD. This conclusion alone is sufficient to grant the application for judicial review.

B. ***The nexus to a Convention ground***

[30] Turning briefly to the substantive dimension of the nexus to a Convention ground, Mr. Singh argues that the RAD erred in its interpretation of the refugee definition in section 96 of the IRPA. According to Mr. Singh, the RAD wrongly focused on his anti-drug activities as the reason why Mr. Singh was persecuted, but forgot to take into consideration the other grounds for his persecution. Mr. Singh argues that he was denouncing both police corruption and drug activities. According to Mr. Singh, the former constitutes the expression of a political opinion, which is a Convention ground.

[31] The Minister responds that Mr. Singh's fear of KKA and the authorities is "clearly not linked with the Convention's ground of political opinion."

[32] I am not convinced by the Minister's arguments and instead agree with Mr. Singh. The nature of Mr. Singh's activities should have been assessed according to the test enunciated in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, where the Supreme Court of Canada, at page 746, stated that a political opinion encompasses "any opinion on any matter in which the machinery of state, government, and policy may be engaged." Indeed, the Federal Court of Appeal in *Klinko v Canada (Minister of Citizenship and Immigration*), [2000] 3 FC 327 (FCA) [*Klinko*] held that the denunciation of state officials' corruption can represent such political

opinion (*Klinko* at paras 33–35; *Nyembua v Canada (Citizenship and Immigration)*, 2015 FC 970 at para 14).

[33] The evidence provided by Mr. Singh reveals that his complaint to the District Commissioner exposed both KKA and the corrupt police. It should be underlined that the RAD did not render its Decision on the basis of a lack of credibility of Mr. Singh as did the RPD. It only stated that the RPD had "good reasons" for finding Mr. Singh not credible, but did not itself provide any reasons on that front. Therefore, the RAD had no reason to disregard Mr. Singh's evidence on his complaint to the District Commissioner, which indicated that he was exposing police corruption, thus potentially expressing a political opinion.

[34] While the Minister is correct to suggest that such activities are not always considered expressions of political opinion, the RAD still had a duty to consider Mr. Singh's complaints about corrupt local police officers in the same way that it considered his anti-drug activities. If the RAD was not satisfied that the denunciation of police corruption constituted an expression of political opinion, it should have said so and given reasons to support its position. At the hearing, the Minister's counsel attempted to supplement the Decision by explaining why Mr. Singh's conduct does not constitute political opinion within the meaning of a Convention ground under section 96 of the IRPA. However, it is not the role of this Court to determine this issue; it is for the RAD to do so, something it has failed to consider in this case.

[35] I do not dispute that, when an administrative decision maker fails to mention evidence, it does not necessarily make the decision unreasonable (*Valencia* at para 25; *Khir v Canada*

(Citizenship and Immigration), 2021 FC 160 [*Khir*] at para 48; *Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 24). However, a decision maker still has a duty to account for the relevant evidence before it when such evidence contradicts its conclusions (*Vavilov* at para 126; *Valencia* at para 26; *Khir* at para 48; *Torrance v Canada (Attorney General)*, 2020 FC 634 at para 58). Here, the RAD failed to explain why it did not consider Mr. Singh's denunciation of corrupt police as a political opinion. It only focused on Mr. Singh's anti-drug activities, and omitted to refer to evidence that contradicted its own conclusions about a possible nexus to a Convention ground.

[36] Thus, I am left with a Decision that does not allow me to properly assess the reasonableness of the RAD's reasoning process given the lack of reasons on this issue (*Vavilov* at para 103). To be reasonable, a decision must allow the reviewing court to "connect the dots on the page" (*Vavilov* at para 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11). In Mr. Singh's case, there is a gap that cannot be accounted for by relying on the reasons in the Decision.

IV. Conclusion

[37] For the reasons detailed above, I conclude that the administrative process followed by the RAD did not achieve the basic level of procedural fairness required in the circumstances of this case, and that it was procedurally unfair. Since Mr. Singh was not given a full and fair opportunity to be heard and to understand the case he had to meet, I must allow this application for judicial review and return the matter to the RAD for redetermination by a different panel, in accordance with the Court's reasons.

[38] There are no questions of general importance to be certified.

JUDGMENT in IMM-543-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, without costs.

2. The decision of the Refugee Appeal Division dated December 23, 2021, rejecting the appeal of Mr. Singh, is set aside and the matter is referred back to a differently constituted panel for redetermination on the merits, in accordance with the Court's reasons.

3. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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