Federal Court Cour fédérale

Date: 20231211

Docket: IMM-12828-22

Citation: 2023 FC 1673

Toronto, Ontario, December 11, 2023

PRESENT: Madam Justice Go

BETWEEN:

ANISH KALAPPURAKKAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Anish Kalappurakkal, is a citizen of India, from the state of Kerala.

[2] The Applicant was defrauded by PT, a business partner and bank manager, who the Applicant alleges also harassed and threatened him. The Applicant reported the fraud to the police and alleges he was threatened for doing so. The Applicant, a member of the Communist

Party, alleges the chairman of the bank, who approved the fraudulent loan and is a member of the Congress Party, has threatened him.

[3] The Applicant travelled to Canada on September 30, 2017 and sought protection in February 2019 after learning that the police had charged PT and his wife with what the Applicant considered as minor offences. At the hearing before the Refugee Protection Division [RPD], the Applicant also alleged he could not attend his church because the agents of persecution spoke to his priest about him.

[4] The RPD rejected the Applicant's refugee claim, a decision upheld by the Refugee Appeal Division [RAD]. The Federal Court in *Kalappurakkal v Canada (Citizenship and Immigration)*, 2022 FC 1133 sent the matter back to the RAD.

[5] Upon redetermination, the RAD once again dismissed the Applicant's appeal in a decision dated November 29, 2022 [Decision], finding the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicant seeks judicial review of the Decision.

[6] For the reasons set out below, I dismiss the application.

II. Issues and Standard of Review

[7] The Applicant raises an issue of procedural fairness, arguing the RAD should have provided notice of the issue that the Communist Party is the party in power in Kerala and not the Congress Party.

[8] The Applicant also submits the Decision was unreasonable because:

a. The RAD erred in its finding that he did not have a nexus to the Convention refugee grounds;

b. The RAD erred in its section 97 analysis because it failed to give him the "benefit of the doubt;" and

c. The RAD should have considered that cumulatively, the threats and harassment, on a balance of probabilities, amounted to a risk to life or cruel and unusual punishment or danger of torture.

[9] With respect to the procedural fairness issue, the standard of review is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-55. As to the merits of the Decision, the standard of review is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[10] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

[11] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep:" *Vavilov* at para 100.

III. Analysis

A. *Did the RAD breach the duty of procedural fairness?*

[12] The Applicant submits the RAD should have given notice of the issue that the Communist Party is the ruling party in Kerala because it relied on this fact to assert that the Congress Party cannot act against the Applicant. The Applicant argues that failing to do so breached the duty of procedural fairness.

[13] The Applicant submits the Federal Court has held that the RAD has an obligation to give notice to parties of a new issue, and to give them an opportunity to respond, citing *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 74.

[14] I reject the Applicant's argument.

[15] As the Applicant conceded at the hearing, the fact that the Communist Party is the ruling party in Kerala is not new, as the Communist Party has always been in power during the relevant time period. Further, as the Respondent pointed out, this fact was also mentioned in the previous RAD decision. I therefore do not agree with the Applicant that by simply noting this in the Decision made it a new issue.

[16] I also find the RAD's observation concerning the Communist Party has no bearing on its main finding that there is insufficient evidence that the Congress Party can act against the Applicant. The RAD's finding was based on other factors including the lack of evidence of recent or subsequent threats, and the lack of evidence regarding the status of the legal case.

[17] As such, by noting an issue already known to the Applicant and noted in the previous RAD decision, I find the RAD did not breach the duty of procedural fairness.

B. *Did the RAD err in its section 96 assessment*

[18] The Applicant makes two arguments to challenge the RAD's section 96 analysis, which I will address as follows:

i. *Error with respect to "mixed motivation"*

[19] First, the Applicant submits that had he been a member of the Congress Party, his targeting would have been unlikely. The Applicant submits that the Congress Party perceives him as the enemy, and that the evidence demonstrates, at least in part, that this was for reasons of

his political opinion. The Applicant points to his Basis of Claim [BOC] narrative where he names the Congress Party as his agent of persecution and the party's control of the bank. This, the Applicant argues, is evidence indicating, at least in part, that his problems are political in nature. The Applicant also makes various references to the RPD hearing where he testified that he "stood against" the Congress Party and that the Congress Party was threatening him and his family.

[20] Citing *Cabaracas v Canada*, 2002 FCT 297 [*Cabaracas*] the Applicant submits that "[a]s long as some part of the motivation behind persecution has a nexus, that is sufficient to make out the nexus element" of section 96.

[21] With respect, *Cabaracas* does not assist the Applicant. In *Cabaracas*, the Court similarly rejected the applicant's argument of mixed motivation, noting that the decision-maker had thoroughly reviewed the evidence and reasonably concluded that the motivation was unrelated to a section 96 ground.

[22] Here, the RAD considered the Applicant's submission and evidence regarding the alleged political motivation of the bank manager. The RAD observed the Applicant entered into a private and unofficial deal with a government employee that went awry. Citing *Ass'ad Hawri v Canada (Citizenship and Immigration)*, 2022 FC 629, the RAD noted that the Court upheld a RAD's finding of no nexus to political opinion because the transaction in question was secret and outside of legal channels. The RAD concluded the Applicant's evidence indicated that the bank or Congress Party's threats were because the Applicant pursued charges that could create

reputational harm, as opposed to being motivated by the Applicant's real or perceived political opinion. The RAD thus found that being a member of a different party was not sufficient by itself to establish that there is an aspect of political opinion at play.

[23] While the Applicant may disagree with the RAD, he fails to point to any reviewable error arising from that conclusion. Even though the case law confirms mixed motivation can lead to nexus, the Applicant must still establish that the RAD's analysis in this case was unreasonable. The Applicant has failed to do so.

ii. *Error with respect to persecution based on religion*

[24] To the Applicant's claim that he was unable to attend his church because his agents of persecution went there, the RAD found that this did not amount to persecution as there was no evidence the harassment was based on the Applicant's religious background or evidence of the agents' own religion. The RAD also noted that the Applicant did not raise religious persecution in his BOC narrative, and the only evidence stems from the RPD hearing when it questioned the Applicant on the matter.

[25] The Applicant argues the RAD erred in its assessment of the religion nexus. The Applicant points to his testimony at the RPD hearing when the RPD member asked about his religious background and he responded that he could not attend church because of the threats made. The Applicant submits the RAD erred in finding that the harassment at his church was not sufficient to establish, even in part, the agents' motivation to impair his right to worship. The Applicant submits, "one must look at the act and the effect" when assessing whether it amounts

to persecution: *Nejad v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5458 (FC).

[26] The Applicant further submits that the intention of the agent of persecution is sufficient, but not necessary, to prove nexus, citing James C. Hathaway and Michelle Foster [Hathaway & Foster], *The Law of Refugee Status*, 2nd ed (Cambridge University Press) at 367, section 5.2, lines 25-30 [Law of Refugee Status].

[27] The Applicant finally submits the RAD's observation that the agents' religion was unknown does not mean there is no persecution, and that someone of the same religion can still persecute another on religious grounds. The Applicant also submits that the RAD did not consider the impact on the Applicant's religious freedom because he was fearful of attending his church, citing *Zhou v Canada (Citizenship and Immigration)*, 2009 FC 1210 [*Zhou*] at para 29 in support of this point.

[28] I find *Zhou* is distinguishable on the facts. In *Zhou*, the applicant alleged fear of persecution as he was a member of an illegal house church in China. The Court rejected the RPD's finding that the applicant could attend a legal church instead, given the applicant stated practicing in a state church went against his beliefs. The Court also observed the RPD inappropriately questioned the genuineness of the applicant's faith because he did not have a religious background prior.

[29] Here, the RAD did not question the Applicant's faith, and there was no evidence that the Applicant had to practice his religion in hiding. Rather, the RAD found no connection between the alleged harassment at the church and the fact that the Applicant was a Roman Catholic.

[30] I also find the cases and authorities the Applicant cites do not support his position that just by demonstrating an impact on his ability to practice religion is sufficient to establish nexus. In my view, the Applicant's argument conflates "impact" on his personal circumstances with "reason" of persecution.

[31] As noted by Hathaway & Foster in Law of Refugee Status, at 5.2:

> …the nexus requirement is satisfied where the applicant's predicament – <u>the reason for</u> exposure to her well-founded fear of being persecuted – is linked to a Convention ground.
>
> [Emphasis added]

[32] Hathaway & Foster criticized decision-makers' narrow focus on the intention of the persecutor in the nexus analysis, and considered whether this could be ameliorated by considering the intention for the state to withhold protection. Hathaway & Foster then cited, as an example, claims involving a risk of forced military conscription where a claimant may fail at the nexus stage depending on which approach to nexus the decision-maker adopts: Law of Refugee Status at 376.

[33] Hathaway & Foster then proposed that a "predicament approach" which focuses on the "reason for exposure to the risk," as opposed to the intent of the prosecutor or of the state in failing to protect, could allow a claim based on a law of general application. This is so because

"the equal application of the law to all persons may impact differently on some of those persons:" Law of Refugee Status at 378, citing *Applicant VEAZ of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs*, [2003] FCA 1033 (Austl) at para 26.

[34] Applying this predicament approach, the Applicant in my view must show that the "reason for exposure to his well-founded fear of being persecuted:" Law of Refugee Status at 378, is linked to a Convention ground.

[35] Here, the Applicant has not provided any evidence that the reason for exposure to the risk is linked to his religion. Indeed, as the Respondent rightly points out, the Applicant did not mention religion as a ground in his BOC Form. This issue transpired at the end of the hearing when the RPD member inquired if the Applicant had anything else to add. That was when the Applicant added:

> Because like these people are threatening I cannot go to church and everything. They have gone to my church and talked with my priest and the priest also asked me what the situation.

[36] The Applicant's evidence, limited as it was, did not point to his religion being the reason for the harm he was exposed to. In the absence of any such evidence, the RAD's finding that there is no nexus based on religion was thus reasonable.

C. *Did the RAD commit error in its section 97 assessment?*

[37] The Applicant submits the RAD erred as it failed to accord him the “benefit of the doubt” in its section 97 analysis, in light of the RAD’s finding that there is no recent evidence of targeting or threats and the last of this evidence is from 2017.

[38] The Applicant refers to the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook] at paras 203-204, which outlines the principle of the “benefit of the doubt.” According to the UNHCR Handbook, the “benefit of the doubt” should be given when “when all available evidence has been obtained and checked” and the refugee claimant’s general credibility is met. Behind this principle is the rationale that the claimant cannot be expected to “prove” every part of their case.

[39] The Applicant submits that the Supreme Court of Canada has recognized the importance of the UNHCR Handbook and the “benefit of the doubt” principle when considering refugee admission practices: *Chan v Canada (Minister of Employment and Immigration)*, 1995 CanLII 71 (SCC), [1995] 3 SCR 593 [*Chan*] at paras 46-47.

[40] I note, first of all, that the passage in *Chan* quoted by the Applicant came from the dissent of Justice La Forest, as he then was, and is not binding on me. The majority in *Chan* did not adopt Justice La Forest’s position. Instead, the majority reiterated at para 120 that “[b]oth the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities.” Further, the majority explicitly stated that even if a

refugee claimant is given the benefit of the doubt, "the existence of a subjective fear of persecutory treatment is not sufficient to meet the statutory definition of a Convention refugee:" *Chan* at para 133.

[41] The parties also make dueling submissions concerning whether section 97 sets a higher standard of proof than that of section 96. I need not weigh in on this debate. Under either sections 96 or 97 of the *IRPA*, the standard of proof imposed on applicants is one of a balance of probabilities: *Ramos v Canada (Citizenship and Immigration)*, 2023 FC 1659 at para at para 17, *Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 at paras 24-27 and *El Achkar v Canada (Citizenship and Immigration)*, 2013 FC 472 at para 28.

[42] The Respondent submits that the RAD's findings should be given deference, citing *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [*Magonza*].

[43] I note in *Magonza* Justice Grammond discussed the concept of "sufficiency" and what it means in the context of refugee law. While his comments were made in the context of a section 96 claim, they are nevertheless instructive in helping the reviewing court assess decision-makers' sufficiency findings. As Justice Grammond explained:

> [32] …The use of this concept, especially if it is meant to require several pieces of evidence to prove a fact, may be surprising. After all, the law does not require that facts be proved by more than one witness. When a contract is filed in evidence, or a witness testified that he saw the accused discharge a firearm on the victim, those facts are proven. But these are cases of direct evidence. Where the evidence is indirect or circumstantial, however, the fact-finder must rely on inferences, weigh each piece of evidence and decide whether the cumulative weight of all the evidence is sufficient to warrant a finding that the disputed fact exists.

> [33] Another manner of conveying the concept of sufficiency is to require corroboration: evidence that stands alone may not be sufficient. Of course, there is no accepted manner of quantifying credibility, probative value and weight. Thus, it is impossible to describe in advance what "amount" of evidence is "sufficient." "Sufficiency" is simply a word used by decision-makers to say that they are not convinced.

[44] After noting that the central fact that must be proven is "more than a mere possibility of persecution," citing *Chan* at para 120, Justice Grammond noted, "this can only be proved by indirect evidence and it is impossible to say in advance 'how much.'" Finally, he concluded: "Deciding whether the evidence is sufficient is a practical judgment made on a case-by-case basis:" *Magonza* at para 34.

[45] Having considered the Decision and the record before the RAD, I find the RAD reasonably and adequately explained its findings of insufficient evidence with regard to the risk of harm.

[46] As the Respondent rightly conceded, if the RAD's finding was based solely on the lack of evidence of recent targeting of the Applicant, it could have rendered the Decision unreasonable. However, in this case, the RAD also referenced the Applicant's testimony that PT is regularly not in India, as well as a lack of evidence regarding the status of the legal case. In light of the record before it, the RAD's finding of insufficient evidence was reasonable.

D. *Did the RAD fail to address cumulative threats?*

[47] The Applicant argues the RAD erred by not explaining why the cumulative threats and harassment did not establish, with sufficient evidence, that he faces a risk to life or cruel and unusual treatment or punishment. The Applicant submits the RAD only provided its conclusion, but not an explanation.

[48] I am not persuaded by this argument. The RAD acknowledged the Applicant's submission to consider the threats and harassment cumulatively before concluding the Applicant has not established with sufficient evidence his section 97 claim. This finding, in my view, flowed logically from the RAD's findings of insufficient evidence of threats from PT and from the Congress Party. I see no basis to interfere with this finding.

IV. Conclusion

[49] The application for judicial review is dismissed.

[50] There is no question for certification.

JUDGMENT in IMM-12828-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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