Federal Court  Cour fédérale

Date: 20231220

Docket: IMM-10219-22

Citation: 2023 FC 1726

Ottawa, Ontario, December 20, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SUKPREET SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision addresses an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated September 27, 2022 [Decision], which upheld the decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [IRPA]. The determinative issue before both the RPD and the RAD was the availability of an internal flight alternative [IFA].

[2] For the reasons explained in greater detail below, this application is allowed, as the RAD failed to address intelligibly the Applicant's appeal submission that the RPD's IFA analysis was unreasonably premised on the Applicant not sharing his whereabouts with family and friends.

II. **Background**

[3] The Applicant is a citizen of India who claims fear for his life at the hands of his village Sarpanch as a result of a land dispute. He alleges that the Sarpanch and her goons attacked him and his father in November and December 2016 and that the police refused to look into the matter because the Sarpanch is influential. He also alleges that the police falsely accused the Applicant of being a Khalistani terrorist.

[4] Following these attacks, the Applicant went to live with relatives and in May 2017 he went to live in Mumbai. However, he was asked to leave because he did not provide his identification, and he returned to his village in July 2017. He alleges that, while he was away, the Sarpanch destroyed his family's crops and filed a court case against his father related to the land dispute. He also alleges that he and his father were again arrested by the police and beaten during interrogation.

[5] The Applicant then engaged a smuggler to arrange for him to come to Canada. He arrived in Canada in December 2017 and made a refugee claim. Following his hearing, the RPD rejected

his claim in May 2022, finding that he had a viable IFA in Delhi. He appealed the RPD's decision to the RAD, which dismissed his appeal in the Decision that is the subject of this application for judicial review.

III. **Decision under Review**

[6] In performing its analysis under the first branch of the IFA test (related to the risk of persecution or harm in the IFA), the RAD first considered the objective evidence surrounding the role of village Sarpanches, which the RAD concluded did not support the Applicant's position that the Sarpanch of his village would have the capacity to influence police to locate him throughout India. The RAD considered the Applicant's testimony, that the police and party leaders would help the Sarpanch to locate him, but concluded that this was speculation and that there was no evidence that the Sarpanch had any influence outside his village. The RAD found, on a balance of probabilities, that the Sarpanch does not have influence beyond the village and that, even if she did, politicians and/or police would not be motivated to search for the Applicant throughout India.

[7] In relation to the Applicant's testimony that the Sarpanch and police threatened to label him a terrorist, which would motivate the authorities to track him down, the RAD again concluded that this was speculation by the Applicant. The RAD noted that there was no evidence in the record that he had been declared a terrorist or that the Sarpanch had the influence to have him declared a terrorist. The RAD found, on a balance of probabilities, the Applicant had not been declared a terrorist and that his agents of persecution do not have the capacity to do so.

[8] The RAD also considered the Applicant's submission that he could be tracked through India's Crime and Criminal Tracking Network System [CCTNS] but noted the objective evidence that the CCTNS does not maintain a record of extrajudicial arrests. Concluding that the Applicant's detention had not likely been officially recorded, the RAD found, on a balance of probabilities, that the Applicant's arrest was not entered into any police database and, again on a balance of probabilities, that he would not be located via the CCTNS.

[9] Similarly, the RAD considered the Applicant's submission that he could be tracked by the Aadhaar system. The RAD noted the objective evidence that the Aadhaar is a random 12 digit number issued to residents of India but that there was no link between this number and police tracking systems. The RAD found, on a balance of probabilities, that the Applicant cannot be tracked by the Aadhaar database.

[10] Finally, the RAD considered the Applicant's submission that he would be tracked by the mandatory tenant verification system, through tenant verification being sent to the police who would then inform the police in his village. Noting that the applicable test is a balance of probabilities and not just a mere possibility, the RAD considered the objective evidence that, while tenant registration is mandatory and police verification programs exist, it is not possible for the police to actually verify the identity of all those who rent property. The evidence also stated that the police do not follow up with the police stations of other states. As the RAD had found the Applicant's detention to be extrajudicial, such that his name would not appear on any criminal database, the RAD found on a balance of probabilities that he would not be located through tenant verification.

[11] In conclusion on the first branch of the IFA test, the RAD found that the Applicant had not established on a balance of probabilities that his agents of persecution had the means to locate him in Delhi. As such, the RAD found on a balance of probabilities that the Applicant would not be personally subject to a risk to life or risk of cruel and unusual treatment or punishment or danger, believed on substantial grounds to exist, of torture in Delhi.

[12] Turning to the second branch of the IFA test (the reasonableness of relocating to the IFA), the RAD considered the Applicant's level of education, employment history, language skills, Sikh ethnicity, and level of wealth and concluded that it would not be unreasonable for him to relocate to Delhi. Although noting his submission that he had never been to Delhi and had no support system there, the RAD agreed with the RPD that there was no evidence that being away from his family would rise to the level of jeopardizing his life or safety, as required to render a proposed IFA unreasonable.

[13] In conclusion, the RAD found that there was not a serious possibility of persecution under section 96 of the IRPA if the Applicant returned to India and, on a balance of probabilities, that he would not be personally subjected to a danger of torture or face a risk to life or risk of cruel and unusual treatment or punishment in India, under section 97 of the IRPA.

IV. **Issues and Standard of Review**

[14] The Applicant raises the following issues for the Court's determination:

A. Did the RAD err by applying a balance of probabilities threshold to future risk?
B. Did the RAD err in concluding that the Applicant has a viable IFA in Delhi?

[15] The parties agree, and I concur, that the reasonableness standard of review applies to these issues.

V. **Analysis**

Did the RAD err in concluding that the Applicant has a viable IFA in Delhi?

[16] I will first provide my analysis of the second issue raised by the Applicant, as my decision to grant this application for judicial review turns on the Applicant's argument that, in concluding that he has a viable IFA in Delhi, the RAD failed to address intelligibly an argument raised in his appeal submissions to the effect that the RPD unreasonably expected that he would live in the IFA without disclosing his whereabouts to his family and friends.

[17] The portion of the RPD's decision upon which the Applicant relies, related to the risk of the agents of persecution locating him in Delhi, reads as follows:

> 37. The Claimant's counsel also argued that due to the continuing harassment by the agents of persecution of the Claimant's family, he could be located through his family. I am mindful that being unable to share your whereabouts with your family or friends is tantamount to requiring a claimant to go into hiding, which the Court has found to be unreasonable. However, this is not a matter of cutting all communications with his family members. Nor is it about hiding from them. This is a matter of not disclosing to family members specific information that is not vital to maintaining their relationship and is a reasonable compromise if it otherwise provides the Claimant the opportunity to continue his life in his country of origin without danger to him or his family members. No evidence was submitted as to why the Claimant would be unable to inform his friends and family that he is in India, communicate with them regularly, and meet with them outside the area of influence of his agents of persecution. Furthermore, no evidence was submitted that his family would in the future divulge the Claimant's location to his agents of

> persecution, particularly as they have expressed their support of the Claimant. I therefore find that the Claimant would be able to have a reasonable amount of contact and communication with his friends and family, without, on a balance of probabilities, being located by his agents of persecution as a result.

[18] In support of its comment that the Court has found that it is unreasonable to be unable to share one's whereabouts with family and friends, the RPD cited *Zamora Heurta v Canada (Citizenship and Immigration)*, 2008 FC 586 [*Zamora*].

[19] In his written submissions to the RAD in support of his appeal, the Applicant argued that the finding in the above paragraph of the RPD's decision is inconsistent with the principle from *Zamora* cited by the RPD. He argued that he could not afford to share his whereabouts in the IFA location with his family, as his testimony established that his father was still being targeted by the agents of persecution. As such, he would have to live in hiding in the IFA.

[20] In the only portion of the Decision that perhaps relates to this submission, the RAD states as follows:

> 35. The Appellant submits that he has no support system in Delhi, and he has never been to or stayed there. There is nothing in the record to suggest that the Appellant would have to cut off his family and friends and the RPD correctly noted that there was no evidence given that being away from his family would raise to the level of jeopardizing his life or safety. …

[21] I agree with the Applicant that, if this portion of the Decision is intended to be responsive to the Applicant's appeal submission, it is not intelligibly so. He argued on appeal that the RPD's analysis was predicated on him not sharing his whereabouts in the IFA with his family and

friends, an analysis comparable to that which *Zamora* found to be unreasonable. If the RAD's analysis is to be interpreted as a conclusion that the Applicant is misreading the RPD's decision, it is not apparent to me how the RAD arrived at that conclusion. Nor does the RAD's analysis address the Applicant's appeal submission that, given the evidence that the agent of persecution continues to target his father, he could not live safely in the IFA without ensuring that his father was not aware of his whereabouts.

[22] Based on the foregoing, I find the RAD's IFA analysis unreasonable.

Did the RAD err by applying a balance of probabilities threshold to future risk?

[23] In his Memorandum of Fact in Law, the Applicant argued that the RAD misstated the applicable test when considering whether an IFA exists and applied a "balance of probabilities" standard when it should have applied a "more than a mere possibility" or "serious risk" standard in assessing future risk. His written submissions refer to the interplay between the balance of probabilities standard of proof being applied to factual findings and the serious risk threshold that applies when determining whether a person is a Convention refugee. The tribunal must employ the balance of probability standard in making the factual findings necessary for its task and then apply those facts to the serious risk threshold, determining based on those facts whether there is more than a mere possibility of persecution.

[24] The Applicant's Memorandum argues that the RAD erred by misunderstanding this interplay and applying a balance of probabilities threshold when considering future risk, this being the sort of error identified by Justice Grammond in *Gomez Dominquez v Canada*

(Citizenship and Immigration), 2020 FC 1098. The Respondent's Further Memorandum of Argument takes the position that the RAD did not so err, as its use of the balance of probability standard in its IFA analysis related to its assessment of the facts.

[25] At the hearing of this application, I raised with counsel for both parties whether there is any scope for this issue to arise in this particular case, given that it is clear from the Decision that the RPD had found no nexus between the Applicant's claim and a Convention ground, a finding that the Applicant did not contest and with which the RAD agreed. As such, the Decision reflects an analysis by the RAD only under section 97(1) of IRPA, to which the "serious issue" threshold under section 96 has no application.

[26] Counsel for both parties agreed with this characterization of the Decision, and the Applicant's counsel conceded that there was no merit to advancing the argument as framed in his Memorandum of Fact in Law. Indeed, both counsel noted that they had themselves identified this point when preparing for the hearing the evening before. However, given the late identification of this point, the Applicant's counsel requested an opportunity to provide post-hearing written submissions on whether there was a version of this issue and argument that still applied in the context of the IFA analysis employing only section 97 of the IRPA. I agreed to afford both parties an opportunity to advance such submissions.

[27] Having now received and reviewed the submissions, I decline to engage in a substantive analysis of this issue. Effectively, the Applicant encourages the Court to revisit the conclusion by the Federal Court of Appeal in *Li v Canada (Minister of Citizenship and Immigration)*, 2005

FCA 1, that the degree of danger or risk contemplated by section 97 of the IRPA is to be assessed on a balance of probabilities. In my view, any consideration of such arguments should be left to another matter where the Court has the benefit of both written and oral submissions and where this issue would be determinative of the matter.

VI. **Conclusion**

[28] For the reasons explained above, this application for judicial review will be allowed, the Decision set aside, and the matter returned to a different member of the RAD for redetermination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-10219-22

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different member of the RAD for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10219-22
STYLE OF CAUSE:	SUKPREET SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 28, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	DECEMBER 20, 2023

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