

Federal Court



Cour fédérale

Date: 20211008

Docket: IMM-5526-20

Citation: 2021 FC 1053

Toronto, Ontario, October 8, 2021

PRESENT: Madam Justice Go

BETWEEN:

MANOJ THAPA MAGAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Manoj Thapa Magar [the Applicant], a citizen of Nepal, filed a refugee claim in Canada on February 17, 2016 on the basis that he fears persecution from the Maoists in his home country. The Applicant's claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on December 3, 2018. Citing credibility as a determinative

issue, the RPD found the Applicant is neither a Convention Refugee nor a person in need of protection.

[2] The Applicant appealed the RPD decision to the Refugee Appeal Division [RAD]. On October 9, 2020, the RAD upheld the RPD decision.

[3] The Applicant has applied for judicial review of the October 9, 2020 RAD decision [Decision]. For the reasons set out below, this application is dismissed.

II. Background

A. *Factual Context*

[4] The Applicant, aged 48, is married with two children. His spouse and children, as well as his parents and siblings are still residing in Nepal. The Applicant had been working in Nepal to support himself and his family, including most recently as a self-employed person who drove his own vehicle for various companies.

[5] The Applicant states he fled Nepal due to a well-founded fear of persecution from the Maoists and Young Communist League [YCL] cadres because of his association with a pro-monarchist party called the National Democratic Party of Nepal or Rastriya Prajatantra Party [RPP] of which the Applicant has been a member since 2002.

[6] In March 2015, the Applicant evicted tenants from his father's house who happened to be members of the YCL. In May 2015, while participating in the relief efforts following a devastating earthquake in Nepal, the Applicant states his relief materials were looted by members of the YCL, who then threatened the Applicant after he reported their actions to the police. The Applicant further alleges he was threatened by the Maoists and members of the YCL to make donations. The Applicant states he was also robbed of one million rupees by two men at gunpoint upon leaving a bank, and later threatened by the YCL after he reported the incident to the police.

[7] The Applicant arrived in Canada on October 1, 2015 on a visitor visa. While in Canada, the Applicant alleges that his spouse was approached by members of a particular Maoist faction, the Biplav Maoists, in December 2019. The Applicant's spouse was threatened to disclose the whereabouts of the Applicant and to pay one million rupees within a month's time. Rather than paying the Biplav Maoists, the Applicant's spouse moved to another part of Nepal and cancelled her phone plan.

[8] At his first RPD hearing, the Applicant was represented by counsel. Before the hearing was completed, counsel advised the RPD member that his relationship with the Applicant had completely broken down and requested to be removed as the Applicant's representative. Counsel's request was granted with no objection from the Applicant. The Applicant was given the option to adjourn the hearing, which he accepted. He was advised to find new counsel and notify the RPD to schedule a return hearing date. After four months, the RPD scheduled a new hearing since it had not heard from the Applicant. Prior to the new hearing, the Applicant wrote

to the RPD to seek further adjournment as he had not been able to find new counsel. The Applicant attended the hearing as scheduled, and was asked by the RPD member if he was ready to proceed with the hearing. The Applicant responded in the affirmative. The Applicant's claim was ultimately rejected due to issues arising from credibility.

B. *Decision under Review*

[9] The Applicant was represented by new counsel before the RAD.

[10] The RAD considered the Applicant's submissions on the issue of the IFA. The RAD did not re-assess the issue of credibility. The RAD found that the cities of Pokhara and Kathmandu are safe and reasonable IFAs.

[11] The RAD also dealt with the Applicant's argument that he was denied procedural fairness at the RDP hearing because he was not provided with a fair and reasonable opportunity to be represented by counsel, and the interpreter did not provide quality interpretation at the first hearing. Both arguments were rejected by the RAD.

III. Issues

[12] The Applicant raises the following two issues:

- A. *Did the RAD err in its conclusion that a safe and reasonable IFA exists for the Applicant; and*
- B. *Did the RAD err in finding that there was no breach of procedural fairness?*

IV. Standard of Review

[13] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], at para 25. The RAD decision is to be reviewed on the standard of reasonableness: *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296, at para 8. 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. The onus is on the Applicant to demonstrate that the RAD decision is unreasonable. To set aside a decision on this basis, “the reviewing court must be satisfied 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”: *Vavilov*, at para 100.

[14] With respect to the Applicant’s argument that he was denied procedural fairness before the RPD, the Court in *Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148, at para 11, states that the RAD’s review of breach of procedural fairness by the RPD is reviewable by this Court on the reasonableness standard.

V. Analysis

A. *Did the RAD err in its conclusion that a safe and reasonable IFA exists for the Applicant?*

[15] The parties agreed that when determining whether there is an IFA, the decision maker must consider the two-pronged test developed in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA):

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

[16] While the parties agree on the IFA test, they disagree on whether the RAD has applied the test appropriately to the Applicant's situation.

[17] The Applicant submits that neither of the two prongs are met. With regards to the first-prong, the Applicant provides quotations from a number of reports and articles, which speak generally to the existence of the YCL in Nepal in 2011 and 2012; the YCL's violent acts in relation to the Nepalese elections between 2013 and 2014; the involvement in kidnapping and extortion in 2015 by the Biplav Maoists, including a nationwide campaign to collect funds in December 2014; and the YCL's involvement in extortion and intimidation from 2011 to 2013.

[18] The Applicant cites *Gurung v Canada (Citizenship and Immigration)*, 2019 FC 622 [*Gurung*] as particularly "pertinent" given the similarities in the facts in *Gurung* to the present proceeding. In *Gurung*, the applicant claimant alleged that he feared persecution in Nepal at the hands of the Maoists and YCL due to his political opinions. The RPD accepted the applicant's evidence of persecution but found there was an existing IFA in Kathmandu. The RAD dismissed the appeal. On judicial review before this Court, Justice Campbell found the RAD decision to be unreasonable because the applicant's risk should not be based on "profile," but on established personalized risk.

[19] The Applicant argues that the RAD made similar erroneous conclusions as those outlined by Justice Campbell in *Gurung*. The Applicant claims that he has provided copious objective evidence of his personalized risk of persecution by the Maoists and YCL in Nepal and the nationwide network established by the Maoists and YCL in Nepal. The Applicant also submits he has provided evidence of continued risk in Nepal in that the Maoists have recently contacted and threatened his spouse in Nepal to find out his whereabouts.

[20] With regards to the second-prong of the IFA test, the Applicant highlights that, in determining that the IFA is “reasonable in all the circumstances,” the test is flexible and to be assessed on a case-by-case basis, taking into consideration the particular situation of the claimant and the particular country involved. In furtherance of the second-prong of the IFA test, the Applicant submitted several reports and letters from the Nepalese police as evidence that there is no state protection available in Nepal to establish that the potential IFAs are unreasonable.

[21] The Respondent submits that the RAD decision is reasonable as it “did not impermissibly engage in speculation but instead drew logical conclusions from its transparent analysis of the evidence and submissions before it.” The Respondent submits that the RAD’s determination with respect to the IFAs is reasonable.

[22] The Respondent further submits that the RAD reasonably held the Applicant to the principles in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] F.C. 164, at para 15, as it requires the claimant to demonstrate “nothing less than the existence of

conditions which would jeopardize the life and safety of a claimant... [and] actual and concrete evidence of such conditions.”

[23] While I note that the RAD did refer to the Applicant as a “low-profile member of the public” and to the Applicant’s “political profile as a member of the RPP,” the RAD also considered the particular situation of the Applicant throughout its decision while assessing the objective country condition documents about Nepal. The Decision, at paras 47 to 49, referred to National Documentation Package [NDP] evidence suggesting that the YCL has split into two separate youth groups, and other sources reporting that the YCL has been disbanded altogether, resulting in conflicting reports regarding the existence of a YCL nationwide network. Similarly, the NDP suggests that the Maoists are not unified, but divided. Furthermore, the RAD states:

[49] The Appellant moved to Kathmandu in May 2015 and remained there until he came to Canada in October 2015. The Maoists did not find the Appellant at the location where he was living in Kathmandu for months. Although he says he avoided public places and only went out when necessary, he still ran his transportation business from Kathmandu and was not completely in hiding.

[24] In view of the conflicting country condition evidence, and considering the Applicant’s circumstances, the RAD has coherently concluded that there is insufficient evidence showing a nationwide network of Maoists and YCL with the means to locate the Applicant. It is not the role of this Court to reweigh evidence: *Vavilov*, at para 125, and I do not see any basis to disturb the conclusion reached by the RAD.

[25] The RAD’s finding that there was insufficient evidence to support that the Maoists are motivated to locate the Applicant was further supported by the evidence provided by the

Applicant, including the letter left for him in 2017 by the YCL. The RAD noted that the 2017 letter was different from the 2015 letter, as the more recent letter contained no threats and merely sought support in the next election. Given that the 2017 letter specifically states it is “not a warning, but a campaign to bring youths” into their party and that is the reason for the request for support, I find the RAD’s conclusion in this regard reasonable.

[26] At the hearing before this Court, the Applicant further argues that the Applicant’s profile extends beyond his membership in a political party. He was also a soccer player, a businessperson, and a member of a minority community. Yet the Applicant did not elaborate on how these other aspects of his background would put him at serious possibility of persecution in the IFAs.

[27] With respect to the Applicant’s argument that I should apply *Gurung* based on the similarity in facts, I would first note that each case must be assessed on its own merit. In *Gurung*, Justice Campbell noted there was “authoritative nationwide network evidence placed on record and confirmed by the RAD” which constitutes “evidence of a nationwide risk to the Applicant.” In this case, as noted above, the evidence of such a nationwide network is far from clear.

[28] The Applicant also relies on *Gurung* for his position that a conclusion on his welfare in the potential IFAs may not be drawn from the fact that the Applicant’s family members have not had problems. While I agree with this position as a general principle, I note that the Applicant appears to have made his family’s problems a relevant part of his refugee claim as well as his IFA submissions. As the RAD noted, at para 50:

[50] The Appellant's Basis of Claim states that he fears that the Maoists will target his family members and possibly kidnap his son. Yet, the Appellant testified at the RPD 2018 hearing that his wife has been living in Kathmandu since January 2016 and she did not have any problems with the Maoists. He did not speak of any harm or problems concerning his children. His sister also lives in Kathmandu and has not had any problems with the Maoists.

[29] The Applicant himself continued to raise concerns about his family members in support of his IFA argument by noting the threat his wife received in 2019 when she was stopped on the street by two Biplav Maoists demanding payment. The RAD dealt with that evidence when it questioned how two unknown men would recognize the Appellant's wife and connect her to the Applicant, while noting that she has not been contacted again in the nine months since she moved to another city, even though she did not pay the amount demanded. The RAD's decision is reasonable, and demonstrates that it has taken into account the Applicant's specific situation when considering the risks to the Applicant as part of its IFA analysis.

[30] In conclusion on the first prong of the IFA test, the RAD's findings that there is no serious possibility of the Applicant being persecuted in the IFAs was based on a coherent review of the documentary evidence before it, and in so finding, the RAD did take into account the specific interactions between the Applicant and the Maoist factions in question. I therefore find that the Applicant has not satisfied the first prong of the IFA test.

[31] I further find that the Applicant has similarly failed to discharge his burden of satisfying the second prong of the IFA test. In this regard, noting the reports of ongoing political protests throughout Nepal, particularly in Kathmandu, the RAD reasonably found that such incidents largely targeted government, NGOs, or business officials and buildings, and that the Applicant

has not established that these protests reach the level of jeopardizing his life or safety. The RAD's decision also references the documentary evidence provided to it in regards to the willingness or ability of police to protect citizens against Biplav Maoists in any location in Nepal. The country condition documentation and news articles put before the RPD and the RAD by the Applicant suggest that the police do not refuse to take action against the Biplav Maoists – on the contrary, the police have made numerous arrests and detentions of cadres of Maoist faction groups. Based on the record before the RAD, these findings were reasonable.

[32] Finally, the RAD found that no evidence was presented to establish any unreasonable barriers that may prevent the Applicant from finding means of support in the IFAs. Given the Applicant's ability to speak Nepali (the official language of Nepal), Hindi and English, his family network, as well as his history of self-employment (including in Kathmandu), I find the RAD's conclusion reasonable.

[33] In sum, when read in its entirety, I find the RAD's decision reasonably addresses the evidence, using the appropriate legal test, and its conclusion that there is reasonable and safe IFAs in this case, is supported by the evidence before it.

B. *Did the RAD err in finding that there was no breach of procedural fairness?*

[34] The Applicant submits that the RPD breached his rights to procedural fairness. The Applicant claims that the RPD did not provide him a fair and reasonable opportunity to be represented by counsel during the RPD hearing.

[35] The Applicant claims mental health issues as the reason for his inability to find new representation for the RPD hearing. The Applicant provided a letter from a medical doctor in support of his claim.

[36] In response, the Respondent highlights the RAD's findings that the Applicant was provided a four-month adjournment to find new counsel after a breakdown with previous counsel during the RPD hearing. In addition, the Respondent submits that the letter from the walk-in clinic and two prescription receipts, dated just days prior to the resumption of the hearing before the RPD, do not speak to the Applicant's inability to retain counsel.

[37] In my view, the Applicant's argument on procedural fairness falls short for two reasons. First, there is no evidence as to how the Applicant's mental health condition had affected his ability to seek counsel. The doctor's letter that the Applicant relies on consists of just one line, which states: "This patient has been diagnosed with a mental health condition for which he is currently receiving treatment from me." Neither the letter nor the Applicant provide any explanation as to why he was unable to find counsel due to his mental health issues.

[38] Second, while decision makers shall consider a party's request for accommodation (including an adjournment request) due to their disability, it would be inappropriate for a decision maker to assume that a person with mental health condition will automatically lack the requisite capacity to seek counsel or otherwise engage in legal proceedings. Such an assumption has the effect of reinforcing negative stereotypes about people with mental health conditions and undermine their right to autonomy and agency.

[39] In this case, given that the Applicant has not provided any explanation to the RPD linking his mental health condition to his difficulties in retaining counsel, it was thus reasonable for the RPD to proceed with the hearing with the Applicant being unrepresented, and for the RAD to find there has been no breach of procedural fairness.

VI. Conclusion

[40] For the reasons summarized above the application for judicial review is dismissed.

[41] Neither party proposed a serious question of general importance for certification and I find that none arises.

JUDGMENT in IMM-5526-20

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

DOCKET: IMM-5526-20

STYLE OF CAUSE: MANOJ THAPA MAGAR v THE MINISTER OF
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