Federal Court  Cour fédérale

Date: 20221209

Docket: IMM-1076-22

Citation: 2022 FC 1700

Ottawa, Ontario, December 9, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

DEEPAK KUMAR
HARPREET KAUR
KAVYA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Deepak Kumar, his wife, Harpreet Kaur, and their daughter Kavya, are citizens of India. They seek judicial review of a decision by the Refugee Appeal Division [RAD], dated January 10, 2022, to dismiss the Applicants' appeal and confirm the decision of the Refugee Protection Division [RPD] to reject their claim for refugee protection,

finding that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Applicants allege that they fear persecution from the Punjab and Delhi police, as well as militants and criminal groups, because the police falsely accused Mr. Kumar of being involved with anti-nationals and militants after he was caught by the police with two bags of firearms, ammunition and drugs in the trunk of his taxi. Mr. Kumar states that when his taxi was stopped at a police roadblock, the two passengers he was driving ran away, leaving the illegal items behind in his taxi.

[3] The RPD rejected the Applicants' claim on the basis of inconsistencies and omissions in the testimony and evidence that impacted Mr. Kumar's credibility, as well as the existence of an Internal Flight Alternative [IFA], namely in New Delhi, Mumbai, Kolkata and Bangalore. The determinative issue for the RAD was the existence of an IFA in Mumbai, Kolkata and Bangalore.

[4] The Applicants submit that the RAD: (i) failed to consider the prohibition of return to a substantial risk of torture and Article 3 of the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [Convention Against Torture]; (ii) erred in its assessment of the IFA and the applicable legal criteria; and (iii) erred by ignoring the Gender Guidelines in a case involving a rape victim.

[5] The Respondent submits that the RAD reasonably concluded that an IFA exists. The Respondent pleads that the Ludhiana police threatened and harassed the Applicants in order to obtain bribes, and adds that no serious possibility of persecution exists in the IFA given that Mr. Kumar is not the subject of an official investigation, warrant, or charge. The Respondent further submits that the Applicants did not raise the Gender Guidelines before the RAD, and in any event, the RPD and the RAD complied with them.

[6] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[7] The Applicants have raised a number of issues, which I reformulate as follows:

A. Did the RAD err by failing to address Article 3 of the Convention Against Torture, Canada's international obligations and the risk of torture should the Applicants be returned to India?

B. Did the RAD err in its assessment of the IFA?

C. Did the RAD err by not considering the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines]?

[8] At the hearing, the parties agreed that the standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A

reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicants, the parties challenging the decision, who bears the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court 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", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[9] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). A reasonableness review also is not a "line-by-line treasure hunt for error," the reviewing court simply must be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102, 104).

III. Analysis

A. *Did the RAD err by failing to address Article 3 of the Convention Against Torture, Canada's international obligations and the risk of torture should the Applicants be returned to India?*

[10] In their written submissions, the Applicants spent a considerable amount of pages on arguments related to Article 3 of the Convention Against Torture, Canada's international obligations to comply with international instruments, and the risk of torture should the Applicants be returned. The Applicants cite a number of authorities including a judgment of the European Court of Human Rights (*Chahal v United Kingdom (1996)*, 23 EHRR 413 [*Chahal*]), a decision of the Committee against Torture of the United Nations, and a decision of the International Court of Justice.

[11] In their written submissions, the Applicants plead that Mr. Kumar and Ms. Kaur were severely tortured at the hands of the police officers, and given torture is a human rights violation, these principles ought to have been considered in the RAD's decision.

[12] During oral argument, when asked about their written submissions on this point, the Applicants acknowledged that this line of argument has been rejected by this Court in the past, but suggested that these fundamental principles of human rights should nevertheless be taken into account as a lens through which to assess the RAD's analysis.

[13] I am not persuaded that the above-mentioned instruments ought to have influenced the RAD's analysis of the IFA. The approach to be taken by the RAD, when conducting an IFA analysis, is set out in section III(B) of this judgment below. The Applicants are not currently facing removal. Consequently, under such circumstances, these arguments have consistently been rejected by this Court on the basis that they are premature (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 164 at para 11; *Singh v Canada (Citizenship and Immigration)*, 2021

FC 341 at paras 15-18; *Ogiemwonyi v Canada (Citizenship and Immigration)*, 2021 FC 346 at paras 38-39; *Davila Valdez v Canada (Citizenship and Immigration)*, 2022 FC 596 at paras 21-22).

B. *Did the RAD err in its assessment of the IFA?*

[14] The analysis of an IFA is based on the principle that international protection can only be offered to claimants in cases where the country of origin is unable to provide that person with adequate protection everywhere within their territory (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 26). It is well established that international protection is a measure of last resort, as such, if claimants can safely and reasonably relocate within their country of nationality, they are expected to do so rather than seek refugee protection in Canada (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7). Consequently, if a claimant has a viable IFA, this will negate a claim for refugee protection under either section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, regardless of the merits of other aspects of the claim (*Ibid*).

[15] The test for establishing the viability of an IFA is two-pronged. Both prongs must be satisfied in order to make a finding that a claimant has an IFA. The first prong consists of establishing, on a balance of probabilities, that there is no serious possibility of the claimant being subject to persecution in the proposed IFA. In the context of section 97, it must be established that the claimant would not be personally subjected to a section 97 danger or risk in the proposed IFA. The second prong requires that the conditions in the proposed IFA be such that it would not be unreasonable, upon consideration of all the circumstances, including of the

claimant's personal circumstances, for the claimant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (FCA) at 597-598; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10-12; *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 9; *Mora Alcca v Canada (Citizenship and Immigration)*, 2020 FC 236 at para 5 [*Mora Alcca*]; *Souleyman v Canada (Citizenship and Immigration)*, 2020 FC 708 at para 17).

[16] It is a refugee claimant, and not a respondent or the RAD, who bears the onus of demonstrating that the IFA is unreasonable (*Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106 at para 21). As stated by Justice René LeBlanc in *Mora Alcca*, the onus is an exacting one:

> [14] I am well aware that the onus of demonstrating that an IFA is unreasonable in a given case, an onus that rests with the claimant, is an exacting one. In fact, it requires nothing less than demonstrating the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions.
>
> [Citations omitted.]

[17] In order to demonstrate that an IFA is unreasonable, the Applicants must provide actual and concrete evidence of the existence of conditions that would jeopardize the life and safety of the Applicants in relocating to the IFA. The Applicants submit that they are not requesting that this Court re-weigh the evidence. Rather, they allege that the RAD erred in two main respects.

[18] First, the Applicants submit that the RAD overemphasized the importance of the lack of a First Incident Report [FIR] by police in India. The Applicants plead that even if there is no FIR

or official charge, Mr. Kumar nevertheless has the profile of a person of interest because he has been accused of being a terrorist and a militant, which engages the security of the state. The Applicants argue that the objective evidence demonstrates that police departments will communicate with each other about such persons across state lines.

[19] The Respondent highlights that the Applicants' own evidence was that no complaints or charges were filed by the police against Mr. Kumar (despite threatening to do so). There was no official arrest or a warrant, he was not brought before a court, there was no FIR, and there was no evidence that anything was documented by the police or entered into a database. The Respondent submits that the RAD reasonably concluded, based on the Applicants' own evidence, that there was only a local interest in extorting the family.

[20] The RAD's findings on the IFA are essentially factual, are based on its assessment of the evidence, are within its area of expertise and thus require a high degree of deference from this Court (*Singh v Canada (Citizenship and Immigration),* 2021 FC 459 at para 23). Having considered the evidentiary record before the RAD, including the testimonial evidence, I am not persuaded that the RAD committed a reviewable error in assessing the evidence of risk in the IFA. It was not, in my view, unreasonable for the RAD to conclude, given Mr. Kumar's profile, that there is no serious possibility that the Punjab police will pursue the Applicants to the IFA or that the police in the IFAs would have any interest in them.

[21] The Applicants rely on Justice B. Richard Bell's decision in *Bansal v Canada (Citizenship and Immigration),* 2020 FC 531 [*Bansal*] for the proposition that it was an error on

the part of the RAD not to conclude that the allegations against Mr. Kumar were sufficiently serious to give rise to interstate communications between the police forces. I find *Bansal* to be distinguishable on the basis that the evidence in *Bansal* showed that the police were being utilized by an agent of persecution to locate the applicant and Justice Bell found the charges brought against the applicant were serious. In the matter at hand, no charges have been brought and the agents of persecution differ.

[22] Second, the Applicants submit that the RAD failed to appreciate the ability of the police to use systems at their disposal to track them. The Applicants refer to Item 10.6 of the National Documentation Package [NDP], and submits that it is evidence that the Applicants would be unable to live a normal life in India.

[23] The Respondent submits that it is not for this Court to reassess the evidence considered by the RAD, highlighting that the RAD considered the issues raised by the Applicants with respect to the Crime and Criminal Tracking Network and System [CCTNS] and the tenant verification process.

[24] I find that the Applicants' arguments with respect to this issue amount to disagreement with the RAD's assessment of the evidence, and as such, there is no basis upon which for this Court to intervene. As noted above, it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). The RAD considered the documentary evidence pertaining to the CCTNS and the tenant verification process. In fact, the RAD expressly referenced Item 10.6 of the NDP on

surveillance by state authorities and the CCTNS, to which the Applicants refer; Item 10.13 on Police databases, the CCTNS and the tenant verification system; and Item 14.8 on the tenant verification system.

[25] The Applicants have not identified a particular section or page of the NDP that would evidence an error; rather they simply allege that the RAD erred in its comprehension of the evidence. An allegation such as this is insufficient to satisfy their onus of demonstrating that the RAD's findings are unreasonable.

C. *Did the RAD err by not considering the Chairperson* Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution *[Guidelines]?*

[26] The Guidelines are used to ensure that gender-based claims are heard with sensitivity (*Munoz v Canada (Citizenship and Immigration)*, 2006 FC 1273 at para 33 [*Munoz*]). The application of the Guidelines in the context of judicial review has been summarized by my colleague Justice Jocelyne Gagné in *Boluka v Canada (Citizenship and Immigration)*, 2015 FC 37 [*Boluka*]:

> [16] The applicant is required to demonstrate a lack of understanding or insensitivity on the RPD's part to convince the Court that the Guidelines have not been applied (*Sandoval Mares v Canada (Minister of Citizenship and Immigration)*, 2013 FC 297 at para 43). Further, this Court has found that the RPD's failure to specifically refer to the Guidelines in its reasons does not, in and of itself, demonstrate insensitivity (*Akinbinu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 581) and mere failure to consider the Guidelines is not fatal to a decision (*Higbogun*, above at para 65).

[27] The purpose of the Guidelines is to ensure that the decision maker is sensitive to the difficulties an applicant may face when testifying in the context of a gender-based claim (*Konecoglu v Canada (Citizenship and Immigration)*, 2021 FC 1370 at para 26 and the cases cited therein [*Konecoglu*]). The Gender Guidelines do not, however, serve to cure all deficiencies in an applicant's evidence (*Konecoglu* at para 26; *Yu v Canada (Citizenship and Immigration)*, 2021 FC 625 at para 22).

[28] In addition, the "spirit" of the Guidelines may be followed by means of active listening (*Iqbal v Canada (Citizenship and Immigration)*, 2012 FC 1338 at 40; *Munoz* at 33).

[29] The Applicants submit that because Ms. Kaur was detained by the police in Ludhiana and sexually assaulted, the RAD erred by ignoring the Guidelines. The Applicants plead that this is a central element of the case which was not addressed and should have been taken into account by the RAD in the context of its analysis of the IFA. The Applicants argue that instead, the RAD focused on the issues of employment and language.

[30] The Respondent submits the following: (i) the Guidelines were not raised by the Applicants on appeal to the RAD and as such it is improper for this Court to grant judicial review on a ground not raised before the RAD; (ii) the RPD mentioned and applied the Guidelines; (iii) the main target of the police is Mr. Kumar, and Ms. Kaur was only detained because the police could not locate him at their residence, so this is not a gender-based claim; (iv) the Applicants have failed to identify how the RAD lacked sensitivity to Ms. Kaur's experience; and (v) it is not fatal to a decision to not mention the Guidelines.

[31] I agree with the Respondent that the Applicants never raised the Guidelines or the RPD's application of them in their submissions to the RAD, nor did they refer to any gender-based factors affecting Ms. Kaur in the proposed IFAs. Rather the submissions to the RAD addressed the Applicants' level of education, business and loan opportunities, and the lifestyle they have become accustomed to in Canada. The RAD's reasons were responsive to the submissions made to it. The RAD can hardly be faulted for not considering a submission that was not put to it (*Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14; *Enweliku v Canada (Citizenship and Immigration)*, 2022 FC 228 at para 42).

[32] Furthermore, when questioned at the hearing, the Applicants were unable to indicate to the Court to any place in the transcript, the record, the RPD decision or the RAD decision where the Guidelines were not followed with respect to Ms. Kaur. The Applicants were also unable to point to a specific portion or section of the Guidelines that were not followed. While the Applicants submit that the RAD erred by failing to mention the Guidelines, a mere failure to mention the Gender Guidelines is not fatal to a decision (*Boluka* at para 16). I note that the RPD expressly mentioned that they were applying the Guidelines.

[33] The Guidelines are intended to ensure that gender-based claims are heard with compassion and sensitivity and there is nothing in the present record to indicate that this was not the case. On the contrary, despite the fact that Ms. Kaur's assault by the police was not raised by the Applicants in the context of their submissions on the IFA, the RAD decided nevertheless to consider it in its analysis:

> [59] I have also considered that the adult Appellants allege that they were tortured by Punjab police and that the adult Associate

> Appellant alleges that she was tortured and sexually assaulted by Punjab police. However, I have already found that there is not a serious possibility that the Punjab police will pursue the Appellants in the IFA. The Appellants have not raised any additional arguments before the RPD or on appeal regarding the impact of their experiences in detention on the reasonableness of relocating within India.

[34] The Applicants have failed to persuade me that the RAD committed a reviewable error by failing to mention the Gender Guidelines.

IV. Conclusion

[35] For the reasons set out above, I am of the view that the Applicants have failed to meet their burden of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). I therefore dismiss this application for judicial review.

[36] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-1076-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed;

2. The style of cause is amended to name the Minister of Citizenship and Immigration as the proper Respondent; and

3. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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