Federal Court  Cour fédérale

Date: 20221221

Docket: IMM-48-22

Citation: 2022 FC 1782

Ottawa, Ontario, December 21, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

PARAMJEET KAUR THIND

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Paramjeet Kaur Thind, is a citizen of India. She seeks judicial review of a decision by the Refugee Appeal Division [RAD], dated December 13, 2021, to dismiss the Applicant's appeal and confirm the decision of the Refugee Protection Division [RPD] to reject her claim for refugee protection, finding that she is neither a Convention refugee nor a person in

need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Applicant alleges a fear of violence and persecution at the hands of the Punjab police. Both the RPD and the RAD considered the determinative issue to be the existence of an Internal Flight Alternative [IFA] in the cities of Mumbai and Bengaluru.

[3] The Applicant pleads that the RAD erred by failing to: (i) consider the most recent version of the National Documentation Package [NDP] for India; and (ii) address the testimonial and documentary evidence and provide adequate reasons in the context of its assessment of the reasonableness of the proposed IFAs.

[4] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicant has persuaded me that the RAD's decision is unreasonable with respect to the RAD's assessment of the reasonableness of the IFA.

[5] For the reasons below, this application for judicial review is therefore allowed.

II. Issues and Standard of Review

[6] The two issues in the present judicial review are:

A. Did the RAD err by failing to consider the most recent version of the NDP for India?

B. Did the RAD err in its assessment of the reasonableness of the proposed IFAs?

[7] With respect to the first issue, the Applicant argues that the RAD's error was a breach of procedural fairness. Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The focus of the reviewing court is essentially whether the procedure followed by the decision maker was fair and just (*Canadian Pacific* at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[8] With respect to the second issue, reasonableness is a deferential, but robust, standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13 [*Vavilov*]). It is the Applicant, the party challenging the decision, who bears the burden of demonstrating that it is unreasonable (*Vavilov* at para 100). In conducting a reasonableness review, the Court must 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).

III. Analysis

[9] The two issues raised by the Applicant relate to the RAD's analysis of whether the Applicant has a viable IFA. As such, it is worthwhile setting out the applicable test for establishing the viability of an IFA.

[10] 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. 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).

[11] 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.]

[12] In order to demonstrate that an IFA is unreasonable, the Applicant must provide actual and concrete evidence of the existence of conditions that would jeopardize the life and safety of the Applicant in relocating to the IFA.

A. *Did the RAD err by failing to consider the most recent version of the NDP for India?*

[13] With respect to the first prong of the IFA test, the Applicant pleads that the RAD erred by failing to refer to the most recent version of the NDP for India. In particular, the Applicant pleads that the documentary evidence relied upon by the RAD to find that there was no serious possibility that she would be persecuted in the IFA, has since been removed from the NDP.

[14] The Applicant submits that removal of the documentation from the NDP is the equivalent of it ceasing to exist in the record, legally speaking. As such, the Applicant argues, the RAD breached procedural fairness by relying on documentation that was not, legally speaking, in the record.

[15] The Applicant pleads that it is not for the Applicant, the Respondent or the Court to assess whether the documentation in the new NDP is novel, different, or significant, as compared to the previous version. Rather, according to the Applicant, the RAD had the obligation to consider the latest version of the NDP and the failure to do so is a breach of procedural fairness.

[16] The Respondent submits that the NDP was updated, and the documents were replaced with documents that were not significantly different or did not demonstrate a clear change in the country conditions. The Respondent submits that it was the Applicant who bears the burden of

demonstrating that the RAD erred. The Respondent pleads that neither the older versions nor the updated versions of the NDP documents were included in the Applicant's Record, and as such the Applicant is not in a position to argue before this Court that the older versions of the documents are not reliable and that there is different, novel and significant information in the new versions.

[17] The Respondent further submits that the RAD's decision was responsive to the Applicant's arguments, as it referenced the documents raised by the Applicant in her submissions on appeal. Moreover, the Respondent states that the "Policy on National Documentation Packages in Refugee Determination Proceedings" provides that the RAD will disclose to the parties new NDP documents only when it wishes to rely upon them. In the present matter, the RAD did not provide the Applicant with a notice and an opportunity to respond to any new or different information, which it would have been obliged to do if it relied on anything novel or different.

[18] I am not persuaded that the RAD breached procedural fairness. Where recent NDP information arises after an applicant has perfected their appeal and made their submissions and that information is different and shows a change in the general country conditions, an applicant must be advised if the RAD is to rely on that information. In such circumstances, a failure to advise an applicant and provide them with an opportunity to make submissions in response to the new information, where that information is sufficiently different, novel and significant, is a breach of procedural fairness (*Zhang v Canada (Citizenship and Immigration)*, 2015 FC 1031 at paras 55, 60-62).

[19] In a similar vein, in *Zheng v Canada (Citizenship and Immigration)*, 2011 FC 1359 [*Zheng*], Justice Richard G. Mosley considered the situation where the Board relied on a document that had been removed from the NDP and replaced by an updated document. The document had not been disclosed to the applicant nor was it found in the NDP. Justice Mosley concluded that the non-disclosed document presented a more favourable view of the situation than the updated document. Consequently, Justice Mosley found that the Board's reliance on an earlier and more favourable document that was not disclosed to the applicant was a breach of procedural fairness (*Zheng* at paras 9-13). Moreover, he found that the changes in the new document were not so trivial so as to enable him to find that the decision maker would have reached the same conclusion notwithstanding the breach of procedural fairness (para 13).

[20] In the present matter, the documents contained in the earlier NDP were not only known by the Applicant, she relied upon them for the purposes of her appeal before the RAD. As such, it cannot be said that she was unaware of documents that she in fact relied upon.

[21] Furthermore, I disagree with the Applicant that the fact that the RAD relied upon a version of the NDP in force at the time of the appeal, but updated by the time of the RAD's decision, is in itself a breach of procedural fairness. The Applicant's view that, legally speaking, the documents suddenly no longer existed in the record the moment the NDP was updated is not an appropriate characterization of the situation.

[22] Rather, one must ascertain whether the updated information or documentation was sufficiently different, novel and significant such that the RAD's reference to documentation in

the previous NDP constitutes a reviewable error (*Siddique v Canada (Citizenship and Immigration)*, 2022 FC 964 at paras 20-25 [*Siddique*]; *Adnani v Canada (Citizenship and Immigration)*, 2020 FC 21 at paras 13-19 [*Adnani*]; *Ding v Canada (Citizenship and Immigration)*, 2014 FC 820 at paras 11-13 [*Ding*]). Where the updated information is not sufficiently different, novel and significant, or, in other words, where there are no material differences or changes in substance, then there is simply no breach of procedural fairness (*Ding* at para 13; *Adnani* at para 19; *Worku v Canada (Citizenship and Immigration)*, 2019 FC 784 at para 33; *Talab v Canada (Citizenship and Immigration)*, 2022 FC 747 at para 40 [*Talab*]; *Siddique* at para 21).

[23] It is the Applicant who bears the burden of demonstrating that the RAD breached procedural fairness, and as such must demonstrate that the updated documents are sufficiently different, novel and significant (*Ding* at para 13; *Talab* at para 40).

[24] In this respect, the Applicant has not included the updated NDP documents in the Applicant's Record. The Applicant would have been entitled to include any relevant portions of the updated NDP in her record as new evidence, as it would have been filed in support of an alleged breach of procedural fairness (*Adnani* at paras 13-14). Rather, the Applicant has relied on her argument that the older NDP documents no longer existed, legally speaking, in the record before the RAD once they had been removed, and in any event the exercise of comparing the documentation is one for the RAD, not this Court, the Applicant or the Respondent.

[25] While the Applicant did not provide any argument whatsoever as to the differences between contents of the NDP documentation referenced by the RAD and the documents in the updated NDP, the Applicant did identify that Documents 3.16, 10.13, 14.4 and 14.9 were removed from the NDP dated April 16, 2021. I note that for the updated NDP dated June 30, 2021, the titles of three of the four documents that replaced the aforementioned documents are effectively identical.

[26] I conclude that the Applicant has not met her burden of demonstrating that the RAD's decision ought to be set aside on this basis. She has failed to persuade me that the documents referenced by the RAD are sufficiently different, novel and significant, from those in the updated NDP, so as to constitute a breach of procedural fairness.

B. *Did the RAD err in its assessment of the reasonableness of the proposed IFAs?*

[27] With respect to the second prong of the IFA test, the Applicant submits that the RAD unreasonably found that she could relocate to the proposed IFAs. In particular, the Applicant pleads that the RAD engaged in a microscopic analysis of the documentary evidence, failed to consider the NDP Document 5.11 on the situation of single women and women who head their own households, and failed to address contradictory evidence. The Applicant further submits that the RAD erred in concluding that her husband would join her and thus unreasonably found that she had the profile of a married woman. The Applicant argues that she ought to be considered a single woman or a woman who heads her own household.

[28] The Respondent submits that the Applicant is in fact married; she has not been abandoned or divorced by her husband; they remain in contact; she has three children with her husband; and she testified that she hoped her husband would join her. The Respondent highlights that the RAD did in fact consider and specifically referenced the NDP Document 5.11, however, the RAD reasonably concluded that the Applicant would not be faced with the issues described therein on the basis that she is a married woman. The Respondent states that a number of the issues facing women, identified in the NDP Document 5.11, relate to them not being able to indicate a husband's name on forms for government services or accommodation. These barriers do not apply to the Applicant.

[29] The Respondent further submits it was the Applicant's burden to demonstrate that she is at serious risk of being persecuted in the IFA and it would be unreasonable to relocate there, and she has failed to do so.

[30] As to the Applicant's profile, the RAD characterized it as follows:

> The Appellant is a 44-year-old married woman with three children. She has 10 years of education, work experience in farming and in manufacturing, travelled to both the UK and Canada and applied to US visas on four occasions before coming to Canada to claim refugee protection. In her testimony the Appellant clearly stated that she hoped that she would be joined by her husband and children in the IFAs.

[31] Consequently, the RAD determined that the Applicant's profile "as a married woman who could be joined in the IFA by her family" differed from those who are vulnerable to gender-based violence and single women who face a number of barriers.

[32] During the Applicant's testimony before the RPD, she testified that her husband is in hiding and that he would not join her in either Mumbai or Bengaluru. After stating the ages of her children who live with their grandparents, the Applicant was asked by her counsel whether she would wish to be reunited with her family. She responded that she would wish to live with her children, but raised concerns that their departure from the village, the use of their identity documents for school registration, and the subsequent use of social media would alert the police to her location.

[33] There is a disconnect between the RAD's reasons and the testimony upon which it is based. Moreover, it is not clear from the RAD's reasons whether: (i) it was irrelevant for the purposes of the Applicant's profile whether her husband in fact joins her or not; (ii) the RAD simply did not believe her that her husband and family could not join her; or (iii) there was insufficient evidence that she would have the profile of a single woman or a woman who heads her own household without male support. For these reasons, I find that the RAD's treatment of the Applicant's profile in the context of its analysis of the reasonableness of the IFA to be unreasonable.

IV. Conclusion

[34] For the foregoing reasons, this application for judicial review is allowed. The RAD's decision is hereby set aside and the matter is remitted to a different panel for redetermination. No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-48-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is allowed;
2. The RAD's decision is set aside and the matter is remitted back to a differently constituted panel for redetermination; and
3. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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