

Federal Court



Cour fédérale

Date: 20230222

Docket: IMM-9175-21

Citation: 2023 FC 259

Ottawa, Ontario, February 22, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

MADHANAGANESH VARATHARAJAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] On this application for judicial review, Mr. Madhanaganesh Varatharajan challenges a November 17, 2021 decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board that dismissed his appeal and confirmed the Refugee Protection Division's (RPD) determination that he is not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Varatharajan fears persecution or harm by the police in India. He alleges that in the course of his work as a delivery driver, he was stopped and searched by police officers having no cause to do so. The officers found a quantity of marijuana in Mr. Varatharajan's possession, which he alleges was planted. Mr. Varatharajan suspects the person behind these events was a former co-worker who accused Mr. Varatharajan of jeopardizing of his job.

[3] Mr. Varatharajan states he was subjected to physical violence while in police custody. He bribed a police officer to provide access to a telephone and contacted a lawyer and family friend with political connections, who arranged for his release with more bribes. The lawyer told Mr. Varatharajan he had been accused of drug trafficking and could face a 10-year sentence, as well as charges for escaping police custody. The lawyer and Mr. Varatharajan's father arranged to smuggle Mr. Varatharajan out of the country. Mr. Varatharajan states the police continued to search for him after he left India.

[4] The RAD found that Mr. Varatharajan had not established a nexus to a section 96 Convention ground of persecution, and assessed his claim under section 97 of the *IRPA*. In this regard, the RAD confirmed the RPD's determination that Mr. Varatharajan cannot avail himself of protection under section 97. The RAD found Mr. Varatharajan had not established that removal to India would subject him to a risk of cruel and unusual treatment or punishment, or that any such risk would not be inherent or incidental to lawful sanctions according to subparagraph 97(1)(b)(iii) of the *IRPA*.

[5] Mr. Varatharajan submits the RAD committed errors in its analysis of the lawful sanctions exception, rendering the decision unreasonable. First, he states the RAD erred by considering the exception at all. Since the RAD accepted his core allegations as credible, it cannot be lawful to face sanctions for a crime that he did not commit. Second, even if the RAD did not err by considering the lawful sanctions exception, Mr. Varatharajan states it erred in assessing whether the elements of the exception were met in the circumstances of his case.

[6] The respondent submits the RAD reasonably determined that Mr. Varatharajan's evidence did not establish he would face a section 97 risk to life or risk of cruel and unusual treatment or punishment in India. This first element of the lawful sanctions test is the same analysis as for any claim of risk under section 97 of the *IPRA*, and it was determinative in Mr. Varatharajan's case. The RAD provided a detailed explanation of the evidence and how it was lacking, and the respondent submits Mr. Varatharajan's arguments on judicial review amount to an impermissible attempt to reverse the onus by asserting there was insufficient evidence for the RAD to conclude he would not be at risk.

[7] The reasonableness of the RAD's decision is reviewed according to the guiding principles set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. Reasonableness is a deferential but robust standard of review: *Vavilov* at paras 12-13, 75 and 85. In applying the reasonableness standard, the reviewing court determines whether the decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker:

Vavilov at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[8] Subsection 97(1)(b)(iii) of the *IRPA* provides that:

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

[...]

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

[...]

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards...

[9] In *Canada (Minister of Citizenship and Immigration) v Harvey*, 2013 FC 717 at paragraph 41 [*Harvey*], this Court articulated the elements of the test under subparagraph 97(1)(b)(iii) as follows:

- a. The claimant must demonstrate that they face a risk to life or a risk of cruel and unusual treatment or punishment (as that term is understood in Canadian law) in their country of origin;
- b. The treatment or punishment in question must not be inherent or incidental to lawful sanctions; and
- c. If the treatment or punishment is inherent or incidental to lawful sanctions, the claimant must demonstrate the treatment or punishment was imposed in disregard of accepted international standards.

[10] In other words, where a claim for protection is based on a risk of cruel or unusual treatment or punishment that is inherent or incidental to lawful sanctions, it is not sufficient for

the punishment to constitute cruel and unusual punishment in Canada; the claimant must also establish that the punishment is imposed in disregard of international standards: *Harvey* at paras 50-51.

[11] Mr. Varatharajan states that the RAD erred by assuming he was arrested on genuine charges, when in fact his risk arises from a criminal conspiracy between a former co-worker bent on retaliation and officers who were acting outside of the law. Mr. Varatharajan had alleged that the drugs were planted and found in a search that was co-ordinated between the co-worker and corrupt police officers. Since the RAD assumed his core allegations to be true, any sanctions he would face cannot be lawful, and subparagraph 97(1)(b)(iii) is inapplicable to his claim for protection. Furthermore, Mr. Varatharajan submits the RAD failed to address how country condition evidence of high rates of bribery and corruption in the Indian police force affects whether he would be subject to legitimate legal sanctions.

[12] Mr. Varatharajan states the RAD also erred in assessing whether the three elements of the lawful sanctions exception were met in the circumstances of his case. He alleges the RAD erred as follows:

- i. the RAD found that the first element of the test had not been met without considering and explaining why it did not accept Mr. Varatharajan's evidence that he was arrested and accused of possessing marijuana that was planted by the police, and that the police had continued to look for him after he left India;
- ii. the RAD imposed a requirement of a "serious prison sentence" when the duration of time spent in prison has little bearing on the risk to life or risk of cruel and

unusual treatment or punishment based on the human rights violations that occur in the Indian prison system;

- iii. the RAD failed to assess the second element of the test, and simply asserted that countries have the authority to enact laws and impose penalties to control drugs; the RAD's finding that the second element of the test was met also contradicted other findings of the RAD, including findings that there was insufficient evidence to establish that Mr. Varatharajan would be subject to cruel and unusual punishment because there was no evidence he had been charged—it is unclear how the treatment or punishment in question could be inherent or incidental to lawful sanctions if there have been no formal charges and Mr. Varatharajan is uncertain of whether he has been sentenced;
- iv. with respect to the third element, the RAD faulted Mr. Varatharajan for failing to provide substantive submissions on whether the prospective punishment would meet international norms, without adequately addressing his submissions that the RPD had committed a reviewable error by failing to identify the “accepted international standards” in terms of cruel and unusual treatment; the RAD's decision lacked transparency for failing to provide guidance on the international standards;
- v. also, the RAD did not justify the manner of determining that Indian prison systems are in compliance with international standards, in view of country condition evidence establishing that treatment of prisoners in India fell below minimum standards set by the United Nations; the country condition evidence showed high rates of abuse in Indian prisons, and the RAD acknowledged that

there was country condition evidence suggesting that the conditions in the Indian prison system are harsh, violent, and at times life threatening.

[13] Mr. Varatharajan has not established that the RAD's decision was unreasonable. In my view, Mr. Varatharajan misunderstands the RAD's reasons, and alleges errors with findings that are taken out of context. Fundamentally, the RAD denied Mr. Varatharajan's claim because there was insufficient evidence to establish, on a balance of probabilities, that removal to India would subject him to a risk to his life or a risk of cruel and unusual treatment or punishment. As the respondent notes, the presumption of truthfulness does not avoid the need for sufficient evidence to support key elements in a claim, and an applicant's belief may be limited in what it can establish as objectively true: *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 27; *Barros Barros v Canada (Minister of Citizenship and Immigration)*, 2022 FC 9 at paras 48-50.

[14] Mr. Varatharajan alleges he would face a risk to his life or risk of cruel and unusual treatment or punishment in India by being imprisoned for a crime he did not commit; however, I agree with the respondent that Mr. Varatharajan had not met the first step of the analysis in *Harvey*. The RAD found there was no evidence that Mr. Varatharajan was charged with a crime, that a warrant or summons was issued for his arrest, or that the police have an interest in apprehending him. Furthermore, Mr. Varatharajan's evidence did not indicate what charge he would face if the police decided to prosecute, or whether he was considered a fugitive. The RAD noted that there was no evidence Mr. Varatharajan made any effort to determine whether

he had been charged with an offense in India or whether the police remained interested in him as a result of events that had occurred more than three years earlier.

[15] The RAD noted other deficiencies in the evidence, including that Mr. Varatharajan presented no evidence of the potential penalties he would face in India, such as the likely sentencing range or how a court in India would interpret and apply a sentencing range, and he had not explained how the potential penalties compare with penalties that could be imposed in Canada under similar circumstances. Owing to this lack of evidence, the RAD assessed the Indian sentencing regime based on the available information and made general comparisons to Canadian law, finding that the Indian and Canadian sentencing regimes were not grossly disproportionate.

[16] The RAD acknowledged the country condition evidence of prison conditions in India, but found the risk of cruel and unusual treatment in prison to be “highly speculative”, as Mr. Varatharajan had not been charged or convicted, and there was no evidence of what a sentencing range might be.

[17] Mr. Varatharajan alleges the RAD failed to assess the second element of the lawful sanctions exception. The RAD provided brief reasons in respect of the second element because the RAD found the first element of the test to be determinative, and it reviewed the second and third elements as an alternative. The RAD also noted that Mr. Varatharajan did not contest or challenge the RPD’s findings with respect to the second element. Mr. Varatharajan has not established an error with the RAD’s finding that the alleged risk, which he had described in the

RAD memorandum as a “risk of being sentenced with jail time under the *Narcotic Drugs and Psychotropic Substances Act* in India”, is a risk that is inherent or incidental to lawful sanctions in India according to the second element of the exception.

[18] The RAD acknowledged and fully addressed Mr. Varatharajan’s submissions regarding the third element of the lawful sanctions exception. Mr. Varatharajan argued before the RAD that the RPD had erred by failing to undertake an analysis under the third element, but the RAD explained that the onus was on Mr. Varatharajan to establish the third element was met. The RAD noted this Court’s statements in *Harvey* that the words “unless imposed in disregard of accepted international standards” in subparagraph 97(1)(b)(iii) mean that it is not sufficient for a claimant to establish that they would be subjected to punishment that is considered cruel and unusual under Canadian law. Mr. Varatharajan was required to establish that the treatment or punishment he may face in India would be contrary to international standards, and he provided no evidence on the issue. The RAD also noted this Court’s jurisprudence that the risk of a harsher prison sentence or poorer prison conditions than those in Canada is not itself sufficient to ground a claim under section 97: *You v Canada (Minister of Citizenship and Immigration)*, 2013 FC 100; *Usta v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1525. The RAD concluded there was insufficient evidence to establish that prison conditions in India were contrary to international standards.

[19] In conclusion, Mr. Varatharajan has not established that the RAD’s decision was unreasonable. Accordingly, this application for judicial review is dismissed. The parties did not propose a question for certification and I find there is no question to certify.

JUDGMENT in IMM-9175-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9175-21

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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