Federal Court Cour fédérale

Date: 20230619

Docket: IMM-5530-22

Citation: 2023 FC 839

Ottawa, Ontario, June 19, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

SALINDER KUMAR
USHA RANI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants, Mr. Salinder Kumar and his spouse Ms. Usha Rani, are citizens of India. They sought refugee in Canada based on fear of persecution at the hands of the police in India, particularly the police in their home state of Haryana, and at the hands of the Jat Sikhs of Haryana and other castes. Both the Refugee Protection Division [RPD] and the Refugee Appeal

Division [RAD] found the Applicants had a viable internal flight alternative [IFA] in each Kolkata and Mumbai. The RAD thus confirmed the RPD decision that the Applicants are neither Convention refugees nor persons in need of protection as defined by section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Immigration Act].

[2] The Applicants now seek judicial review of this decision of the RAD.

[3] The test for determining whether a viable IFA exists is two-pronged. First, the RAD must be satisfied on a balance of probabilities that there is no serious possibility that the Applicants will be persecuted in the proposed IFA. Second, the conditions in the proposed IFA must be such that it is not unreasonable for the Applicants to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), FCJ No 1172 (FCA) at para 12; *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), FCJ No 1256 (FCA) at para 13).

[4] Before the Court, the Applicants are challenging the RAD's findings with regard to the first prong of the IFA test – that there is no serious possibility that the Applicants will be persecuted in Kolkata and Mumbai by the Haryana police. They argue that the RAD (1) failed to address the objective documentary evidence of tab 10.2 of the National Documentation Package for India [NDP]; and (2) disregarded the principles entrenched by the Federal Court in *Ali v Canada (Citizenship and Immigration)*, 2020 FC 93 [*Ali*]. The Applicants do not dispute the RAD's conclusion in regards to the second prong of the IFA test.

[5] For the reasons that follow, and considering the applicable standard of review, I will dismiss the application. In brief, considering the evidence before the RAD and the applicable law, I find no basis for the Court to intervene. First, the arguments raised before the Court were raised neither before the RPD nor before the RAD, per the acknowledgment of the Applicants in their Reply Memorandum, and second, in any event, the Applicants have not shown that the decision of the RAD does not bear the hallmarks of reasonableness - justification, transparency and intelligibility – or that it is not justified in relation to the relevant factual and legal constraints that bear on the decision.

II. Context

[6] On March 22, 2018, having received each a Canadian multiple-entry visitor's visa, the Applicants arrived in Canada and claimed protection based on their fear of the Haryana police, the Jat Sikhs in Haryana and other castes. In short, and relevant to this proceeding, in the Basis of Claim forms they signed in March 2018, the Applicants allege that Mr. Kumar, a Jat Sikh himself, is in danger from the police in India, particularly from the police in his home state of Haryana, because the police have accused him of participating in violent Jat Sikh riots in 2017 and have deemed him to be a terrorist; the police are either going to kill him or imprison him. He outlines in particular that on November 13, 2017, he was arrested by the police, who alleged that he had hidden bombs and weapons during the Jat Riots, and detained for two days, beaten and tortured by police, and was only released on payment of a bribe. The Applicants also allege that they fear the Jat Sikhs of Haryana because Mr. Kumar refused to join the Jat Riots and other castes as well, who hold the Jat Sikhs responsible for damage and violence committed during the

Jat Riot. As for Ms. Rani, she claims that she fears maltreatment by the police should she return to India with her husband.

[7] Mr. Kumar amended his Basis of Claim form to indicate that he had received information, since coming to Canada, that the police have visited his father's house and that the police informed his father that Mr. Kumar is a militant involved in the Jat Riots, but also in the recent farmer's agitation in the district, and said they had two witnesses who saw Mr. Kumar supplying weapons during the riots and who say they have Mr. Kumar's confession in their record as well. Mr. Kumar also alleges that the police have visited his aunt in Delhi.

[8] Before the RPD, the Applicants argued, amongst other things, that Mr. Kumar is in the Crime and Criminal Tracking Network and Systems [CCTNS] given that he was arrested and that his father was advised that an informer has provided information to build a criminal case against him. The Applicants thus stressed that the police from Haryana has the capacity to locate them in the IFAs.

[9] The RPD rejected the Applicants' claim, finding that the Applicants have a viable IFA in Kolkata and Mumbai. The RPD did not question the credibility of the Applicants' claims except where specified in the analysis of a possible IFA. The RPD indicated what it determined the factual elements that had been established on balance or probabilities.

[10] The Applicants appealed the RPD decision before the RAD. In their written submissions to the RAD, the Applicants raised that the RPD erred (1) in its finding regarding the capacity of

the police to locate the Applicants in the IFA because (a) they have provided evidence that there is a record against Mr. Kumar that exists with the police, i.e., the police's visit informing Mr. Kumar's father that they have two witnesses and a confession; (b) objective documentary evidence in the NDP for India (items 11.4, 4.4, and 12.4) supports the argument that even though Mr. Kumar is not connected with the riots, the police allegations of militarism make him a target; (c) continuous interest of the police in Mr. Kumar is clear from his testimony that the police continue to search for him in Delhi; (d) the RPD erred in concluding that he would not be in the CCTNS database because of the seriousness of his crimes (i.e., allegations of militarism and terrorism) (NDP items 10.6, 10.2); and (2) in concluding that Mr. Kumar failed to establish that the police has the motivation to search him in Delhi considering that the police have visited Mr. Kumar's father or relatives in Haryana seeking information about Mr. Kumar and what the police told Mr. Kumar's father.

[11] The RAD found that the RPD did not err in its analysis of whether the Applicants had a viable IFA in Kolkata or Mumbai. Essentially, the RAD's analysis on the first prong of the IFA analysis was that the Applicants did not satisfactorily establish that their agents of harm would have the motivation and the means to track them down in the proposed IFAs.

[12] First, the RAD found the Applicants had not established that the police were motivated to pursue them. It considered Mr. Kumar's testimony regarding the police's visit at his aunt in Delhi and his father in Haryana to be vague and imprecise, and ultimately concluded that the information submitted was insufficient to establish a continuing motivation on the part of the police.

[13] Second, the RAD found that the Applicants had not established that the police had the means to pursue them so as to render the two IFAs not viable. The RAD assessed the documentary evidence relating to the tenant verification system and the CCTNS database and considered, *inter alia*, that the NDP indicates that the CCTNS only allows for communication within a state and the portal created in 2017 that allows for the exchange of information between states is limited to individuals who have been charged with crimes. In addition, the RAD noted that the NDP indicates that information on extrajudicial arrests is not incorporated into the CCTNS database and, given that Mr. Kumar testified that he was never charged or brought before a magistrate, it concluded that, on a balance of probabilities, Mr. Kumar's name was not entered into CCTNS and that the portal would not assist in locating him. The RAD concluded as well that the Applicants failed to establish that they are persons of interest or high profile who would be identified in the CCTNS.

[14] This is the decision that is the subject of this application.

III. Parties' positions

[15] The Applicants submit that the RAD committed a reviewable error in its determination that the suggested IFA locations were safe since the agent of harm - the Haryana police - did not have the motivation and means to persecute the Applicants in the suggested IFA locations.

[16] First, the Applicants submit that the said determination was made in spite of the RAD's acknowledgment that the police have accused Mr. Kumar of engaging in terrorism/militancy and

that Mr. Kumar's family members have been visited by the police, whereby the latter inquired as to Mr. Kumar's whereabouts.

[17] The Applicants argue that the RAD's determination regarding the lack of motivation and means of the police to continue pursuing the Applicants in the suggested IFA failed to address the objective documentary evidence that points to the opposite conclusion. Specifically, they point to tab 10.2 of the NDP, which highlights that, in certain extreme and major crimes, including terrorism, the police in India are sufficiently motivated to bring the accused to justice and facilitate "interstate police communication" without making use of any criminal database.

[18] Second, the Applicants submit that the RAD committed a reviewable error by determining Mr. Kumar has viable IFAs in India while also confirming that his family members were visited at their homes by the police in search of him. More specifically, relying on *Ali* at paragraphs 49 to 52 [*Ali*] and *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at paragraphs 20 and 21 [*AB*], they assert that the RAD's determination that the Applicants have viable IFAs in Mumbai and Kolkata was unreasonable since Mr. Kumar's families cannot be expected to continue putting their own lives at risk, which would force Mr. Kumar to hide his new location from his families. They add that the mere fact that the police have visited Mr. Kumar's families at their homes - while insufficient to establish motivation - unquestionably establishes that the police have the means to locate Mr. Kumar, as per the above-cited Federal Court cases of *Ali* and *AB*.

[19] The Applicants add that in light of the foregoing, the RAD's determination that the Applicants have a viable IFAs in Mumbai and Kolkata was unreasonable since Mr. Kumar's families cannot be expected to continue putting their own lives at risk, which would force Mr. Kumar to hide his new location from his family.

[20] The Respondent generally submits that the RAD reasonably found that the Applicants failed to establish that their agents of harm are motivated or have the means to pursue them in the proposed IFAs locations.

IV. Analysis

A. *Standard of review*

[21] I agree with the parties that the issues raised are reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[22] When the reasonableness standard of review is applied, the burden is "on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The Court's focus must be "on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83) to 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). It is not for the Court to substitute its preferred outcome (*Vavilov* at para 99).

B. *Arguments not before the RAD*

[23] As discussed during the hearing, the Court noted that in their Reply Memorandum (paragraph 8), the Applicants stress that they have not argued – either in their Appellants' Memorandum to the RAD nor at their refugee hearing to the RPD – that the tribunal failed to address the objective documentary evidence and to follow the legally-entrenched principle from *Ali*.

[24] It is well established that the Applicants cannot raise before the Court arguments that were not put to the administrative decision maker. The Applicants can hardly fault the RAD for ignoring arguments if they did not raise them in their appeal (*Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at paras 23–24; *Constant v Canada (Citizenship and Immigration)*, 2019 FC 990 at para 25).

[25] Per the Applicants' own acknowledgment, which is confirmed by examining the record, the application for judicial review must be dismissed on that basis alone. As highlighted below, the Applicants' arguments cannot succeed.

C. *The RAD's decision was responsive to the arguments raised by the Applicants*

[26] The Applicants argue before the Court that the RAD failed to address the objective documentary evidence of the NDP 10.2 that highlights that, in certain extreme and major crimes, i.e., notably in terrorism, the police in India are sufficiently motivated to locate a person of interest without making use of any criminal database. Again, this argument was not raised before

the RAD, where the Applicants argued, on the contrary, that given the seriousness of the crime, Mr. Kumar's name would appear in the CCTNS database which would in turn allow the police to locate him.

[27] Before the RAD, in regards to the NDP evidence, the Applicants submitted that "given the serious nature of the allegations, it is more likely than not that the appellants name is in the database and the police, on balance of probabilities, can use all the means available to them to fabricate a case, a confession, witness, an arrest etc. to locate the appellants" [my emphasis] (Appellants' Memorandum to the RAD at para 13). Hence, before the RAD, the Applicants have not argued that the police in India are sufficiently motivated to facilitate "interstate police communication" *without* making use of any criminal database as they are now arguing.

[28] I am thus satisfied that the RAD did not ignore the documentary evidence of the NDP 10.2 that addresses another set of circumstances. The RAD is presumed to have considered this evidence, along with the other evidence, and I am satisfied that it did consider it in combination with the particular circumstances the Applicants presented and the arguments the Applicants raised. The RAD's analysis was responsive to the arguments that were presented, which in this case, was limited to Mr. Kumar's name being in a database and the impact of his name being in the database.

[29] The second argument raised by the Applicants based on this Court's decisions in *Ali* and *AB* was likewise not put to the RAD.

[30] In any event, the Applicants allege that they cannot be said to have a reasonable IFA as Mr. Kumar's family in India has been directly approached about his whereabouts. They allege that it would thus be unreasonable to expect Mr. Kumar's family to place their own lives in danger by denying knowledge of his whereabouts or for Mr. Kumar to be forced to hide from his family.

[31] However, unlike in the Federal Court decisions in *Ali* and *AB* which the Applicants rely upon, the RAD in this case found the evidence was insufficient to establish that the police had indeed attempted to find Mr. Kumar through his family members, a finding that the Applicants have not challenged before the Court.

[32] Hence, both arguments raised by the Applicants are unfounded and cannot succeed.

V. Conclusion

[33] The Applicants have not met their burden to show that the RAD's decision is based on an internally coherent and rational chain of analysis and that it is not justified in relation to the facts and law that constrain the decision maker, per the teachings of *Vavilov*. For these reasons, the application for judicial review will be dismissed.

JUDGMENT in IMM-5530-22

THIS COURT'S JUDGMENT is that :

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5530-22
STYLE OF CAUSE:	SALINDER KUMAR, USHA RANI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 18, 2023
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	JUNE 19, 2023

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