Federal Court  Cour fédérale

Date: 20230809

Docket: IMM-9384-22

Citation: 2023 FC 1092

Toronto, Ontario, August 9, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

TERBOY SOLOMON
LIGY TERBOY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division [RAD], dated September 2, 2022, confirming the refusal of their refugee claim by the Refugee Protection Division [RPD]. The RPD and the RAD concluded that the Applicants had a viable internal flight alternative [IFA] in Bengaluru, India and accordingly, that they were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons set out below, I am dismissing the application, as the Applicants have not identified a reviewable error.

I. Background

[3] The Applicants are a married couple who are citizens of India from the state of Kerala. They claim a fear of persecution at the hands of the Communist Party of India – Marxist [CPI], and the Kerala state police [together, the Agents of Harm].

[4] The Principal Applicant is a supporter of the Indian National Congress Party [Congress Party]. He witnessed an abduction of a Congress Party member (referred to in the RAD decision as "Shammy") by CPI while transporting the Congress Party member as part of his job as a taxi driver. The Principal Applicant recognized one of the offenders as a kingpin of the CPI and after the member was found badly beaten, reported the incident to the Congress Party and then to the police. He was subsequently picked up by the police who brought him to members of the CPI who assaulted him and demanded that he retract his police statement. When he did not do so, the CPI began making inquiries at his home and with his family. The Applicants relocated within India shortly thereafter, and lived in another state (Chennai) for three months before coming to Canada.

[5] The determinative issue for both the RPD and the RAD was the availability of an IFA in Bengaluru.

[6] On the first prong of the IFA test, the RAD found that the Agents of Harm did not have sufficient motivation to pursue the Applicants in the IFA. The RAD found on the reasonable possibility standard that there were no good grounds to fear future persecution in the IFA. It also found it implicit that the Applicants would not be subjected to a personal risk of danger of torture under section 97 of the IRPA. As such, it concluded that neither section 96 nor section 97 had been satisfied.

II. Issues and Standard of Review

[7] The following issues are raised by this application:

A. Did the RAD err by not conducting an independent paragraph 97(1)(a) and (b) analysis?

B. Did the RAD err in concluding that the Agents of Harm lacked sufficient motivation to pursue the Applicants in the IFA?

C. Did the RAD breach procedural fairness by referring to external evidence that was not included in the record?

[8] The parties assert and I agree that the standard of review is reasonableness. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a reasonableness standard are present in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17 and 25.

[9] A reasonable 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 paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2,

31. A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[10] Questions of procedural fairness ask whether the procedure was fair having regard to all of the circumstances with the ultimate question being whether the applicant knew the case it had to meet and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56.

III. Analysis

A. *Did the RAD err by not conducting an independent paragraph 97(1)(a) and (b) analysis?*

[11] The Applicants argue that the RAD made a fatal error by not conducting a separate paragraph 97(1)(a) and (b) analysis. They refer to the Court's decision in *Paramananthalingam v Canada (Citizenship and Immigration)*, 2017 FC 236 [*Paramananthalingam*], where Justice McVeigh held that it was unreasonable in the context of that case (which did not involve an IFA) that the RPD did not conduct a separate section 97 analysis, after dismissing the applicant's claim under section 96. As stated at paragraphs 16-18 of *Paramananthalingam*:

> [16] The purpose of section 97 is to capture those legitimate refugee claimants who may not meet the stringent standards of a well-founded fear of persecution. Despite the lower evidentiary threshold under section 96, proving both objective and subjective fear of persecution is very difficult. Section 97 acts as a safety valve which Parliament created to protect those persons who, even if found lacking credibility, face a personalized risk of harm. It bears repeating here that well-founded fear of persecution and a personalized risk of harm require different analysis.
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> [17] The RPD on these facts unreasonably assumes that if the test under section 96 cannot be met, then neither can the test under section 97. According to the RPD, this is due to the higher

> evidentiary standard under section 97 (balance of probability) than section 96 (serious possibility). What the RPD fails to grasp is that under section 96, the applicant must prove a serious possibility of a well-founded fear of persecution, as opposed to a personalized risk of harm on a balance of probabilities under section 97. To conflate one test with the other is a reviewable error which makes this decision unreasonable.
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> [18] The officer should have commented, even briefly, on whether the Applicant faced a personalized risk upon returning to Sri Lanka. Having none of this information, this Court is left guessing at why the Applicant does not meet the test under section 97. ...

[12] The Applicants acknowledge that the requirement for a separate section 97 analysis, however, is not absolute. In *Paramananthalingam*, Justice McVeigh noted that a section 97 analysis is not necessary in all cases, particularly where a lack of credibility has been shown:

> [19] A separate section 97 analysis does not always need to be done. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paragraph 3, held that:
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> > ….where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[13] Similarly, as noted by the Respondent, where allegations and evidence supporting a section 97 claim are the same as those advanced for section 96, the RAD is under no obligation to undertake a second analysis: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 50.

[14] The principle set out in *Kaur* was recently applied by Justice Walker in *Ali v Canada (Citizenship and Immigration)*, 2019 FC 859 [*Ali*] at paragraphs 43-45 as follows:

[43] The Applicants submit that the RPD's negative credibility findings were not necessarily dispositive of a claim for protection pursuant to section 97 of the IRPA (*Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at paras 14-16). The Respondent submits that there is no obligation for the RPD to conduct an additional section 97 analysis where an applicant's allegations regarding their section 97 claim are the same as those advanced in their section 96 claim (*Kaur* at paras 50-51).

[44] In *Kaur*, Chief Justice Crampton held that there is no categorical duty to conduct a separate section 97 analysis in every case (at para 50):

> [50] The Board is not obliged to conduct a separate analysis under section 97 in each case. Whether it has an obligation to do so will depend on the circumstances of each case (*Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at para 16, 137 ACWS (3d) 604). Where no claims have been made or evidence adduced that would warrant such a separate analysis, one will not be required (*Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at paras 17-18, 254 FTR 244; *Velez*, above at paras 48-51).

[45] In the present case, the basis of the Applicants' claims is fear of persecution in Sudan due to political opinion which is a section 96 nexus. A section 97 analysis by the RPD would have been based on the same facts, allegations and evidence, and would have resulted in the same outcome. The Applicants presented no claims that would warrant a separate section 97 analysis. As stated by Justice Gibson in *Kulendrarajah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 79 at paragraph 13 (see also, *El Achkar v Canada (Citizenship and Immigration)*, 2013 FC 472 at paras 29-32):

> [13] The sole bases for the principal Applicant's claims are Convention grounds, that is to say, ethnicity and membership in a particular group. Since I am satisfied that the RPD's credibility analysis and analysis of risk to the principal Applicant in Colombo is sufficient to support its conclusion that the principal Applicant is not at risk of persecution based on a Convention ground if she were required to return to Sri Lanka, it follows that she is equally not a person in need of protection

> because no other ground to support a need of protection other than a Convention ground was advanced on her behalf and the alleged Convention grounds are not sustainable by reason of the credibility finding. While a more extensive explanation for the RPD's conclusion regarding "person in need of protection" in relation to the principal Applicant might well have been desirable, I am satisfied that its absence does not constitute reviewable error.

[15] In this case, the RAD found the Applicants had a nexus to a Convention ground and thus assessed the Applicants' risk under section 96 of the IRPA. The RAD refused the Applicants' claims because it found there was no reasonable possibility of future persecution in the IFA and that it was implicit that the Applicants would not be subject personally to a danger of torture:

> [34] ... As there is a nexus to a Convention ground, I have assessed the Appellant's risk of persecution pursuant to section 96 of the IRPA. In doing so, I have concluded that the Appellants do not face a reasonable possibility of future persecution in the IFA, using the *Adjei* test. Persecution is a broader concept than torture. As such, in concluding that the Appellants do not have good grounds to fear persecution, I have also implicitly concluded that they would not be subjected personally to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture. The Appellants do not contest that the concept of an IFA applies to an assessment of whether an Appellant faces a danger of torture under s. 97 of the IRPA in this case. As such, even if I were to apply the "real risk" ("reasonable chance") test to assess the risk of torture in this case, as the Appellants commend, their claims would still fail.

[16] The Respondent asserts that where a refugee claim is based on a nexus and the claimant cannot satisfy the "more than a mere possibility of persecution" test under section 96, the RAD faced with the same factual context is not required to conduct a separate section 97 analysis under the elevated "balance of probabilities" legal threshold of there being a danger of torture, or risk that is "more likely than not". It asserts that section 97 imposes a higher legal burden of

proof than section 96 of the IRPA relying on *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 [*Li*]. In this case, it argues that the factual underpinnings for the section 97 allegations were tied to the section 96 claim such that there was no separate aspect that needed to be assessed.

[17] The Applicants take issue with this characterization. They assert that as the Principal Applicant was severely beaten, there was a history of torture. As such, they say it was strongly argued before the RAD that there was a separate section 97 concern such that a nexus analysis alone was not sufficient.

[18] As stated in paragraph 34 of the reasons cited above, the Applicants did not contest that the concept of an IFA applied to the assessment of whether the Applicants would face a danger of torture under section 97 of the IRPA in the IFA.

[19] The first part of the IFA test tracks section 97. Indeed, the RAD titles its analysis of the first prong of the IFA test as an analysis of the "Risk of persecution or s. 97 harm". However, an analysis of sections 96 and 97 under this part is not always mutually exclusive. As explained in *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paragraphs 40 and 43, which was referenced by the RAD:

> [40] While the IFA test as it has developed in the law of refugee protection has not been imported directly into subsection 97(1) of the *IRPA*, its underlying rationale is still helpful in assessing a risk of harm under that provision: see *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 16; and *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at para 46. In fact, the first part of the IFA test tracks closely paragraph 97(1)(b)(ii) of the *IRPA*, which provides that, to be a

> person in need of protection under paragraph 97(1)(b), the claimant must, among other things, personally be at risk in every part of the country to which they would be removed. While not stated expressly in relation to the risk of torture under paragraph 97(1)(a), this risk must also be present in every part of the country to which the claimant would be removed to entitle a claimant to protection on that basis: see Sasha Baglay and Martin Jones, *Refugee Law* (2nd ed.) (Toronto: Irwin Law, 2017) at 244. The second part of the IFA test is also incorporated into the assessment under subsection 97(1). A claimant can be entitled to protection under this provision even if there is a place where they would not be at risk as long as it is a place to which it would be unreasonable to expect them to relocate.
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> [...]
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> [43] Under the first part of the test, what a claimant must establish to demonstrate that a particular place is not a viable IFA depends on the nature of the claim for protection. If the claimant is seeking protection as a Convention refugee under section 96 of the *IRPA*, they must establish that they have a well-founded fear of persecution in the proposed IFA. This includes establishing on a balance of probabilities that there is a serious possibility of persecution in the IFA. If the claimant is seeking protection under section 97 of the *IRPA*, they must establish on a balance of probabilities that they would be personally subject to a risk to life, to a risk of cruel and unusual treatment or punishment, or that there is a danger, believed on substantial grounds to exist, of torture in the proposed IFA. Obviously these are not mutually exclusive and many claims involve both section 96 and section 97 of the *IRPA*. This part of the test is simply a reiteration of the burden borne generally by a claimant seeking protection under sections 96 or 97, as the case may be, only now focused specifically on the proposed IFA. See *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 8.

[20] In its analysis, the RAD considered the future risk to the Applicants given the Principal Applicant's interactions with the Agents of Harm after the abduction of Shammy, in addition to whether the Applicants' would face a reasonable possibility of persecution in the IFA arising from their political affiliation or Christian faith. The Applicants have not satisfied me that there is any factual context that the RAD did not consider in its risk analysis.

[21] While the RAD states that the question of future risk was decided on the reasonable possibility standard, it notes that the overall factual finding that there were not good grounds to fear persecution also applied to the question of whether the Applicants would be subjected to personal danger, believed on substantial grounds to exist, of torture. In my view, it is implicit from the reasons that the RAD considered the full factual context and risk to the Applicants, but was of the view that the threshold for section 97 had also not been met. The RAD acknowledges and considers that Applicants' argument that the decision in *Li* should be revisited and whether a different burden should apply to the section 97 analysis. While it does not accept this argument, it confirms that even if it were to "apply the "real risk" ("reasonable chance") test to assess the risk of torture in this case, as the [Applicants] commend, their claims would still fail".

[22] As this Court has noted, a finding of a viable IFA is dispositive of a section 97 claim where a risk analysis has been undertaken: *Salman v Canada (Citizenship and Immigration)*, 2021 FC 1396 [*Salman*] at para 23-25, citing *Balakumar v Canada (Citizenship and Immigration)*, 2008 FC 20 [*Balakumar*] at para 14. Unlike *Paramananthalingam*, in my view there is no reviewable gap in the RAD's analysis. The RAD turned its mind to section 97, but found based on the risk analysis it had already conducted that the test would not be satisfied. On this basis, the first argument must fail.

B. *Did the RAD err in finding that the Agents of Harm lacked sufficient motivation to locate the Applicants in the IFA?*

[23] In the Decision, the RAD concludes that the Agents of Harm lacked sufficient motivation to locate the Applicants in the IFA. It bases this conclusion on a cumulative set of findings, including *inter alia*: 1) the past behaviour of the Agents of Harm in not pursuing the Applicants

for three and a half months in Chennai despite knowing of their presence there; 2) that the Agents of Harm were not motivated to harm Shammy years after the abduction; and 3) that there was insufficient evidence of pending prosecution that would give rise to a continued interest in the Applicants.

[24] The Applicants take issue with each of these findings and raise a number of arguments as to why the Decision is unreasonable. As set out further below, I do not find these arguments persuasive.

[25] First, the Applicants argue it was unreasonable for the RAD to rely on their three-month stay in Chennai to support the finding that the Agents of Harm lacked sufficient motivation to locate the Applicants outside Kerala. They argue that this is too short a time period and that the RAD's reference to *Ortiz Ortiz v Canada (Citizenship and Immigration)*, 2022 FC 1066 [*Ortiz*] is misplaced because *Ortiz* involved a more significant time period (2 years) when the agent of harm last threatened the applicants' family. However, as noted by the Respondent, *Ortiz* did not dictate any minimum timeframe for this type of analysis. It was open for the RAD to refer to *Ortiz* for the general principle that an absence of evidence that agents of persecution made efforts to go after a claimant can be supportive of a finding that the agents of persecution have no ongoing interest in pursuing them in the proposed IFA, and then to apply this principle to the facts of the case.

[26] In this case, the RAD relied not just on the passage of time, but also on the fact that the while the Agents of Harm had some motivation to inquire as to the whereabouts of the Applicants, once they knew the Applicants were in Chennai they took no steps to pursue them further. Nor was there any evidence of steps taken to solicit assistance from the authorities in

Chennai, including utilizing the tools available to urgently pursue fugitives, such as an arrest warrant, an order barring the Applicants from leaving the country, or the preparation of a First Information Report [FIR] to initiate investigations.

[27] This is different from the factual background in *Marimuthu v Canada (Citizenship and Immigration)*, 2022 FC 1694 [*Marimuthu*], cited by the Applicants. *Marimuthu* involved two incidents where the police detained the applicant. The first occurred in 2007 and the second occurred eleven years later, in 2018, where the applicant was located, detained and beaten based on a new complaint attributed to the principal applicant. In this case, no further contact was made with the Applicants after the first incident when the Agents of Harm learned of the Applicants' whereabouts.

[28] In my view, it was open for the RAD to consider the specific factual context at play when assessing whether there was motivation to pursue the Applicants in the IFA. Such consideration does not constitute a reviewable error.

[29] Second, the Applicants take issue with the RAD's reliance on the circumstances involving Shammy as informing the risk to the Applicants. In the Decision, the RAD upheld the RPD's finding that as the Agents of Harm were not motivated to harm Shammy after he had been kidnapped, it was unlikely that they would be motivated to harm the Applicants.

[30] The transcript from the RPD hearing and the letter in evidence from Shammy indicate that Shammy lived in Kerala for two and a half years after he was attacked. The RAD acknowledged that Shammy is no longer in touch with the Applicants or with his family, but found that there was no evidence to suggest that the lack of knowledge about his current

whereabouts had anything to do with the Agents of Harm. As noted by the RAD, "[t]the Principal [Applicant] testified that he has been in touch with Shammy's family and he did not indicate that they were concerned about Shammy's well-being. To the contrary, the Principal [Applicant] expressed confidence that the Communist Party and police would not harm Shammy anymore". While the Applicants take some issue with this summary of the evidence, I do not consider it a mischaracterization. As noted by the RAD, there was no evidence to suggest that Shammy was incommunicado because of actions by, or fear of, the Agents of Harm.

[31] In my view, it was reasonable for the RAD to consider what it knew about the situation involving Shammy as a relevant factor when considering motivation. The Applicants' argument amounts to a request for the Court to reweigh this evidence.

[32] Third, the Applicants assert that the RAD erred in relying on the fact that no FIR was produced to support its finding that there was no outstanding prosecution. They assert that it was unreasonable to suggest that there was a requirement to upload FIRs to the Kerala police website, because this requirement only stemmed from a decision of the Supreme Court of India that was issued shortly before the abduction of Shammy.

[33] I agree with the Respondent, as the use of FIRs to initiate investigations and their availability was discussed in the National Documentation Package [NDP], it was not unreasonable for the RAD to make reference to this tool as an indicator of whether proceedings were pending. Further, the reference to the absence of an FIR was only one of the factors the RAD considered in concluding that there was insufficient information to support any outstanding prosecution. As noted by the RAD, the Applicants did not mention any such prosecution or trial

in their Basis of Claim form and it was not mentioned in Shammy's letter. In testimony, the Principal Applicant could only state that he thought there was pending prosecution, but could not offer any evidence for this belief. When pressed by the RPD, he could not confirm this.

[34] The remaining arguments relating to the reasonableness of the Decision can best be described as a treasure hunt for error in which the Applicants take a paragraph-by-paragraph approach in an effort to deconstruct the words of the Decision. This is not the proper approach for a reasonableness review: *Vavilov* at para 102.

C. *Was there a breach of procedural fairness?*

[35] With respect to the Applicants' procedural fairness arguments, I am similarly not persuaded that a viable argument has been made.

[36] While the Applicants point to certain references made in footnotes of the Decision as being references to improper extrinsic evidence, the references relate to information that is either supported within the NDP, and therefore not novel, or is not material to the Decision.

[37] The Applicants argue that the RAD breached procedural fairness by referring to the Kerala police website in a footnote to the Decision. However, the website is not cited to establish new information. Rather, it simply provides further support to statements made in the NDP regarding the availability of FIRs on police websites. I do not consider this reference to create an issue of procedural unfairness.

[38] In another footnote to the Decision, the RAD cites a source from the NDP to support the statement that "elections are conducted peacefully." The footnote goes on to state that in the 2019 election, BJP won by 20% in the state in which the IFA is located. While it is unclear whether this specific statement is found in the source from the NDP cited, the specific statement made in the footnote, in my view, is not material to the overall finding and its inclusion does not serve to prejudice the Applicants.

[39] The Applicants point to the RAD's reliance on evidence from the 2011 census relating to the number of Christians in Bengaluru. I accept this information in view of its source as a generally recognized fact that is further supported by information in the NDP. This does not amount to unfair extrinsic evidence: *Aladenika v Canada (Citizenship and Immigration)*, 2018 FC 528 at para 16; *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at paras 32-33.

[40] In my view, the Applicants have not identified a breach of procedural fairness.

IV. Certification

[41] For all of these reasons, the application will be dismissed.

[42] At the hearing of the application, both parties confirmed that they did not have a question for certification. The Applicants asserted that this was because they were simply arguing that *Paramananthalingam* should apply. However, in further submissions from the Applicants after the hearing, intended to allow the Applicants to comment on the *Ali* decision, which was not

referenced by the Respondent in advance of the hearing, counsel for the Applicants changed his view. He now argues that certification should be ordered on the following question:

> Does the RAD have to consider s. 97(1)(a) and (b) in relation to the first prong analysis of the Internal Flight Alternative, if s. 96 has been considered?

[43] The Respondent opposes this request.

[44] While counsel for the Applicants asserts that this change in position is a result of *Ali*, I do not view *Ali* as introducing any new propositions that were not already before the Court when the Applicants' initial position on certification was made. Paragraphs 43-45 of *Ali*, which are cited above, simply refer and apply the Court's decision in *Kaur*, which was already before the Court.

[45] In my view, this change in position cannot be entertained. Accordingly, the request is denied.

JUDGMENT IN IMM-9384-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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