Federal Court  Cour fédérale

Date: 20231102

Docket: IMM-8741-22

Citation: 2023 FC 1462

Ottawa, Ontario, November 2, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

SUMIT KUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sumit Kumar fears that if he returns to India, he will be persecuted or seriously harmed by local police in the state of Haryana. The police twice arrested and tortured Mr. Kumar, who they incorrectly suspected of being a gang member. Each time, he was released on payment of a bribe, after the police made him sign a blank piece of paper, took his photograph, and told him to report to them at the beginning of every month. The Refugee Protection Division [RPD] and

Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB] each found that Mr. Kumar could reasonably and safely seek refuge within India. Since he had such an internal flight alternative [IFA], the RPD and the RAD found that Mr. Kumar was not a person in need of protection within the meaning of section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Mr. Kumar seeks judicial review of the RAD's decision, arguing that its conclusion that he had an IFA in Mumbai or Bengaluru was unreasonable. In particular, he argues the RAD failed to consider the entirety of the objective documentary evidence before it; failed to consider a contradictory decision from another panel of the RAD; and failed to address the inquiries the police had made to members of his family when considering if he would remain at risk from the Haryana police in the proposed IFA cities.

[3] For the reasons below, I conclude the RAD's decision was reasonable. Mr. Kumar has not satisfied me that the RAD unreasonably failed to consider either the objective evidence or the evidence relating to his family. Nor was the RAD required to address the decision of another RAD member that was not put before it.

[4] The application for judicial review is therefore dismissed.

II. Issue and Standard of Review

[5] The RAD's decision that Mr. Kumar is not a Convention refugee or a person in need of protection because he has viable IFAs within India is reviewable on the standard of

reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at para 32.

[6] The only issue on this application for judicial review is therefore whether the RAD's decision was unreasonable.

[7] When reviewing a decision on the reasonableness standard, the Court considers the reasons given by the decision maker in light of the record and the issues raised, and asks whether the decision bears the hallmarks of justification, transparency, and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on it: *Vavilov* at paras 83–86, 91–95, 99. The onus lies on the applicant challenging the decision to demonstrate that it is unreasonable: *Vavilov* at para 100.

III. Analysis

A. *Mr. Kumar's refugee claim*

[8] Mr. Kumar's claim for refugee protection in Canada arises from events that occurred between December 2018 and September 2019. In December 2018, Mr. Kumar's cousin visited and stayed with him and his brother in Haryana. Unbeknownst to Mr. Kumar, the cousin was associated with a criminal gang. Shortly after the cousin left, local police raided Mr. Kumar's home and arrested his brother. His brother was detained for three days, but subsequently released after payment of a bribe. In March 2019, the police again raided Mr. Kumar's home, alleging he was a member or supporter of the criminal gang. They detained Mr. Kumar for three days, beat

him, took his fingerprints and photograph, and made him sign a blank piece of paper. He was released only upon payment of a bribe.

[9] Another similar event occurred in July 2019, after Mr. Kumar visited a witness who had seen the police arrest his brother. He was again released after paying a bribe, and told to report to the police station on a monthly basis starting in September 2019. Instead, Mr. Kumar left India with the assistance of an agent and came to Canada, where he sought refugee protection.

[10] In support of his refugee claim, Mr. Kumar filed a letter from his lawyer in India. The Indian lawyer stated that he visited the local police station and that there is a complaint against Mr. Kumar and his brother, but that he could not obtain documents regarding the complaint. The police advised the lawyer that the two brothers were suspected of having links with the criminal gang, noted Mr. Kumar had failed to report monthly as required, and asked for Mr. Kumar's surrender. The lawyer gave his opinion that if Mr. Kumar returned to India, the police would arrest him and "register a case" against him under the abetment provisions of India's Penal Code.

B. *The RAD's decision*

[11] The RAD found Mr. Kumar's claim had no nexus to a Convention ground, rejecting his arguments about imputed political opinion and membership in the particular social group of "family." It therefore determined Mr. Kumar's claim under section 97 of the *IRPA*, assessing whether he fell within the definition of a person in need of protection. As the RAD noted, to meet this definition, Mr. Kumar had to show it was more likely than not that he would be killed

or seriously harmed by the Haryana police if he returned to India and relocated to one of the IFA cities.

[12] It is well established that the assessment of whether a refugee claimant has a viable IFA within their country is based on a test with two parts or "prongs." In the first prong, the decision maker must consider whether, on a balance of probabilities, the claimant would face a risk described in section 97 of the *IRPA* in the IFA. In the second prong, the decision maker must assess whether it would be reasonable in all the circumstances, including those particular to the claimant, for them to seek refuge there: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at pp 709–710; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) at pp 595–597.

[13] In considering the first prong of the IFA test, the RAD concluded the Haryana police would not be motivated to track down Mr. Kumar if he returned to India and relocated to one of the IFA cities. The RAD found that the evidence did not establish it was more likely than not that Mr. Kumar's name and personal information appear in any police databases, since his arrest was "extrajudicial" in nature. The RAD considered the Indian lawyer's letter, but found Mr. Kumar had given inconsistent evidence about whether the police had filed a formal case against him, at times stating a formal complaint had been made and he had been charged with abetment, at other times stating that while there was a complaint registered, there was no formal case registered. The RAD noted that Mr. Kumar's appeal submissions confirmed there was no first information report [FIR] yet registered against him, but argued the police were still conducting an investigation.

[14] The RAD found the allegation that there was a “complaint” but no FIR to be inconsistent with the evidence contained in the National Documentation Package [NDP] for India published by the IRB. The NDP states that the FIR forms the basis for a case, and that it is mandatory to register a case before starting an investigation. When an FIR is registered, notice is sent to the accused and it is uploaded to the Crime and Criminal Tracking Network and Systems [CCTNS] database. The RAD concluded that since there was no evidence any of this happened, the evidence did not establish that Mr. Kumar’s information was in the CCTNS or any other police databases. The RAD found that the police releasing Mr. Kumar without laying a charge or filing an FIR spoke to a lack of motivation to take the steps that would be necessary to track him down in the IFA cities four years after he left India.

[15] While Mr. Kumar alleged the Haryana police continued to search for him by harassing his family, the RAD found the evidence on this issue to consist of “vague allegations” that lacked details. The RAD found the evidence did not establish that the police were still actively looking for Mr. Kumar or that they would have the motivation necessary to track him down in one of the IFA cities. Given this finding with respect to motivation, the RAD concluded it did not need to address the question of whether the police would have the means to track him down.

[16] On the second prong of the IFA test, the RAD concluded it would not be unreasonable in all of the circumstances to expect Mr. Kumar to relocate to one of the IFA cities. While Mr. Kumar had challenged the RPD’s analysis of the second prong, he does not challenge the RAD’s findings with respect to this question on this application for judicial review.

C. *The RAD's decision was reasonable*

[17] Mr. Kumar bases his challenge of the reasonableness of the RAD's decision on three principal grounds: (1) the RAD's assessment of the NDP documentation with respect to information in the CCTNS and its characterization of his arrest as "extrajudicial"; (2) the RAD's failure to consider a decision rendered by another RAD member shortly before the decision in this case; and (3) the RAD's treatment of evidence about the Haryana police continuing to make inquiries of his family.

[18] Having reviewed these arguments and the evidence and arguments before the RAD, I am not persuaded that Mr. Kumar has met his onus to show the RAD's decision is unreasonable.

(1) The RAD's assessment of the NDP documentation was reasonable

[19] The RAD's conclusion that the Haryana police were not sufficiently motivated to track Mr. Kumar down if he relocated to one of the IFA cities was based on evidence that (i) the police had not taken the mandatory initial step of registering an FIR against Mr. Kumar and had twice released him from custody without doing so; (ii) the police were unlikely to have put Mr. Kumar's name and information in police databases since his arrest was extrajudicial in nature; (iii) the police had not employed other tools such as summonses to seek Mr. Kumar's attendance at the police station; and (iv) to the extent the police suspected Mr. Kumar of a minor offence, the police would not be motivated to engage in interstate communications to track him to the IFA cities.

[20] Mr. Kumar argues that the RAD erred in not differentiating between an “extrajudicial” arrest and an “arbitrary” one. He argues that while his detention and torture may have been arbitrary, it was unreasonable to call his arrest “extrajudicial,” since it was not unlawful or extrajudicial for the police to question or detain him. He therefore argues it was unreasonable for the RAD to conclude that his personal information and fingerprints would not be in the CCTNS database.

[21] I cannot accept this submission for two reasons. First, the asserted distinction between an “extrajudicial” and an “arbitrary” arrest was not an argument made to the RAD. The RPD found that on a balance of probabilities, the two arrests of Mr. Kumar were “extrajudicial in nature,” and that the NDP for India indicated that no official records of such extrajudicial arrests were kept in the CCTNS. In his appeal to the RAD, Mr. Kumar did not argue that the RPD’s description of his arrest as “extrajudicial” was incorrect, or that a distinction between the terms “extrajudicial” and “arbitrary” meant his information was more likely to be in the CCTNS. Having failed to challenge the same terminology used by the RPD, Mr. Kumar cannot now suggest that it was an error for the RAD to have adopted it: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14–18; *Vavilov* at paras 127–128; *Campbell-Service v Canada (Citizenship and Immigration)*, 2022 FC 1050 at paras 22–23.

[22] Second, I see little merit in the distinction Mr. Kumar is trying to make. The NDP indicates that no record of “extrajudicial arrests” is captured in criminal databases, but Mr. Kumar did not point to anything in the NDP saying that “arbitrary arrests” *are* recorded in

the CCTNS, or that the distinction, if there is one, is relevant for such purposes. The RAD's ultimate conclusion was that Mr. Kumar's information was unlikely to be in the CCTNS given the circumstances of the arrest and the absence of an FIR. I am not persuaded that any distinction that might be made between an "extrajudicial" arrest and an "arbitrary" one renders the RAD's conclusion unreasonable.

(2) The RAD did not err in not referring to another decision

[23] Mr. Kumar argues it was unreasonable for the RAD not to refer to a decision by another RAD member involving a refugee claimant fleeing police in Punjab, dated June 10, 2022 (RAD File No. TC2-05747). That decision was rendered two months before the RAD's decision in this case, but after Mr. Kumar filed his appeal with the RAD.

[24] I cannot accept this argument, for the same reasons I recently gave in another unrelated judicial review application in which the same argument was made (coincidentally, heard by me on the same day as the application for judicial review in this case): *Kumar v Canada (Citizenship and Immigration)*, 2023 FC 1279 at paras 15–22. Those reasons, including as to the factual differences and the relevant principles of administrative law, apply equally in this case.

[25] In the current case, the RAD addressed primarily the *motivation* of the Haryana police to locate Mr. Kumar, and therefore expressly did not address arguments about whether the police would have the *means* to do so. Indeed, the RAD noted that the RPD had accepted that the police would have the means to find Mr. Kumar if they were sufficiently motivated to do so. The fact that another panel of the RAD may conclude that a different set of police officers may have the

motivation to locate a different individual in different factual circumstances creates no precedent requiring consideration or explanation, even if the decision had come to the RAD's attention.

(3) The RAD's assessment of evidence about ongoing inquiries was reasonable

[26] Mr. Kumar's third argument challenges the RAD's treatment of evidence that the Haryana police continued to inquire after him and harass his family. The RAD reviewed this evidence thoroughly, finding it vague, lacking in detail, and based on hearsay that was only corroborated by other hearsay. The RAD therefore concluded that the evidence was insufficient to establish that the police is in fact still actively looking for Mr. Kumar or, at the very least, that they would be motivated to track him down in the IFA cities to harm him.

[27] Having reviewed the evidence and Mr. Kumar's arguments, I cannot conclude that the RAD's assessment of this evidence was unreasonable. While Mr. Kumar submits that the evidence should be accepted and that it demonstrates the ongoing interest of the Haryana police, this effectively amounts to a request that the Court reassess the evidence to reach its own factual conclusions. This is not the role of the Court on judicial review: *Vavilov* at paras 83, 125.

[28] Mr. Kumar notes that this Court has held that neither refugee claimants nor their families can be expected to live in hiding in a proposed IFA, and that family members are not expected to put their lives in danger to avoid disclosing the claimant's whereabouts: *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at paras 20–22, citing *Zamora Huerta v Canada (Citizenship and Immigration)*, 2008 FC 586 at para 29 and *Ali v Canada (Citizenship and Immigration)*, 2020 FC 93 at paras 49–50. However, in the present case, the RAD concluded that

the evidence did not establish that the Haryana police were actually motivated to locate Mr. Kumar or that they were in fact continuing to harass his family. These factual conclusions based on the evidence were open to the RAD, and render the cases cited by Mr. Kumar inapplicable to his situation.

IV. Conclusion

[29] As Mr. Kumar has not met his onus to establish that the RAD's decision was unreasonable, his application for judicial review must be dismissed.

[30] I agree with the parties that no question meeting the test for certification arises in the matter.

JUDGMENT IN IMM-8741-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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