Federal Court  Cour fédérale

Date: 20231213

Docket: IMM-10820-22

Citation: 2023 FC 1690

Edmonton, Alberta, December 13, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

PALVINDER KAUR
KULDIP SINGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Singh and Ms. Kaur seek judicial review of the denial of their claim for refugee status. I am dismissing their application, because the decision-maker reasonably found that Mr. Singh has committed a serious non-political crime and Ms. Kaur has an internal flight alternative [IFA] in India.

I. Background

[2] Mr. Singh and Ms. Kaur are citizens of India. They are husband and wife. They came to Canada and claimed refugee status.

[3] Mr. Singh claims refugee status because he was attacked by members of the Congress Party in 2010 for refusing to join their party and for instead remaining a member of the Akali Dal Mann party. He fled to the United States. In 2013, while in that country, he was accused of battery and molesting a child. He approached a 12-year old girl near her school, asked for her telephone number, gave her two unwanted kisses and tried to hug her. He pled guilty to a reduced charge of battery and was sentenced to 80 hours of community work, 26 hours of behavioural training and three years' probation. The US court documents also indicate that he was sentenced to 30 days in jail, although he now asserts that this was a conditional sentence.

[4] Ms. Kaur initially remained in India after her husband was attacked. In 2014, members of another political party came to her house, damaged the furniture and asked for her husband. When the family reported the incident, the police detained and assaulted Ms. Kaur's father. In 2018, she was detained and raped by police officers who were searching for her husband. She fled to Canada. Shortly afterwards, Mr. Singh left the United States for Canada.

[5] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dismissed their refugee claims. The RPD found that Mr. Singh was excluded from refugee status pursuant to article 1F of the *Convention Relating to the Status of Refugees*, Can TS 1969 No 6

[the Refugee Convention], because he committed a serious non-political crime. It found that Ms. Kaur had an IFA in Delhi or Hardaspur. The Refugee Appeal Division [RAD] of the IRB dismissed their appeal.

[6] Mr. Singh and Ms. Kaur now seek judicial review of the RAD's decision.

II. Analysis

[7] I am dismissing this application, because the RAD reasonably found that Mr. Singh was excluded from refugee protection for having committed a serious crime and Ms. Kaur had an IFA in India.

[8] The grounds that Ms. Kaur and Mr. Singh invoke to challenge the RAD's decision pertain mainly to factual determinations. On such issues, the Court intervenes only if the RAD "has fundamentally misapprehended or failed to account for the evidence before it": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 126, [2019] 4 SCR 653. This is a high threshold. It is not enough to reiterate submissions made before the RAD nor to make general assertions about the conditions in a particular country. Rather, to succeed, applicants must point precisely to evidence that was overlooked or misapprehended and show how the mistake compromised the logic of the decision.

A. *Exclusion Pursuant to Section 1F*

[9] Section 1F of the Refugee Convention provides that "any person with respect to whom there are serious reasons for considering that . . . [h]e has committed a serious non-political crime" is excluded from refugee protection. There is a rebuttable presumption that a crime is considered serious if the maximum sentence would be ten years' imprisonment or more had the crime been committed in Canada: *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paragraph 62, [2014] 3 SCR 431; *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at paragraph 40, [2009] 4 FCR 164 [*Jayasekara*].

[10] The RAD found that in Canada, Mr. Singh's actions would have constituted sexual interference with a minor or sexual assault, crimes defined in sections 151 and 271 of the *Criminal Code*, RSC 1985, c C-46. As the maximum sentence for these crimes exceeds ten years' imprisonment, the RAD found that the presumption of seriousness applied.

[11] The RAD then reviewed the factors that could rebut the presumption. It accepted that Mr. Singh's guilty plea was a mitigating factor. However, it found the following to be aggravating factors: (1) his attempt to deny responsibility in his testimony before the RPD, contradicting statements he made to the police in the US; (2) the circumstances of the offence; (3) the young age of the victim; and (4) the inherent seriousness of sexual offences against children. The RAD noted that Mr. Singh "did not receive a significant term of imprisonment," but that this was the result of plea bargaining. It concluded that Mr. Singh committed a serious non-political crime barring him from refugee protection.

[12] On judicial review, Mr. Singh argues that the offence cannot be considered serious because it falls on the low end of the spectrum of conduct captured by the offences of sexual assault or sexual interference with a minor. He insists that a crime cannot be considered serious where no custodial sentence was imposed or when it was prosecuted as a misdemeanor instead of a felony.

[13] I am unable to agree. Mr. Singh does not dispute that the presumption of seriousness arose. The RAD then considered all the relevant factors. The RAD was clearly aware that sexual assault and sexual interference with a minor are offences that cover a broad range of conduct, but that they carry heavy maximum sentences as well as minimum sentences. It was also open to the RAD to find that sexual interference is an inherently serious offence, given this Court's comments in *Canada (Citizenship and Immigration) v Raina*, 2012 FC 618 at paragraph 47. Moreover, the RAD reasonably found that the young age of the victim and the circumstances of the crime were aggravating factors, as was Mr. Singh's denial of the facts before the RPD.

[14] To challenge the RAD's decision, Mr. Singh argues that the crime he committed would be considered minor in most countries of the world and that in any event, the disposition of the matter in the United States indicated that the crime was not serious. I emphatically disagree. As the Federal Court of Appeal stated in *Jayasekra* at paragraph 41, "There are many reasons why a lenient sentence may actually be imposed even for a serious crime." In this case, we do not have the benefit of the reasons of the sentencing judge. What we have, however, is the circumstances of the offence and Mr. Singh's attempts to deny them. They are sufficient to support the RAD's finding that the crime was serious.

[15] Contrary to Mr. Singh's submission, the fact that the offence was prosecuted as a misdemeanor was not determinative. In *Jayasekra*, at paragraph 44, the Federal Court of Appeal stated that the mode of prosecution was one of several factors to consider when deciding if the presumption of seriousness is rebutted. Mr. Singh's submission is incompatible with an approach based on the balancing of several factors, none of which is determinative. Had the Federal Court of Appeal intended to say that an offence prosecuted as a misdemeanor could never be considered serious, it would employed a different approach.

B. *Internal Flight Alternative*

[16] To justify its conclusion that Ms. Kaur has an IFA in Delhi or Hardaspur, the RAD found that (1) the agents of persecution have not sought Ms. Kaur in her home city since 2018; (2) no one sought Ms. Kaur when she relocated to Hardaspur from April to September 2018; (3) Ms. Kaur was not member of a political party; and (4) no charges were ever laid against her or Mr. Singh. Based on these facts, the RAD concluded that the agents of persecution did not have the motivation to seek Ms. Kaur outside of her home city.

[17] Ms. Kaur has not shown that the RAD failed to apply the relevant legal principles or that its decision is based on a fundamental misapprehension of the evidence. Rather, she flatly denies that it is possible to have an IFA in India, because of the police's flagrant disrespect of human rights. She argues that "Sikhs suspected of separatist activities are routinely arrested, tortured and murdered by a corrupt police force that is not held unaccountable for its actions."

[18] The fundamental flaw of Ms. Kaur's submissions is that they do not address the RAD's findings and they are not focused on her personal circumstances. Rather, they wrongly assume that she will face the same risks as someone who is "suspected of separatist activities." In reality, they consist in large part of boilerplate submissions that do not speak to her personal circumstances.

[19] Yet, refugee status is determined on an individual basis. It does not assist claimants to make general assertions about the human rights situation in their country of origin, unless they can show that these conditions put them personally at risk of persecution or torture. Of course, a person may show that they are personally at risk because similarly situated persons are at risk: *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (CA). However, the RAD found, in substance, that Ms. Kaur's situation could not be compared to that of persons "suspected of separatist activities."

[20] For the same reason, there is no useful analogy between *Chahal v United Kingdom* (1996), 23 EHRR 413 [*Chahal*], a decision of the European Court of Human Rights submitted by counsel for Ms. Kaur, and present matter. Mr. Chahal was as a well-known political figure. He was closely associated with the nephew of the main Sikh leader who died in the 1984 events at the Golden Temple in Amritsar. He became the most prominent pro-Khalistan leader in southern England. The United Kingdom government sought to remove him to India on national security grounds. His suspected association with violent or terrorist activities was publicly known in both India and the United Kingdom.

[21] The European Court of Human Rights held that Mr. Chahal's removal to India would expose him to a substantial risk of torture. This was contrary to Article 3 of the European Convention on Human Rights, which protects against torture, including removal to a country where the person would be exposed to a real risk of torture. When reading the judgment of the Court, it is obvious that the determinative factor was Mr. Chahal's profile. He was "well known in India to support the cause of Sikh separatism and to have had close links with other leading figures in that struggle" (at paragraph 106).

[22] Ms. Kaur does not rely on *Chahal* to argue that the RAD misinterpreted the relevant provisions of the Act. She does not argue that the European Court applied a test that differs from the one applied by the RAD. If anything, the European Court appears to use the concept of IFA in a manner similar to that set out by the Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*], and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) [*Thirunavukkarasu*] and followed by the RAD.

[23] Rather, Ms. Kaur appears to rely on *Chahal* for its factual findings. Of course, the factual findings of a foreign or international adjudicative body may be relevant in determining refugee status, as country condition evidence. To be relevant, however, the facts of the decision must match the applicant's profile. Here, Ms. Kaur's situation can simply not be likened to Mr. Chahal's. Moreover, the facts of the decision should be current. In *Chahal*, the European Court reviewed facts taking place in the 1980s and early 1990s. Counsel's bare statement that things

have only become worse since then is no substitute for a careful review of the more recent information found in the national documentation package for India.

[24] Ms. Kaur also argues that the RAD failed to consider the IRB Chairperson's Gender Guidelines, because it rejected her submission that one cannot reasonably expect a victim of rape by the police to relocate anywhere else in India. The RAD gave detailed reasons for its decision. It accepted that Ms. Kaur was raped by the police and likely suffered psychological trauma as a result. It found, however, that the threshold for finding a proposed IFA to be unreasonable is very high and that being a victim of rape in another region of the country does not rise to that level. It also noted that Ms. Kaur would not be alone, as she would live with her husband or, at the very least, her family in Hardaspur.

[25] Before this Court, Ms. Kaur merely reiterates the submissions made before the RAD. I am unpersuaded. Ms. Kaur fails to show that the RAD's treatment of this issue is unreasonable. The RAD's decision is in line with the very high bar set by the Federal Court of Appeal, in *Rasaratnam and Thirunavukkarasu, for finding that a proposed IFA is unreasonable.*

[26] Lastly, at the hearing, Ms. Kaur sought to rely on two documents pertaining to the situation of Sikhs in India that she asked the RAD to admit as new evidence. The RAD declined, because these documents were written in 2004 and Ms. Kaur had not shown why she could not have filed them before the RPD. In her application for judicial review, Ms. Kaur did not challenge this aspect of the RAD's decision. Hence, she cannot rely on evidence that the RAD declined to admit.

C. *Convention against Torture*

[27] Large portions of Ms. Kaur's written submissions aim to show that her removal to India would breach Canada's international obligations, in particular the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can TS 1987, No 36 [the Convention against Torture]. Once again, these are in large part boilerplate submissions by counsel for Ms. Kaur. They are redundant and unhelpful. It may be useful to explain why.

[28] The RPD and RAD are tasked with applying sections 96 and 97 of the Act. Paragraph 97(1)(a) specifically aims to implement the Convention against Torture. It states:

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	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; . . .	**a)** soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; […]

[29] Hence, where a refugee claimant alleges a risk of torture in their country of origin, that risk is captured by paragraph 97(1)(a). It is unnecessary and redundant to invoke the Convention against Torture as an additional ground. If the RAD finds that the test in paragraph 97(1)(a) is

not met, it logically flows that it finds that there is no risk pursuant to Article 3 of the Convention against Torture.

[30] Of course, the Convention against Torture and the jurisprudence applying it could assist in solving a potential difficulty of interpretation of paragraph 97(1)(a) of the Act. Ms. Kaur, however, is not putting forward any such argument. It is therefore unhelpful to supplement submissions regarding the reasonableness of the RAD's factual findings with a lengthy discussion of the Convention against Torture.

III. Disposition

[31] Mr. Singh and Ms. Kaur have not shown that the RAD's decision is unreasonable. For this reason, their application for judicial review will be dismissed.

[32] At the close of the hearing, Mr. Singh asked me to certify the question whether a misdemeanor can ever constitute a serious crime within the meaning of Article 1F of the Refugee Convention. Mr. Singh did not follow section 36 of the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022), which requires notice of such a question be given to the other party five days before the hearing. In any event, as explained above, the proposed question is answered by *Jayasekra*. Beyond this, the present matter raises essentially factual issues, which do not warrant certifying a question for the consideration of the Federal Court of Appeal.

JUDGMENT in IMM-10820-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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