Federal Court  Cour fédérale

Date: 20240923

Docket: IMM-13050-23

Citation: 2024 FC 1484

Ottawa, Ontario, September 23, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

VIKASH SAINI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Vikash Saini [Applicant], seeks judicial review of a decision by the Refugee Appeal Division's [RAD] dated September 21, 2023 [Decision] that dismissed his appeal and confirmed the Refugee Protection Division's [RPD] decision. The RAD agreed with the RPD that the Applicant is neither a *Convention refugee* nor a person in need of protection. The determinative issue for the RAD was that there was a viable Internal Flight Alternative [IFA].

[2] Mr. Saini contends that the RAD failed to properly consider the risks posed to him and his family by his alleged persecutors. They have continued to visit and harm his family in their searches for him. The Applicant states that the IFA is neither safe nor reasonable.

[3] For the following reasons, the application for judicial review is dismissed. The Applicant raised a new issue on judicial review that was not before the RAD and I cannot consider this new issue. The RAD's Decision is also not unreasonable.

I. Background and Decision Under Review

[4] The Applicant is from India, and sought refugee protection stating that he feared harm and persecution due to his grassroots political involvement from a number of agents, including the BJP party, Raju gang and local police.

[5] The RPD heard the refugee protection claim and refused it on January 31, 2022. The RAD heard the appeal and upheld the RPD's decision, both finding that the Applicant does not face a serious possibility of persecution and that there is a viable IFA. The Applicant contends that the RAD erred in its assessment of the IFA, and its finding that his persecutors do not have the means and motivation to locate him in the IFA.

[6] The RAD upheld the RPD's decision by stating that the RPD provided a clear and intelligible decision, which was justified by the evidence. The RAD confirmed the RPD's analysis that the Appellant's position was unsubstantiated because of a lack of evidence. The RAD found that the Applicant did not establish that his agents of persecution would have the

motivation to search for him throughout India five years after the relevant events. The Applicant had conceded that there was no First Information Report or outstanding arrest warrant against him. The RAD found that there was no evidence that local police was looking for him.

II. Issues and Applicable Standard of Review

[7] The issue for the Court's consideration is whether the RAD's Decision is unreasonable.

[8] The parties both submitted that the applicable standard of review on the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653 [*Vavilov*]). I agree that the appropriate standard of review in the assessing the RAD's conclusions about the existence of an IFA is reasonableness (*Singh v Canada (Citizenship and Immigration)*, 2024 FC 1290 at para 10).

[9] On judicial review, the Court must assess whether the Decision bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

III. Analysis

[10] The Federal Court of Appeal developed the two-pronged analysis that is used to determine whether a refugee protection claimant can avail himself or herself of an IFA (*Rodriguez Sanchez v Canada (Citizenship and Immigration)*, 2023 CF 426 (CanLII), 2023 FC 426 at para 37 citing *Rasaratnam v Canada (Minister of Employment and Immigration)(CA)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706 and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589):

> • There is no serious possibility of the refugee protection claimant being persecuted (under section 96 of the IRPA) or exposed to a danger or a risk under section 97 of the IRPA (according to a "more likely than not" standard) in the proposed IFA area.
>
> • The conditions in that area must be such that it would not be unreasonable, in all the circumstances, including those particular to the refugee protection claimant, for him or her to seek refuge there.

[11] The bar for establishing that an IFA is unreasonable is very high. Refugee protection claimants have the burden of demonstrating, using actual and concrete evidence, that there are conditions that would jeopardize their life or safety in the event that they relocate to the proposed IFA (*Ranganathan v Canada (Minister of Citizenship and Immigration)(CA)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164 at para 15).

A. *The Applicant Raises a New Issue*

[12] The Applicant submitted that the determinative issue on judicial review was that the RAD did not address his argument that he would be required to hide his IFA location from his family. As such, the RAD's analysis of the determinative issue – the IFA - was unreasonable.

[13] The Applicant states that the RAD failed to address the Applicant's testimony that, since he fled India, his family has been visited and harmed by the police in search of him. The Applicant argues that he will be forced to hide his whereabouts to avoid alerting the agents of persecution to his presence in the IFA which renders the IFA location not reasonable (citing *Ali v Canada (Citizenship and Immigration)*, 2020 FC 93 at paras 49-52; and, *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at paras 20-21, citing *Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586).

[14] The Applicant states that the issue is not whether the merits of the RAD's Decision were reasonable. Instead, it is what the RAD did not consider or include in the Decision that is the subject of the Applicant's challenge. If I agree with the Applicant that this issue was properly before the RAD, the Applicant states that not considering or grappling with this issue constitutes a reviewable error.

[15] The Respondent argues that the Applicant did not place this argument before the RAD in the appeal. The Respondent underlines that the Applicant is seeking to introduce an issue that was not raised before the RAD and the Court should therefore not consider this new argument on

judicial review. The Respondent relies on the Court's decision in *Singh v Canada (Citizenship and Immigration)*, 2023 FC 875 [*Singh*].

[16] At paragraph 59 of *Singh*, Justice Roy, citing *R v Milan*, 2014 SCC 54, [2014] 2 SCR 689, paragraph 30, states that an issue or argument is new when it raises a new basis for potentially finding an error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties and cannot reasonably be said to stem from the issues as framed by the parties.

[17] Justice Roy's analysis in *Singh* at paragraphs 29 to 58 outlined the relevant jurisprudence relating to new arguments or issues raised for the first time before the Court on judicial review, but not before the previous decision-maker whose decision is the subject of review.

[18] The applicants in *Singh* had also put their focus on the safety of the proposed IFAs and argued that it was not reasonable to expect family members to place their own lives in danger by either denying knowledge of the applicants' whereabouts or deliberately misleading the agent of persecution. Justice Roy declined to entertain this new issue presented for the first time on judicial review (*Singh* at para 60).

[19] To support his position that this is not a new issue or argument, the Applicant pointed me to his Memorandum of Law submitted to the RAD on appeal [RAD appeal Memorandum of Law]. The Memorandum of Law is a 15-paged document, totalling 84 paragraphs.

[20] The first passage is found in the section of the RAD appeal Memorandum of Law entitled: “Système de surveillance centralisé.” The Applicant underlined two sentences found in two separate paragraphs in this section. The first sentence is in the middle of a paragraph, and speaks to the means available to police to find someone in another state including speaking with members of the family. This was in relation to information in the National Documentation Package.

[21] Two paragraphs later, the last sentence in that paragraph states that the Applicant’s family and friends would know where he was in India, and that local police would be able to find the Applicant because of them.

[22] Four paragraphs later, in another section of the RAD appeal Memorandum of Law entitled “Motivation de la police”, there is one stand-alone paragraph and sentence. This passage asserts the Applicant’s testimony that the police had come to his parents’ home, that his father and uncle had been beaten and that his uncle passed away a week later (and providing a copy of the death certificate).

[23] The Applicant stated that his case is distinguishable from *Singh,* in that his RAD appeal Memorandum of Law did, in fact, raise the issue he seeks to argue on judicial review. I disagree.

[24] The Applicant has taken select sentences from parts of the RAD appeal Memorandum of Law, put them together and asking that the Court glean from these extracts an argument. This recasts what the RAD was presented with after the fact. Reading these passages in their proper

context, the Applicant's argument that he expressly put the issue before the RAD cannot succeed.

[25] Regrettably, I cannot agree that the Applicant clearly articulated to the RAD that he would be forced to hide from his family as an issue on appeal. When reading the RAD appeal Memorandum of Law holistically and in the context of where the passages were found and what arguments they were actually related to, I also cannot conclude that the RAD ought to have been able to glean the Applicant's argument from the three passages he identified.

[26] I find that the Applicant is seeking to argue or advance a new issue or argument that was not placed before the RAD. Accordingly, the Court cannot consider it in this application for judicial review. It is well established that applicants cannot raise before the Court arguments that were not put to the administrative decision maker.

[27] The Applicant can hardly fault the RAD for ignoring arguments if they did not raise them in their appeal. The application for judicial review must be dismissed on that basis alone (*Kumar v Canada (Citizenship and Immigration*), 2023 FC 839 at paras 24-25, other citations omitted; (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654).

IV. Conclusion

[28] Although the Applicant focused on the new issue or argument, I am satisfied that the Decision was reasonable and that the RAD respected the factual and legal constraints that bear upon them.

[29] Based on the record that was before the RAD, it was open to the RAD to conclude that there was a viable IFA. The Decision meets the hallmarks of reasonableness as it is justified in relation to the facts and law that constrain the decision maker. As such, the application for judicial review is dismissed.

[30] The parties do not propose any question for certification and I agree that none arise in the circumstances.

JUDGMENT in IMM-13050-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-13050-23
STYLE OF CAUSE:	VIKASH SAINI v MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Me Jonathan Gruszczynski	FOR THE APPLICANT
Me Guillaume Bigaouette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Immigration Team Barristers and Solicitors Montréal (Québec)	FOR THE APPLICANT
Attorney General of Canada Montréal (Québec)	FOR THE RESPONDENT