Federal Court  Cour fédérale

Date: 20240923

Docket: IMM-7269-23

Citation: 2024 FC 1491

Vancouver, British Columbia, September 23, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SUKHBIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this judicial review application made pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], the applicant, Mr. Sukhbir Singh, disputes the finding made by the Refugee Appeal Division [RAD] according to which he has an internal flight alternative [IFA] in two large metropolitan cities in his country of nationality, India.

I. The facts

[2] The applicant claims to fear drug traffickers operating at the local level in his village in the Punjab. That fear stems from his reporting the illegal activities to the police. That is the basis for his claim of refugee protection made according to s 97 of the Act.

[3] Given that the issue turns on the existence of IFAs, it is not necessary to delve deeply into the facts which are claimed to support a refugee claim under s 97. Suffice it to say that the applicant is a Sikh Indian now in his mid-thirties. He claims, and it was not disputed by the Refugee Protection Division [RPD] or the RAD, that in April 2017 he was threatened by the drug traffickers and he was inflicted a bullet wound on one of his fingers. After having gone to the police, he moved to another city in another state in May 2017, and then to Delhi in July 2017. The applicant fled to Canada in August 2017. He claimed protection in December 2019.

[4] The credibility of the applicant was found to be suspect. His basis of claim [BOC] was said to contain minimal information about his allegation of harm. His testimony before the RPD was evolving as the questioning continued and inconsistencies appeared.

[5] What is more relevant is the finding made by the RPD that the agents of harm do not have the means to locate the applicant in large metropolitan cities in India. Although the RPD expressed a willingness to accept that, in view of the traffickers' continued harassment of his parents to extort money from them, the agents of harm have the motivation to locate the claimant (RPD decision, para 36), they do not have the means to do so. They are street-level drug

traffickers and the speculation that the applicant would be traceable through the tenant verification system – a claim often made in refugee cases – is not supported by evidence that the police are an agent of harm or could be colluding with the drug traffickers in this case. The access to the system is accordingly deemed to be non-existent.

[6] The RPD also states that the applicant did not provide any testimony about other methods that could enable the agents of harm to find him. That is sufficient to conclude that there exists an appropriate IFA if it would otherwise be reasonable to move to that different location.

II. The RAD decision

[7] In reaching its conclusion, the RAD agreed with the RPD that the agents of harm did not have the means to locate him in the identified IFAs. However, the two divisions disagreed that these agents of harm had the motivation to locate the applicant, the RAD finding, contrary to the RPD, that agents of harm did not have the motivation, according to its review of the evidence led before the RPD.

[8] The RAD agreed with the RPD that the street-level drug traffickers are not affiliated with an influential criminal who could have found the applicant in the two cities he had fled to before coming to Canada. Furthermore, there was agreement that the police were not colluding with the agents of persecution, including making threats against the applicant.

[9] Acknowledging that, in order to conclude about the reasonable existence of an IFA, it must be established that, somewhere in India, the applicant would not be at risk (because the

agent of harm does not have the motivation or the means to locate the person) and that it would be reasonable for him to relocate there, the RAD proceeded to examine these two prongs.

[10] First, the RAD does not accept the contention that the agents of harm could locate him through his parents, as it would be unreasonable to ask them to deny their knowledge of his whereabouts or to mislead the agents of harm. Contrary to the RPD, the RAD finds it unclear that the agents of harm have harassed the applicant's parents in order to locate him. Reviewing the evidence before the RPD, the RAD concludes that the agents of harm are seeking to extort the parents; that fails to establish that they are motivated to locate the applicant. Their motivation is different. At any rate, they do not have the means to locate him when he moves to one of the identified IFAs. Accordingly, the first prong of the test is satisfied.

[11] Second, the fact that the applicant is a Sikh who would be moving to an IFA predominantly Hindu does not make the IFA unreasonable. The mere fact that the applicant is Sikh does not make him someone who cannot relocate because of discrimination, according to the evidence from the National Documentation Package for India. The RAD acknowledges that there are various degrees of discrimination in India, but it found "that this is not sufficient to render the IFAs unreasonable or unduly harsh" (RAD decision, para 25).

III. The applicant's argument before the Court relating to the case under review

[12] The applicant argues that the RAD decision, which is the only one before the Court, is not reasonable. As indicated earlier, the RAD found that the first prong of the test for a valid IFA

was satisfied because the agents of harm have neither the motivation nor the means to locate the applicant in his IFA.

[13] The RAD is faulted for not having reversed the RPD which failed to assess the means the agents of harm had after the RPD had acknowledged that the harassment of the parents was for the purpose of locating the applicant, thus showing the agents had the motivation to find him. The applicant goes on to argue that he should not have to hide from his family or to put their lives in danger by requiring them to deny knowledge of his whereabouts or to exercise caution in what will be disclosed. He refers in particular to *Ali v Canada (Citizenship and Immigration)*, 2020 FC 93 [*Ali*].

[14] It is also advanced that the RAD failed to observe the principles of procedural fairness when it determined that it was not in agreement with the RPD as it accepted that the drug traffickers had the motivation to locate the applicant. The RAD considered the evidence before the RPD and concluded that it established attempts at extortion of the parents, and not an attempt to locate the applicant, which would tend to show motivation. In the view of the applicant, the matter was not before the RAD because it had not raised it on appeal. Any consideration of that matter required that the applicant be informed and provided an opportunity to make submissions.

IV. The respondent's factum

[15] The respondent argues that the standard of review before the reviewing court of a decision of the RAD is reasonableness which carries a measure of deference toward the administrative decision maker. The RAD, on the other hand, comes to its own conclusions given

that it does not owe any deference to the RPD (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157). That translates into conducting its own assessment of the availability of the refugee status in view of the evidence submitted.

[16] It is the applicant who carries the burden of establishing that either one of the two prongs that constitute the requirements for an IFA have not been met once the availability of an IFA is raised before the RPD. The onus is to be discharged by an applicant on the balance of probabilities.

[17] On the first prong, the respondent argues that it was for the applicant to show that it was unreasonable for the RAD to conduct its own assessment of the evidence and to conclude that the agents of harm were not proven to have the motivation to locate the applicant. The harassment was motivated by their attempt at extorting the parents. The lack of concrete evidence of motivation to locate the applicant is fatal.

[18] The applicant was equally unsuccessful in showing that the IFA is unreasonable. The applicant's circumstances were carefully examined. It is the failure to bring concrete evidence which explains why the applicant was also unsuccessful about the second prong.

V. Analysis

[19] An applicant who is faced with the possibility that there is an IFA available can defeat that possibility by showing, on a balance of probabilities, that he has a well founded fear of persecution in the IFA or that moving to an IFA would be unreasonable, in all the circumstances,

in order to seek refuge in that other part of his country of nationality. If either one of these two prongs is not established, the IFA is not available.

[20] The applicant focuses his attention in the case at bar on the first prong of the test. The second prong constitutes a notoriously high bar to meet (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, p 597 to 599; *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, para 15). The first prong is concerned with the fear of persecution. If agents of persecution have the means and the motivation to locate someone elsewhere in the country, the IFA will not be safe. If either the motivation or the means are not present, that will tend to demonstrate that the IFA is safe. An agent of persecution who has the motivation but does not have the know-how does not pose a real danger. The same is true of the agent who has the means but does not have the motivation to locate the person.

[21] The burden of showing that the IFA is not safe is on the applicant. In order to demonstrate on a balance of probabilities that there is a serious possibility of persecution in the IFA (the so-called “first prong”), refugee applicants must attempt to establish that agents of persecution have the motivation and the means to locate them throughout the country, which makes the location unsafe. However, if they fail to establish motivation and means, applicants run the risk of failing in their attempt at establishing that the identified IFA is unsafe. They would then have to rely on showing that moving to an IFA would prove to be unreasonable (the so-called “second prong”) in order to avoid the finding of the existence of an IFA.

[22] Here the applicant argues before this Court that the RAD ought not to have disturbed the RPD's finding that the agents of harm have the motivation to locate him throughout the country. As will be recalled, the RAD specifically disagreed with the RPD on whether the evidence led by the applicant supported the contention that the harassment allegedly inflicted on the applicant's parents showed motivation to locate the applicant throughout the country. Such was the conclusion reached by the RPD. It found that motivation to locate the applicant was present, but that the applicant failed to establish the means.

[23] Here, the applicant appealed the RPD decision to the RAD on the broadest basis possible: he alleged that the decision was based on "an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it" (appellant's memorandum before the RAD, para 3). The applicant/appellant discussed the issue of his credibility and the need for corroboration. It is only from paragraphs 15 to 24 that one reads what is raised as to the existence of an IFA, which is said to be the determinative issue before the RPD.

[24] The applicant/appellant was starting his appeal from the proposition that the RPD had accepted that the agents of harm had the motivation to locate him in India. Hence, the appeal before the RAD was limited to challenging that these agents of persecution had the means to locate him, since it was accepted that they had the required motivation.

[25] With that motivation being acknowledged, the applicant/appellant argued that it was unreasonable to conclude that the agents of harm did not have the means to find the applicant/appellant as he would continue to be in touch with his parents: through these contacts

with his parents, his whereabouts will be discovered. Since the Chairperson's Guideline 4 posits that claimants are not obligated to go into hiding in order to be safe in the IFA location, the means to locate the applicant/appellant are associated with the motivation to locate, which was acknowledged by the RPD. Thus, it would be unreasonable, in those circumstances, to require that the applicant/appellant relocate in India because the agents of harm, who continue to be motivated to locate the applicant, would have the means through the harassment of the parents to discover where the applicant had relocated.

[26] The difficulty encountered by the RAD is that if the agents of harm are motivated to locate the applicant/appellant, and that motivation is established by the regular harassment of the applicant's parents, then the harassment of the parents for the purpose of locating their son, the argument goes, becomes the means to locate him.

[27] To counter that possibility, the RAD concluded that the agents of harm did not have the motivation to locate the applicant in an IFA because the harassment inflicted on the applicant's parents was for the purpose of extorting the parents, not to ascertain where their son is to be found.

[28] Whether the argument prevails or not is not the issue. It is rather that the RAD chose to revisit the issue of whether there was motivation to locate or not. However, it did not advise the applicant/appellant that the issue was on the table. The applicant/appellant never knew that this constituted a live issue. This was confirmed at the hearing of the judicial review application. He was therefore not able to address the matter.

[29] It is fundamental to our notion of justice that one be allowed to participate in the process leading to administrative decisions: *audi alteram partem*. As the Supreme Court put it in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]:

> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> (Emphasis added)

Whether we speak of "natural justice" or "duty of fairness", there is no doubt that where the rights, privileges and interests of individuals are affected, procedural fairness is engaged. The content of the duty will vary as a function of various factors. They were first identified in *Baker* and usefully summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650, para 5.

[30] While it has been said that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653, at p 682), the Court has no doubt that where the importance of the issue to be decided is whether someone is a refugee or not, at the very minimum someone must be afforded the possibility to participate by being advised that an issue already decided in his favour was being considered anew. That did not happen here.

[31] On matters of procedural fairness, it has been decided that the standard of review is correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79), because no deference is owed to the administrative decision maker. In fact, no standard of review is necessary (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69). It is for the reviewing court to determine the measure of procedural fairness required in a particular case.

[32] The RAD was under a duty of fairness to advise Mr. Singh that it was reconsidering the finding of the RPD, which was favourable to him, that the agents of harm were motivated to find him if he were to relocate somewhere in India.

[33] The argument according to which the issue of motivation is largely irrelevant since both the RPD and the RAD found that the agents of harm did not have the means to find the applicant is not convincing. It is not that simple. That is because of the link between the motivation to locate and the means. If the agents of harm have the motivation, the means available may include pressure exerted on the parents to disclose the applicant's whereabouts in India. That possibility was not considered by the RAD since it concluded, on the basis of its review of the evidence (including the testimony before the RPD) that there was no such motivation, in spite of the argument being put squarely before the RAD in the appellant's factum that the presence of motivation led to having the means to locate the applicant/appellant in the proposed IFAs.

[34] To put it differently, the predicate to the applicant's argument on the existence of means before the RAD was that the agents of harm have the motivation to find him. The RAD disposes

of the argument that the agents of harm have as possible means pressure and threats exerted on the parents by concluding that there is no evidence of motivation on the part of these agents to locate the applicant. However, in order to reach that conclusion, the RAD should have advised the applicant that it was considering the motivation issue put to rest by the RPD. The applicant had the right to be heard, and he was not.

[35] The respondent argues that there was no requirement to notify the applicant that the motivation issue was a live one because it was not a new one. That is, says the respondent, because motivation was part of the decision made by the RPD. It was accordingly a known issue.

[36] We are referred to *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1174 at para 10, where Mactavish J, then of this Court, referred to *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689, in writing that "[t]here the Court stated that an issue is 'new' where "it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties"". The Court went on to observe that "[g]enuinely 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"; at para 30".

[37] As I pointed out at the hearing, the matter before the Court falls squarely within those parameters. What was raised by the applicant as a new issue was a completely new basis for an error by the RPD. The argument was that because motivation was accepted, there were the means to locate the applicant. That constituted the central argument. When the RAD takes upon itself to declare that the motivation to locate the applicant is not present, contrary to what was

found by the RPD, it pulls the rug from under the applicant's feet without advising him of this turn of events.

[38] The appeal before the RAD is based on motivation being accepted. The issue, as framed by the appellant/applicant, is that motivation exists. Thus, the appeal as framed is emasculated from a legal standpoint, but also factually because the RAD makes a new assessment of the facts as found by the RPD. In other words, the RAD considered an appeal on a basis that was foreign to what was put before it.

[39] If the RAD was going to proceed in that fashion, it had to give Mr. Singh the opportunity to participate in this new issue which was outside of the confines of the appeal that was pending before it.

[40] It did not notify the appellant/applicant and that failure constitutes a violation of the procedural fairness requirements. The Court must accordingly intervene.

VI. Conclusion

[41] It is unknown whether the applicant's argument can prevail. Such is not the issue. A court of review is not a court of first view. It will be for the RAD to deal with the matter of the merits of the appeal. The judicial review application is granted. The matter is remitted to a differently constituted RAD panel for redetermination.

[42] The parties were canvassed and there is no question to be certified pursuant to s 74.

JUDGMENT in IMM-7269-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The matter is remitted to a differently constituted Refugee Appeal Division panel for redetermination; and

2. There is no question to be certified pursuant to section 74.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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