Federal Court  Cour fédérale

Date: 20221202

Docket: IMM-5810-21

Citation: 2022 FC 1668

Ottawa, Ontario, December 2, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

JAGDEEP SINGH X
HARPREET KAUR KAMBOJ
ARSHLEEN KAUR X
JASGUN KAUR X

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated July 29, 2021, affirming a decision of the Refugee Protection Division [RPD],

which found that the Applicants are neither *Convention* refugees nor persons in need of protection largely due to the existence of an internal flight alternative [IFA].

II. Facts

[2] The Applicants are a Sikh family from India, consisting of the Principal Applicant [PA], his wife and their two minor children. Their narrative is as follows.

[3] The PA ran a business that sold, installed and serviced water purifying systems and entered into contracts with government bodies. During the PA's time contracting with the government, he was extorted by government officials responsible for contracting. Specifically, the Applicant alleges he was threatened and harassed by these individuals because he would not pay them a portion of his commission. In May 2017, the PA alleges these individuals threatened to kill him, so he paid them the 5 per cent commission being sought. The PA was threatened with similar demands again in December 2018.

[4] In February, 2019 the PA alleges the agents of persecution came to his home and once again threatened to kill him. The next day he attended a police station but was largely ignored. While there, the PA was told that he was under investigation for supporting a 2020 referendum. The PA alleges that instead of acting on his complaint, the police wanted to engage in a "false case" by alleging he was in a Sikh temple in which other Sikh individual were gathering to decide support about the 2020 referendum.

[5] The PA did not feel safe in his home given these potential safety concerns and decided to move his family to another municipality in March 2019. Despite this relocation, the PA alleges that he continued to be threatened personally and with regards to the kidnapping of his children.

[6] Fearing for their lives, the Applicants, who were in possession of valid visas to Canada, left India in May and claimed refugee status.

[7] The claim was heard by the RPD and subsequently rejected on February 2, 2021, due to credibility concerns and its finding he had viable internal flight alternatives [IFA] elsewhere in India.

III. Decision under review

[8] In broad strokes, the RAD found that the Applicants have a viable IFA in two other cities and, as such, are neither *Convention* refugees nor persons in need of protection. As I'll outline, the RAD considered the presence of an IFA the determinative issue in its assessment. As specifically noted in its reasons, the RAD did not address all of the credibility and subjective fear challenges specifically.

[9] In making a determination on a viable IFA, the two-prong test from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA), must be established:

> (a) There is no serious possibility of the Appellants being persecuted or subjected, on a balance of probabilities, to a danger of torture or to a risk to their lives or of cruel and unusual treatment or punishment in the proposed IFA; and

> (b) Conditions in the IFA area are such that it would not be unreasonable, in all the circumstances, including those particular to them, for the Appellants to seek refuge there.

[10] The RAD found the Applicants have a viable IFA in two other Indian cities. Specifically, the RAD noted the Applicants failed to provide sufficient credible evidence that a local government employee and his connections have the interest and power to locate the Applicants in either of the two proposed IFAs.

A. *Agents of harm*

[11] The Applicant argued that upon registering with the local police to obtain a rental property, the agents of persecution would have the ability to locate the Applicants in any city. The Applicant supported this claim by tendering a news article that spoke to a Provincial Civil Service officer being held for embezzlement. The RAD, however, found that the article supported the proposition that corrupt officials do not act with impunity. Neither did the RAD find that the article supported the claims that police officers in the two IFA cities would be inclined to work with local corrupt politicians in the Applicant's hometown.

[12] The RAD also noted that the PA maintained contact with his neighbour, but was unable to provide information on the existence of the agent of harm in Punjab. The RAD noted there was also no new evidence that sufficiently established the existence of the agents of harm.

[13] Neither did the RAD find sufficient credible evidence the PA was being investigated by the local police for any reason. This is with specific reference to the allegation that when the PA

went to report a threat by the agents of persecution to the police on February 19, 2019, the officer ignored him. The RAD noted it had been 2.5 years since the PA attended the police station and there was no supporting evidence of any police investigation or further interaction him or his family members around this allegation.

[14] With regards to the Applicants' allegations of discrimination and harassment faced by Sikh separatists, the RAD acknowledged these difficulties, but found the Applicants had not faced this level of persecution. The RAD pointed to the Applicants' ability to move from their local area to the new locality earlier, and to subsequently use their Canadian visitor visas to leave India as supporting this proposition.

B. *No serious possibility of persecution or risk of harm [Prong 1]*

[15] Again and in broad strokes, the RAD found, on a balance of probabilities, the Applicants do not face more than a mere possibility of persecution or risk of harm from the local government employee allegedly extorting the PA, or police forces. The RAD notes as per the test in *Rasaratnam*, there can only be a serious possibility of persecution if the agents of harm have both the "means and motivation" to search for and locate the Applicants. In the RAD's view, the Applicants had not provided sufficient credible evidence establishing either.

[16] Specifically, the RAD points out the agents of harm visited the Applicants' home five times since their departure to Canada. In the RAD's view, a continued search for the PA at his last known address does not reflect that the agents of harm are connected with the police and

high-level politicians, otherwise they would be aware of the Applicants' exit using their passports.

[17] The RAD also rejected the Applicants' argument they could be tracked through their Aadhaar (identity) numbers, which contain personal information. The RAD agreed it would be dangerous for an individual who was wanted by the police for separatist activities, but once again found the Applicants had not established that profile, which in any event the Applicants denied being. The RAD stated that, according to the evidence, the use of and access to Aadhaar biometric data for criminal investigations is not permissible under the *Aadhaar Act*. Similar, the RAD noted it was impossible for the police to actually verify the identities of all those who rent because they do not have the resources.

[18] Regarding the PA's attendance at the police station in 2019, the RAD found there was no evidence of police interest in him following his attendance at the police station nor since he came to Canada. Given the combination of these issues, the RAD found insufficient evidence to establish that the Punjab police are complicit with the agent of harm or interested in the PA as alleged.

[19] Similarly, in the RAD's view, the evidence supports that a Sikh person in the Applicants' town who is wanted for advocating for independence would face severe treatment, but that this was not the experience of the PA nor his profile. The RAD pointed to evidence that stated the majority of Sikhs do not experience discrimination or violence in India. Additionally, the massive population of either of the IFA cities would offer anonymity for the Applicants.

[20] Given these considerations, the RAD found the first part of the *Rasaratnam* test was met.

C. *Is it reasonable for the Applicants to relocate to the IFA*

[21] The RAD was satisfied it is reasonable for the Applicants to relocate to either of the two IFAs based on their specific circumstances. The RAD notes, firstly, that as per this Court's decision in *Raganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA), there is a very high threshold for the unreasonableness test which requires "nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area."[Emphasis added].

[22] The Applicants' focus on this part of the two-pronged test was their perceived error by the RPD to consider their Sikh faith. The RAD acknowledges there is evidence of groups that harass and pressure Sikhs to reject their religious practices, but notes religious freedom is protected in the Indian Constitution, and is a principle generally respected by governments. Furthermore, the RAD pointed to sources that found violence was less frequent towards Sikhs than other minorities and that the Government of India has increased its response to communal violence by providing aid to victims. Other sources indicated there is little discrimination against Sikhs in India, and that Sikhs are generally safe. The RAD also acknowledged evidence of rising Hindu nationalism in India, but found that it was not systemic, and reports by Sikhs were minor cases of violence. Another source indicated the majority of Sikhs do not experience societal discrimination or violence.

[23] Considering the evidence, the RAD was satisfied that the second part of the *Rasaratnam* test was also made out.

IV. Issues

[24] The only issue is whether the RAD's decision was unreasonable.

V. Standard of Review

[25] Both parties agree that the applicable standard of review in this case is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the " (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at

> para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[26] Critically for this application, *Vavilov* determined that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs this Court and others as follows:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[27] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be

> drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[28] I also agree with this Court's decision in *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7, where Justice Kane enunciated the "significant deference" this Court must give tribunals:

> [14] With respect to the Board's analysis of credibility and plausibility, given its role as trier of fact, the Board's findings warrant significant deference: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, [2008] FCJ No 1329 at para 13; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857, [2012] FCJ No 924 at para 65.
>
> [15] This does not mean, however, that the Board's decisions are immune from review where intervention is warranted. In *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291, [2009] FCJ No 350 Justice Phelan stated:
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> > [11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error (*Revolorio v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404). The deference owed acknowledges both the contextual circumstances and legislative intent, as well as the unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.

VI. Analysis

A. *Preliminary remarks regarding assessing credibility and the sufficiency of evidence*

[29] To begin with it is essential to distinguish between credibility assessments and weighing and assessing evidence. They are not the same. I subscribe to the following summary of the jurisprudence by Justice Pamel in *Uwera v Canada (MCI)*, 2022 FC 1425, at paras 25-26, citing *Huang v Canada (MCI)*, 2018 FC 940, at para 43:

> [43] The trier of fact may decide to assign little or no weight to the evidence, and hold that the legal standard has not been met. In the same vein, the presumption of truth or reliability of statements made by refugee applicants, as expressed in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA), cannot be equated with a presumption of sufficiency. Even if presumed credible and reliable, evidence from a refugee applicant cannot be presumed to be sufficient, in and of itself, to establish the facts on a balance of probabilities. This is for the trier of fact to determine. When frailties have been highlighted in the evidence, it is appropriate for the trier of fact to consider whether the evidentiary threshold has been satisfied by an applicant. By doing so, the trier of fact does not question the applicant's credibility. Rather, the trier of fact determines whether the evidence provided, assuming it is credible, is sufficient to establish, on a balance of probabilities, the facts alleged (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 17-18). In other words, not being convinced by the evidence does not necessarily mean that the trier of fact disbelieves the applicant.
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> [Emphasis in original]

[30] I appreciate that distinguishing between the two is not always easy, but the distinction must be made. The reality is that evidence which is entirely truthful may nonetheless be inadequate to make required findings such that whether it is truthful or not simply doesn't make a difference.

B. *Erroneous credibility findings*

[31] While the RAD determined the existence of the IFAs was the determinative issue for it, the RPD had additional credibility issues with the Applicants' evidence. The RAD on the other hand made no express credibility findings against the Applicants. It set out to determine the matter on the two pronged IFA test.

[32] That said, counsel for the Applicants filed very detailed submissions on what they submitted were credibility issues including a comprehensive outline of their position on numerous points in the RAD's reasons.

[33] In oral submissions, the Applicants' counsel took the Court from the many factual and evidentiary findings by the RAD, to their Memorandum where each was analysed for alleged unreasonableness.

[34] However, and with respect, these analyses while cast in terms of credibility, on examination, were not findings of credibility but sufficiency of evidence findings. Indeed most were described as matters of evidence or the sufficiency of evidence by the RAD itself. I realize a tribunal's self description of its findings may not bind the Court, but upon careful consideration and analysis I have determined they were as described, that is, findings made as a result of weighing and assessing the evidence and not credibility findings.

[35] Thus, the Court is forced to reckon with the binding direction of both the Supreme Court of Canada and the Federal Court of Appeal that it must "must refrain from 'reweighing and reassessing the evidence considered by the decision maker'" [*Vavilov* at para 125] and *Doyle* where the Court is instructed that weighing and assessing evidence is no part of the Court's role on judicial review.

[36] In my view, and no serious issue is taken in this respect, the RAD applied settled law in assessing both prongs of the IFAs. I appreciate counsel pointed to other cases based on different evidence, and in some different countries where specific findings helpful to the Applicants were made. But each case is fact specific and I am not persuaded to apply lines of factual assessment from other cases to this case without a great deal more.

[37] In my view the RAD conducted a comprehensive consideration of the points raised by the Applicant.

[38] In addition and in any event I also give the RAD's evidentiary findings the significant deference required by jurisprudence cited above.

[39] In addition, and given binding jurisprudence in *Vavilov* and *Doyle*, I am unable to accept counsel's invitation to engage in the reweighing and reassessing of the mass of evidence considered, assessed and weighed by the RAD resulting in the findings reported above in these Reasons. Neither am I persuaded any exceptional reasons exists to do otherwise. In this

connection I note the RAD weighed and assessed not just the Applicants' Basis of Claim [BOC] and oral testimony, but the documentary evidence including country condition evidence as well.

[40] I agree with the Respondent that although the Applicants assert they fear the Indian government and police, the Applicants' claim was centred on an individual "PS" [an individual agent of persecution], who allegedly was the local officer with whom the PA had several contacts, who allegedly demanded a portion of the contract payouts, and who allegedly sent "gangsters" to collect money he demanded. Moreover, although the PA was repeatedly questioned throughout the hearing if anyone else had ever threatened them or demanded money, the PA's sole answers were to repeat that it was "PS" who had friends in high places, and that "they" could always find him wherever he went. It did not help the Applicant's case that he was not responsive to direct questioning. Having reviewed portions of the transcript, his testimony confirms the Applicants had very little evidence to demonstrate even the existence of "PS", let alone his allegedly high level of power and connections, such that the proposed IFA would not be viable options. I also note the Applicants did not include any details of "PS" in their BOC, referring again to the nebulous "they" as their agents of persecution.

C. *Unreasonable IFA finding*

[41] As noted above, the jurisprudence had defined a two-pronged test for IFAs. For reference, in making a determination on a viable IFA, the two-prong test from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA), must be established:

> i. There is no serious possibility of the Appellants being persecuted or subjected, on a balance of probabilities, to a

> danger of torture or to a risk to their lives or of cruel and unusual treatment or punishment in the proposed IFA; and
>
> ii. Conditions in the IFA area are such that it would not be unreasonable, in all the circumstances, including those particular to them, for the Appellants to seek refuge there.

[42] The Applicants also refer to this Court's decision in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589, as it relates to the second prong of the test. In that case, Justice Linden stated:

> Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.

(1) PRONG 1: Serious possibility of persecution in the IFA

[43] A major issue was whether the agents of persecution would find the Applicants in the IFAs. This is a heavily factually infused determination. It seems to me the RAD identified the appropriate considerations, weighed and assessed the evidence, and found the Applicants had not met the burden on them (not the Respondent) to show a serious possibility of persecution in the proposed IFA. These are largely set out in the factual summary set out earlier in these Reasons. The theory of the Applicants was the corrupt contract officer "PS" in their home city would be able to find out if they were to return to India. He would do so, their theory went, with the assistance of other corrupt government officials, gangsters and it seems the police.

[44] I understand that now the Applicants do not allege the police are agents of persecution, although that is not how they put it in their Memorandum nor how the PA described his fears in his testimony. That concession is just as well because in my view there is close to if not a complete absence of evidence to tie the corrupt official “PS” to the police. I will not go further in terms of assessing and reweighing the evidence but suffice it to say I am not persuaded of reviewable error in the factual determinations underlining the RAD’s determination on the first prong of the IFA test.

[45] I appreciate the Applicants disagree with the RAD’s assessment and weighing of the evidence. That overlooks the Court’s role which requires significant deference and withholds reweighing and reassessing the evidence.

[46] I am left to conclude the Applicants failed to sufficiently demonstrate the facts of their case with respect to the agent of persecution, his position within the local government or even his existence. They failed to establish their allegation they are wanted by the police on the basis of false allegations, as a result of PS connections or otherwise, and they failed to establish that PS or the police for that matter have either the means of motivation to track them in the IFAs.

[47] As I did with the Applicants, I likewise decline the Respondent’s invitation to relitigate – for the third time – the record in this case in terms of reweighing and reassessing the evidence.

[48] I appreciate there is evidence relied upon by both parties. With respect, the factual foundation for the decision in this case was for the RPD in the first instance, and now the RAD to determine, unless exceptional circumstances apply which is not the case.

[49] The Applicants failed to meet their burden.

(2) PRONG 2: Reasonableness of the IFA

[50] The Applicants submit the RAD ignored much of the evidence contained in the National Document Package, which explains that India is an increasingly unsafe country for religious minorities. The Applicants specifically note India has been recommended to be designated a "Country of Particular Concern" by the United States Commission on International Religious Freedom. This designation is given to countries "where the government engages in or tolerates particularly severe violations of religious freedom."

[51] From this, in my respectful view, the Applicant again invites the Court to reweigh and reassess the country condition and other evidence in terms of the second prong of the IFA namely the reasonableness of the IFA for the Applicants. I decline that invitation.

[52] In this connection, the Respondent correctly notes the Applicant bears a high onus to demonstrate that a proposed IFA is unreasonable, as per this Court's decision *in Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA), which states:

> [15]We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would

> jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. […]
>
> [Emphasis added]

[53] On the other side, the Respondent submits the Applicant has failed to provide any evidence of the existence of conditions which would jeopardize the life and safety of a claimant.

[54] There is no doubt this is the test and that it is a high one.

[55] That said, I will not go through the evidence in this respect either, for the reasons noted above. However, I will observe the RAD identified relevant factors to consider including the Applicants' extensive language abilities, level of education, employment experience and Sikh faith in making this assessment of the evidence. I am not persuaded the RAD committed reviewable error in this respect either.

[56] The second prong of the IFA test is therefore reasonable.

VII. Conclusion

[57] In my respectful view, the Applicant has not established the RAD's decision was unreasonable. Therefore, the Application for judicial review will be dismissed.

VIII. Certified Question

[58] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-5810-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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