Federal Court  Cour fédérale

Date: 20230330

Docket: IMM-3562-22

Citation: 2023 FC 452

Ottawa, Ontario, March 30, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

DURGA PRASAD SUBEDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision, dated March 23, 2022 [Decision]. The RAD confirmed the decision of the Refugee Protection Division [RPD] finding that the Applicant is not a Convention refugee or person in need of protection due to the availability of an internal flight alternative [IFA] in Biratnagar, Nepal.

[2] For the reasons that follow, I am satisfied that the RAD's decision was reasonable and I will dismiss the application for judicial review.

II. **Background**

[3] The Applicant is a citizen of Nepal who fears persecution at the hands of the Biplav Maoist faction of the Communist Party of Nepal (Maoists) and the Young Communist League (YCL).

[4] The Applicant claims that he was targeted on the basis of his political opinion because of his membership and participation in the Nepali Congress Party (NCP) and its related organizations, and because he has refused their demands for support.

[5] The Applicant fled to Japan in July 2014 where he lived until coming to Canada in January 2019, subsequently initiating a claim for refugee protection.

[6] On July 7, 2021, the RPD rejected the Applicant's claim finding that he had a viable internal flight alternative [IFA] in Biratnagar.

[7] The Applicant appealed the RPD's decision to the RAD.

III. **Decision under Review**

[8] On appeal to the RAD, the Applicant argued that the RPD erred: (1) by making credibility findings that were impermissibly vague and reached primarily on the basis of

irrelevant considerations and without corroborative evidence; and (2) in its IFA analysis and findings.

[9] The RAD noted that it independently assessed all the evidence, including the audio recording of the RPD hearing and the Applicant's arguments on appeal.

[10] The RAD considered the Applicant's submissions on credibility and the viability of the IFA and ultimately agreed with the RPD's conclusions that the Applicant could safely and reasonably relocate to Biratnagar.

IV. **Issues and Standard of Review**

[11] The Applicant raises the following issues:

1. Did the RAD err in refusing to admit new evidence?
2. Did the RAD err in declining to hold an oral hearing?
3. Did the RAD err in its analysis of whether the Applicant has a viable IFA in Biratnagar, Nepal?

[12] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23. While this presumption is rebuttable, no exception to the presumption is present here.

[13] A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. It does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem: *Vavilov* at para 83.

[14] A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires a reviewing court defer to such a decision: *Vavilov* at para 85.

[15] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with their factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

[16] While the Applicant submits that the first two issues are matters of procedural fairness, for the reasons set out below, I do not agree.

V. **Analysis**

A. *The RAD's Decision not to Admit New Evidence under IRPA subsection 110(4)*

[17] The Applicant argues that the RAD erred in refusing to admit some of his new evidence.

[18] The procedural context in which the new evidence was tendered, admitted, and/or refused is extensive, occurring over several stages, as set out below.

(1) Evidence submitted with the Appellant's Record

[19] When the RAD appeal was first submitted, the Applicant stated that he did not seek to rely on new evidence.

[20] The Applicant did however, tender an affidavit, sworn on August 23, 2021. The Applicant made no submissions to the RAD as to how the evidence contained in the affidavit met the criteria in subsection 110(4) of the *IRPA.*

[21] The RAD decided to admit the affidavit only as argument and not as new evidence.

(2) Rule 29 application to submit new evidence:

[22] The Applicant made a Rule 29 application pursuant to the RAD Rules to submit new evidence after the appeal was perfected. This new evidence consisted of nine news articles and press releases. The Applicant submitted generally that the articles demonstrated the Biplav Maoists continued to resort to violent means of protest despite having entered into a peace agreement in March 2021.

[23] Of the nine articles tendered, the RAD accepted only one.

[24] The RAD refused to admit the first three articles, finding that they had little or no relevance or probative value in relation to the determinative issue of an IFA. The RAD described how the articles referred to a nationwide strike called by the Chand-led CPN in November 2021, to protest a hike in petroleum product prices, and the effect of that strike.

[25] The RAD also refused to admit the fourth and fifth articles finding that the Applicant failed to establish that they had any relevance or probative value in relation to the risk faced by the Applicant at the hands of the agents of persecution in the IFA location.

[26] The remaining articles were refused because no submissions were made by the Applicant about their relevance or probative value or how they relate to him or the risk he faces at the hands of the agents of persecution in the IFA location.

(3) New evidence submitted in response to Member's Direction:

[27] In independently assessing the evidence, the RAD issued a "member's direction" on two occasions, disclosing to the Applicant additional documentary evidence and inviting him to make submissions in response.

[28] In the first direction, the RAD disclosed to the Applicant additional country condition evidence including evidence about political events following a peace agreement signed in March 2021, between the government of Nepal and the Biplav Maoists (the peace agreement), inviting the Applicant to make submissions responding to that evidence.

[29] In response to the first direction, the Applicant submitted an affidavit, attaching 12 news articles as exhibits.

[30] The affidavit was admitted as it responded to evidentiary concerns raised by the Member.

[31] Of the 12 articles, the first six were the very same ones the Applicant previously attempted to tender under the Rule 29 application. The RAD refused to admit them as the Applicant again failed to make specific submissions on their relevance and probative value with respect to the IFA location.

[32] The RAD accepted the remaining six articles, despite a lack of submissions from the Applicant as to how they were relevant, finding they were “at least arguably relevant”.

[33] The RAD subsequently issued a second direction inviting the Applicant to make submissions in relation to one of the articles the member had previously accepted as new evidence. In response, the Applicant submitted a further eight news articles, this time accompanied by submissions. The RAD accepted all eight of the articles submitted under this second direction.

[34] The Applicant submits that the RAD erred in refusing to admit eight of the news articles tendered by him, asserting that they were sufficiently probative with respect to the determinative issue of the risk faced by the Applicant in the IFA location.

[35] The Applicants submissions on this point are not persuasive. I agree with the Respondent that they amount to a mere disagreement with the RAD’s analysis.

[36] First, the RAD identified the correct legal test for the admission of new evidence under subsection 110(4), including whether the evidence was new, credible and relevant in accordance

with the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [2016] 4 FCR 230.

[37] Second, the RAD gave clear reasons for the evidence it rejected, namely, that they lacked probative value with respect to the IFA location. The reasons provided are intelligible, transparent, and justified in light of the constraining facts and law.

[38] I further note that the Applicant failed to make specific submissions to the RAD about the relevance or probative value of the new evidence at issue. They are now attempting to do so before this Court for the first time.

[39] In the absence of submissions from the Applicant, the RAD was forced to undertake its own assessment of relevance, without the Applicant's input. In my opinion, having reviewed the reasons for the Decision, the RAD did so in a manner that was entirely fair to the Applicant and reasonable.

[40] The Applicant has failed to articulate a sufficient basis for this Court to disturb the RAD's findings on the probative value of the evidence it refused to admit.

B. *The RAD's decision not to convene an oral hearing under IRPA subsection 110(6)*

[41] Subsection 110(3) of the *IRPA* requires that the RAD proceed without an oral hearing. Subsection 110(6) carves out a narrow exception: the RAD may convene an oral hearing if new evidence (a) raises a serious issue with respect to the credibility of the person who is the subject

of the appeal; (b) is central to the decision with respect to the refugee protection claim; and (c) if accepted, would justify allowing or rejecting the refugee protection claim.

[42] The Applicant submits that the RAD erred when it refused to convene an oral hearing, asserting that it admitted evidence raising a serious concern with respect to credibility, which was central to the claim.

[43] Specifically, the Applicant refers to his affidavit where he explained why he could not obtain a letter from his wife to corroborate his narrative of ongoing threats, an explanation that was ultimately rejected by the RAD.

[44] The RAD's reasons for declining to hold an oral hearing were as follows:

> The Appellant states in the further submissions that he requests an oral hearing to clarify the issues raised in the Member's Direction, and states that an oral hearing is warranted under subsection 110(6) of the IRPA, but he does not provide any submissions, let alone full and detailed submissions, about why a hearing should be held. In my assessment, although some of the statements in the Appellant's affidavit relate to some credibility concerns, most of them do not relate to the determinative IFA issue, and even those that arguably do (such as his statements explaining why he did not attempt to provide evidence from his wife), are not central to the IFA decision; he has been given an opportunity to provide his explanation and has done so, and an oral hearing is not required to assess those statements. The affidavit and the country condition documents admitted as new evidence do not raise a serious question of the credibility of the Appellant, they are not central to the decision respecting the refugee claim, and they are not determinative of the refugee claim. The request for an oral hearing is denied.

[45] The Respondent submits that the credibility concerns raised by the Applicant's affidavit were not central to its conclusions on the viability of the IFA. Moreover, the country conditions documents admitted did not raise credibility questions and were not central to the decision.

[46] I agree with the Respondent.

[47] The RAD explicitly reasoned that though some of the Applicant's evidence did relate to his credibility, particularly as to why he could not obtain a supporting letter from his wife, the new evidence was neither central to, nor determinative of, the IFA analysis.

[48] In a January 28, 2022 direction to the Applicant, the RAD, gave the Applicant an opportunity to respond to their concerns about a lack of evidence from the Applicant's wife by asking: "Did you attempt to obtain written evidence from your wife supporting your allegations, and particularly your testimony that your wife was attacked in 2017, her activities/movements since her return to Nepal from Japan, and your testimony about contacts by Maoists with your wife since you left Nepal for Japan? Did you ask her to provide testimony at the hearing, or to provide affidavit evidence or a letter? If not, why not?"

[49] In response, the Applicant explained that he told his former RPD counsel about the incidents that happened to his wife and that counsel advised him it was unnecessary to obtain a letter or affidavit of support from her.

[50] In the Decision, the RAD found the Applicant's explanation for the lack of corroborative evidence was neither reasonable nor credible because he had been represented by experienced

immigration counsel throughout the RPD proceedings. The Applicant also failed to provide evidence from his former counsel regarding this advice.

[51] The Decision, read as a whole, supports the Respondent's position that this credibility finding was not central to the Decision. The RAD's reasons, particularly with respect to the first prong of the IFA were heavily focussed on the country conditions evidence that, in its view, failed to demonstrate that Biratnagar would be unsafe for the Applicant.

[52] It is also my view that the sole credibility issue flowed not from the Applicant's new evidence, but from his failure to include the details of threats to his wife in his Basis of Claim form narrative. Further, the RAD gave the Applicant ample opportunity to respond to this issue and it was open to the RAD to find that his response was insufficient to overcome its concerns.

[53] Finally, the adverse credibility finding was not determinative of the RAD's ultimate conclusion on the safety of the IFA location. As will be explained in the next section, the RAD's analysis was far more focussed on the country condition evidence and how it failed to establish an ongoing risk of harm to the Applicant in the IFA.

[54] Based on all of the foregoing, I conclude that the RAD made no reviewable error and committed no breach of procedural fairness in not convening an oral hearing under subsection 110(6) of the *IRPA*.

C. *IFA Analysis*

[55] When determining whether there is an IFA, the decision maker must consider the two-pronged test developed in *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706 (CA) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA).

[56] On a balance of probabilities, the Board must be satisfied that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists; and the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for them to seek refuge there.

[57] The Applicant challenges the RAD's analysis under the first prong, asserting that the Member "did not analyze the country conditions as found in the NDP and as provided by the applicant's counsel".

[58] There is no doubt that there was mixed country condition evidence before the RAD. However, based on a holistic review of the record before this Court, I find, as Justice Go did in *Magar v Canada (Citizenship and Immigration)*, 2021 FC 1053, that the RAD reasonably concluded that there is insufficient evidence showing a nationwide network of Maoists and YCL with the means to locate the Applicant in the proposed IFA.

[59] The RAD's conclusions under the first prong of the test were transparent, justified, and followed a rational chain of analysis. Among them, the RAD found:

A. The preponderance of country documentary evidence indicates that mainstream Maoists, and their affiliated youth groups, stopped issuing extortion threats and letters since they joined the democratic process and the government, and that violence targeting individuals or members of other political parties dramatically decreased following the end of the civil war in 2006 and became "increasingly rare occurrences from a political party perspective" and "not common."

B. The country documentation describes the Biplav Maoists as a splinter group that separated in late 2014 or 2015 from another splinter group (Baidya) that separated from the larger former insurgent Maoist party, UCPN-M, in 2012.

C. Documentary evidence indicates that the government's efforts to neutralize the group has reduced its capacity.

D. The Applicant is not a government or business official, or a prominent businessperson; while in Nepal, he worked mostly as a teacher. Further, instances of extortion occurred "mainly outside of Kathmandu, and 'particularly in the mid-West and Far-West region' with a few cases in the Western Region. The IFA Location is in south-east Nepal, approximately 550 kilometres by road from Kathmandu. There is no evidence of them engaging in extortion in Biratnagar.

E. The evidence does not support the assertion that members of the NCP – even active members of the NCP – are currently at risk of persecution or harm simply because of that membership or activity. Objective country documentation indicates that, in general, political opponents of Maoists do not face violence unless they participate in violent political demonstrations, in which case they face no greater threat of violence than other participants do.

F. The RAD agreed with the RPD's finding that Applicant does not have a high political profile, and he has not established that his political profile makes him a target or places him at serious risk of persecution in Nepal. This is particularly so in light of his absence from Nepal for almost eight years.

G. In the RAD's view of the evidence, the peace agreement between the government of Nepal and the Biplav Maoists, in which the Biplav Maoists agreed to address all their political issues through

> dialogue and to carry out all their political activities in a peaceful manner, reduces even further the Applicant's forward-looking risk of persecution or harm, because it reduces the risk of violent activities by the Biplav Maoists against political opponents and of coercive demands and/or violence in support of its fundraising.
>
> H. The RAD was not satisfied that the Applicant had established that the Biplav Maoists have continuing motivation to search for the Applicant throughout Nepal or in the IFA Location, particularly in light of the peace agreement.
>
> I. The RAD did not find the Applicant's allegations of threats against his wife in May 2021 to be credible because it was omitted from his basis of claim narrative and because he provided no evidence to corroborate the incident.

[60] The Applicant's submissions take aim at most of the RAD's findings but particularly take issue with the RAD's analysis of the implications of the March 5, 2021 peace agreement between the government of Nepal and the Biplav Maoists.

[61] I cannot find that, as the Applicant contends, the RAD misconstrued or overemphasized the effect of the agreement on his risk in the IFA location. To the contrary, I find the RAD undertook a highly nuanced assessment of the peace agreement, acknowledging the mixed country condition evidence as to its effect and the fact that the situation "is not yet stable and there are issues to be addressed". Ultimately the RAD concluded:

> In current conditions, and looking forward, the peace agreement, which includes the renunciation of violence by the Biplav Maoists, and the absence of evidence of significant Biplav violence of the type that results in risk to the Appellant since the agreement, **significantly reduces the risk to the Appellant of violence at the hands of the Biplav Maoists, which, in my assessment, was already not a serious risk before the agreement.**
>
> [my emphasis]

[62] I find the RAD's assessment under the first prong of the IFA test, including its assessment of the peace agreement to be reasonable.

[63] The remainder of the Applicant's written and oral submissions amount to a mere disagreement with the RAD's assessment of the country conditions evidence. It is not the role of this Court to reweigh the evidence: *Vavilov*, at para 125.

VI. **Conclusion**

[64] For the foregoing reasons this application for judicial review is dismissed.

[65] Neither party proposed a serious question of general importance for certification and I find that none arises on these facts.

JUDGMENT in IMM-3562-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no serious question of importance to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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