

Federal Court



Cour fédérale

Date: 20230728

Docket: IMM-4641-22

Citation: 2023 FC 1034

Toronto, Ontario, July 28, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ASHISH SHARMA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of India, claimed fear of persecution by a Hindu-nationalist paramilitary organization called the Rashtriya Swayamsevak Sangh [RSS] and the police because he advocated against violence towards Muslims by Hindu fundamentalists. In March of 2017, the Applicant gave a speech at an interfaith marriage condemning Hindus who promote violence towards Muslims over the slaughter of cows. Following this speech, the Applicant received threatening phone calls from members of the RSS. He reported the threat, but received no assistance from the police.

[2] In May of 2017, the police attended the Applicant's home in what he believes was a religiously-motivated case against him, and only left after his family paid a bribe. In June of 2017, the Applicant was allegedly beaten by members of the RSS near his home and was hospitalized for three days. The police took his statement following the incident, but did not register a First Information Report.

[3] The Applicant arrived in Canada on July 26, 2017. The Applicant states that in February of 2018, Hindu fanatics attended his home in India and assaulted his family. He filed a claim for refugee protection on March 16, 2018.

[4] The Refugee Protection Division [RPD] found that the determinative issues of the Applicant's claim were credibility and the availability of an internal flight alternative [IFA]. That said, the RPD's reasons state that while it had some concerns as to the credibility of the Applicant's allegations, it would give him "the benefit of the doubt" and found on a balance of probabilities that he was accosted by the RSS as a result of his speech. The RPD went on to find that the Applicant had an IFA in Chennai or Trivandrum and therefore does not require Canada's protection.

[5] The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD], asserting that the RPD's credibility finding was confusing and replete with errors and that the RPD failed to meaningfully consider whether the RSS would have the means and motivation to find the Applicants in the IFA locations, devoting the majority of its analysis to the means and motivation of the police.

[6] The RAD held that the determinative issue was the availability of the IFA locations and found that: (a) there was no serious possibility of persecution or a risk to harm in the IFA locations; and (b) the two proposed IFA locations were reasonable. The RAD therefore dismissed the Applicant's appeal.

[7] The Applicant has raised a number of issues on this application for judicial review. However, I find that the determinative issue is the RAD's denial of procedural fairness to the Applicant.

[8] Procedural fairness is a matter for the Court to determine. The standard for determining whether a decision-maker complied with the duty of procedural fairness is correctness [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54]. A Court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances [see *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at para 54]. The ultimate question is whether the Applicant knew the case to meet and had a full and fair chance to respond [see *Laag v Canada (Citizenship and Immigration)*, 2019 FC 890 at para 10].

[9] In its decision, the RAD found that the Applicant had a viable IFA in both Chennai and Trivandrum and stated that as a result, the RAD would "only address the RPD's credibility findings that pertain to the viability of the IFAs". With respect to the RSS, the RAD concluded that the RSS lacked the motivation to search for and pursue the Applicant in the IFA locations. In reaching this

conclusion, the RAD found an inconsistency in the Applicant's evidence regarding the attack on his family in February of 2018, stating at paragraph 16:

...The Appellant testified that the perpetrators of the attack against his family were members of the RSS, although in the Basis of Claim form (BOC), he only refers to them as "Hindu fanatics", whereas he identified his own attackers in the BOC from the June 18, 2017, incident as "RSS gangsters". His cousin and his friend do not refer to this incident in their affidavits and therefore do not help resolve this inconsistency. Given the inconsistency in this evidence, I do not find the Appellant credible in his assertion that the attack against his family after he left India was perpetrated by the RSS. This alleged incident therefore does not establish that the RSS is motivated to pursue and search for him.

[10] This was the sole analysis conducted by the RAD regarding whether the Applicant faces a serious possibility of persecution or a risk of harm from the RSS in the IFA locations.

[11] The Applicant asserts that he was denied procedural fairness as he was never given an opportunity to address the inconsistency in his evidence as found by the RAD. I agree. A "new question" is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the Applicant, to support the valid or erroneous nature of the decision appealed from [see *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600]. While the Respondent is correct in noting that it is open to the RAD to make additional findings on credibility where the issue of credibility was already before the RPD, it is still incumbent upon the RAD at the very least to assess whether a new issue/question has arisen that warrants notice or additional submissions [see *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 71-74; *Ugbekile v Canada (Citizenship and Immigration)*, 2016 FC 1397 at

para 22; *Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819 at paras 15-17].

[12] In this case, the RPD made a number of comments regarding the Applicant's evidence and the weight to be given to documentary evidence, but made no express credibility findings related to its IFA analysis (and in particular, made no credibility finding relating to the February 2018 attack). This leads me to question the basis for the RAD's statement that it would "only address the RPD's credibility findings that pertain to the viability of the IFAs". Moreover, with respect to the motivation of the RSS to pursue the Applicant in the IFA locations, the RPD did not question whether the attack against the Applicant's family in February of 2018 was perpetrated by the RSS, but rather found that the RSS lacked motivation for other reasons. I find that the RAD's new ground of reasoning for the RSS' lack of motivation constitutes a new issue, which the RAD failed to turn its mind to and failed to afford the Applicant an opportunity to address. It was incumbent on the RAD to raise its concern with the Applicant regarding the February 2018 attack and provide him with an opportunity to respond thereto. Having failed to do so, I find that the Applicant was denied procedural fairness.

[13] Accordingly, the application for judicial review is granted, the RAD's decision is set aside and the matter shall be sent back for redetermination by a differently-constituted panel of the RAD.

[14] The parties proposed no question for certification and I agree that none arises.

JUDGMENT in IMM-4641-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Refugee Appeal Division dated April 28, 2022 is set aside and the matter shall be remitted to a differently-constituted panel of the Refugee Appeal Division for redetermination.
3. The parties proposed no question for certification and none arises.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4641-22

STYLE OF CAUSE: ASHISH SHARMA v MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 27, 2023

JUDGMENT AND REASONS: AYLEN J.

DATED: JULY 28, 2023

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