

Federal Court



Cour fédérale

Date: 20230921

Docket: IMM-5104-21

Citation: 2023 FC 1270

Ottawa, Ontario, September 21, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

**HARISH KUMAR MITTAL
DEEP SHIKHA AGGARWAL
ARIPTA MITTAL
ADITI MITTAL**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family from India, who came to Canada to claim refugee status. The Principal Applicant [PA] is Harish Kumar Mittal, who says he fled India due to a fear of persecution based on his political opinion. The refugee claims of his spouse, Deep Shikha Aggarwal, and their daughters Arpita Mittal and Aditi Mittal, rest on the PA's narrative.

[2] The Applicants seek judicial review of the decision of the Refugee Appeal Division [RAD], dismissing their appeal from the decision of the Refugee Protection Division [RPD] that found them not to be refugees. Although the RAD disagreed with the RPD's negative credibility determination, it found the Applicants had a viable Internal Flight Alternative [IFA] in New Delhi, and so it dismissed their appeal.

[3] The Applicants claim the RAD engaged in speculation and a selective reading of the evidence, and ignored pertinent evidence that shows the agents of persecution are still motivated to find them, and that the police have the means to do so even if they are in New Delhi.

[4] For the reasons that follow, the Applicants' application for judicial review will be granted. I find that there are two significant flaws in the RAD's decision: it engaged in unfounded speculation about why the PA was targeted, and it ignored relevant evidence on the key question of whether the police were motivated to find the Applicants. The combined effect of these two errors on key points is sufficient to make the decision unreasonable.

I. Background

[5] The PA and his father were both members of the Bharatiya Janata Party (BJP) and served as town councillors in the city of Shahkot for many years. After the Indian National Congress Party [INC] came to power in Punjab in the 2017 state elections, the PA and his father were threatened by political opponents and goons, and they decided not to run in the municipal elections in December 2017. The Applicants came to Canada to escape the threats but returned to India in February 2018.

[6] The Shahkot Member of the Legislative Assembly died in February 2018, and a by-election was scheduled for May 2018. The PA and his father were pressured to support the INC candidate, but they refused. The police went to the Applicants' house in late March 2018 and arrested the PA, accusing him of trying to buy votes for the BJP candidate and supplying drugs and weapons to goons in order to disrupt the by-election. The PA was held in police custody for one day, and released after a bribe was paid. He was hospitalized for several days for treatment of the injuries he sustained while in custody.

[7] Soon thereafter, the PA went into hiding in New Delhi, to await the end of the election. While he was in hiding, the Applicants' house was vandalized by goons. His wife was harassed by the police when she tried to file a complaint about this incident. The PA's wife and daughters then joined him in hiding in New Delhi, where they remained until June 2018. After the Congress Party candidate won the by-election on May 31, 2018, the PA's father informed him that the police came to his house looking for the PA. The Applicants then fled to Canada to claim refugee status. Subsequently, goons have attacked the PA's stores and the Applicants' home, including five times in three days.

[8] The RPD dismissed the Applicants' claim, largely based on a negative credibility assessment of the PA's evidence, and because the RPD found they had a valid IFA in New Delhi. The Applicants appealed to the RAD, and the Respondent Minister intervened in the appeal on the grounds of credibility. Before the RAD, the Applicants did not apply to file new evidence but they did request an oral hearing, which was denied because without new evidence they had not met the statutory requirements for an oral hearing before the RAD.

[9] The RAD dismissed the Applicants' appeal. It disagreed with the RPD's credibility findings, but upheld the determination that the Applicants had a viable IFA in New Delhi.

II. Issues and Standard of Review

[10] The only issue is whether the RAD decision is unreasonable, when measured against the framework endorsed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[11] In summary, under the *Vavilov* framework, 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 decision maker" (*Vavilov* at para 85). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95), not only in general but also to the individuals most affected by the decision (*Vavilov*, paras 133-135).

[12] The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant" to make the entire decision unreasonable (*Vavilov* at para 100). The decision should be assessed in light of the history and context of the proceedings, including the evidence and submission made to the decision-maker (*Vavilov* at para 94). A reviewing court should not interfere with a decision-maker's factual findings "absent exceptional circumstances" (*Vavilov* at para 125). However, a decision-maker's failure to "meaningfully grapple with key issues or central arguments raised by the parties" may render a decision unreasonable (*Vavilov* at para 128).

III. Analysis

[13] The Applicants argue that the RAD's decision is unreasonable for three reasons: (i) the RAD engaged in a selective review of the relevant country condition evidence regarding the police's ability to find them in the IFA, and its analysis is marred by internal contradictions; (ii) the RAD failed to consider the affidavits they filed that show the police continued to look for them after they fled India, and (iii) the RAD engaged in speculation regarding why the agents of persecution were searching for them.

[14] The RAD properly noted that the IFA test has two prongs. The RAD's decision is only challenged on the first element, under which the facts must demonstrate on a balance of probabilities that the Applicants are not at risk in the proposed IFA, as defined in sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. This usually involves an assessment of both the means and motivation of the agent of persecution.

[15] In this case, the RAD concluded that the Applicants would not be at risk in New Delhi because the political actor who had caused him and his father trouble had won the by-election and thus had no reason to continue trying to harm them. In addition, the RAD found that the police would not be motivated to search for the Applicants in the IFA location because the PA had been arrested and detained illegally and there was no evidence that an arrest warrant or First Information Report had been filed against him. The RAD found that the evidence about the tracking systems available to the police was mixed, and did not indicate that the police in

Sharkhot would likely learn of the Applicants' return to New Delhi. Based on this, the RAD concluded that they had not demonstrated a risk in the IFA.

[16] It is not necessary to review all of the Applicants' submissions in detail, because I am persuaded that the RAD decision is unreasonable for two reasons, the combined effect of which casts into doubt the RAD's conclusion. Simply put, I am unable to find that the RAD's analysis "adds up" on a central element of the case (*Vavilov* at para 104).

[17] The first major problem with the RAD's decision is its unsupported speculation about why the PA was at risk from his political opponent after that person won the local by-election. The RAD questioned the PA's explanation that he was at risk because he posed a threat to his opponent in the next election. The RAD stated that this did not explain why he had been singled out compared to other former politicians, and then continued (para 19):

According to the PA, the police accuse him of having supplied weapons and drugs to political workers and of having created havoc during the election campaign. Although he testified that these allegations are not true, he did not provide sufficient details to permit one to establish why he has been targeted in the way that he has been. He likely engaged in conduct during the by-election which led the INC candidate and the police to act the way they did. Exactly what he did to warrant this treatment cannot be established on the basis of the evidence presented.

[18] I agree with the Applicants that the RAD engaged in speculation that is entirely unsupported in the record, something that has been found unreasonable in previous cases. This Court has repeatedly cautioned against speculating "as to the rational actions of reasonable agents of persecution": *Hernandez Cortez v Canada (Citizenship and Immigration)*, 2021 FC

1392 at para 36, citing *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at paras 18-19; *Soos v Canada (Citizenship and Immigration)*, 2019 FC 455 at paras 12-14; *Builes v Canada (Citizenship and Immigration)*, 2016 FC 215 at paras 16-17.

[19] The RAD's analysis on this point is premised on a belief that the PA had engaged in conduct during the by-election which caused the INC candidate and police to act the way they did. The RAD found the PA to be credible, but seems not to have accepted his testimony that he did not commit any of the crimes of which he was accused, although there was no contradictory evidence. I note the RAD did not make a specific finding on this point. The RAD did not provide any other explanation for the assumption that it made, and it is difficult to ascertain whether or how this affected the rest of its reasoning.

[20] The second major flaw in the RAD's decision concerns its failure to explain how the continued pressure by the police on the Applicants' family was considered in its assessment of the risk they face in the IFA. The Applicants filed an amended Basis of Claim form, together with affidavits from the PA's father as well as two neighbours, stating that the police continue to ask them about the Applicants' whereabouts and to threaten them when they did not provide the information. The PA's father also stated that the police had sent a note asking that he present himself at the local police station.

[21] The Applicants submit that two things flow from this evidence: it contradicts the RAD's findings that the police were not motivated to locate them; and it shows that if they returned to New Delhi, their family and friends would have to take the risk of lying to the police in order to

shield them from being found. The Applicants point to the case-law that has found that not being able to share the IFA location with family or friends is tantamount to hiding, which makes the IFA location unreasonable: *Zamora Huerta v Canada (Citizenship and Immigration)*, 2008 FC 586 at para 29; *Ali v Canada (Citizenship and Immigration)*, 2020 FC 93 at paras 49-50; *AB et al v Canada (Citizenship and Immigration)*, 2020 FC 915 [AB] at paras 20-26.

[22] The Respondent submits that these cases are distinguishable, because they involved police or security forces' searching for the claimants outside of their original location, whereas in this case the evidence only shows that the local police were interested in finding the Applicants.

[23] The key aspect of the RAD's finding on this point is set out as follows:

[21] The Punjab police sent a note to the PA's father requesting that he present himself at the Shahkot police station. There is no evidence that an FIR was drafted or that a formal warrant for his arrest has been issued. Although interstate police communications are possible, the volume of tenant registrations and staffing issues present challenges to its implementation. The documentary evidence establishes that, despite inefficiencies, police are able to track persons of interest to other states if the crime is serious enough or there is pressure from local authorities. The PA denies all wrongdoing, and attributes the issue to an attempt to prevent him from interfering with the current MLA during the next election. On the facts of this case, the PA has not established that authorities in Shahkot have initiated formal legal proceedings against him or that they would likely have the motivation to track him to the proposed IFA in New Delhi. The INC goons in Punjab would not likely be able to locate the PA in New Delhi. The RPD did not err in concluding that, on a balance of probabilities, there is no serious possibility that the PA would be persecuted in New Delhi or otherwise seriously mistreated.

[24] It was certainly open to the RAD to find that the police lacked the motivation to track down the Applicants in New Delhi, and that the PA's political opponents would not be able to find them either. However, it was not open to the RAD to draw this conclusion without explaining its analysis of the affidavit evidence about ongoing police visits to the PA's father and the Applicants' neighbours, including the threats they faced from police. This evidence tends to show an ongoing strong police interest in locating the Applicants. The RAD's conclusion that the political threat the PA faced was diminished after the INC candidate won the election is not supported by any evidence, and fails to consider that this individual's influence over the police could have increased after he won the by-election. Simply put, the RAD's conclusion that the Applicants have a valid IFA cannot stand without some discussion of the affidavit evidence showing ongoing police searches and threats.

[25] In addition, I agree with the Applicants that the RAD had to consider the impact of the ongoing police visits and threats upon their family and friends. The case-law makes clear that having to hide one's location from family and close associates, for fear that they will be forced to disclose this information to the authorities or face consequences for not doing so, can undermine an IFA finding in some circumstances: see *AB* at paras 20-26 and the cases cited therein.

[26] It should be emphasized that my finding on this aspect of the decision does not preclude the next decision-maker from reaching a similar conclusion as the RAD did here; all that I have found is that such a result must be explained and that the key evidence on the essential question of the means and motivation of the agents of persecution to locate the Applicants in the IFA

location, and the impact of the ongoing search on the Applicants' ability to share information about their new location with family and friends, must be factored into the analysis.

[27] The combined effect of these two elements are sufficiently serious to cast doubt over the RAD's conclusion on the IFA question, on which its decision rests. Based on the foregoing analysis, I find the RAD's decision to be unreasonable. It is not, therefore, necessary to discuss the other arguments advanced by the Applicants.

[28] The application for judicial review will be granted. The RAD decision will be quashed and set aside, and the matter will be remitted back to a different panel for reconsideration.

[29] There is no question of general importance for certification.

JUDGMENT in IMM-5104-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Refugee Appeal Division dated June 25, 2021 is set aside and quashed.
3. The matter is remitted back to a different panel of the Refugee Appeal Division for reconsideration.
4. There is no question of general importance for certification.

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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