Federal Court  Cour fédérale

Date: 20231101

Docket: IMM-8843-22

Citation: 2023 FC 1457

Ottawa, Ontario, November 1, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

AMARJIT SINGH
RAJWINDER KAUR
DAVINDERJIT SINGH
RAVINDERJIT SINGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of India. They seek judicial review of a decision by the Refugee Appeal Division [RAD], dated August 15, 2022, dismissing their appeal and confirming the decision of the Refugee Protection Division [RPD] rejecting their claim for refugee

protection. The RAD found that they are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicants allege they fear the Punjab police and Khalistani militants. The determinative issue for the RPD and the RAD was the availability of a viable internal flight alternative [IFA] in New Delhi, Jaisalmer (Rajasthan) and Dehradun (Uttarakhand).

[3] The Applicants submit that the RAD's decision is unreasonable on three grounds. First, the RAD erred by rejecting new evidence, namely, a letter from the South Asian Women's Community Center and a report from Dr. Colavincenzo, a family doctor. Second, by erring in the application of the *Chairperson's Guidelines 4: Considerations in Proceedings before the Immigration and Refugee Board* [Gender Guidelines]. Third, by providing incoherent reasoning and failing to address the new evidence in the context of the second prong of the two-prong IFA test.

[4] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RAD's decision is unreasonable. For the reasons below, this application for judicial review is therefore dismissed.

II. Standard of Review

[5] At the hearing, the parties agreed that the standard of review is reasonableness as set out in Canada (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicants, the parties challenging the decision, who bear the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[6] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). A reasonableness review also is not a "line-by-line treasure hunt for error," the reviewing court simply must be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102, 104).

III. Analysis

[7] As noted above, the determinative issue for both the RPD and the RAD was the existence of a viable IFA. If a refugee claimant has a viable IFA, this will negate a claim for refugee

protection under either section 96 or 97 of the IRPA, regardless of the merits of other aspects of the claim (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7). It is the Applicants who bear the burden of demonstrating that a proposed IFA is not viable.

[8] The test for establishing the viability of an IFA is two-pronged. Both prongs must be satisfied in order to make a finding that a claimant has an IFA. The first prong consists of establishing, on a balance of probabilities, that there is no serious possibility of the claimant being subject to persecution in the proposed IFA. In the context of section 97, it must be established that the claimant would not be personally subjected to a section 97 danger or risk in the proposed IFA. The second prong requires that the conditions in the proposed IFA be such that it would not be unreasonable, upon consideration of all the circumstances, including of the claimant's personal circumstances, for the claimant to seek refuge there (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (FCA) at 597-98; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10-12; *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 9; *Mora Alcca v Canada (Citizenship and Immigration)*, 2020 FC 236 at para 5 [*Mora Alcca*]; *Souleyman v Canada (Citizenship and Immigration)*, 2020 FC 708 at para 17; *Ifaloye v Canada (Citizenship and Immigration)*, 2021 FC 1110 at para 14). The onus is on the Applicants to negate either of the two prongs (*Chitsinde v Canada (Citizenship and Immigration)*, 2021 FC 1066 at para 21).

[9] As stated by Justice René LeBlanc in *Mora Alcca*, in the second prong of the IFA test, the onus on the Applicant is an exacting one:

> [14] I am well aware that the onus of demonstrating that an IFA is unreasonable in a given case, an onus that rests with the

> claimant, is an exacting one. In fact, it requires nothing less than demonstrating the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions.
>
> [Citations omitted.]

[10] The Applicants focused their arguments on the RAD's reasoning. In particular, its application of the Gender Guidelines and the rejection of two pieces of new evidence, namely, a letter from the South Asian Women's Community Center and a report from Dr. Colavincenzo, a family doctor. The Applicants submit that the reasoning was incoherent as these elements were in fact relevant to the second prong of the IFA test.

[11] The RAD concluded that the RPD committed no error with respect to its application of the Gender Guidelines. It further concluded that neither of the two letters submitted by the Applicants contained information that was relevant to the IFA analysis, nor did counsel raise any arguments that the IFA cities would not be viable due to any mental health issues expressed by the Applicants. The RAD stated that despite the fact that the RPD's conclusions on the second prong of the IFA test were not contested, it had reviewed the evidence and ultimately concluded it agreed with the RPD.

[12] The Respondent highlights that the Applicants did not raise any issues about mental health in their objections to the IFA cities during their testimony. Rather they focused on language, employment and education. Furthermore, and key in the Respondent's view, the Applicants did not contest the RPD's findings as to the reasonableness of the IFA cities (i.e., the second prong of the test) before the RAD.

[13] The Applicants submit that the RAD ought to have connected the dots in that the RAD was aware of the treatment suffered by the female Applicant at the hands of the police and that post-traumatic stress disorder was mentioned in the medical report. As such, in the Applicants' view, the RAD ought to have considered this relevant to an analysis on the reasonableness of the proposed IFAs.

[14] In response, the Respondent submits that not only did the Applicants not make arguments to contest the RPD's finding on the second prong of the test before the RAD, they did not contest the RAD's conclusion on the second prong in their memorandum before this Court. The Respondent therefore strenuously objected to this issue being raised at the hearing. Moreover, the Respondent pleads that the Applicants are seeking to shift the burden on to the RAD to do the work that they did not do. The onus was on the Applicants to establish that the proposed IFAs would be objectively unreasonable or unduly harsh and they failed to discharge it.

[15] This Court has consistently held that it is inappropriate to grant judicial review based upon a ground not raised before the RAD (*Tcheuma v Canada (Citizenship and Immigration)*, 2022 FC 885 at para 27; *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 24 [*Kanawati*]; *Ogunmodede v Canada (Citizenship and Immigration)*, 2022 FC 94 at paras 23-30; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1692). Indeed, the RAD can hardly be faulted for not considering a submission that was not put before it (*Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14; *Enweliku v Canada (Citizenship and Immigration)*, 2022 FC 228 at para 42).

[16] The Applicants were the ones who framed their appeal. They cannot now fault the RAD for not considering the alleged errors that they now raise. The jurisprudence of this Court is clear that the RAD's reasons must be read in light of the history and context of the proceedings in which they were rendered, including the submissions of the parties and how the Applicants framed their appeal (*Vavilov* at para 94; *Kanawati* at para 23; *Singh v Canada (Citizenship and Immigration)*, 2021 FC 341). I agree with the Respondent that the Applicants are seeking to shift their onus to demonstrate that the proposed IFAs are unreasonable onto the RAD.

[17] As such, I find that the Applicants, given the record before the RAD, have failed to persuade me that the RAD committed a reviewable error in its treatment of the two letters submitted as new evidence or in its analysis of the second prong of the IFA test.

[18] I now turn to the issue of the Gender Guidelines. The purpose of the Gender Guidelines is to ensure that the decision maker is sensitive to the difficulties an applicant may face when testifying in the context of a gender-based claim (*Konecoglu v Canada (Citizenship and Immigration)*, 2021 FC 1370 at para 26 and the cases cited therein [*Konecoglu*]). The Gender Guidelines do not, however, serve to cure all deficiencies in an applicant's evidence (*Konecoglu* at para 26; *Yu v Canada (Citizenship and Immigration*), 2021 FC 625 at para 22).

[19] The Applicants argue that the RAD failed to appreciate that during the hearing, the RPD member cut the female Applicant off and did not let her express herself as to the details of the rape she suffered. The Applicants argue that she should not have been cut-off. The RPD, in the Applicants' view, did not create a safe environment for her as she was interrupted by the RPD

member switching the subject after she had stated the date of the assault. The Applicants further argue that had she been permitted to discuss the rape, it would have had a bearing on the IFA analysis.

[20] Before the RAD, the Applicants had argued that the rape had barely been addressed in the RPD decision and that the RPD had failed to properly apply the Gender Guidelines in its analysis. The RAD concluded that the RPD properly applied the Gender Guidelines by assuring the female Applicant that she did not need to testify about the details regarding the rape and thus minimizing the chances of re-traumatization at the hearing.

[21] I have considered the Gender Guidelines, the Applicants' submissions to the RAD, the exchanges between the RPD member and the female Applicant, and the RAD's reasons, and I do not find that the RAD committed a reviewable error in its treatment of the Applicants' arguments on the Gender Guidelines. The female Applicant, in my view, was not cut-off as the Applicants allege nor was she prevented from expressing herself as to how her rape may have an impact on her reasons for not wanting to move to the proposed IFAs.

[22] The RPD member was sensitive to the difficulties the female Applicant may face when testifying and informed her of the following:

> "Okay and Madam, I note that in your narrative, there is police misconduct while you're in detention. I just want you to know, I'm not going to be asking specific questions to that. So, don't want you to be worried about that?"

[23] It is clear, later in the hearing, that the female Applicant was asked open-ended questions as to whether there were any reasons why she would not wish to move to any of the IFAs and had the option to address the impacts of her rape had she wished to. The RAD, therefore, did not err as alleged by the Applicants.

IV. Conclusion

[24] For the foregoing reasons, this application for judicial review is dismissed. Given the record before it, the RAD's decision bears the required hallmarks of reasonableness - justification, transparency and intelligibility. No question for certification was proposed, and I agree that none arises.

JUDGMENT in IMM-8843-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed;
2. The style of cause is amended to name the Minister of Citizenship and Immigration as the proper Respondent; and
3. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8843-22
STYLE OF CAUSE:	AMARJIT SINGH ET AL v MCI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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