Federal Court  Cour fédérale

Date: 20231212

Docket: IMM-10665-22

Citation: 2023 FC 1674

Toronto, Ontario, December 12, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

NIKI PARESHBHAI PATEL
JAINISH BHUPENDRAKUMAR PATEL
RISHI JAINISH PATEL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are citizens of India. They are two adults and their minor child. They filed a claim for protection in Canada under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] The applicants based their claim on their fear of the police in their home state of Gujarat. They claimed that after they assisted an employee of their family business, the Gujarat State Police raided their business. The next month, the police raided the applicants' home, arrested and sexually assaulted the adult female applicant, and detained and threatened the minor applicant. They were released after paying a bribe. A few days later, the police again raided their home and arrested the adult applicants. Another bribe secured their release. The female applicant advised that the police forced her to sign a document in which, among other things, she agreed to being involved with radicals and supporting terrorists.

[3] The applicants left India shortly after these incidents. They alleged that after they left, the police issued two notices to the adult applicants that they were suspected to have committed an offence.

[4] By decision dated February 16, 2022, the Refugee Protection Division ("RPD") dismissed their claims for *IRPA* protection. The RPD concluded that the applicants had an internal flight alternative ("IFA") in Kolkata, India.

[5] The applicants appealed unsuccessfully to the Refugee Appeal Division (the "RAD"). By decision dated October 11, 2022, the RAD also concluded that they had an IFA in Kolkata.

[6] In this judicial review proceeding, the applicants seek to set aside the RAD's decision. They submitted that the RAD's decision was unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65,* [2019] 4 SCR 653. *Vavilov*

contemplates that a reviewing court may set aside an administrative decision if the applicant demonstrates that it was unreasonable because it was not transparent, intelligible and justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 12-15, 83-85, 99-106, 125-128.

[7] The determinative issue in this case was the existence of an IFA for the applicants in Kolkata.

[8] As the RAD and the RPD both recognized, the Federal Court of Appeal set out a two-prong test for an IFA in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA), at pp. 710-711 (paras 8-10). The test requires that the RAD be satisfied, on a balance of probabilities, that: (1) there is no serious possibility of the applicants being persecuted in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the applicants, conditions in the IFA are such that it would not be unreasonable for them to seek refuge there. The applicant bears the onus to show that the proposed IFA is unreasonable. See also *Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration)* (1993), [1994] 1 FC 589 (CA), at pp. 595-599; *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA), at paras 15-17.

The First Prong of the IFA Test

[9] On the first prong, the RPD found that the police in Gujarat did not have the means to find the claimants in Kolkata. On the motivation of the police to find them elsewhere in India, the applicants submitted two documents purporting to be police notices to show that the police

continued to pursue them after they left India for Canada. The RPD concluded that these documents were not authentic and gave them no weight.

[10] On appeal, the RAD found that it was "not out of the question" that the Gujarat police could be informed of the applicants' new address if they registered in a tenant registry system in India.

[11] However, the real question for the RAD was whether the police were motivated to search for them outside Gujarat, particularly in Kolkata (which the RAD said was some 2,000 kilometres away). Given that the police notices were forged, the RAD found there was no serious possibility that the police had such motivation. The RAD found that the police were motivated by extraction of money from the applicants, having arrested and released them only after they paid bribes, not by an intention to investigate terrorist links.

[12] On this application, the applicants made several arguments to challenge the RAD's reasoning. Most of those arguments seemed to argue why the RAD's decision was not correct, which the Court is not permitted to consider: *Vavilov,* at para 83.

[13] Focusing on the reasonableness of the RAD's decision, I find no reviewable error in its analysis of the first prong.

[14] While the applicants referred to the police notices as evidence that the police were still pursuing them after they left India, that evidence was found not to be authentic by both the RAD

and the RPD. Although the applicants argued orally that the RAD and the RPD erred by reaching their inauthenticity findings on the notices without expert evidence on Indian law, this issue was not raised before the RAD. The Court generally will not consider a new issue on judicial review where the issue could have been, but was not, raised before the administrative decision-maker: see e.g., *Firsov v. Canada (Attorney General)*, 2022 FCA 191, at para 49; *Gordillo v. Canada (Attorney General)*, 2022 FCA 23, at para 99. In addition, the RAD's reasoning contained no reviewable error on that issue. The RAD agreed with the RPD's conclusion that the notices were not authentic because the Indian Criminal Procedure Code expressly mentioned certain contents in such a notice (including reference to the offence at issue), which the applicants' filed documents did not contain. The applicants have not demonstrated that expert evidence was required to support the authenticity conclusion in this case: see *Jess v. Canada (Citizenship and Immigration)*, 2018 FC 1285, at paras 30-31; *Xiao v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 195, [2009] 4 FCR 510, at para 24-26.

[15] The applicants impugned the RAD's reasoning on the motivation of their alleged agents of persecution, by arguing that the RAD found that the police were acting in their personal capacity when they extracted money from the applicants, rather than as state actors. I do not agree that the RAD made that finding; however, even if it did, such a finding would not materially detract from the RAD's reasoning on either the extraction of money as the motivation behind the police action before they left India or the absence of any continuing motivation to pursue them in Kolkata.

[16] The applicants submitted that it was well known that the police were corrupt, as shown by the bribes paid in this case. The applicants disagreed with the RAD's reasoning that if the police seriously considered that the applicants might have links to terrorists, the police would not have released them without charges. While the applicants may disagree with the RAD, I see no basis to find a reviewable error in the impugned statement.

[17] As the respondent submitted, the applicants did not show that the RAD's finding that the police were motivated by money was not open to it on the evidence.

[18] While the applicants argued that the police could still search for one of the adult applicants because she signed a document that (falsely) admitted some association with militants or terrorists, this theory was not put to the RAD. It cannot be considered by the Court, at minimum because a determination would require fact-finding. Fact-finding was the purview of the RAD and the RPD.

The Second Prong of the IFA Test

[19] The second prong of the IFA test requires "actual and concrete" evidence of "nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling to or temporarily relocating in a safe area": *Ranganathan,* at para 15.

[20] The RPD found that the applicants had not provided sufficient credible evidence to meet the very high threshold for the second portion of the IFA test. The adult applicants' education and sophistication, including knowledge of languages and their work experience (having both

started their own businesses), would all assist them in finding work and sustaining themselves in Kolkata. The RPD concluded that it was reasonable for the claimants to seek refuge in Kolkata.

[21] The RAD's analysis stated, referring to *Thirunavukkarasu*:

> Concerning the second part of the IFA analysis, I note that Thirunavukkarasu sets a very high bar for determining that an identified IFA would be unreasonable. It must be established that there is evidence to demonstrate the existence of conditions that would endanger the life and safety of the claimant if they were to travel to and remain in the place used as an IFA. The appellants still need to establish that the IFA is unreasonable. The appellants have not met their burden of proof in this regard.

[22] In this Court, the applicants argued that Kolkata was not an IFA under the second prong because the applicants have insufficient language skills to live there, no family support, it would be difficult for the minor applicant, and they would have to live in hiding. These submissions cannot succeed. Each argument goes to the merits of the IFA analysis, not the reasonableness of the RAD's decision. I also observe that none of these arguments was put to the RAD. The language issue in particular was addressed by the RPD, but apparently not pursued on appeal to the RAD.

[23] In its reasons on appeal, the RAD stated that the applicants questioned the reasonableness of the IFA on the grounds, among other things, of their fragile psychological state, the female applicant's vulnerability as a victim of violence, and the difficulty the adult applicants would have in finding jobs due to the high unemployment rate in Kolkata.

[24] Importantly for the reasonableness of the RAD's analysis on the second prong, quoted above, the applicants fairly conceded that there was no evidence before the RAD concerning the applicants' fragile psychological state and the female applicant's vulnerability as a victim of violence. As for the third issue, difficulty in finding jobs, both the RPD decision and the applicants' submissions in this Court relied on the adult applicants' experiences as founders of their own businesses. These factors concerning the grounds of appeal to the RAD on prong two, considered against the background of the RPD's reasoning on that prong, persuasively explain why the RAD's reasons stated so summarily that the applicants had "not met their burden" to show unreasonableness on the high standard required by *Thirunavukkarasu*. In the circumstances, any possible flaw related to the completeness of the RAD's reasoning on the second IFA prong did not render the decision unreasonable: *Vavilov*, at paras 83, 87, 100, 142.

[25] For these reasons, the application is dismissed. Neither party raised a question to certify for appeal and none arises.

JUDGMENT in IMM-10665-22

1. The application is dismissed.

2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10665-22
STYLE OF CAUSE:	NIKI PARESHBHAI PATEL, JAINISH BHUPENDRAKUMAR PATEL, RISHI JAINISH PATEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 2, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	DECEMBER 12, 2023

APPEARANCES:

Rajender Singh	FOR THE APPLICANTS
Jake Boughs	FOR THE RESPONDENT

SOLICITORS OF RECORD:

RST Law Professional Corporation Mississauga, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT