Federal Court  Cour fédérale

Date: 20240610

Docket: IMM-8144-23

Citation: 2024 FC 881

Ottawa, Ontario, June 10, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SURINDER KUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated June 16, 2023 [Decision], dismissing an appeal from the Refugee Protection Division [RPD] rejecting the Applicant's claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RAD held that the RPD was correct in finding that the Applicant was neither a Convention

refugee nor a person in need of protection and that the Applicant has viable Internal Flight Alternatives [IFAs] elsewhere in India.

II. Facts

[2] The Applicant is a citizen of India. He is Hindu and a member of the Lohar caste, which is recognized as a Backward Class. Note that the Court has removed many identifiers from these reasons because they are not material to the result.

[3] In April 2018, the Punjab state police raided his business. The Applicant was detained, beaten, and falsely accused by police of sheltering gangsters and militants and working as their middleman.

[4] The Applicant was eventually released with the assistance of a village head and the payment of a bribe to the police, including a condition he report to police monthly. Upon his release, the police visited his business and harassed and threatened him until they accepted a monetary bribe and left.

[5] For three months the Applicant reported to the police on the first day of the month as instructed. He grew increasingly fearful of the police, who continued to question and mistreat him, and told him to act as a police informer. The Applicant decided to leave his home city for another, where he received the assistance of a relative in finding an agent to help him leave India.

[6] After the Applicant failed to report to police, police went to his home looking for him. The Applicant states on that same day, the local police were told where he had relocated, went to his relative's home looking for him, but did not find him because he was hiding elsewhere. The Applicant's relative paid a bribe to the police and they left.

[7] Some five months later, the Applicant arrived in Canada, and filed a claim for refugee protection soon after his arrival. In an amended Basis of Claim form, the Applicant notes the police visited his home every few months, harassing his family members and accepting bribes.

[8] However, police did not come looking for him during the five months before he left for Canada.

[9] The RPD denied his claim for refugee protection finding the Applicant has viable IFAs in two cities where he may safely and reasonably relocate. The Applicant appealed to the RAD, which dismissed his appeal coming to the same conclusion.

III. Decision under review

[10] The RAD held the RPD was correct in finding that the Applicant was neither a Convention refugee nor a person in need of protection and that the Applicant has viable IFAs elsewhere in India.

[11] The parties do not dispute the legal tests for an IFA. The RAD set out the correct two prong legal test for assessing an IFA, both of which must be satisfied to find that the Applicant has an IFA:

> I must first determine whether there is a serious possibility that the Appellant will be persecuted or that he will face, on a balance of probabilities, a risk to his life, torture, cruel and unusual treatment or punishment in the proposed IFAs.
>
> Second, I must also be satisfied, after considering his individual circumstances and the conditions in the proposed IFAs, that it would not be unreasonable for him to seek refuge in the proposed IFA locations.

[12] The RAD also correctly noted an IFA will only be viable if both criteria are met.

[13] Also, and importantly, the RAD noted the onus is on the Applicant to demonstrate he does not have a viable IFA.

[14] On the first prong of the test, the RAD concluded on the evidence that the police did not have the means or motivation to track the Applicant:

> [18] I have reviewed the relevant country conditions evidence in the National Documentation Package for India (the "NDP") alongside Appellant's testimony and evidence. The evidence is not consistent with the police continuing to believe that the Appellant is a serious criminal suspect. On this basis, for the reasons set out below, I find on a balance of probabilities that the [deleted] are not motivated to pursue the Appellant to distant states. Moreover, the [deleted] police do not have the means to find him.
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> …
>
> [24] After weighing the Appellant's submissions and testimony against the objective evidence conclude that there is insufficient, credible evidence to support a finding on a balance of probabilities that the [deleted] police have any real suspicion that the Appellant has links to gangsters and militants, or that they have serious interest in pursuing the Appellant as a criminal suspect via a nationwide search. This is relevant to whether the Appellant will be safe from persecution in one of the proposed IFAs.
>
> …

> [33] Having considered and weighed the Appellant's submissions against the objective documentary evidence, I find on a balance of probabilities that the Appellant's stated fear that police authorities will locate him in [the two IFAs] is objectively unfounded. I agree with the RPD that the Appellant does not face a serious possibility of persecution if he relocates to either of the proposed IFA locations, nor is it more likely than not that he will face a risk to life, a risk of cruel and unusual treatment or punishment, or a danger of torture.

[15] With respect to the second prong of the test, the RAD held the Applicant had not met his burden to demonstrate on a balance of probabilities that it would be objectively unreasonable in all of the circumstances for him to relocate. At paragraphs 40-41 of the Decision:

> [40] I have considered the Appellant's testimony about how he has been treated throughout his life as a member of the Lohar caste, and I do not find that his basic human rights have been threatened or violated in a fundamental way by the cumulation of discriminatory treatment by higher caste members that he described. I conclude that, in the Appellant's case, the caste-based discrimination he has faced in [deleted] or will face in [the IFAs] does not rise to the level of persecution.
>
> [41] I have also weighed the Appellant's personal situation – the experiences he has had as a member of the Lohar caste and his life circumstances – against the documentary evidence of the way members of Backward Classes are treated generally in India. I give greater weight to the Appellant's own situation as a more precise indicator of the impact his Lohar caste status will have on him personally in an IFA.

[16] The RAD held the RPD was correct when it concluded the evidence on the record is insufficient to establish, on a forward-looking basis, that the Applicant would face cumulative discrimination amounting to persecution because of his Lohar caste in either of the proposed IFAs.

[17] In the result the RAD held the RPD did not err in its application of the IFA tests, and correctly identified viable IFAs available to the Applicant elsewhere in India.

IV. Issues

[18] The Applicant raises the following issues:

1. What is the standard of review to be applied by the RAD?
2. Did the RAD err in its assessment of the means and motivation of the agents of persecution to find the Applicant in the IFA?
3. Did the RAD err in its finding that relocation to the proposed IFA is not unreasonable?

[19] The Respondent submits the issue is whether the Applicant has demonstrated the RAD's Decision is unreasonable. I agree.

V. Standard of Review

[20] The parties submit the standard of review is reasonableness, and I agree. With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corp*] the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard. Justice Rowe concludes at paragraph 32, the reviewing court "must ask 'whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.'"

[21] In addition, as Justice Rowe in *Canada Post Corp* determined:

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[22] Furthermore, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances." The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[23] The Federal Court of Appeal recently reiterated in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*], that the role of this Court is generally not to reweigh and reassess evidence unless there is fundamental error:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal

> Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[24] Importantly also, this Court has settled that a review of a RAD's determination of the availability of an IFA is entitled to deference and there is a high onus to demonstrate unreasonableness: *Pidhorna v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1 at paragraph 39 per Kane J: "[t]he test for an IFA is well established. There is a high onus on the applicant to demonstrate that a proposed IFA is unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA)."

VI. Submissions of the parties and analysis

A. *Test for IFA*

[25] As I outlined in *Lawal v Canada (Public Safety and Emergency Preparedness*, 2020 FC 301, it is settled law that the two-prong test to be applied in determining whether there is an IFA is established in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589.

[26] The test was recently outlined by Justice Pamel in *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at paragraph 15:

> [15] The decisions in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, have established a two-prong test to be applied in determining whether there is an IFA: (i) there must be no serious possibility of the individual being persecuted in the IFA area (on the balance of probabilities); and (ii) conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there (*Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 19; *Titcombe v Canada (Citizenship and Immigration)*, 2019 FC 1346 at para 15). Both prongs must be satisfied in order to make a finding that the claimant has an IFA. This two-prong test ensures that Canada complies with international norms regarding IFAs (UNHCR Guidelines at paras 7, 24–30).

[27] It is long established that once an IFA is raised by the RPD, the onus is on the Applicant to prove that IFA is not reasonable, per Associate Chief Justice Gagné in *Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106 at paragraph 21:

> [21] It is the applicant, and not the respondent or the RAD, who has the onus of demonstrating that the IFA is unreasonable (*Photskhverashvili v Canada (Citizenship and Immigration*), 2019 FC 415 at para 32; *Diaz Pena v Canada (Citizenship and Immigration*), 2019 FC 369 at paras 36–37). The applicant must present actual and concrete evidence of the existence of conditions that would jeopardize his life or safety if he were to attempt to relocate to that part of the country (*Ranganathan v Canada (Minister of Citizenship and Immigration*), 2000 CanLII 16789 (FCA), [2001] 2 FC 164 (FCA) at paras 15–17).

B. *First prong: No serious possibility of persecution in the IFA*

(1) Availability of an IFA where the agents of persecution are the police

[28] The Applicant submits an IFA is not a viable option as a legal matter because the agent of persecution in his case is an agent of the state. The Applicant relies on *Li v Canada (Citizenship and Immigration)*, 2014 FC 811 at paragraph 27, citing the Federal Court of Appeal:

> [27] When a state participates in that which amounts to persecution, an IFA is not an option (*Canada (Minister of Employment and Immigration) and Sharbdeen* (1994), 1994 CanLII 10962 (FCA), 81 FTR 90, 23 Imm LR (2d) 300 (FCA).

[29] The Applicant submits that because the RAD did not raise credibility concerns with his testimony, it is presumed it accepted his evidence, and therefore, must have been concerned with his return to India on fabricated criminal charges.

[30] The Applicant submits the RAD failed to engage with the nature of the allegations against the Applicant, as being serious and not a one-off case where local police are harassing an individual for their own motives. This with respect is not the case. The RAD did consider this and found against the Applicant as will be seen. The Applicant disagrees with the conclusion, but that is entirely a different matter.

[31] The Applicant also submits the local police allege the Applicant committed a serious crime of national importance. This again is not the case. That was the position unsuccessfully advanced by the Applicant, but considered and in my view reasonably rejected by the RAD on the evidence in this case, as will be seen. This is an important issue because while the Applicant

repeatedly makes this argument, it was carefully considered and firmly rejected as the starting point of the RAD's reasons. In the result, some of the Applicant's submissions proceeded before me on the false surmise that the local police consider him a serious criminal, which was not the case.

[32] In my view, the RAD's finding there is insufficient evidence the Applicant was suspected of a serious crime is reasonably supported by the record. I appreciate the Applicant does not agree with this threshold determination, but with respect an interference by this Court on judicial review would be an impermissible attempt to re-weigh and reassess the evidence and inferences. I am not persuaded there was either fundamental error or exceptional circumstances in this respect. The Applicant simply failed to meet the deference owed to the expert tribunal and the high onus to obtain judicial intervention in such a fact-finding.

[33] As noted, the Respondent submits the mere fact agents of harm are police is not sufficient to establish that they are acting as agents of the state, such that the Applicant would risk persecution throughout India. I agree. In this respect I adopt and rely on my colleague Justice Régimbald's recent and considered conclusion in this respect in *Patel v Canada (Citizenship and Immigration)*, 2024 FC 711. There the Court rejected this argument (not for the firsts time) at paragraph 18:

> [18] Moreover, this Court has previously rejected the argument that a viable IFA does not exist where the agent of harm is an Indian state police (*Vartia v Canada (Citizenship and Immigration)*, 2023 FC 1426 at para 12, citing *Singh v Canada (Citizenship and Immigration)*, 2021 FC 341 and *Singh v Canada (Citizenship and Immigration)*, 2010 FC 58). This line of reasoning is applicable to the case at hand. In light of the foregoing, I find that the RAD did not err in engaging in an IFA analysis in this case.

[34] Therefore I find no error in this aspect of the RAD's decision. For the same reasons, I reject the Applicant's submission there is a reverse onus where agents of harm are police.

(2) Police lack the ongoing motivation to locate the Applicant through India

[35] The Applicant submits the RAD erred in agreeing with the RPD that the police lacked the motivation to seek the Applicant in the proposed IFAs. This is another of several factual determinations by the RAD with which the Applicant disagrees, in respect of which the Court was once again and impermissibly invited to reweigh and reassess the evidence notwithstanding the injunctions in *Vavilov* and *Doyle* to the contrary. For example, the Applicant submits while noting the police attempted to find him where he moved in with a relative, the RAD failed to explain how this visit did not demonstrate motivation to locate the Applicant. That is again not the case. It overlooks the fact he remained there for five months with no evidence of any effort by police to pursue him further. While criticized by the Applicant, there is no reviewable error in the RAD's conclusions the police in his home city only went to see his family "every few months", which among other facts resulted in the RAD concluding local police had only "low" i.e., insufficient motivation. I should add that the RAD's negative motivation finding was based not only on the Applicant's evidence but also on the available objective country condition evidence in the National Documentation Package.

[36] In reviewing IFAs as we are in this case, it is in my view important to keep in mind the considerable deference owed by reviewing courts to the expertise of both the RPD and the RAD, together with the high onus required by the jurisprudence before interfering with their

determinations, in addition to the need to avoid reweighing and reassessing the evidentiary record.

[37] While I will not reweigh the evidence, it is the case as the Respondent notes that at paragraph 19 the RAD concluded:

> [19] In India, state police forces are primarily in charge of local issues such as crime prevention investigation, and maintaining law and order, and they also provide the first response in case of more intense internal security challenges. In general, there is a good degree of cooperation between state police services. There is no state extradition requirement, but if a person of interest is being sought by another state, the states would work together in securing the arrest of that person. However, except in such cases of major crimes, there is little interstate police communication. It follows that a person would need to be of a high profile, suspected of involvement in major crimes, in order for the police to search for them in other states.
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> [Emphasis added]

[38] Simply put the RAD found there was no "major crime" perceived by the local police. This finding was in my view reasonably open to it on the evidence. In this respect, the RAD considered the Applicant's own evidence of his treatment by the police: he was initially arrested because he was suspected of being involved in criminal activity as drugs and arms were found in a vehicle he was known to have serviced. However, after his arrest, no firearms, drugs or other evidence was found. The Applicant was never formally charged by the police. I also note the RAD reasonably considered the Applicant had inexplicably managed to leave without triggering India's exit controls.

[39] On this basis, and other facts, I repeat that the RAD in my respectful view reasonably concluded there was "low" i.e. insufficient motivation to locate the Applicant.

(3) Police lack the means to locate the Applicant

[40] It was not necessary for the RAD to consider means, having found against the Applicant on motivation. Nor is that necessary for this Court to pursue this line of argument further. But the RAD did, and again found against the Applicant.

[41] The Applicant again disagrees, arguing the RAD ignored evidence with respect to the police's ability to locate the Applicant, especially since the police were able to locate the Applicant's whereabouts when he went with a relative. This is very unpersuasive because in that case the local police were actually told where he had relocated. It was no stretch to find him.

[42] The parties made submissions on the many other facts going one way or the other in relation to means (as they did on motivation). That said, having both read and now heard the lengthy and detailed submissions of counsel on both sides, it is my respectful view the RAD reasonably concluded there was insufficient evidence of means for the police tracking the Applicant to the proposed IFAs.

[43] In particular I am not persuaded the RAD made any fundamental or central error or flaw in this analysis. The RAD was entitled to rely on the objective country condition evidence on police record keeping, including what information would likely be entered into national databases. In particular in my view the RAD reasonably found the tenant verification system in the proposed IFAs could not be employed by the police to track the Applicant at paragraph 31 of the RAD's Decision:

> [31] If the Appellant attempts to enter into a tenancy agreement in one of the identified IFAs, it is unlikely that tenancy verification

> process will lead local police in [deleted] to cross-check information about him with the [deleted] police because, as noted above, there is insufficient, credible evidence that he is a serious suspect in major crimes or terrorism, has a criminal record, or is listed in a nationally accessible criminal database.

C. *Second prong: Objectively reasonable for the Applicant to seek refuge in either IFA*

[44] The Applicant does not provide submissions with respect to the second prong of the IFA test. I conclude with respect that the Applicant failed to demonstrate it would be objectively unreasonable for him to relocate to an IFA as a member of the Lohar caste in the circumstances.

VII. Conclusion

[45] Based on the foregoing, the RAD's Decision is reasonable and the application for judicial review must be dismissed.

VIII. Certified question

[46] The parties have not raised a question of general importance and I agree none arises.

JUDGMENT in IMM-8144-23

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8144-23
STYLE OF CAUSE:	SURINDER KUMAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 5, 2024
JUDGMENT AND REASONS:	BROWN J.
DATED:	JUNE 10, 2024

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