

CANADA / JUDGMENT

Krishnan v. Canada (Citizenship and Immigration)

2025 FC 547

COURT

Federal Court

DECIDED

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20250325 Docket: IMM-5735-24 Citation: 2025 FC 547 Ottawa, Ontario, March 25, 2025 PRESENT:
The Honourable Madam Justice Saint-Fleur BETWEEN: AKHIL KRISHNAN Applicant and THE
MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA Respondent JUDGMENT AND
REASONS I. Overview [1] This is an application for judicial review of a decision by the Refugee
Appeal Division [RAD] of the Immigration and Refugee Board, dated March 13, 2024 [Decision].

- [2] The RAD upheld the decision of the Refugee Protection Division [RPD], finding the Applicant neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA] because an Internal Flight Alternative [IFA] is available in Mumbai or New Delhi.
- [3] For the reasons outlined below, this judicial review is granted. II. Background Facts [4] The Applicant, Akhil Krishnan [Applicant], is a citizen of India. He seeks protection on the basis of his sexual orientation as a gay man because he fears harassment, discrimination, and persecution by the police and general society in India.
- [5] The Applicant lived in the city of Kottayam, in the state of Kerala. He met another man in December 2016 at a party organized by a mutual friend and began a relationship with this individual approximately one month after they met. He did not disclose the nature of the relationship to his family.
- [6] In October 2017, the Applicant decided to travel abroad to study in a country where homosexuality was not a crime. He and his partner applied and were accepted in a university in Canada.

- [7] In July 2018, he attended a farewell party which got very loud. Neighbours complained to the police, who found out that some of the men attending the party were gay. The Applicant and his partner were taken to the police station for questioning and were assaulted. Both of them were released after the Applicant's mother paid a bribe. They were told to report to the police station weekly, but they left town after being released. Since the Applicant did not report to the police, on July 13, 2018, the police visited his mother's house.
- [8] The Applicant left India on August 31, 2018, and came to Canada where he commenced his studies. While he was in Canada, between 2020 and 2021, the police conducted three other visits to his mother's home. III. Decision Under Review [9] The RAD proceeded to conduct an IFA analysis, agreeing that the Applicant established his sexual orientation as a gay man before the RPD. The RAD considered Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act, IRB, Ottawa, Effective date: May 1, 2017, dated revised December 17, 2021 [SOGIESC] in assessing this claim, particularly when considering the evidence of the risk to the Applicant .
- [10] The RAD considered the proposed IFA of Mumbai and New Delhi setting out the two-prong IFA test.
- [11] Detailing the RPD's reasons for concluding these two cities satisfied the first prong of the test, the RAD found there is insufficient evidence of a continued police interest in the Applicant or that they would be motivated to search for him outside of his hometown. The RAD found that the first part of the test has therefore been met.
- [12] Turning to the second prong of the test, the RAD found there is insufficient evidence of a language barrier that would amount to undue hardship in the IFA locations or place the Applicant's life or safety in jeopardy, which, according to the RAD, is the required threshold to establish unreasonableness. The RAD found the Applicant has not established there will be an unreasonable language barrier in the IFA locations that will amount to undue hardship because his language is Malayalam, which is a prominent language in either location, and he also speaks English, an official language in India and widely spoken in urban areas. The RAD also considered the Applicant to be a young man with well-above-average education, work experience in Canada who comes from a family economically able to pay for his studies abroad.
- [13] In its analysis of the second prong of the IFA test, the RAD acknowledged the Applicant will most likely face some discrimination and harassment in India because of society's conservative and traditional views about his sexual orientation. The RAD also recognized discrimination that results in an insecure existence due to lack of access to education, housing, employment, health care, etc., can amount to persecution, but according to the country condition evidence regarding the treatment of SOGIESC individuals in India, this may be mitigated or lessened in large urban centres such as Mumbai and New Delhi. The

RAD found the Applicant had not provided sufficient evidence that he may experience an insecure existence in the IFA locations and concluded it would not be unreasonable in all the circumstances for the Applicant to seek refuge in the proposed IFA.

- [14] The RAD further concluded that the Applicant has not established that he would have to conceal his sexual orientation to remain safe in the IFA locations since Mumbai and New Delhi are specifically referenced in the National Documentation Package as cities with tolerance and pockets of acceptance towards gay men. IV. Issues and Standard of Review [15] The issue in this application is whether the Decision is reasonable.
- [16] The Applicant makes no submissions on the standard of review. The Respondent submits, and I agree, that the RAD's decision is to be reviewed on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25, 85, 99, 101-4, 115-26 [Vavilov]).
- [17] A reasonable decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility (*Vavilov* at paras 91-95, 99-100). V. Submissions [18] The Applicant argues the Decision only deals with persecution by the police and does not consider whether the effects of cumulative societal discrimination amounted to persecution in the analysis of the first prong, citing *Nugzarishvili v Canada (Citizenship and Immigration)*, 2020 FC 459 at paragraphs 52-60.
- [19] The Applicant submits the Decision is unreasonable on its face for its finding in the analysis of the second prong that "pockets of acceptance" exist in the proposed IFAs. The Applicant describes this as a "problematic proposition" as it implies he can confine his life as an openly gay man to neighbourhoods in the city where he would be accepted. According to the Applicant, "tolerant pockets" is not what the IFA test states.
- [20] The Respondent submits the Decision is reasonable and the Applicant is asking for this Court to reweigh and reassess the evidence, which is not its role on judicial review.
- [21] The Respondent argues the Applicant misunderstood the RAD's findings. It's not that the RAD found there were pockets of tolerance where gay men could be safe, but rather that the objective country condition evidence demonstrated Mumbai and New Delhi were tolerant cities in general where in addition there are areas with more acceptance of gay men.
- [22] The Respondent asserts the RAD conducted a cumulative assessment of the country conditions under the second prong of the assessment and as long as the substance of the test is there, the Decision is reasonable. For the Respondent, the reasons clearly demonstrate that the RAD turned its mind to the cumulative discrimination and made a finding on that issue. VI. Analysis First prong of the IFA test – the RAD analysis is unreasonable [23] I find that the Decision is unreasonable because the RAD did not consider

the effects of cumulative discrimination the Applicant would be subjected to in Mumbai and New Delhi in the analysis of the first prong of the IFA test in order to concluded the IFA locations are safe since there is no serious possibility of persecution or, on a balance of probabilities, a risk to life, or of cruel and unusual treatment or punishment, or a danger of torture.

- [24] As summarized by Justice Fothergill in *Malik v Canada (Citizenship and Immigration)*, 2023 FC 429 at paragraph 18:
- [18] The test for a viable IFA is well established (*Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706 (FCA) at paras 5-6, 9-10): first, the IRB must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country where it finds an IFA to exist; and second, conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. Both prongs of the test must be satisfied. [Emphasis added]
- [25] I understand that some factors are relevant to both prongs of the test, such as in this case, country conditions with regards to discrimination against gay men in India. However, the RAD's analysis of discriminatory treatment was conducted to determine whether it would jeopardize the life and safety of the Applicant in living in the IFA locations and consequently render them unreasonable; thus under the second prong. In my view, in so concluding, the RAD has conflated the first and second branches of the IFA test.
- [26] In *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430, Justice Norris states at paragraphs 44-45:
- [44] With respect to the second part of the IFA test, the onus is on the claimant to establish that, in all the circumstances (including the claimant's personal circumstances), it is unreasonable to expect them to relocate to the proposed IFA. This has been described as a high threshold for a claimant to meet: see *Ranganathan* at para 15; see also *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at para 12. The conditions in the proposed IFA that would make relocating there unreasonable must be something other than the risks that form the basis of the claim for protection. This is because, to even reach the second prong of the test, it must have been determined under the first prong that those risks are absent in the proposed IFA. If the claimant establishes on the applicable standard that the risks are present in the proposed IFA, that is the end of the IFA analysis, at least with respect to the location under consideration.
- [45] Although the onus in these respects is on the claimant, the jurisprudence is clear that rejecting a claim on the basis that there is a viable IFA is not simply a matter of concluding that the claimant has not met their onus. Rather, the decision maker must conclude affirmatively on a balance of probabilities that the claimant does have an IFA – in other words, that there is a place where the claimant would not be at risk (in the relevant sense and on the applicable standard) and to which it would be reasonable for the claimant to

relocate: see *Rasaratnam* at 710; see also *Hamdan* at paras 11-12 and *Khan v Canada* (Citizenship and Immigration), 2020 FC 1101 at para 10. One way to understand this is to consider the existence of a place where the claimant would be safe and that is realistically accessible to the claimant to raise a presumption that it would be reasonable for the claimant to relocate there instead of seeking international protection. A claimant may rebut this presumption by showing that it would be unreasonable to expect them to seek safety in the proposed IFA; however, if they fail to do so this is a sufficient basis on which to conclude that there is a viable IFA and, as a result, the claim should be rejected. See *Baglay and Jones* at 160; see also *Thirunavukkarasu* at 598-99. [Emphasis added]

- [27] Any harm described in section 96 or subsection 97(1) that, according to the Applicant, exists in the proposed IFA should be considered under the first prong of the test (*Thirunavukkarasu v Canada* (Minister of Employment and Immigration), [1994] 1 FC 589 (CA)).
- [28] In the case at bar, the RAD fail to analyze whether the discriminatory treatment and the harassment the Applicant alleges he would face in the IFA locations will cause him to face a serious possibility of persecution under section 96 or, on a balance of probabilities, cause him to face a danger of torture or a risk to his life or a risk of cruel and unusual treatment or punishment under paragraph 97(1)(b) of the IRPA.
- [29] The RAD's finding on the first prong was solely based on the insufficiency of evidence of a continued police interest in the Applicant or motivation to search for him outside of his hometown. However, considering the allegations of discrimination, harassment and persecution made by the Applicant because of his sexual orientation, the RAD should have considered the cumulative nature of discrimination in its assessment of the first prong of the IFA test. VII. Conclusion [30] I conclude that the application for judicial review must be allowed. The decision of the RAD dated March 13, 2024, will be set aside and the matter will be remitted for redetermination by a different decision maker. The application for judicial review is allowed. JUDGMENT in IMM-5735-24 THIS COURT'S JUDGMENT is that: The application for judicial review is granted; The matter is sent back to the RAD for redetermination by a different decision maker; and No question of general importance is certified. "L. Saint-Fleur" Judge FEDERAL COURT SOLICITORS OF RECORD DOCKET: IMM-5735-24 STYLE OF CAUSE: AKHIL KRISHNAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA PLACE OF HEARING: TORONTO (ONTARIO) DATE OF HEARING: FEBRUARY 25, 2025 JUDGMENT AND REASONS: SAINT-FLEUR J. DATED: MARCH 25, 2025 APPEARANCES: Wennie Lee For The Applicant Desmond Jung For The RESPONDENT SOLICITORS OF RECORD: Lee & Company Barristers and Solicitors Toronto (Ontario) For The Applicant Attorney General of Canada Toronto (Ontario) For The RESPONDENT

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