

Federal Court



Cour fédérale

Date: 20190226

Docket: IMM-3539-18

Citation: 2019 FC 228

Ottawa, Ontario, February 26, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

THINESRUPAN GOPALAPILLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Gopalapillai, a citizen of Sri Lanka, seeks judicial review of the dismissal of his claim for asylum. I am allowing his application, as the Refugee Protection Division [RPD] of the Immigration and Refugee Board improperly disregarded evidence provided by Mr. Gopalapillai's father, overlooked evidence of the Sri Lankan authorities' continuing interest for Mr. Gopalapillai and failed to appreciate that the authorities' perception of Mr. Gopalapillai may put him at risk.

I. Context

[2] Mr. Gopalapillai is a citizen of Sri Lanka of Tamil ethnicity. He is now 31 years old. The facts alleged in support of his claim for asylum began in 2007, when he was about 20 years old. He says that on several occasions, he was apprehended by the Karuna group, a militia sympathetic to the government, interrogated, accused of being a member of the Liberation Tigers of Tamil Eelam [LTTE] and beaten. He was required to sign in every two weeks as a condition of his release.

[3] In order to protect him from this violence, his father made arrangements for Mr. Gopalapillai to work in Qatar. However, he returned to Sri Lanka in 2008, apparently because the work was too difficult or the pay lower than what was promised. Upon his return, he was detained for three days, fined for being outside the country and again ordered to sign in every two weeks. In the following year, after several incidents in which Tamils were killed, including persons who, like him, had been ordered to sign in regularly, he made arrangements to come to Canada.

[4] On July 9, 2018, the RPD dismissed Mr. Gopalapillai's claim for asylum. The RPD noted that Mr. Gopalapillai's testimony "was generally consistent with the narrative in his Personal Information Form." The RPD found, however, that he had not satisfactorily explained why he came back from Qatar, which was indicative of a lack of subjective fear.

[5] The bulk of the RPD's decision is devoted to a review of the profiles of persons who might, according to documentary evidence, be at risk of persecution. Although the logic of the decision is sometimes difficult to follow, the RPD appears to have accepted (at paragraph 20) that "an individual with suspected links to the LTTE, as identified in the UNHCR Guidelines of 2012" would have a well-founded fear of persecution. In this regard, the RPD's finding appears to be encapsulated in paragraph 29 of its decision:

The claimant has not participated or been involved in any anti-regime or pro-LTTE activities, either in Sri Lanka or since his arrival in Canada, and there is no evidence to indicate that the claimant would fit any of the current risk profiles. The panel, therefore, concludes that the claimant is unlikely to face any additional scrutiny upon his return to Sri Lanka as a result of his activities while in Sri Lanka and subsequent to his departure from Sri Lanka.

[6] Mr. Gopalapillai now seeks judicial review of that decision.

II. Analysis

[7] While Mr. Gopalapillai advanced a number of arguments in support of his assertion that the RPD's decision is unreasonable, I need only deal with three of them.

A. *Evidence of continuing interest*

[8] I agree with Mr. Gopalapillai that the RPD unreasonably discounted a letter from his father to the effect that soldiers recently attended their house and asked about Mr. Gopalapillai's whereabouts. While agreeing that "the letter appears to support the assertion that there continues to be interest in the claimant by authorities," the RPD expressed doubts as to "the reliability of

documentary evidence emanating from family members.” In so doing, the RPD relied on a presumption to the effect that such evidence is not credible. However, this Court has repeatedly held that this is unreasonable, as there is often no other source of evidence to prove critical elements of the claim: see, for example, *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458 at para 28; *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 43–47.

[9] Moreover, the RPD stated the following:

The panel also finds it curious that about a month before the claimant’s hearing, the authorities would now express interest in the claimant in whom they have displayed little interest since his departure seven years ago.

[10] This is contrary to the evidence. Before the RPD, Mr. Gopalapillai testified that after his departure, soldiers or members of the Karuna group went to his home at least once a year to inquire as to his whereabouts, and also went to the village office for the same purpose. In the face of that evidence, the RPD could not rely on the authorities’ purported “little interest”, in order to cast doubts on the credibility of Mr. Gopalapillai’s father’s letter.

B. *Profile and Risk*

[11] The RPD also reached the unreasonable conclusion that Mr. Gopalapillai’s profile does not fit any of the profiles of persons who are at risk of persecution in Sri Lanka. This conclusion appears to be based on the uncontested fact that Mr. Gopalapillai did nothing to support the LTTE.

[12] This, however, misses the mark. A well-founded fear of persecution need not be based on actual political opinion. A perceived political opinion suffices. The Supreme Court of Canada explained this in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 747:

[...] the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.

[13] A similar approach is adopted in human rights legislation. Discrimination is prohibited if a distinction is made on the basis of a perceived characteristic of the individual, even though the perception may be inaccurate: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 81, [2000] 1 SCR 665.

[14] In this case, what matters is not whether Mr. Gopalapillai was, in fact, an LTTE supporter, but whether he was perceived as such by the Sri Lankan authorities. By focusing on the fact that Mr. Gopalapillai did not in fact support the LTTE, the RPD asked the wrong question. This renders its decision unreasonable. Moreover, this error is compounded by the RPD's disregard of Mr. Gopalapillai's testimony to the effect that he was still sought by Sri Lankan authorities.

[15] At the hearing before me, counsel for the Respondent eloquently attempted to sustain the decision by arguing that the Sri Lankan authorities would not have allowed Mr. Gopalapillai to leave the country in 2008 and 2010 if he had been of interest to them or if they suspected him of

supporting the LTTE. Counsel suggested that if Mr. Gopalapillai had really been suspected, he would have been arrested, convicted and jailed. Mr. Gopalapillai testified, however, that his trips out of Sri Lanka were arranged by an agent who paid bribes, presumably to avoid various forms of border control. Thus, it is difficult for me to draw any inference from the fact that Mr. Gopalapillai was able to leave Sri Lanka, especially as the issue was not canvassed by the RPD. More importantly, counsel for the Respondent is asking me to speculate about the course of action that a reasonable agent of persecution would take. In reply, counsel for Mr. Gopalapillai provided an equally plausible explanation of the motivations of Sri Lankan authorities. Given this uncertainty, I am not in a position to draw an inference adverse to Mr. Gopalapillai.

[16] I would also wish to underline that in order to reach this decision, I am not assuming that every male Tamil, or every young male Tamil, is at risk of persecution. I am not creating a new profile. I simply observe that the RPD did not reasonably assess whether Mr. Gopalapillai fits the profiles described in the country condition documents.

C. *Re-availment*

[17] The RPD also found that Mr. Gopalapillai's return to Sri Lanka in 2008 constituted re-availment and negated his subjective well-founded fear of persecution. Mr. Gopalapillai argues that this is unreasonable, as the RPD failed to assess whether subsequent events justified Mr. Gopalapillai's present fear of persecution. It will be remembered that, after his return to Sri Lanka, Mr. Gopalapillai was arrested, questioned and beaten more than once. Moreover, despite the end of the war, three Tamils who lived in the vicinity were killed.

[18] The role that this issue played in the RPD's decision is unclear. Despite the finding of re-availment, the RPD proceeded to assess Mr. Gopalapillai's profile, which might indicate that it did not consider re-availment to be determinative.

[19] However, to the extent that the RPD considered that re-availment in 2008 was a bar to the claim, without considering subsequent events, I agree with Mr. Gopalapillai that this would be unreasonable.

[20] As a result, the application for judicial review will be allowed.

JUDGMENT in IMM-3539-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is sent back to a different panel of the Refugee Protection Division for redetermination.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3539-18

STYLE OF CAUSE: THINESRUPAN GOPALAPILLAI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 19, 2019

JUDGMENT AND REASONS: GRAMMOND J.

DATED: FEBRUARY 26, 2019

APPEARANCES:

Barbara Jackman FOR THE APPLICANT

Michael Butterfield FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Ottawa, Ontario