Federal Court  Cour fédérale

Date: 20190405

Docket: IMM-1832-18

Citation: 2019 FC 408

Ottawa, Ontario, April 5, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

KARUNARAJU KITTU RASIAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of Sri Lanka of Tamil ethnicity. He was born in the city of Kandy in central Sri Lanka in 1957. He trained as a welder and worked in this field and others both overseas and in Sri Lanka for many years.

[2] The applicant left Sri Lanka on September 2, 2011, for the United States. He presented himself at the Canada/U.S. border shortly afterwards and made a refugee claim. One of the applicant's brothers had been accepted as a refugee by Canada in August 2011. One of his sons lives in Canada as well.

[3] The applicant claims to be at risk as a perceived member or supporter of the Liberation Tigers of Tamil Eelam [LTTE]. He claims to have been detained and questioned many times by the authorities about whether he supported or was a member of the LTTE and to have been physically abused during this questioning. The event that finally led to his fleeing Sri Lanka occurred in the evening of January 3, 2011. The applicant claims that he was attacked at his home by members of the police force who demanded money from him. The applicant claims that he was stabbed with a knife. The applicant also claims that his daughter-in-law was injured when she attempted to intervene and died several months later from her injuries. The attackers fled when other family members came outside. However, subsequently they continued to demand money from the applicant over the phone. The applicant and his family went into hiding in Colombo until June 2011, when they returned home. The demands for money continued. The applicant decided to leave and seek protection in Canada. He flew to the United States on his own passport using a valid U.S. visitor's visa he had obtained previously. He made his refugee claim upon entry to Canada at Fort Erie, Ontario, on September 14, 2011. The applicant states that the demands for money have continued since he left Sri Lanka.

[4] The applicant claims to fear that if he returned to Sri Lanka he would be apprehended by the army or the police, they would demand money, they would accuse him of helping the LTTE while he has been in Canada, and they would torture him.

[5] The applicant's hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] took place on November 22, 2017. The RPD rejected his claim in a decision dated March 28, 2018.

[6] The applicant now applies for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[7] The applicant challenges the decision on a number of grounds but I have found it necessary to address only two. One is the submission that the delay in holding a hearing before the RPD breached the requirements of procedural fairness. The other is the submission that the decision is unreasonable because the member does not address the alleged attack on January 3, 2011 – the pivotal event in the applicant's narrative. For the reasons that follow, I have concluded that there is no merit to the complaint about delay. However, I have also concluded that the decision is unreasonable because of the complete absence of findings with respect to the January 3, 2011, attack. As a result, there must be a new hearing.

II. DECISION UNDER REVIEW

[8] The RPD member was satisfied that the applicant had established his personal identity as a citizen of Sri Lanka of Tamil ethnicity. The determinative issues for the member were the

applicant's lack of credibility, the significance of the applicant's failure to seek refugee protection elsewhere, and the significance of his regular returns to Sri Lanka.

[9] The member's reasons for rejecting the claim can be summarized as follows:

- The applicant claimed in his Personal Information Form [PIF] that he feared not only the army and the police but also the Karuna group, a group which extorts money from people by threatening to identify them to the police as LTTE supporters. However, when asked at the hearing who he feared if he had to return to Sri Lanka, the applicant only mentioned the army, the police and "the armed groups." He did not mention the Karuna group.

- The applicant gave inconsistent evidence about when he had had problems with the authorities in Sri Lanka.

- The applicant was able to leave and return to Sri Lanka using his own passport without incident several times over many years.

- The applicant gave inconsistent evidence about when and why he had been in the United States previously.

- The applicant's claim that he did not seek refugee protection in the United States because he did not know how was not believable given that he is otherwise knowledgeable about immigration procedures (e.g. the need for a visa).

- It would not have been reasonable for the applicant to return to Sri Lanka from the United States in December 2010 if he genuinely feared the army and the police.

- The applicant's wife, daughter and some of his siblings have continued to live in Kandy without any difficulty.

- There was no evidence linking the applicant to the events upon the basis of which his brother was granted refugee status.

- There was no evidence that the applicant had been engaged in activities in Canada that would be of interest to the authorities in Sri Lanka.

III. STANDARD OF REVIEW

[10] It is well-established that this Court reviews the RPD's assessment of the evidence before it on a reasonableness standard (*Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at paras 6-15 [*Hou*]). This standard applies to the RPD's factual findings, including its credibility determinations (*Pournaminivas v Canada (Citizenship and Immigration)*, 2015 FC 1099 at para 5; *Nweke v Canada (Citizenship and Immigration*), 2017 FC 242 at para 17).

[11] It is also well-established that this Court should show significant deference to the RPD's credibility findings (*Rahman v Canada (Citizenship and Immigration)*, 2019 FC 71 at para 18; *Su v Canada (Citizenship and Immigration)*, 2013 FC 518 at para 7). This is because the RPD is well-placed to assess credibility (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4 (QL); *Hou* at para 7). Unlike the reviewing court, it has the advantage of observing the witnesses who testify. It may also have expertise in the subject matter that the reviewing court does not share, including with respect to country conditions (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42;

Zhou v Canada (Citizenship and Immigration), 2015 FC 821 at para 58). Nevertheless, the reviewing court has a duty to ensure that the RPD's credibility findings are reasonable.

[12] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[13] When a decision is challenged on the basis that the requirements of procedural fairness were not met, the reviewing court "is required to ask whether the procedure was fair having regard to all the circumstances, including the *Baker* factors" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*], referring to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837-41; *Khosa* at para 43). It has been said that, in doing so, the reviewing court applies a

correctness standard. There is some debate as to whether it is even helpful to speak of a standard of review being applied to questions of procedural fairness, especially when the question was not addressed by the original decision-maker (see *Canadian Pacific Railway* at para 54). To the extent that it is helpful, what applying the correctness standard means is that the reviewing court will not show deference to the procedure adopted by the decision-maker; instead, it will make its own determination of whether the proceeding was fair or not having regard to all the circumstances, including the statutory framework, the nature of the substantive rights involved, and the consequences of the decision for the applicant. In the end, a procedural choice which made the proceeding unfair could well be said to be both incorrect and unreasonable.

IV. ANALYSIS

A. *Delay in Holding a Hearing*

[14] The applicant made his refugee claim when he arrived at the Canada/U.S. border at Fort Erie on September 14, 2011. He was immediately found to be eligible to be referred to the IRB despite the fact that he was coming from the United States because he had "anchor" relatives in Canada (his brother and his son). The applicant submitted his PIF to the IRB on October 6, 2011. His hearing before the RPD did not take place until just over six years later – on November 22, 2017. The decision rejecting the claim was released four months after that.

[15] There is no evidence before me explaining why it took as long as it did for the applicant's claim to be heard by the RPD. However, there is no dispute that there was a significant backlog of refugee claims at the time and the applicant's case was dealt with as what is referred to as a

"legacy" claim. Significant changes were made to the refugee determination process in December 2012. Claims made before that date were processed in one stream while claims made after that date were processed in a different stream. There is also no dispute that legacy claims typically moved more slowly through the refugee determination process than claims made after December 2012.

[16] The applicant submits that his right to procedural fairness was breached because "the six-year delay between the time he made his refugee claim and the time his hearing was held was excessive and significantly jeopardized any opportunity he had to fairly present his case" (Applicant's Memorandum of Argument, at para 74). In particular, he submits that his case depended on his credibility and he was unable to present his case effectively because his memory of details had faded with the passage of time. This argument was framed solely in terms of the common law requirements of procedural fairness; no issues under the *Canadian Charter of Rights and Freedoms* were raised.

[17] Largely for the reasons advanced by the respondent, I find that this submission is without merit.

[18] First, this issue is being raised for the first time on judicial review. There is no evidence from the applicant either at the original hearing or in the form of new evidence in support of this application that his memory of relevant events was actually affected by the passage of time. Broad statements by counsel unsupported by evidence to the effect that memories fade over time,

that details become less clear, and that dates get mixed up, are insufficient to establish the breach of procedural fairness the applicant alleges.

[19] Second, in any event, the only remedy the applicant seeks on this application is that the decision be set aside and the matter referred back to the RPD for redetermination. It is difficult, to say the least, to reconcile this relief with the complaint that it took too long for the original hearing to be held. The second hearing will obviously be even more delayed than the first one. Still, perhaps it is not surprising that no other relief is sought. It would be self-defeating to seek a remedy tantamount to a stay of the refugee claim. And this Court does not have the jurisdiction to confer refugee protection on the applicant, at least not in the absence of a request for relief under section 24(1) of the *Charter* (the legal viability of which I make no comment upon here). Furthermore, the applicant has not pointed to any basis for an order directing the RPD to find him to be a Convention refugee, a form of relief he did not request in any event. In such circumstances, the complaint about delay appears to be entirely academic.

[20] Third, the applicant submits that the RPD member should have been more alive and sensitive to the difficulties he had recounting the basis of his claim because of the passage of time when evaluating his credibility. The applicant contends that at most the member paid lip service to this issue when she stated that she was "cognizant of the many difficulties faced by claimants in establishing their claims" and acknowledged that the applicant "has been in Canada for more than five years and, therefore, his memory of past events may not be as fresh in his mind." Even assuming for the sake of argument that the member failed to heed her own advice, this is a matter that goes to the reasonableness of the decision, not to procedural fairness.

B. *The Reasonableness of the Credibility Determinations*

[21] As set out in paragraph 9 above, the RPD member offered a number of reasons for rejecting the applicant's claim. Several of these reasons relate to the applicant's credibility, which the member found wanting. None relate directly to the January 3, 2011, incident and its aftermath. While the member mentions this incident in passing when she summarizes the contents of the applicant's PIF narrative at the beginning of her reasons, she does not make any express findings about it anywhere in the reasons. The incident is never mentioned again. The applicant contends the decision is unreasonable because the failure to address this incident leaves one completely in the dark with respect to how the member dealt with a key part of the claim for protection.

[22] I agree with the applicant that this is a serious flaw in the reasons. The incident on January 3, 2011, was not a peripheral event. As the applicant put it in his initial claim, it was when his problems in Sri Lanka began. It is the principal reason he is now seeking protection. Yet the member makes no express findings whatsoever with respect to it.

[23] The respondent submits that it is implicit in the result that the member must not have found the applicant's evidence about the incident to be sufficient to establish his claim for protection under either section 96 or 97 of the *IRPA*. This is indisputable. The problem is that we do not know why the member reached this conclusion. Her other findings shed no light on this. While the member makes a number of negative findings with respect to the applicant's credibility, none of them relate directly to the January 3, 2011, incident. The member drew an

adverse inference from the applicant's failure to seek refugee protection on his earlier visits to the United States. This failure could be probative of whether the applicant had a well-founded fear of persecution at that time, but it says nothing about the January 2011 incident, which came later. The same also holds with respect to the applicant's willingness to return to Sri Lanka prior to January 2011. The applicant's inconsistent evidence about how long he was in the United States previously and why he was there is not directly probative of the January 2011 incident either.

[24] The member could have rejected the claim despite the applicant's evidence about the January 2011 event for a number of different reasons. Was it because, given all the other concerns the member had with the applicant's credibility, she was not satisfied that the incident actually happened? Was it because she was satisfied that the incident happened but was not satisfied that it amounted to persecution? Was it because she was satisfied that the applicant was in fact targeted because of his ethnicity at the time but, given the passage of time since the event, there was no basis to find that he was still at risk in relation to a Convention ground? Was it because, even though she was satisfied the event happened, she was not satisfied that it provided a sufficient basis to find that the applicant was a person in need of protection under section 97 of the *IRPA* because he had not established that he was still personally at risk?

[25] One looks to the reasons in vain for answers to any of these questions. The answers matter not just because they would explain how the result was reached but also because they have implications for whether "the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). For example, the

member did not conduct a separate analysis under section 97 of the *IRPA* after rejecting the claim under section 96. If the member was not satisfied that the January 2011 incident occurred at all, given her other findings there arguably would be no need for a separate analysis under section 97. On the other hand, if the member found instead that the applicant had only failed to establish a nexus between the January 2011 incident and a Convention ground, the applicant may still have had a basis for protection under section 97. A separate analysis under section 97 is not always required but whether one is required in a given case or not depends on the circumstances of that case and the specific findings made by the decision-maker (*Kandiah v Canada (Citizenship and Immigration)*, 2005 FC 181 at paras 11-19; *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at paras 50-51). In the absence of any findings regarding the January 2011 incident, it is impossible to tell whether a separate analysis under section 97 of the *IRPA* was required here or not.

[26] The respondent submits that, given the member's concerns with the applicant's credibility generally (which concerns the respondent maintains are reasonably supported by the record), there were ample grounds for the member not to be satisfied that the January 2011 event and its aftermath ever occurred. This, together with the member's express findings, would explain the rejection of the claim under both section 96 and section 97. If the member had explained that this was how she had dealt with the January 2011 incident, the outcome of this application could well have been different. The difficulty for the respondent's position is that it is an invitation to speculate about what the RPD member might have concluded with respect to the January 2011 incident when she rejected the applicant's claim. This is an invitation I cannot accept (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, cited with

approval in *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 28; *Canadian Pacific Railway Company v Univar Canada Ltd*, 2019 FCA 24 at para 66).

[27] When the decision-maker has failed to make the necessary connections, general adverse credibility findings alone cannot sustain the result reached in this case. It is not the reviewing court's role to re-weigh the evidence. It is, however, the reviewing court's duty to determine whether the decision is justified, transparent and intelligible. In the complete absence of any analysis of the pivotal incident in the applicant's narrative, the decision lacks justification, transparency and intelligibility. It is unreasonable and must be set aside.

V. CONCLUSION

[28] For these reasons, the application for judicial review is allowed, the decision of the RPD dated March 28, 2018, is set aside, and the matter is remitted for redetermination by a differently constituted panel.

[29] The parties did not suggest any serious questions of general importance for certification under subsection 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-1832-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated March 28, 2018, is set aside and the matter is remitted for redetermination by a differently constituted panel.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1832-18
STYLE OF CAUSE:	KARUNARAJU KITTU RASIAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 17, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	APRIL 5, 2019

APPEARANCES:

Cemone Morlese	FOR THE APPLICANT
Maria Burgos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Grice and Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT