

Federal Court



Cour fédérale

Date: 20200302

Docket: IMM-3595-19

Citation: 2020 FC 313

Ottawa, Ontario, March 2, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ROBINSON ALEXANDER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [Decision], which denied the Applicant refugee protection under sections 97 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Facts

[2] The Applicant is a 38-year-old citizen of Sri Lanka. He arrived in Canada in June, 2018, and made a claim for refugee protection in July, 2018 on the basis of his ethnicity as a Tamil, and perceived political opinion as a supporter of the Liberation Tigers of Tamil Eelam [LTTE]. He also raised a *sur place* risk as a Tamil male returning to Sri Lanka as a failed refugee claimant.

[3] In his Basis of Claim [BOC] narrative, the Applicant alleged numerous incidents of being detained, interrogated and abused by authorities or their proxies, generally on suspicion of being involved with the LTTE. These incidents occurred in 2005, 2009 and 2011. The Applicant also alleged he faced multiple extortion demands from the Sri Lankan military and pro-government Karuna paramilitary group from 2011 through to 2017. The Applicant's allegations are summarized in the Decision:

ALLEGATIONS

[2] The claimant's allegations are fully set out in his Basis of Claim (BOC) form. To summarize, the claimant alleges that he is at risk of persecution in Sri Lanka for his ethnicity (being Tamil) and his imputed political stance of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE).

[3] The claimant, a jeweller, testified to a number of incidents of persecution that occurred before the end of the Sri Lankan civil war in 2009. The claimant testified to being interned by the army twice in 2005.

[4] In 2009, the claimant testified to having his family relocated to Anadakumarasamy refugee camp and then released to Batticaloa, where they suffered two house checks in 2009.

[5] The claimant testified that he was targeted by members of the Karuna Group, who would repeatedly bother the claimant for small sums as a bribe from 2011-2017.

[6] In September of 2017, the claimant testified that soldiers demanded 2,000,000 rupees from the claimant, a far greater sum than he had been paying. After the claimant closed his shop and did not pay, 3 officers came to his house in October of 2017, searched it, and took 27,000 rupees in cash. After the claimant and his family went to the police station, where they were turned away, the men attempted to put him in a white van in front of his house, until some neighbours intervened.

[7] The claimant then fled to Colombo for three months, and fled Sri Lanka on January 14, 2018. The claimant arrived in the United States (US) on February 5, 2018 and was detained. The claimant was released on bond on June 13, 2018 and entered Canada on June 26, 2018.

[Footnotes omitted]

III. Decision under review

[4] The RPD held a hearing and rejected the Applicant's claim for refugee protection in a decision dated May 16, 2019, finding the Applicant was neither a Convention refugee nor a person in need of protection. Many issues were determined including the Applicant's *sur place* claim, i.e., the risk to him in returning to Sri Lanka as a failed refugee claimant.

[5] On the issue of the risk to the Applicant as a Tamil failed refugee returnee, the RPD stated the documentary evidence indicated Tamil males are screened at Sri Lankan airports upon return, but that this screening is done to establish a failed refugee claimant's identity, and that failed refugee claimants are typically only at risk of torture if they are suspected LTTE members or sympathizers. The RPD found the Applicant's claim he was extorted not credible, and that he had not established Sri Lankan authorities suspected him of being a LTTE member. The

Applicant submitted he was likely to be questioned by Sri Lankan authorities because he had been questioned by CSIS about his identity. The RPD found: “With regard to the claimant’s return, the panel notes that Sri Lankan authorities will be aware that he has traveled abroad prior and has a family to return to, and is 38 years old, facts that Canadian authorities with CSIS did not immediately have confirmation of when the claimant arrived in Canada without a passport”.

IV. Issues

[6] The Applicant submitted a large number of issues for determination, however I have determined the RPD’s treatment of the *sur place* claim is a determinative issue, and was decided unreasonably such that judicial review must be ordered. I make no findings with respect to the other issues since there will be a new hearing before a different decision-maker.

V. Standard of Review

[7] As for the applicable standard for the *sur place* claim, it is common ground the standard of review is reasonableness, which I accept. Reasonableness requires the reviewing court to pay respectful attention to the decision-maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner, at para 84 [*Vavilov*]. In assessing reasonableness the Court must look at the reasoning process in terms of coherent and rational chain of analysis, and the outcome of the reasoning in terms of the legal and factual constraints facing the decision-maker: *Vavilov* at paras 83-86. The decision under review must be justified, intelligible and transparent: *Vavilov* at para 99. Judicial review is not a treasure hunt for errors: *Vavilov* at para 102.

VI. Analysis of determinative *sur place* claim

[8] The Applicant submits the RPD's risk assessment is unreasonable because the RPD's conclusion is contradicted by relevant evidence in the record. The RPD's risk assessment stated:

RISK AS A RETURNING REFUGEE CLAIMANT

[54] The panel has established that the claimant has travelled to Canada, will have failed to secure refugee protection, and is a Sri Lankan Tamil. Given objective conditions in Sri Lanka, the panel will analyze the claimant's prospective status as a returning refugee claimant. The panel is required to look at the claimant's complete profile in this regard.

[55] Objective evidence indicates that Tamil males are subject to screening and questioning at Sri Lankan airports upon return. However, the objective information indicates that screening and arrests are typically for the purposes of either establishing the former claimants' identity (to be sure there is no prior criminal involvement), and that incidents relating to torture of returning refugee claimants are typically a risk only to those suspected of membership or involvement in the LTTE.

[56] Claimant's counsel argued in submissions that, because the claimant was questioned by Canadian Security Intelligence Services (CSIS) regarding his identity, Sri Lankan authorities will probably make the same decision to do so.

[57] As noted in detail above, the incidents described by the claimant are not credible. The panel has found that the claimant has not established that he is suspected of membership in the LTTE by Sri Lankan authorities. The claimant testified that he was the victim of an extortion attempt, which the panel did not accept occurred.

[58] With regard to the claimant's return, the panel notes that Sri Lankan authorities will be aware that he has traveled abroad prior and has a family to return to, and is 38 years old, facts that Canadian authorities with CSIS did not immediately have confirmation of when the claimant arrived in Canada without a passport.

[9] It is certainly the case that the RPD is not required to refer to every piece of evidence contrary to its findings, given the presumption that it has reviewed the record. However, a decision-maker's failure to mention and analyze evidence that directly contradicts a finding or conclusion may militate in favour of the reviewing court inferring the decision-maker's conclusions were made without regard to the evidence: *Ban v Canada (Citizenship and Immigration)*, 2018 FC 987, per Gleeson J at para 32. Conclusions made without regard to the evidence are by definition unreasonable because they fail to respect the factual constraints of the case: *Vavilov* at para 99.

[10] As the Applicant notes, the RPD accepts that Tamil males are subject to screening and questioning at the Sri Lankan airports upon return. However, the RPD downplayed the Applicant's risk by stating that torture is reserved to those suspected of LTTE involvement in Sri Lanka. In doing so, the RPD ignored material objective evidence to the effect that the fact of claiming refugee protection overseas, particularly in countries considered to have a huge Tamil diaspora like Canada, could itself form the basis for suspicion of having LTTE links, or lead to mistreatment.

[11] In particular, the Applicant points to a great number of objective country condition documents, many from Canada's National Documentation Package [NDP] that contradict the findings of the RPD. Notably, none of this contrary objective evidence is considered by the RPD, giving rise to my conclusion that the *sur place* conclusions were made without regard to the evidence and hence are unreasonable.

[12] As the Applicant correctly notes, under the same section of NDP that the panel relied on in the Decision, namely Item 1.4 United Kingdom Home Office “Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0” (June 2017), the following passages are found under section 12.2:

12.2.1 ... ‘Tamils returning from abroad, particularly those returning from working in the Middle East and deported from other places, continue to be questioned and sometimes detained on arrival...’

...

12.2.9 ... ‘Returning Tamils from abroad continue being arrested at the airport. The surveillance of the civil society in the North and East is remaining high.’

...

12.2.10 ...A July 2015 International Truth & Justice Project (ITJP) Sri Lanka report on Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015 stated that: ‘A security force insider testified since the presidential election in 2015 that military intelligence officials from Joseph Camp were actively looking for any Tamils returning home from abroad in order to interrogate them. The witness stated that the intention was to abduct, detain and torture them.’

...

12.2.14 The International Truth & Justice Project (ITJP) Sri Lanka documented the experiences of 20 Sri Lankan Tamils in a January 2016 report on survivors of torture and sexual violence in 2015 and stated that ‘In some cases the interrogators showed the victims print outs of photographs of themselves or people close to them attending recent Tamil diaspora commemorative events abroad. Some had spent periods in hiding in southern India and it was clear their interrogators regarded this with great suspicion when they returned home.’

[Emphasis added]

[13] Section 8.5.8 of the same document states “Most of the time when people return [from outside the country] there is the possibility they will be arrested. So for this reason many people refuse to return.” As well, section 9.3.5 provides “According to a lawyer who spoke to the FFM team about Tamils returning to Sri Lanka, it is a given fact they will be questioned and may be monitored, if not at the airport, then when they return to their homes.”

[14] That the Sri Lankan government continues its interest in diaspora activities for possible LTTE resurgence is also discussed at section 13 of the same document and reports that the Sri Lankan government continues to monitor Tamil gatherings overseas.

[15] I also agree with the Applicant that the RPD’s reliance on NDP Item 1.5, United Kingdom Home Office, “Report of a Home Office Fact-Finding Mission. Sri Lanka: treatment of Tamils and people who have real or perceived association with the former Liberation Tigers of Tamil Ealam (LTTE)” (July 2016), is difficult to understand because the section quoted, section 4.7.3, does not exist. What NDP Item 1.5 does state is that there is a presumption that any Tamil male who grew up in the north or northeast of Sri Lanka during the conflict would have LTTE connections. This is because “it would have been forced on young men”. I agree this presumption might likely apply to the Applicant considering he is from Batticaloa and frequently travelled into Vanni during the height of the communal war.

[16] The Applicant submits, and again I agree, that the RPD ignored a number of other documents contained in the NDP that corroborate the risk of Tamils returning to Sri Lanka as failed refugee claimant, including the following:

- NDP Item 13.1, Response to Information Request, LKA 105041.E (11 February 2015), which states that “failed asylum seekers are more likely to be readily associated with the LTTE either by virtue of the fact that they sought asylum or because of a presumption of involvement in Tamil diaspora activities which are viewed by the Sri Lankan government as being supportive of the LTTE”;
- NDP Item 13. 7, Asylum Research Centre, “Sri Lanka: Query Response – Update The Situation of Tamils” (11 March 2016), quoting a Human Rights Watch 2014 report which stated that “The government’s treatment of Tamils forcibly returned to Sri Lanka after being denied asylum overseas continues to be a significant concern. [...] Human Rights Watch and others have documented the authorities’ use of torture against people suspected of links to the LTTE, including those returned as failed asylum seekers from the United Kingdom and other countries”;
- NDP Item 10.6, International Truth and Justice Project, “Unstopped: 2016/ 2017 Torture in Sri Lanka” (July 2017), lists the reasons that a Tamil individual might come to the attention of the Sri Lankan authorities, which include, among others, returning from abroad (including after failing an asylum claim) and having a family member suspected of LTTE ties. As the Applicant notes, both these factors apply to the Applicant;
- NDP Item 1.11, ACCORD, “Sri Lanka COI Compilation” (December 2016) quotes a number reports from various sources confirming that Tamils who are forcibly returned to Sri Lanka are arrested and tortured. Specifically, the document quotes a 2016 report from the Human Rights Watch that provides “[t]he law [the Prevention of Terrorism Act, PTA] has been used since the end of the war, including under the present

government, to detain and torture people suspected of links to the LTTE, including forcibly returned asylum seekers.”

[17] The Applicant notes he supplied the RPD with numerous other articles further reporting on the treatment of individuals returned to Sri Lanka, including "Post-deportation Risks: A Country Catalogue of Existing References", published by Stitching LOS, which states:

Returnees are upon arrival first questioned by the Criminal Investigation Division (CID) and the possible also by the State Intelligence Service (SIS). These interrogations can be harsh and violent. The government wants information on the diaspora and about the West. Returnees can be arbitrarily treated as traitors and as possible source of danger.

[Emphasis added]

[18] The Applicant drew the Court’s attention to other relevant evidence from the NDP:

- NDP Item 2.6 United Nations Human Rights Council “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Visit to Sri Lanka” (14 December 2018) states:

A representative of the newly appointed and highly credible National Human Rights Commission emphasized that torture in custody was widespread, systemic and institutionalized, and its eradication formed a major priority in its work.

- NDP Item 2.9 United Nations. Human Rights Council, “Compilation on Sri Lanka” (28 August 2017) states:

The Committee against Torture remained seriously concerned that torture was a common practice carried out in relation to regular criminal investigations in a large majority of cases by the Criminal Investigation Department of the police, regardless of the nature of the suspected offence.

...

It also noted that people suspected of having even a remote link with the Liberation Tigers of Tamil Eelam had been abducted and subjected to brutal torture, including sexual violence and rape of men and women by the military and the police in unacknowledged places of detention.

[Emphasis added]

- NDP Item 2.10, United Nations Human Rights Council, “Summary of stakeholders’ submissions on Sri Lanka” (8 August 2017) quotes a report from the Freedom from Torture (FfT) which “noted that the Sri Lankan military, police and intelligence services continued to practice torture in a network of torture facilities across the country, including unofficial detention centres”, and a report from HRC-SL which also “noted a widespread incidence of custodial violations, including torture”.

[19] Despite this mass of evidence, the RPD failed to articulate an explanation as to why it was ignored. This failure to deal with the relevant evidence in this case, which evidence contradicts the conclusion reached, renders the decision unreasonable.

[20] In addition, the Applicant points to *Suntharalingam v Canada (Citizenship and Immigration)*, 2014 FC 987:

[45] The respondent submits that the Board reached a reasonable conclusion on this issue because the documentary evidence showed that the possibility of detention upon return is a policy that applies equally to all persons returning to Sri Lanka. Furthermore, the respondent says that there was no evidence to establish that the applicant faces a “serious possibility of abuse if he is detained,” because the Board did not find that he is a suspected LTTE member.

[46] I reject this argument because it does not satisfactorily address the risk of persecution faced by the applicant as a failed asylum seeker returning to Sri Lanka.

[47] In addition, the RPD appears to be saying that because it did not believe the applicant was targeted by the authorities for a

perceived association to the LTTE, there is no need for it to consider whether he is at risk in relation to the objective documentary evidence.

[48] However this logic does not apply to the RPD's determination that the applicant does not fit the profile of failed refugee claimants returning to Sri Lanka. This is what the RPD stated:

[37] The panel notes item 14.5 of Exhibit R/A-1. This Board publication, dated August 22, 2011, sets out that all returnees are subject to criminal checks, and this could entail detention of several days, depending on the day in the week in which a returnee arrives in the country. However, this is indicated to apply equally to all Sri Lankans of all ethnicities. The panel has found that the government would not be concerned about the claimant as an opponent or critic of the government, or as being associated with the LTTE. Thus, the panel finds that this administrative delay in detention, even should it occur to the claimant would not be persecution.

[49] In my respectful view, the RPD's credibility concerns cannot determine the issue of whether there is a serious possibility of persecution of the claimant in his capacity as a failed refugee claimant returnee. The applicant's status in this regard is determined objectively by the fact that he is a failed refugee applicant by virtue of having his claim rejected by the RPD. It has nothing to do with credibility.

[Emphasis added]

[21] See also Justice Diner's decision in *Thevarajah v. Canada (Citizenship and Immigration)*, 2018 FC 458:

[11] Finally, the RPD did not meaningfully address the risk Mr. Thevarajah would face in Sri Lanka as a failed refugee claimant, which was a key aspect of his profile that did not depend on his credibility (*Shanmugarajah v Canada (Minister of Citizenship and Immigration)*, 2014 FC 987 at para 49 [*Shanmugarajah*]). Rather, the RPD focused on a 2012 United Nations High Commissioner for Refugees document, which suggested that a serious possibility of persecution for young Tamil males only arose if they or a close

relation had been actively and formally involved in the LTTE. As Justice Brown found in *Shanmugarajah*, the RPD has a duty to consider whether there is a serious possibility of persecution of the applicant specifically as a failed refugee returnee (see also, by analogy, *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349). The RPD failed to do so in this case.

[22] In response, the Respondent cites Justice Zinn's decision in *Jiang v Canada (Citizenship and Immigration)*, 2012 FC 1067 [*Jiang*], for the proposition that the RPD may assess an applicant's *sur place* claim in light of credibility concerns that relate to the original authenticity of the claim:

[28] This Court has held that it is permissible for the Board to assess an applicant's genuineness and therefore its *sur place* claim in light of credibility concerns relating to the original authenticity of a claim: *Hou v Canada (Minister of Citizenship and Immigration)*, 2012 FC 993, at para 57; *Yang v Canada (Minister of Citizenship & Immigration)*, 2012 FC 849, at para 19.

[23] In my view, *Jiang* does not assist the Respondent in a case involving the failure to consider the considerable volume of contrary evidence in this case.

[24] With respect, I agree with the Applicant's submission that the RPD's rejection of the Applicant's *sur place* claim is unreasonable. In my view, the Decision is unreasonable because the RPD did not adequately address the conflicting documentary evidence concerning the fate of returning failed asylum seekers. The RPD unreasonably allowed its credibility concerns to determine the issue of whether there was a serious possibility of persecution of the claimant in his capacity as a failed refugee claimant returnee.

[25] The foregoing deals with the assessment of the reasons in terms of their outcome given the legal and factual restraints facing the RPD. I have concluded the RPD acted unreasonably in assessing the *sur place* claim because it failed to respect both the applicable legal and factual constraints upon it. This failure also constituted a gap or fatal flaw in the RPD's reasons which, as a result, cannot withstand *Vavilov's* requirement that reasons demonstrate a rational and coherent chain of analysis leading. Therefore judicial review will be granted.

[26] No question of general importance was posed for certification, and none arises.

JUDGMENT in IMM-3595-19

THIS COURT'S JUDGMENT is that this application for judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted RPD, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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