Federal Court  Cour fédérale

**Date: 20200325**

**Docket: IMM-2669-19**

**Citation: 2020 FC 419**

**Ottawa, Ontario, March 25, 2020**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**KANTHARUBAN THEIVENDRAM**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of a decision of the Minister of Public Safety and Emergency Preparedness [Minister], dated March 30, 2019, denying the Applicant's request for relief from the application of paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant is a citizen of Sri Lanka of Tamil ethnicity. Between 1995 and 1996, as an adolescent, he was involved in the activities of the Student Organization of Liberation Tigers [SOLT], the student wing of the Liberation Tigers of Tamil Eelam [LTTE]. The LTTE is a terrorist entity for the purposes of Part II.1 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

[3] The Applicant left Sri Lanka for the United Kingdom [U.K.] in February 1999. He claimed refugee status there but that claim was refused. In September 2003, he left the U.K. for Canada, arriving in Montreal, Quebec under a fraudulent New Zealand passport. His claim for refugee protection based on his fear of the Sri Lankan army and LTTE was accepted on June 16, 2005. He then applied for permanent residence under the Convention refugee class.

[4] The Applicant was first interviewed about his involvement in the activities of SOLT in September 2006 by the Canada Border Services Agency's [CBSA's] Counter Terrorism Section. He was again interviewed on March 16, 2010 and February 8, 2011. During the February 8, 2011 interview, the Applicant requested Ministerial relief.

[5] On March 25, 2011, the Applicant was determined to be inadmissible to Canada under paragraph 34(1)(*f*) of the *IRPA* as a result of his involvement in SOLT.

[6] The Applicant's application for Ministerial relief remained outstanding for several years. After the Applicant applied to this Court for a writ of *mandamus* on April 16, 2018, the parties agreed to a timeline to assess the application for Ministerial relief.

[7] On July 27, 2018, the Applicant filed additional submissions and evidence in support of his application. As a response to the CBSA's draft recommendation he received on October 31, 2018, he filed additional submissions and evidence on November 30, 2018.

[8] The Applicant is not at risk of removal. What is at issue in these proceedings is whether he may be relieved from some of the restrictions that limit his enjoyment of his present status in Canada including being able to reunite with his spouse who resides in Sri Lanka.

## II. **Minister's Decision**

[9] After reviewing the Applicant's submissions and evidence, the CBSA submitted a briefing note to the Minister. The CBSA recommended the Minister refuse the relief requested by the Applicant, and the Minister accepted that recommendation on March 30, 2019.

[10] The CBSA briefing note serves as the Minister's reasons: *Canada (Public Safety and Emergency Preparedness) v Khalil*, 2014 FCA 213 at para 29; *Hameed v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1353 at para 25 [*Hameed*].

[11] The briefing note asserted that the burden of proof rests with the Applicant who must satisfy the Minister that his presence in Canada would not be detrimental to the national interest and that the requested relief is warranted, notwithstanding his inadmissibility. The test for national interest in subsection 34(2) of the *IRPA* (as it read at the time of the application) the briefing note stated, referencing *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*], relates to security and public safety. The national

interest is to be interpreted in the context of Canada as a parliamentary democracy committed to protecting fundamental values of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 and meeting Canada's international obligations.

[12] The briefing note concluded that inconsistencies and incomplete explanations in the Applicant's statements hurt his credibility—or inhibited the Minister from finding the Applicant's presence in Canada is not detrimental to the national interest. The following is a summary of the inconsistencies that were noted:

> (i) The Applicant has asserted his involvement in SOLT was involuntary, that he was forced to join SOLT in an environment of coercion and punishment, and that he chose to join to avoid the attention of the LTTE or avoid being ostracized by family and friends for being the only person not assisting the organization.
>
> (ii) In June 2011, the Applicant stated he dug bunkers in multiple locations ("in common areas such as temples and schools"); in July 2018, he stated he helped dig bunkers "one time"; and in November 2018, he stated he "helped dig bunkers in the community a few times".
>
> (iii) In February 2011, the Applicant recounted spending two days helping "the wounded" at a hospital; in a subsequent statement, he said he did that "two or three times" or "a few times".
>
> (iv) His statements from September 2006 and February 2011 discussed arranging SOLT meetings at his school, but then he stated that these actions were limited to menial tasks such as setting up chairs and tables for the meeting. He had said he organized funeral viewings for deceased LTTE members and other high-ranking locals, but in November 2018, he denied doing that.
>
> (v) The Applicant has stated he had no leadership role in SOLT, with the exception of a February 2011 statement that he had a leadership role in a student group to which he was "forcefully" nominated. (He has since stated that this was a problem with his

English, though he stated in May 2011 that he speaks "English fairly well" and has not claimed any other statements relate to English problems.)

(vi) He has stated his involvement in SOLT ended in April 1996; he subsequently stated it ended in February 1996.

(vii) The Applicant has at times stated his parents and sister are supportive of the LTTE cause, that the parents did not support the Sri Lankan army and that they prayed for the LTTE; the Applicant subsequently said his parents only prayed for the safety of his brother, who was with the LTTE, rather than for the organization.

(viii) The Applicant has asserted his brother joined the LTTE to "avoid the IPKF" or because of his fear of the Sri Lankan army that "targeted young Tamil men" or that he was an unwilling participant, who was either "too afraid to refuse" or was "forcibly taken by the LTTE".

(ix) The Applicant has described his spouse as being supportive of the LTTE and never being supportive of the LTTE.

(x) The Applicant has at times told CIC he travelled from Dubai to London by air after leaving Sri Lanka; that he travelled by air and boat, stopping in Dubai, Russia, Poland and France. He has stated that he meant Ukraine rather than Russia, and that his trip from Ukraine to Poland to France took place in a truck container. He has stated he flew from Sri Lanka to Dubai and then Russia, and then travelled from Russia to France in a truck container.

(xi) Though the Applicant asserts he fears the Sri Lankan army and LTTE, he does not explain why his initial statements at the port of entry only referred to his fear of the army and not the LTTE.

(xii) The Applicant has stated he is a law-abiding person who is not inclined to take part in unlawful acts, however, he has had several criminal charges, pleading guilty to taking a motor vehicle without consent in June 2008.

[13] While the primary focus was on national security and public safety considerations, the briefing note states that all personal factors presented by the Applicant were considered including those described as "H&C". These included the Applicant's desire to be reunited with

his spouse in Canada and the emotional toll their prolonged separation has had on him. Also considered were the Applicant's bipolar affective disorder and anxiety disorder diagnoses.

[14] In the result, the Minister was not satisfied that the positive factors outweighed the negative considerations and denied the request for relief.

## III. **Issues**

[15] The Applicant asks whether the Minister rendered an unreasonable decision by:

a) Unreasonably assessing the Applicant's credibility and evidence;

b) Improperly relying on criminal charges that had been withdrawn; and

c) Failing to reasonably assess why it would be contrary to the national interest to grant relief.

[16] Having considered the Respondent's submission, I am content to rely on the Applicant's statement of the issues.

## IV. **Relevant Legislation**

[17] At the time the Applicant applied for Ministerial relief, the relevant sections of the *IRPA* read as follows:

| **Rules of interpretation** | **Interprétation** |
|---|---|
| **33** The facts that constitute inadmissibility under sections | **33** Les faits — actes ou omissions — mentionnés aux |

34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

**Security**

**34 (1)** A permanent resident or a foreign national is inadmissible on security grounds for

**(a)** engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

**(b)** engaging in or instigating the subversion by force of any government;

**(b.1)** engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

**(c)** engaging in terrorism;

…

**(f)** being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

**Sécurité**

**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :

**a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

**b.1**) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

**c)** se livrer au terrorisme;

…

**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

| | |
|---|---|
| **Exception** | **Exception** |
| **(2)** The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest. | **(2)** Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national. |

[18] Section 34(1) was amended and s 34(2) was repealed through the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, ss 13 and 18 ["*FRFCA"*]. The *FRFCA* also enacted s 42.1 (1) which permits the Minister to relieve an applicant from the effect of s 34(1).

## V. **Standard of Review**

[19] The parties are agreed that the standard of review is reasonableness citing *Agraira* at para 49. Their submissions predate the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[20] In *Vavilov*¸ the Supreme Court articulated a new approach to determining the applicable standard of review. Administrative decisions should be reviewed on the reasonableness standard, except where legislative intent or the rule of law require otherwise. Those exceptions do not apply to this case.

[21] In assessing the reasonableness of an administrative decision, the Court must consider "*both* outcome *and* process": *Vavilov* at para 87. Regarding the process, the Court must try to

understand the reasoning process and assess whether the decision-maker's decision is based on an "internally coherent and rational chain of analysis": *Vavilov* at paras 84-85. Regarding the outcome, the Court must also determine "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": *Vavilov* at para 99 citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 74 and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13.

## VI. **Analysis**

[22] The Supreme Court of Canada reviewed the test the Minister is to apply to an application for Ministerial relief in *Agraira*. The Court, at para 87, determined that "a broad range of factors may be relevant to the determination of what is in the 'national interest', for the purposes of s. 34(2)". The Minister should be guided by the following factors (from *Inland Processing Operational Manual:* "*Refusal of National Security Cases/Processing of National Interest Requests*", Appendix D):

> Will the applicant's presence in Canada be offensive to the Canadian public?
>
> Have all ties with the regime/organization been completely severed?
>
> Is there any indication that the applicant might be benefitting from assets obtained while a member of the organization?
>
> Is there any indication that the applicant might be benefitting from previous membership in the regime/organization?
>
> Has the person adopted the democratic values of Canadian society?

[23] This Ministerial relief is not an alternate form of humanitarian and compassionate consideration: *Agraira* at para 84. However, this "does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review": *Agraira* at para 84.

[24] As noted above, the onus is on the Applicant to satisfy the Minister that his presence in Canada would not be detrimental to the national interest: *Hameed* at para 24; *Al Yamani v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 381 at para 69 [*Al Yamani*].

A. *Did the Minister unreasonably assess the Applicant's credibility and evidence?*

[25] The Applicant points to several errors or unsupported statements in the briefing note. There is no evidence in the record that he had failed to report as required on three occasions as stated at page 17 of the reasons. And as of 2005, he was no longer required to report. Upon arrival in Canada he did disclose his correct identity and use of a false passport at the airport contrary to what is stated at page 36 of the note. In any event, in the context of a refugee claim, travelling to Canada on a false passport is of little significance when determining credibility: *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 11. As for criminality, charges were laid but withdrawn because of his mental health issues. They should not have been given the weight attributed to them by the author of the note.

[26] The Applicant argues he has been "largely consistent" about his involvement in SOLT. The Minister did not identify any material contradictions with respect to his evidence that he had never engaged in acts of violence and that he had no ties to SOLT after 1996. His statements

were recorded over the course of about fifteen years starting with his Personal Information Form submitted with his refugee claim.

[27] The Minister's assessment of his credibility was microscopic, the Applicant argues. At various times he has described what he did or what the older teenagers did, how he had dug bunkers and helped the wounded. Whether he had dug a bunker one time or a couple of times or whether he had stopped participating in SOLT events in February or April of 1996 is not so significant that the Minister is unable to ascertain the nature or extent of the Applicant's involvement.

[28] It was open to the Minister to consider the totality of the Applicant's statements, as the briefing note states at pages 33-34, and to ascribe weight as appropriate to various factors considered in the assessment of the national interest. While some of the inconsistencies may appear to be minor and inconsequential, it was also open to the Minister to find that overall, coupled with the lack or incompleteness of the Applicant's explanations, the inconsistencies called into question the reliability of some portions of his narrative.

[29] I agree with the Respondent that while the manner in which the Applicant arrived in Canada is of little significance in assessing credibility on a refugee claim, it may be taken into consideration by the Minister in determining whether to grant relief. However, the same is not true in this case with regard to the alleged violation of the Applicant's terms of release by failing to report on specified dates as no explanation was provided by the author of the briefing note for

the source of that information. In the absence of some indication that the information was verified, it was unreasonable for the writer to give it any weight.

[30] The Minister was aware of the Applicant's arguments about his mental health issues. However, the decision does not connect those issues with the Applicant's inconsistencies or incomplete explanations other than to note that his psychiatrist and case manager did not identify memory problems or difficulties with expression.

B. *Did the Minister improperly rely on criminal charges that had been withdrawn?*

[31] It is clear from the decision that the Applicant's criminal charges weighed significantly against granting him relief. This is inappropriate, he argues, as he received a conditional discharge for one of those charges for which he had pleaded guilty, six were withdrawn and two were stayed for one year for mental health diversion. In this instance, the Applicant argues, the facts underlying his criminal charges are not on the record and the charges should not have been relied upon.

[32] Arrests and charges are not, in and of themselves, evidence of criminal conduct: see *Tran v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1040 at para 22; *Hutchinson v Canada (Minister of Citizenship and Immigration)*, 2018 FC 441 at para 24. Police reports of incidents are not proven facts and are not necessarily reliable: *Rajagopal v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 523 at para 43.

[33] The Respondent argues that the Applicant cannot claim that he is “law abiding” and then take issue with an assessment of his interactions with the criminal justice system. The interactions are relevant to an assessment of the Applicant’s presence in Canada on public safety grounds.

[34] The Applicant pleaded guilty in June 2008 to the July 2007 charge of taking a motor vehicle without consent, for which he received a conditional discharge. His June 2018 charges under s 264.1(1) of the *Criminal Code* for uttering threats were stayed through a mental health diversion program. The briefing note states that those charges “raised public safety concerns that cannot be ignored.” The charges, as the briefing note indicates, could be revived within a year of being stayed. It further states that the police report and the Applicant’s explanations as to the June 2018 charges were taken into consideration.

[35] In the circumstances, particularly that the Applicant had relied upon a 23 year history of law abiding presence in Canada, it was reasonable for the Minister to take these charges into account.

C. *Did the Minister fail to reasonably assess why it would be contrary to the national interest to grant relief?*

[36] The Applicant argues the Minister did not address why the Applicant’s presence in Canada is detrimental to national security and public safety. Taking the adverse findings at their worst, the Minister failed to explain why, despite the Applicant’s inadmissibility, his presence in Canada is detrimental to the national interest.

[37] As Madam Justice Mactavish explained in *Al Yamani* at para 12:

> The issue for the Minister under subsection 34(2) is not the soundness of the determination that there are reasonable grounds for believing that an applicant is a member of a terrorist organization—that determination will have already been made. Rather, the Minister is mandated to consider whether, notwithstanding the applicant's membership in a terrorist organization, it would be detrimental to the national interest to allow the applicant to stay in Canada.

[38] Additionally, the Applicant argues the Minister failed to consider the factors from *Agraira*. Specifically, the Applicant asserts the Minister failed to consider how he severed all ties with SOLT in 1996, that the Applicant did not obtain and is not presently benefitting from assets acquired while involved with SOLT, and he is not now benefitting from his previous involvement in SOLT. The Minister found the factors favourable to the Applicant "on their own" insufficient to grant the requested relief. The Minister failed to consider these positive factors in their totality.

[39] The Respondent contends that the briefing note addressed all of the factors central to the Applicant's case. It acknowledged the lengthy passage of time from when the Applicant had been involved with SOLT, that he has not benefitted from his former membership and that the Sri Lankan authorities had confirmed that currently he is not involved in any "anti-government activities".

[40] The Minister did not discuss why the Applicant's presence in Canada is detrimental to the national interest and it is difficult for this Court to understand why that may be the case. But the

Supreme Court of Canada has held that a court reviewing the reasonableness of a minister's exercise of discretion is not entitled to engage in re-weighing of the evidence: *Agraira* at para 91.

[41] The CBSA was of the opinion that the Applicant "has not satisfactorily discharged his burden to demonstrate that Ministerial relief is warranted in his case" and described why:

> Based on the assessment above, it is in Mr. Theivendram's favour that, according to his narrative, he was a minor during the entirety of his membership with the group's student wing, notwithstanding the reasonable likelihood of his awareness of the LTTE's engagement in terrorism. Also in Mr. Theivendram's favour is that he may have felt pressured, if not outright forced, to join the organization, and that from a mental health recovery perspective, there is a professional opinion that he may benefit from potential reunification with his spouse, who is currently living abroad.
>
> At the same time, […] certain assessed elements weigh against a grant of relief in this case. Mr. Theivendram has demonstrated instances of non-compliance with Canadian immigration laws, and a pattern of activity that has repeatedly brought him in contact with the criminal justice system over the years. He has had a total of at least nine criminal charges in this country, one of which ("taking a motor vehicle without consent") resulted in a guilty plea on Mr. Theivendram's part, and two of which ("uttering a threat to cause bodily harm", and "uttering a threat to cause death") are currently stayed. In addition, certain factors outlined above affect the reliability of some portions of Mr. Theivendram's narrative. For example, Mr. Theivendram has provided some inconsistent statements to Canadian officials throughout the years, including on pertinent issues, such as, but not limited to, aspects of his membership with the SOLT. Furthermore, he has not offered satisfactory explanations on some facets of his story, despite having been given opportunity to do so, making it difficult to determine the full extent of his involvement in the LTTE's student wing. In the CBSA's opinion, these negative considerations outweigh the above-noted factors that are in Mr. Theivendram's favour.

[42] While the Court may have arrived at a different conclusion on the same evidence that is not its role on judicial review. The decision is based on an internally coherent and rational chain of analysis, and is transparent and intelligible and justified in relation to the relevant factual and legal constraints; *Vavilov* at para 99.

## VII. **Conclusion**

[43] The application is dismissed. No questions for certification were proposed.

**JUDGMENT IN IMM-2669-19**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2669-19 |
| **STYLE OF CAUSE:** | KANTHARUBAN THEIVENDRAM V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 10, 2020 |
| **JUDGMENT AND REASONS:** | MOSLEY J. |
| **DATED:** | MARCH 25, 2020 |

**APPEARANCES:**

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| Judy Michaely | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |