Federal Court  Cour fédérale

**Date: 20200326**

**Docket: IMM-1017-19**

**Citation: 2020 FC 439**

**Ottawa, Ontario, March 26, 2020**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**AKILAN RAJARATNAM**

**Applicant**

**and**

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

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, Akilan Rajaratnam, seeks judicial review of a decision made by a Canada Border Services Agency [CBSA] Inland Enforcement Officer [Officer] dated February 11, 2019, refusing to defer the Applicant's removal to Sri Lanka.

[2] The Applicant is a citizen of Sri Lanka of Tamil ethnicity, who came to Canada in March 2010 and made a claim for refugee protection. The Refugee Protection Division [RPD] rejected his claim in September 2011.

[3] In February 2013, the Applicant applied for a pre-removal risk assessment [PRRA], which was denied in September 2013. This Court granted leave to apply for judicial review of that decision, but the parties settled and the matter was returned for redetermination in 2015. The PRRA redetermination was refused in June 2018.

[4] In October 2018, the Applicant submitted an application for permanent residence based on humanitarian and compassionate [H&C] grounds. The application raised the Applicant's hardship upon return to Sri Lanka, his establishment in Canada and the best interests of the children.

[5] On December 14, 2018, the CBSA notified the Applicant that it had scheduled his pre-removal interview for January 8, 2019. On January 25, 2019, the CBSA issued the Applicant a direction to report for removal on February 23, 2019.

[6] On February 1, 2019, the Applicant updated his H&C application to include new evidence of a warrant issued for his arrest, which the Sri Lankan Criminal Investigation Department left with the Applicant's parents at their home on December 20, 2018. The Applicant also provided further documentation relating to the country conditions in Sri Lanka and updated submissions.

[7] The same day, the Applicant submitted a request to CBSA to defer his removal until a decision was rendered on his H&C application. He alleged that there were compelling individual circumstances warranting a deferral, namely that: (1) he had the profile of an individual who would "surely" come to the attention of the Sri Lankan authorities upon arrival at the airport as his name would be on a "stop list" given the warrant for his arrest, which in turn would lead to his detention and a real risk of ill-treatment or harm; (2) his removal would have damaging effects on his pending H&C application; and (3) he is established in Canada and shares an extremely close familial bond with several children in Canada.

[8] On February 11, 2019, the Officer denied the Applicant's deferral request on the basis that the Applicant had submitted insufficient evidence to establish that a deferral of removal was warranted. On February 20, 2019, Justice Richard F. Southcott stayed the Applicant's removal pending the outcome of this application for judicial review.

[9] The Applicant now seeks judicial review of the Officer's decision. While framed differently in his memorandum of argument, the Applicant disputes the Officer's assessment of (1) the arrest warrant and the sworn evidence of his mother, (2) his evidence of hardship and (3) the best interests of the affected children. He also argues that the Officer fettered his discretion by relying on the previous findings of the RPD and the PRRA to conclude that the Applicant was not at risk and that he was under a statutory bar from applying for a PRRA.

## II. Analysis

[10] This application was argued prior to the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Since one of the issues raised by the Applicant related to the fettering of discretion by the Officer, and since the standard of review in such a case was somewhat unsettled in law, I issued a direction on December 30, 2019 inviting the parties to make additional submissions on the appropriate standard of review.

[11] The parties submit, and I agree, that the applicable standard of review for all of the issues is now reasonableness. None of the situations identified in *Vavilov* for departing from the presumptive standard of reasonableness apply here (*Vavilov* at paras 10, 16-17).

[12] In providing guidance on what constitutes a reasonable decision, the Supreme Court of Canada explained that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Close attention must be paid to a decision maker's written reasons and they must be read holistically and contextually (*Vavilov* at para 97). It is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102). If "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and [if] it is justified in relation to the relevant factual and legal constraints that bear on the decision", it is not for the reviewing court to substitute the outcome it would prefer (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[13] To support his deferral request, the Applicant argued that the warrant for his arrest, which describes him as having close contact with the Liberation Tigers of Tamil Eelam, was new evidence of hardship in Sri Lanka that Canadian immigration authorities had not previously assessed. The Applicant submits that the Officer unreasonably discounted the warrant based on his inability to confirm its authenticity. The Officer identified no issues with the photocopy provided, with the legibility of the document, its features or to whom the warrant was directed. Moreover, the original warrant was also available upon request. If the Officer had wanted to confirm its authenticity, the Officer could have requested the original since the Applicant had indicated in his submissions that it was available upon request. The Applicant also submits that the Officer erred in discounting the affidavit sworn by the Applicant's mother on the basis that no police report was provided. He contends that it is an error to dismiss evidence because other evidence would have been preferable.

[14] Upon review of the Officer's reasons and the record, I am unpersuaded that the Officer's decision is unreasonable.

[15] While I agree with the Applicant that the Officer did indeed note the Applicant's failure to provide the original warrant, the Officer had other concerns regarding the warrant. In particular, the Officer questioned its timing. The Officer noted that: (i) when the Applicant left Sri Lanka in March 2010, there was no warrant for his arrest; (ii) the warrant was issued on December 20, 2018, after the Applicant was called in for a pre-removal interview; and (iii) the Applicant had not provided a satisfactory explanation to show why a warrant for his arrest would be issued eight (8) years after his departure from Sri Lanka. It is in that context that the Officer's

reference to the absence of a police report must be taken. The mother's affidavit, which was prepared for the purposes of the H&C application, contains little information of probative value that could explain why a warrant was issued for the Applicant's arrest eight (8) years after his departure.

[16] The Applicant contends that the Officer should have asked him for the original warrant. Recognizing that the best practice is to send original documents to tribunals, the Applicant points out that he had no statutory obligation to do so, unlike, for instance, when one appears before the RPD. While that may be so, I am still not satisfied that the Officer was required to ask him to provide the original document in the circumstances of this case. A deferral of removal is a temporary measure intended to alleviate exceptional circumstances. The onus was on the Applicant to put his best foot forward by producing the best evidence to support his application, especially when the evidence in question was key to his claim of new risks and his last PRRA was less than eight (8) months before. I further note that the statement regarding the availability of the original warrant is found in a footnote in the Applicant's deferral request. While the Applicant asks the Officer to let him know if the original is required, the footnote also indicates that the "original copy of the warrant has been sent by the Applicant's parents". There is no indication of when the original copy will be received and when it could be made available to the Officer. Given the significant time constraints in which deferral decisions are made, it was not unreasonable for the Officer to proceed without asking the Applicant to provide additional evidence, including the original warrant.

[17] The Applicant also takes issue with the fact that the Officer noted that the reports and articles submitted were not personalized and that there was insufficient evidence to show that the Applicant would be personally subjected to the conditions outlined in the updated reports.

[18] I disagree with how the Applicant characterizes the Officer's statements.

[19] In discussing the documents submitted by the Applicant, the Officer noted that many documents predated the RPD and PRRA decisions and that no explanation had been provided to explain why the documents were not submitted before. The Officer also noted that the issues submitted in the deferral request closely paralleled the issues already addressed in the RPD and PRRA decisions. The Officer then acknowledged that the situation in Sri Lanka was not perfect, that the Sri Lankan government was undergoing changes and that the past president was returning to politics, which would allegedly have an adverse effect on Tamils. The Officer found that there was insufficient evidence to show that the Applicant would be at risk of death or torture if he returned to Sri Lanka. Given his findings regarding the arrest warrant, the Officer found it was speculative for the Applicant to allege that he would be at risk because his name would be on a "stop list" due to the outstanding arrest warrant. Upon review of the Officer's reasons, I am satisfied that the Officer did not expect proof of a personalized risk, as the Applicant alleges, but rather a link between the country conditions and the Applicant's profile.

[20] When new risks are alleged that have never been assessed by a competent body, the role of the enforcement officer is not to perform a fulsome PRRA evaluation. Instead, the enforcement officer's role is to assess the sufficiency of the new evidence of a serious risk and

decide whether deferral of removal is warranted to allow for a fulsome risk assessment (*Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 774 at paras 81-82, 99). In the case at hand, the Officer considered the Applicant's new evidence and ultimately found that it was insufficient.

[21] The Applicant's arguments regarding the best interests of the children analysis also lack merit.

[22] It is trite law that an enforcement officer has no obligation to substantially review the children's best interests before executing a removal order (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 57 [*Baron*]). A deferral is intended to address temporary practical impediments to removal, and the enforcement officer's discretion to defer removal is limited (*Baron* at para 49).

[23] Contrary to what the Applicant alleges, the Officer did not limit his analysis to the typical parental relationship, nor did the Officer ignore the Applicant's sworn evidence of his role as a surrogate parent to his niece and the close bonds he shares with the children of his cousins. The Officer considered both the Applicant's close relationship with the affected children and how the children would be affected by the Applicant's removal. The Applicant has not persuaded me that the Officer's assessment of this factor was unreasonable.

[24] Lastly, the Applicant argues that the Officer fettered his discretion by relying on the previous RPD and PRRA findings to conclude the Applicant was not at risk and by unduly

focusing on the Applicant's one-year PRRA bar. The Applicant argues that the arrest warrant represents changed circumstances of risk, justifying a deferral. In his view, the Officer failed to reasonably exercise his discretion to allow a fulsome assessment of the Applicant's new ground of risk.

[25] I disagree. The Officer noted the Applicant's immigration history and agreed that he was ineligible to apply for another PRRA. After properly noting that it was beyond his authority to conduct a PRRA, the Officer then went on to consider the Applicant's allegations and evidence of new risks. The Officer accepted that he had the discretion to defer removal, but he declined to do so on the basis that the evidence adduced was insufficient to justify a new risk assessment. The Officer also considered the other H&C factors advanced by the Applicant, and he concluded that the Applicant had not submitted sufficient evidence to establish that a deferral was warranted. In my view, the Applicant's arguments on the fettering of discretion simply represent an attempt to re-litigate the Officer's findings. The Applicant is essentially asking this Court to reweigh the evidence to reach a different conclusion. That is not the role of this Court on judicial review (*Vavilov* at para 125).

[26] To conclude, I am satisfied that, when read holistically and contextually, the Officer's decision meets the reasonableness standard set out in *Vavilov*.

[27] Accordingly, the application for judicial review is dismissed.

[28] No questions of general importance were proposed for certification, and I agree that none arise.

**JUDGMENT in IMM-1017-19**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1017-19 |
| **STYLE OF CAUSE:** | AKILAN RAJARATNAM v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 23, 2019 |
| **JUDGMENT AND REASONS:** | ROUSSEL J. |
| **DATED:** | MARCH 26, 2020 |

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| Norah Dorcine | FOR THE RESPONDENT |

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