

Federal Court



Cour fédérale

Date: 20200414

Docket: IMM-5333-18

Citation: 2020 FC 512

Ottawa, Ontario, April 14, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

THANUJAN SATHANANTHARAJAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD] dated October 16, 2018 in which it decided that the Applicant is not a Convention refugee or a person in need of protection [Decision].

[2] For the reasons that follow, this application is granted.

II. **The Decision under Review**

[3] The RPD began by reviewing the Applicant's allegations that he was a Sri Lankan who had been arrested several times by the Sri Lankan Army in 2009. In the Vavuniya Refugee Camp he was beaten and forced to identify members of the LTTE who were in the camp. He was released when he was not identified as a member of the LTTE.

[4] In December 2011, the Applicant and his father tried to reclaim their former home and land from the Sri Lankan Army. The next day, they were arrested and taken to an army camp where they were beaten and forced to do menial tasks. They were released after five days.

[5] The Applicant's family feared for his safety as many young men had been arrested, killed, kidnapped or disappeared. They arranged for him to leave Sri Lanka and travel to the United States so that he could come to Canada. When he arrived in the United States he was detained and he applied for asylum there. When he was released he came to Canada as he had family here. Afraid of returning to Sri Lanka, the Applicant claimed refugee protection in November 2012, in Canada.

[6] The RPD found the key issues were the credibility of the Applicant's claim and whether the Applicant had a well-founded fear of persecution.

[7] The RPD found that the Applicant was a citizen of Sri Lanka. While it found his testimony was "generally consistent with the narrative in his Personal Information Form (PIF)" the RPD found it was not credible that the Sri Lankan authorities had visited the Applicant's

house 14-15 times since he arrived in Canada. The RPD found that a letter from his mother alleging that members of the Criminal Investigation Division (CID) and three Army men had visited the house was improbable and an embellishment of events.

[8] The RPD acknowledged that young Tamils had suffered at the hands of Sri Lankan authorities in the past. It found that the Applicant did not possess the profile that would attract adverse attention upon his return to Sri Lanka. He had not been involved in any political activities in Canada, and he had left Sri Lanka with his own genuine passport.

[9] The RPD found that the Applicant had provided no trustworthy information as to why the current regime in Sri Lanka would be interested in him. It found his claim that Sri Lankan authorities had an ongoing interest in him was an embellishment of his situation; and the letter from his mother, supporting those allegations, was unreliable.

III. **Issue and standard of review**

[10] The only issue in this application is whether the Decision is reasonable.

[11] This application was argued before the Supreme Court of Canada released the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] in which it restated how a reviewing court is to conduct a reasonableness review.

[12] There is now a clear statement that when the merits of an administrative decision are judicially reviewed, the applicable standard of review is presumed to be reasonableness, subject to certain exceptions, none of which apply on these facts: *Vavilov* at paras 23 and 33.

[13] As this application was argued on the basis that the standard of review is reasonableness, I find it is not necessary to receive further submissions from the parties. The result would be the same under the pre-*Vavilov* framework established in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] and its progeny.

[14] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir* at para 47. This is confirmed in *Vavilov* with the added emphasis that the focus is on the decision actually made, including the justification for it: *Vavilov* at para 15.

IV. Analysis

[15] There are serious problems with the risk analysis conducted by the RPD. I will address only the errors made with respect to considering the profile of the Applicant. As they are determinative, it is not necessary to address any other errors.

A. *The profile of the Applicant as a returning asylum seeker*

[16] The profile of the Applicant as a returning failed asylum-seeker under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] was squarely put before the

panel. The Applicant testified about it, his counsel made closing submissions about it, and substantiating references made in the documentary evidence were pinpointed by counsel. Yet, the RPD failed to take that aspect of the Applicant's profile into account, virtually dismissing it out of hand.

[17] The following discussion of the risk profile of the Applicant as a perceived LTTE supporter, is intertwined with and applies equally to his profile as a returning failed asylum-seeker.

B. *The profile of the Applicant as a perceived LTTE supporter*

[18] The Applicant raised before the RPD that because he had previously been persecuted by the Sri Lankan Army he would be perceived as an LTTE supporter regardless of whether or not he actually was a supporter.

[19] Once again, this aspect of his profile is dismissed out of hand with very little or no analysis.

[20] When asked by the RPD whether there was any reason for the Sri Lankan authorities to suspect he was a supporter of the LTTE, other than that he was a young Tamil male from the north, the Applicant pointed out that he was from Mullaitivu and it was suspected that all youth in that area were either supporters or members of the LTTE.

[21] The RPD acknowledged that the Applicant, a young Tamil, has suffered in the past at the hands of authorities. The RPD then immediately concluded that “the claimant does not possess the profile that will attract adverse attention upon his return to Sri Lanka.”

[22] It appears from paragraph 15 of the Decision that the profile being considered by the RPD was that during his six years in Canada the Applicant was someone who had never “been a member of, contributed to, or participated in any pro-LTTE or anti-government organizations or activities.” The only nod in the Decision to the Applicant’s stated risk profile as a failed asylum-seeker is found in the same paragraph and is swept away with a bald assertion:

When asked why he thought the army and CID would be interested in him, he suggested that he would be viewed negatively because he had sought asylum. The panel finds that the claimant has provided no trustworthy or reliable evidence that Sri Lankan authorities have any interest in him or would have any interest, were he to return to Sri Lanka.

[23] The RPD found that there was no evidence for authorities to conclude that the Applicant was in any way supportive of pro-LTTE activities. The panel found that there was insufficient evidence to conclude that authorities would have an interest in the Applicant even given his past experiences in Sri Lanka.

[24] The whole focus of the RPD was that the Applicant did not have the profile of an LTTE supporter. The panel did not acknowledge that a failed asylum-seeker would be of interest to Sri Lankan authorities or that he could be perceived to be a LTTE supporter although he had not previously been one.

[25] The Applicant argued that because of his past persecution he might be perceived as an LTTE supporter and that would put him at risk. In response, the Panel referred to a number of reports that spoke to the “improving situation” for Tamils stating that not all Tamils are routinely screened and that “allegations of torture and detention have diminished.”

[26] The RPD did acknowledge that the situation for Tamils was far from perfect and that the risk profile of an individual with suspected links to the LTTE must be carefully considered. The panel also recognized that a claimant’s individual situation had to be considered in determining the possibility of harm.

[27] Once again, this approach should have included the profile of a failed asylum-seeking returnee and not just one with a suspected link to the LTTE.

[28] The individual situation that the RPD reviewed was that the Applicant had been arrested during his stay at a refugee camp in 2009 and that he and his father had tried to reclaim their home from the army in 2011.

[29] In considering this individual situation, the RPD reviewed a variety of country condition documents concerning how those with perceived or suspected ties to the LTTE would be received on returning to Sri Lanka.

[30] The main document the RPD considered was the August 2016 UK Home Office Report [UK Report] that considered Tamil Separatism which was included in the National

Documentation Package for Sri Lanka. The RPD found it included a number of significant conclusions established by the UK Tribunal in assessing recent independent reports concerning returnees to Sri Lanka. The panel excerpted a paragraph from the UK Report that identified that the objective of the Sri Lankan government was to identify Tamil activists in the Diaspora with a focus on preventing the resurgence of the LTTE and the revival of the civil war in Sri Lanka.

[31] The Applicant points out that the passages cited by the RPD from the UK Report were all drawn from the 2013 decision *GJ & Others* by the UK Upper Tribunal. The UK Report was older evidence; the newer, more relevant evidence before the panel was not mentioned, some of which was also in the UK Report.

[32] The United Nations Committee Against Torture 2017 report was before the panel. It stated that a suspicion of having a link to the LTTE, however remote, would put a person at risk of being abducted and subjected to brutal torture, including sexual violence and rape of men and women. This was said to be carried out by both military and police in unacknowledged places of detention including law enforcement headquarters, Army and internally displaced persons camps as well as rehabilitation centres.

[33] The United States Department of State *2017 Country Report on Human Rights Practices -Sri Lanka* was also before the panel. As was an Amnesty International Annual Report on Sri Lanka for 2017/2018. Both these reports confirmed that being a suspected LTTE member would subject a person to regular monitoring and harassment by security forces.

[34] In terms of evidence about returning failed asylum seekers, particularly from Canada which is an area of perceived LTTE support and funding, the 2017 UK Home Office Country Policy and Information Note: Tamil Separatism contained several paragraphs addressing the mistreatment of Tamils who returned home from abroad. Perhaps the clearest statement in that report that was not mentioned by the RPD is “[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.”

[35] While it is not necessary that the decision-maker refer to every piece of evidence they receive that is contrary to their finding, it is well-known that a court will be reluctant to defer to a tribunal’s decision where the tribunal’s reasons consider in detail the evidence supporting its conclusions, but do not refer to important evidence pointing to a different conclusion: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17; 157 FTR 35.

[36] The evidence not mentioned by the RPD was not hard to find. It, together with other reports containing similar statements, was pinpointed for the panel in the submissions made by the Applicant’s counsel at the end of the RPD hearing. To enable the Applicant to understand how and why the panel found he was not at risk as a failed asylum-seeker it was incumbent upon the panel to address, at a minimum, the contrary evidence specifically referred to in the hearing.

[37] By not referring to such evidence, the reasons for the Decision not transparent.

[38] When the RPD considered the evidence regarding failed asylum-seekers it did so after again finding that the Applicant was not, on a balance of probabilities, a person who would be perceived to be linked to any pro-LTTE factions.

[39] At no point in the Decision did the RPD consider that being a failed asylum seeker in and of itself is a distinct part of the Applicant's profile that is separate from whether or not he was an LTTE supporter.

[40] The jurisprudence of this Court has consistently found, over many years, that in reviewing the risk faced by an applicant the decision-maker is required to consider the cumulative impact of all the risk factors put forward by the Applicant: *K S v Canada (Citizenship and Immigration)*, 2015 FC 999, at para 42; *Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 at para 19.

[41] By failing to address the Applicant's risk as a failed returning refugee, the RPD failed to conduct a reasonable risk analysis. The result is that the reasoning process lacks justification, transparency and intelligibility rendering the Decision unreasonable.

V. **Conclusion**

[42] There is ample jurisprudence in this Court stating that failure to consider the risk profile of a failed returning asylum seeker is a reviewable error when it involves Sri Lankan refugee claimants: *Varatharajah v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 149 at para 10 and other cases cited therein.

[43] Whether the error is serious enough to result in a finding that the Decision is unreasonable turns on the facts. In this case, evidence was put before the RPD and submissions were made to highlight that as a failed asylum seeker forced to return to Sri Lanka, the Applicant, like others before him documented in various country condition documents, would face the prospect of torture. It was incumbent upon the RPD to address that risk directly. By not doing so, the Decision fails to meet the criteria of being justified, transparent and intelligible as required by *Dunsmuir* and *Vavilov*.

[44] The application is granted. The Decision is set aside and the matter will be returned for consideration by a different panel of the RPD.

[45] This is a very fact specific case; there is no serious question of general importance for certification.

JUDGMENT in IMM-5333-18

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The Decision is set aside in this matter is returned for redetermination by a different panel of the RPD.
3. There is no question for certification.
4. No costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5333-18

STYLE OF CAUSE: THANUJAN SATHANANTHARAJAN v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 27, 2019

JUDGMENT AND REASONS: ELLIOTT J.

DATED: APRIL 14, 2020

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