

Federal Court



Cour fédérale

Date: 20220419

Docket: IMM-4731-20

Citation: 2022 FC 548

Ottawa, Ontario, April 19, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

ANANDARAJ RAMACHANDRAN

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 sought refugee protection in Canada because, he alleges, he is suspected of assisting anti-government diaspora movements and the Liberation Tigers of Tamil Eelam (“LTTE”). The Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada (“IRB”) rejected the claim on credibility grounds.

[2] The applicant appealed this decision to the Refugee Appeal Division (“RAD”) of the IRB. The RAD dismissed the appeal in a decision dated August 26, 2020. The RAD agreed with the RPD that the applicant had not established with credible evidence that he has a well-founded fear of persecution in Sri Lanka. Accordingly, the RAD confirmed the RPD’s determination that the applicant is not a Convention refugee or a person in need of protection.

[3] The applicant now seeks judicial review of the RAD’s decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). He argues that the decision is unreasonable because the RAD erred in several respects in finding his claim not to be credible. While I do not agree that the RAD erred in all of the ways the applicant contends, I do agree that three of the RAD’s key determinations about his lack of credibility are fundamentally flawed and that this calls the reasonableness of the decision as a whole into question. As a result, the application must be allowed and the matter remitted for redetermination.

II. BACKGROUND

[4] The applicant was born in Colombo in August 1970. He is married and has three daughters. From October 1999 until April 2017, the applicant worked as a security guard at the British High Commission in Colombo. When he left his employment there, he held the position of Security Shift Supervisor.

[5] The applicant claims that he is suspected by Sri Lankan authorities of assisting the anti-government diaspora movement and of helping obtain UK visas for LTTE members.

[6] According to the applicant, on November 1, 2011, he received a call on his mobile phone from someone asking for his help in obtaining a UK visa. The applicant replied that he had nothing to do with this and directed the caller to the High Commission's website. A few minutes later, the applicant received another call from a different number. When he answered, he believed it was the same caller as before. This time, the caller identified himself as an officer with the Terrorist Investigation Division ("TID") and directed the applicant to report to the TID office in Colombo two days later.

[7] When he reported as directed, the applicant was confronted with the allegation that he was supporting the LTTE and anti-government diaspora movements. He was interrogated mainly about Gajendran Sorubakaanthan, a friend who lives in the United Kingdom and who the police alleged is associated with the LTTE there. The applicant denied the accusations and maintained that he did not have any connection to the LTTE. The police eventually let him go unconditionally, leading the applicant to think the matter was closed. The applicant claims that he learned about six months later that the investigation was the result of his manager at the High Commission having passed along to police a tip she had received that the applicant was involved with the LTTE.

[8] The applicant claims that he was interrogated by the police about the same matters again in December 2016. Once again, Sorubakaanthan was of particular interest to the police. The applicant confirmed that the two were close friends but he continued to deny any links to the LTTE. As before, the applicant was eventually allowed to leave. However, as he left the police station, the applicant was apprehended by unknown parties, held for several hours, abused, and

interrogated further about his connections to Sorubakaanthan and the LTTE. The applicant states in his Basis of Claim narrative that when he was finally released he “returned home frightened and completely traumatized” and “did not return to work for a week.”

[9] Sorubakaanthan was a frequent visitor to Sri Lanka and he and the applicant would meet when he was there. The applicant also visited Sorubakaanthan in the United Kingdom. The applicant had told Sorubakaanthan about the November 2011 interrogation but he never mentioned the December 2016 incident to him. Neither Sorubakaanthan nor the applicant had had any difficulties when travelling to or from Sri Lanka.

[10] According to the applicant, he was questioned by police about the same matters yet again on April 17, 2017. He continued to deny all their allegations. The applicant never told Sorubakaanthan about this incident, either.

[11] The applicant left Sri Lanka for the United States two days later. His wife and daughters remained in Sri Lanka.

[12] The applicant entered the United States on a visitor’s visa that he had obtained in July 2015. He had obtained the visa because he had been planning to visit a friend who was ill. He stayed in New York City for two weeks with his friend’s relatives. On the advice of his friend and others he met in New York, the applicant did not seek refugee protection in the United States. Instead, he decided to try to make his way to Canada and submit a claim there.

[13] On May 3, 2017, the applicant crossed the Canada/United States border irregularly at Roxham Road near Saint-Bernard-de-Lacolle, Quebec, and immediately made a claim for refugee protection.

[14] The applicant's hearing before the RPD took place on April 18 and May 31, 2019. His claim was rejected in a decision dated July 10, 2019. The RPD concluded that "the evidence as presented in this claim [is] untrustworthy and lacking any credibility and that, on a balance of probabilities, the incidents as described by this claimant never occurred and, therefore, does not believe what the claimant has alleged in his claim."

III. DECISION UNDER REVIEW

[15] On his appeal to the RAD, the applicant did not seek to file any new evidence nor, as a result, did he request a hearing. He contended that the RPD had erred in several respects in concluding that his claim lacked credibility. The applicant also contended that the RPD had erred in failing to assess his residual *sur place* claim.

[16] The RAD found that the RPD was correct in rejecting the claim because the applicant was not credible. The RAD also found that the RPD had erred in failing to address the *sur place* claim but, on the basis of its own analysis, it rejected this aspect of the claim as well.

[17] In summary, the RAD made the following key findings:

- The applicant’s failure to seek protection in the United States demonstrated a lack of subjective fear and “undermined the credibility of his allegations that he faced risk in Sri Lanka.”
- It was not credible that the applicant would have been able to maintain his job at the High Commission if there had been “information or concerns” regarding his affiliation with the LTTE.
- The applicant’s explanation for not telling the High Commission about the events in November 2011 was not credible.
- The fact that both the applicant and Sorubakaanthan had been able to enter and leave Sri Lanka without incident is inconsistent with the allegation that they were suspected of supporting the LTTE.
- The fact that the applicant had not told Sorubakaanthan about the 2016 or 2017 interrogations suggested that they had never occurred.
- The fact that the applicant did not leave Sri Lanka until April 2017 despite having had a United States visa since July 2015 “is an additional factor” that undermines his credibility.

[18] Since the applicant does not challenge the rejection of the *sur place* claim, it is not necessary to say anything further about it.

IV. STANDARD OF REVIEW

[19] It is well-established that the substance of the RAD's decision (including credibility determinations) is reviewed on a reasonableness standard: see *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; see also *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 27. That this is the appropriate standard of review has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness is now the presumptive standard of review for administrative decisions, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). There is no basis for derogating from this presumption here.

[20] 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances: see *Vavilov* at para 125. At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review: see *Vavilov* at para 13.

[21] The onus is on the applicant to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency” (*Vavilov* at para 100). The court “must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable” (*ibid.*).

V. ANALYSIS

[22] The applicant challenges many of the reasons why the RAD found his account to not be credible but it is only necessary to address three of them: (1) the fact that the applicant did not inform the High Commission at the time about the events in November 2011; (2) the fact that the applicant was able to keep his job with the High Commission despite suspicions he was linked to the LTTE; and (3) the fact that the applicant did not seek protection in the United States. In my view, the RAD’s assessment of the evidence in each of these three respects is unreasonable.

1) *The failure to inform the High Commission about the events in November 2011*

[23] According to the applicant, the first time he was confronted with the allegation that he was assisting the LTTE was when he was interrogated by TID officers on November 3, 2011. He had been summoned to this interview shortly after receiving a telephone call asking for his assistance in obtaining a UK visa. The RAD drew an adverse conclusion about the credibility of the applicant’s account from the fact that he did not tell his employer, the British High Commission, what had happened. The RAD reasoned that if the events described by the applicant had occurred, he would have informed the High Commission at the time. Since he did not tell the High Commission at the time about what had happened, his account of the events in November 2011 is not credible.

[24] In my view, this inference is unreasonable because the RAD fails to provide reasonable support for the major premise of the argument – that if the events described by the applicant had occurred, he would have told his employer at the time.

[25] The RAD found that the applicant “would have been well aware of the need to inform the [High Commission] of any unusual events related to embassy work” and that “issues related to a British visa is [*sic*] clearly a work related issue.” Thus, the RAD found it “not credible” that the applicant would not have told the High Commission about being approached for a British visa.

[26] What I take the RAD to mean by this is not that, contrary to the applicant’s narrative, he *did* tell the High Commission what had happened but, rather, that his claim that he was approached about securing a British visa for someone on November 1, 2011, is not credible because he did not tell the High Commission about this. The difficulty with the RAD’s analysis, however, is that it never addresses the applicant’s evidence that he did not believe this was a genuine attempt to obtain a visa. According to the applicant, he did not believe the inquiry about a UK visa was genuine; rather, it was a ruse by the police. How something that, on the applicant’s account, he never thought was a genuine attempt to obtain a UK visa could be “clearly a work related issue” is left unexplained in the RAD’s decision. This crucial gap in the analysis leaves the adverse credibility finding lacking transparency, intelligibility and justification.

[27] On a related point, the RAD also rejects the applicant’s explanation that he did not tell the High Commission at the time about the events in November 2011 because he was worried

about losing his job if he disclosed that the police had questioned him about links to the LTTE. The RAD found that this explanation was belied by the fact that the applicant brought the events up when he was interviewed by a senior manager at the High Commission in January 2016. In my view, the RAD's conclusion that there was an inconsistency in the applicant's behaviour is unreasonable. The RAD ignores the fact that, on the applicant's account, by January 2016 he was aware that the police investigation in November 2011 had been prompted by his manager at the High Commission passing along a tip to the police about his having links to the LTTE, something he did not know at the time. The RAD should have considered whether the applicant could reasonably have perceived the risks of mentioning the events in January 2016 compared to November 2011 to be quite different before drawing an adverse inference about his credibility from the fact that he disclosed the events in January 2016 but not in November 2011. Its failure to do so calls the reasonableness of its analysis into question.

2) *The fact that the applicant was able to maintain his employment with the High Commission*

[28] The RAD found that if it were true that the High Commission had concerns about the applicant's activities, it is unlikely they "would not have acted on the information in some capacity." Indeed, they would likely have terminated the applicant's employment if they suspected he was associated with the LTTE. The RAD appears to have reasoned that since the applicant did not lose his job, the High Commission cannot have suspected him of anything and this undermined the credibility of his narrative.

[29] In my view, it was unreasonable for the RAD to draw an adverse inference about the applicant's credibility on this basis. On the applicant's own account, his manager did alert the police after she received a tip that he was assisting the LTTE. When nothing came of it at the time, the applicant thought the matter was closed. Since there is no reason to think that anyone at the High Commission would have thought otherwise, it is not surprising that the applicant was able to keep his job. It was unreasonable for the RAD to infer that this was inconsistent with the truthfulness of the applicant's narrative.

[30] Furthermore, and even more importantly, whatever people at the High Commission might have thought, this has no probative value with respect to the applicant's core allegation that Sri Lankan authorities continued to suspect him of supporting the LTTE. The RAD found that the applicant's claim that he is at risk from Sri Lankan authorities because of their suspicion that he has supported the LTTE was not credible because the High Commission must not have had any further suspicions about him. On the evidence before it, it was reasonable for the RAD to find that the High Commission must not have had any concerns about the applicant (apart from whatever had led to him being questioned in November 2011). However, there is no reason to think that what the High Commission thought about the applicant is any indication of what Sri Lankan authorities thought. There is no chain of rational analysis leading from the premise (the High Commission did not suspect the applicant of supporting the LTTE) to the conclusion (Sri Lankan authorities do not suspect him of supporting the LTTE). In short, the RAD has unreasonably conflated the High Commission and Sri Lankan authorities in its analysis. As a result, its conclusion that the applicant's narrative was not credible because the High Commission did not suspect him of any wrongdoing is unreasonable.

3) *The failure to seek protection in the United States*

[31] According to the applicant, he left Sri Lanka for the United States in April 2017 “to get out of this problem and to be in safe hands.” Once in the United States, he explained his situation to his friend and to others he met there and asked what he should do. He was told that it was not advisable to try to stay there given the current political climate (Donald Trump had recently been elected President). He did not seek out any professional advice. Despite the fact that he was legally authorized to remain in the United States for three months, he made arrangements to go to Canada to seek protection there. The applicant was in the United States for slightly over two weeks.

[32] The RAD found that the applicant’s failure to seek refugee protection in the United States undermined the credibility of his claim. It reasoned as follows:

Regarding the argument on appeal that the Appellant did not claim because he had a genuine fear that his claim would not be adjudicated fairly in the U.S., I am not persuaded by this argument because the Appellant was not told this by an immigration lawyer or consultant but rather learned of anti-immigration policies by [*sic*] his friends whom he speculated had heard about it on the news. Again, the Appellant is not unsophisticated and there appears to be no adequate explanation to account for why he would not have sought legal advice in the U.S. For this reasons [*sic*], I find that the RPD was correct to find that the Appellant’s failure to claim in the U.S., without reasonable explanation, undermined the credibility of his allegations that he faced risk in Sri Lanka.

[33] In my view, the RAD’s assessment of the applicant’s actions is unreasonable.

[34] It is well-established that delay in seeking refugee protection is a factor that a decision maker may take into account in assessing the credibility of a claimant's assertion that they fear persecution. As I have discussed elsewhere, the critical question is whether the claimant acted in a way that is consistent with the fear they advance. When a claimant did not seek protection at the first opportunity, the decision maker must consider why not when assessing the significance of this fact. A satisfactory explanation for why the claimant waited to seek refugee protection can support the conclusion that the delay is not inconsistent with the fear of persecution they allege. On the other hand, absent a satisfactory explanation for the delay, it may be open to a decision maker to conclude that, despite what the claimant says now, they do not actually fear persecution and this is the real reason why protection was not sought sooner. Whether an alternative explanation for the delay in seeking protection is satisfactory or not depends on the facts of the specific case, including the claimant's personal attributes and circumstances and their understanding of the immigration and refugee process. In assessing the credibility of the explanation that is now offered, it is open to the decision maker to consider whether the claimant acted reasonably in light of the facts as they say they believed them to be. If they did not, this can call into question the credibility of their account of their state of mind at the relevant time. See *Zeah v Canada (Citizenship and Immigration)*, 2020 FC 711 at para 61 and the cases cited therein.

[35] In the present case, it was unreasonable for the RAD to conclude that the applicant did not act consistently with the fear he claims to have had when he left Sri Lanka in April 2017. In very short order, and while he still had legal status in the United States, the applicant made arrangements to get to a place where he believed he would have a better chance of having his

refugee claim accepted. His actions were consistent with a belief that his claim for protection had a better chance of success in Canada than in the United States, which was why he did not seek protection in the United States during his brief stay there. In the particular circumstances of this case, whether it was reasonable for him to believe this is beside the point.

[36] Furthermore, by asking whether it was reasonable for the applicant to believe that a claim for protection in the United States was not likely to succeed, the RAD introduced an objective element into what should fundamentally be a subjective test. In doing so, it failed to address the key question: Did the applicant act consistently with his stated fear and with what he believed about his prospects for being able to remain in the United States? The RAD does not appear to doubt the credibility of the applicant's account of what he believed about his prospects for being able to stay in the United States. Its only concern was with the reasonableness of those beliefs, given the sources of the information on which they were based. But this is irrelevant. The applicant's actions were altogether consistent with him fearing having to return to Sri Lanka and believing that his prospects for being able to stay in the United States were poor. It was unreasonable for the RAD to conclude otherwise and, on that basis, to make an adverse finding about the applicant's credibility.

4) *The significance of these flaws*

[37] *Vavilov* explained that in applying the reasonableness standard, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it

arrived” (at para 102, internal quotation marks and citations omitted). A decision will be unreasonable if, among other things, the conclusion reached cannot follow from the analysis undertaken: see *Vavilov* at para 103.

[38] The RAD dismissed the applicant’s appeal and confirmed the RPD’s determination that the applicant is neither a Convention refugee nor a person in need of protection because it agreed with the RPD that his account was not credible. The flaws I have identified above go directly to the RAD’s assessment of the determinative issue in this case – the applicant’s credibility. In each of these respects, the RAD’s conclusion that the applicant was not credible does not follow reasonably from the analysis it undertook. None of the flaws can be dismissed as superficial or peripheral or minor missteps. Especially when taken together, they call the reasonableness of the decision as a whole into question.

[39] Contrary to the applicant’s submissions, I do not agree that it was also unreasonable for the RAD to consider the ability of the applicant and Sorubakaanthan to be able to enter and leave Sri Lanka without difficulty to be inconsistent with the applicant’s allegation that both were suspected of links to the LTTE. Nor am I persuaded that it was unreasonable (or unfair) for the RAD to find that the applicant’s delay in leaving Sri Lanka after he had not only been questioned again by police in December 2016 but had also been abducted by unknown assailants and subjected to serious abuse also weighs against the credibility of his narrative. Nevertheless, these were only some of the factors on which the RAD relied in rejecting the applicant’s claim on credibility grounds. Even though the applicant’s claim is not without its difficulties, the RAD

made significant errors in its assessment of the applicant's credibility. This requires that the matter be redetermined.

VI. CONCLUSION

[40] For these reasons, the application for judicial review must be allowed. The decision of the Refugee Appeal Division dated August 26, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.

[41] Neither party suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4731-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated August 26, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4731-20

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