

Federal Court



Cour fédérale

Date: 20221201

Docket: IMM-10-21

Citation: 2022 FC 1658

Ottawa, Ontario, December 1, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SANJAYA DUMINDA JAYAWARDANE WEERASINGHE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Sanjaya Duminda Jayawardane Weerasinghe [Applicant] seeks judicial review of the Refugee Appeal Division's [RAD] December 3, 2020 decision wherein the RAD upheld the decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection [Decision].

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicant is a 45-year-old non-Tamil citizen of Sri Lanka. He claims persecution if returned to Sri Lanka on the following grounds: a personal dispute with Sri Lankan Army Major Lakmal Perera [Perera]; allegations that he is a Liberation Tigers of Tamil Eelam [LTTE] supporter; and the political activism of his brother, Jeewaka.

[4] The Applicant began working as a commercial seaman in 1999. In 2012, the Applicant began leasing a taxi. The following year, the Applicant rented his taxi to a Tamil friend, Indran Balasingham. Indran delivered payment to the Applicant's home every two weeks. Throughout this time, Jeewaka worked with the Sri Lanka Freedom Party [SLFP] and was openly critical of Sri Lankan Member of Parliament John Amaratunga [Amaratunga].

[5] In December 2013, while the Applicant was out of the country, the Sri Lankan army arrested Indran and accused him of being a LTTE member. The Applicant learned from his wife that the army had searched for the Applicant and demanded he report to an army camp. In February 2014, the Applicant complied with the demand. The Applicant was accused of being an LTTE supporter based on his association with Indran and detained at the camp for eight days, during which time his passport was seized and he was assaulted. The army officers released the Applicant on the payment of a bribe and the condition that he report weekly to the camp. Each time the Applicant reported to the camp, he was pressured to confess his support of the LTTE.

The Applicant came to believe that he was not safe in Sri Lanka. On April 23, 2014, after bribing a soldier to retrieve his passport, the Applicant fled to the United States [US].

[6] The Applicant arrived in Los Angeles [LA] on April 24, 2014. He then boarded a connecting flight to New York City [NYC]. The Applicant did not immediately claim protection in either LA or NYC. In NYC, the Applicant secured a job at a gas station and met a man who explained that he could obtain a green card for the Applicant for \$8,000, which would be easier than securing refugee status. The Applicant paid the man \$5,000, but the man disappeared with the money. The Applicant then began his refugee claim in the US in February 2015.

[7] In August 2015, Jeewaka was subject to a politically motivated attack by men associated with Amaratunga. The Applicant's wife informed the Applicant that army members were searching for him at their home, and warned him to stay away from Sri Lanka. In April 2016, the Applicant received a call from Perera's wife, who explained that Perera had been having an affair with the Applicant's wife since 2012. The Applicant's wife denied the allegation.

[8] In August 2016, Perera's wife called the Applicant to once again confirm the existence of the affair. The Applicant's friend, Hiran Christopher Hobbs [Hiran], and Hiran's wife confirmed the affair. They told the Applicant that Indran had caught Perera and the Applicant's wife together in the Applicant's home during the delivery of his bi-weekly taxi rent. They also told the Applicant that Perera and the Applicant's wife had conspired to implicate Indran and the Applicant as LTTE supporters.

[9] The Applicant informed Jeewaka about the affair, who confronted the Applicant's wife and reported the allegations to the Sri Lanka Corps of Military Police [CCMP]. In December 2016, men associated with Perera and Amaratunga kidnapped and assaulted Jeewaka. Jeewaka fled to Myanmar, where he remains in hiding. Learning of the events that transpired, the Applicant called Perera, who threatened to have the Applicant kidnapped and killed if he returned to Sri Lanka. In August 2017, Hiran informed the Applicant that Perera and the Applicant's wife were conspiring to kill him.

[10] In September 2018, the Applicant was informed that his US asylum claim would be heard in February 2022. Concerned by his circumstances and the anti-immigration rhetoric in the US, the Applicant entered Canada on October 3, 2018 and began his Canadian refugee claim.

A. *RPD Decision*

[11] The RPD refused the Applicant's claim, finding him generally not credible for several reasons:

- 1) The Applicant's explanation as to why he could not provide a lease agreement for his taxi was evasive;
- 2) The country conditions evidence in the National Documentation Package [NDP] indicated that the Applicant, as a non-Tamil perceived of supporting the LTTE, was not at risk of persecution or serious harm because the war with the LTTE ended in 2009;

- 3) The allegation that Perera and the Applicant's wife did not attempt to hide their affair, despite knowing that Indran walked into the Applicant's house unannounced every two weeks, was unreasonable and raised concerns of the Applicant's credibility;
- 4) The allegation that Jeewaka reported the allegations to the CCMP was unconvincing;
- 5) The Applicant's explanations as to why he had not instituted divorce proceedings were extraneous and evolving;
- 6) The supporting affidavits of Hiran and his wife were inconsistent and contained hearsay. Hiran's affidavit did not explain how he overheard the plans of Perera and the Applicant's wife to kill the Applicant upon his return to Sri Lanka;
- 7) The Applicant's testimony regarding Jeewaka's assault, hospitalization, and escape to Myanmar was implausible and contained contradictions, and Jeewaka's statement of support lacked circumstantial detail;
- 8) The Applicant provided fraudulent news articles about Jeewaka;
- 9) The Applicant's failure to claim asylum in LA, dishonest attempt to obtain a green card, delay in claiming asylum in NYC, and decision to seek protection in Canada all supported adverse credibility inferences; and

10) The Applicant's testimony regarding a phone call with his children in September 2019, while simultaneously claiming that he was prevented from speaking to his children by Perera, was inconsistent.

11) The RPD also found that it was implausible that the Applicant would hire a lawyer in Sri Lanka to seek compensation from Perera for the army's treatment.

III. The Decision

[12] The RAD upheld the RPD's decision, agreeing with the RPD's credibility determinations with regard to:

- 1) The Applicant's evasiveness when asked why he could not obtain the lease agreement for his taxi;
- 2) The Applicant's failure to divorce his wife and his implausible narrative regarding Indran's discovery of the affair. The RAD assigned low weight to the supporting affidavits of Hiran and his wife because they contained hearsay and the affiants could not be examined;
- 3) The Applicant's detention by the army;
- 4) The Applicant's claim to have been threatened by Perera during the September 2019 phone call to his children;

- 5) The Applicant's fear of persecution from Jeewaka's political persecution and escape from Sri Lanka; and
- 6) The Applicant's failure to claim asylum in LA.

[13] The RAD also agreed that the NDP evidence did not support the conclusion that the Applicant, as a non-Tamil citizen perceived of supporting the LTTE, was at risk of being monitored or harmed if returned to Sri Lanka.

IV. Issues and Standard of Review

[14] Having considered the parties' submissions, the sole issue in the present matter is whether the Decision is reasonable. The sub-issues are:

- (1) Did the RAD reasonably assess the Applicant's credibility?
- (2) Did the RAD reasonably consider the Applicant's failure to claim protection in Los Angeles?
- (3) Did the RAD reasonably assess the country conditions evidence?

[15] The standard of review for the merits of the Decision is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation

to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

A. *Did the RAD reasonably assess the Applicant’s credibility?*

(1) Applicant’s Position

[16] The RAD erred in finding that the Applicant was evasive when explaining why he could not provide a lease agreement from the company that leased him his taxi. The Applicant testified that he requested a copy of the lease agreement, but was told that the taxi was missing and being sought after. The Applicant provided alternative corroborative evidence in the form of his payment slip receipts for the months of December 2012 to May 2013. The Applicant should not be faulted for failing to provide the lease agreement when he gave a reasonable explanation for being unable to do so (*Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para 10; *Giraldo Cortes v Canada (Citizenship and Immigration)*, 2011 FC 329 at para 3).

[17] The RAD’s implausibility findings regarding the divorce, discovery of the affair with Perera and legal claim against Perera were unreasonable. Implausibility findings should be made

only in the clearest of cases, bearing in mind cultural and social differences (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7). Further, the RAD did not justify its implausibility findings with specific reference to the Applicant's evidence (*Mahmood v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1526 at para 16).

[18] The RAD erred in its assessment of the affidavits of Hiran and his wife. The RAD limited their considerations to what the affidavits did not say, and ignored the portions corroborating the Applicant's narrative (*Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 at para 11, 167 FTR 309; *Belek v Canada (Citizenship and Immigration)*, 2016 FC 205 at para 22).

[19] Lastly, the RAD engaged in an overzealous and microscopic analysis of peripheral and irrelevant issues, including the Applicant's September 2019 phone call to his children and Jeewaka's visit to a naturopath, to find non-existent contradictions in the Applicant's testimony (*Rajaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1271, 135 NR 300 (CA); *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 at para 9, 99 NR 168; *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at para 20).

(2) Respondent's Position

[20] The RAD reasonably found that the Applicant was not credible based on various inconsistencies and implausibilities, including his evasive explanations regarding his taxi lease, his failure to divorce his wife, and Indran's discovery of the affair. The RAD was mindful of

social and cultural differences in rendering these implausibility findings. Similarly, the RAD reasonably found that the affidavits of Hiran and his wife contained hearsay and that the affiants could not be examined.

[21] The Applicant did not challenge several of the RPD's credibility findings before the RAD, and is therefore precluded from doing so now (*Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 35; *Bolanle Lasisi v Canada (Citizenship and Immigration)*, 2021 FC 205 at para 14). These findings include:

- 1) The implausibility of the Applicant hiring a lawyer to obtain compensation from Perera;
- 2) The Applicant's inconsistent testimony regarding his September 2019 phone call with his children; and
- 3) The Applicant's fraudulent news articles.

[22] Absent any submissions on these issues, the RAD reviewed and accepted the RPD's findings. This approach appropriately reflects "the Applicant's obligation, and not the RAD's obligation, to identify errors made by the RPD..." (*Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at para 15 [*Broni*]).

(3) Conclusion

[23] I find that the RAD erred in its consideration of the evidence in two of its findings: the Applicant's explanation for not obtaining the taxi lease agreement and Jeewaka's visit to a naturopath. However, these flaws or shortcomings are peripheral to the merits of the Decision

(*Vavilov* at para 100). These findings were neither the sole reasons nor the central basis for confirming the negative credibility determination.

[24] I agree with the Respondent's submissions that the Applicant has an obligation to raise errors of the RPD before the RAD (*Broni* at para 15). The RAD noted that the Applicant did not contest the RPD's findings about hiring a lawyer to obtain compensation from Perera or his inconsistent testimony regarding his September 2019 phone call with his children. The RAD conducted an independent assessment of the evidence and adopted the RPD's findings without making any additional determinations of its own, which it is entitled to do.

[25] I also note that the Applicant has not challenged the findings of the RPD or the RAD regarding the fraudulent news articles, nor did the Applicant challenge the RPD's findings regarding the implausibility of the Applicant's failure to divorce his wife before the RAD. The RAD reviewed and accepted the RPD's finding that the Applicant's explanations were unreasonable and evolving. Accordingly, the Applicant cannot challenge these findings on judicial review.

[26] Turning now to the credibility findings challenged by the Applicant, I note that the presumption of truthfulness can be rebutted by credibility concerns arising from contradictions, inconsistencies, omissions, and implausibilities (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at paras 20-26).

[27] I find that the RAD's implausibility finding regarding Indran's discovery of the affair is reasonable. Contrary to the Applicant's submissions, the RAD made its finding with specific reference to the Applicant's evidence that Indran visited his home every two weeks and entered unannounced. The RAD found that it was beyond the realm of possibility that the Applicant's wife and Perera would not take precautions knowing this.

B. *Did the RAD reasonably consider the Applicant's failure to claim protection in Los Angeles?*

(1) Applicant's Position

[28] The RAD erred in finding that the Applicant lacked subjective fear due to his failure to claim asylum in LA. The RAD unreasonably dismissed the Applicant's three explanations for his delay: he feared immediate deportation if he claimed asylum at the airport, he was feeling "so low" that he only wanted out of the airport, and he later met a man in NYC who offered him an alternate way to obtain a green card. These are plausible reasons that are supported by the Applicant's refugee claim in the US after failing to obtain a green card. The RAD should have been mindful of the Applicant's psychological condition and fear of authorities based on his experiences with Sri Lankan officials (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 12-13).

[29] Moreover, the Applicant entered the US on a visitor's visa. As such, he did not have an immediate fear of persecution that would require him to claim asylum at the first opportunity, as he was not at risk of being returned to Sri Lanka. The Applicant's delay in claiming asylum cannot be indicative of a lack of subjective fear, otherwise the same could be said for any inland

claimant. The RAD was required to consider the Applicant's reasonable explanation for delay (*Malaba v Canada (Citizenship and Immigration)*, 2013 FC 84 at para 15; *Nezhalskyi v Canada (Citizenship and Immigration)*, 2015 FC 299 at para 12).

(2) Respondent's Position

[30] The RAD was entitled to consider the Applicant's delay in claiming protection (*Chinwuba v Canada (Citizenship and Immigration)*, 2019 FC 312 at para 18; *Guecha Rincon v Canada (Citizenship and Immigration)*, 2020 FC 173 at para 19, citing *Chen v Canada (Citizenship and Immigration)*, 2019 FC 334 at para 24). The RAD found that the Applicant had a strong incentive to claim protection upon arrival in LA and had fled Sri Lanka with the intention of seeking asylum in the US. The RAD also considered and contrasted the Applicant's alleged fear of authorities with his Basis of Claim narrative, finding that the Applicant was aware of the possibility of claiming asylum in the US when he fled Sri Lanka. It is clear that the Applicant knew of the refugee process, yet still delayed in claiming protection. Lastly, the RAD noted the Applicant's delay was not determinative to the Applicant's claim.

(3) Conclusion

[31] I agree with the Respondent. The RAD noted that the RPD was entitled to draw a negative inference against the Applicant's subjective fear from his failure to claim asylum at the first opportunity. The RAD considered the Applicant's explanations regarding his "feeling so low", his fear of authorities, and his attempt to obtain a green card. The RAD found these explanations did not clarify his failure to claim asylum, given that his temporary status provided

no clear way to remain in the US permanently and that he left Sri Lanka with the intention of seeking asylum in the US. The RAD also noted that this finding was not determinative of the claim, and did not draw any adverse credibility inferences from his seeking of other means to remain in the US permanently. Accordingly, I find that the RAD did not err in its assessment of the Applicant's delay in claiming asylum in the US.

C. *Did the RAD reasonably assess the country conditions evidence?*

(1) Applicant's Position

[32] The RAD unreasonably found that the Applicant is not at risk as a suspected LTTE supporter by selectively reviewing the NDP evidence and relying on its previous negative credibility findings. The RAD failed to consider all possible grounds of persecution arising from the other NDP evidence (*Canada (AG) v Ward*, [1993] 2 SCR 689 at 745-46, [1993] SCJ No 74). The RAD also failed to consider the Applicant's forward-looking fear of persecution as a failed refugee claimant returning to Sri Lanka from a western country.

(2) Respondent's Position

[33] The RAD reasonably assessed the Applicant's risk on return as a failed refugee claimant in considering NDP Item 14.1. Moreover, NDP Item 14.6 does not support the Applicant's position, as it confirms that surveillance applies to specific groups of people who have been publicly critical of the state.

(3) Conclusion

[34] I agree with the Respondent. The NDP passage quoted by the Applicant states that returnees from western countries are “‘placed under surveillance’ and the authorities would try to determine whether they have ties to the LTTE; if the ties are confirmed, the returnee would be placed under ‘enhanced surveillance’”. It further states that:

[S]ince the election of the new President in November 2019 there is certainly heightened scrutiny, surveillance, and indeed harassment (short of arrest) of specific groups of people who have been publicly critical about the abuses in the past by the police, armed forces (including in the aftermath of the Easter bombings), and indeed by the people close to the Rajapaksa family, including the Rajapaksa family members themselves.

[Emphasis added.]

[35] In my view, the NDP evidence does not raise any grounds of persecution unrelated to the Applicant’s perceived support of the LTTE or his (or Jeewaka’s) alleged criticism of the Sri Lankan state, both of which allegations the RAD found not credible. The RAD considered the NDP evidence of the monitoring of failed asylum seekers returning to Sri Lanka, and found that this monitoring is limited the LTTE affiliates who have “committed a serious crime.” While the RAD acknowledged that country conditions have deteriorated for Tamil citizens of Sri Lanka, the RAD noted that the Applicant is not Tamil, and found that the Applicant had not established his suspected involvement with the LTTE or that the Sri Lankan army was angry with him for retrieving his passport.

VI. Conclusion

[36] The Decision is reasonable. While I agree with the Applicant that certain of the RAD’s credibility findings were unreasonable, they are peripheral to the Applicant’s claim. It is not the

role of the Court to re-weigh the evidence (*Vavilov* at para 125). Viewed holistically, the Decision is intelligible.

[37] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-10-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10-21

STYLE OF CAUSE: SANJAYA DUMINDA JAYAWARDANE
WEERASINGHE v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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