

Federal Court



Cour fédérale

Date: 20160719

Docket: IMM-5724-15

Citation: 2016 FC 819

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

LEELADEVI MURUGESU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Leeladevi Murugesu is a Sri Lankan national and an ethnic Tamil. She sought refugee protection in Canada based upon her sexual orientation and as someone who is suspected by the Sri Lankan authorities of supporting the Liberation Tigers of Tamil Eelam [LTTE].

[2] The Refugee Appeal Division [RAD] of the Immigration and Refugee Board [Board] confirmed the determination of the Refugee Protection Division [RPD] that Ms. Murugesu is

neither a Convention refugee nor a person in need of protection under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. She has brought an application for judicial review of that decision.

[3] For the reasons that follow, I find that the RAD reasonably concluded that Ms. Murugesu provided no credible evidence that she is currently of interest to the Sri Lankan authorities as a suspected supporter of the LTTE. Ms. Murugesu did not allege any risk based on her cumulative profile before the RAD, and the RAD therefore cannot be faulted for failing to consider it. In addition, the RAD reasonably concluded that Ms. Murugesu did not adduce sufficient corroborating evidence of her sexual orientation. The application for judicial review is therefore dismissed.

II. Background

[4] Ms. Murugesu is a Tamil woman and a practising Christian. She is 50 years old and identifies herself as a lesbian. On May 27, 2015, she sought refugee protection in Canada based on the following assertions.

[5] In 1986, the Sri Lankan army arrested Ms. Murugesu on suspicion of supporting the LTTE. In 1987, Ms. Murugesu moved to Lebanon and worked as a caregiver for approximately 16 years. While there, she formed an intimate relationship with a woman named Patma. They were together for 11 years. In 2003, Ms. Murugesu's Lebanese employment contract expired. She returned to Sri Lanka and opened a grocery store. She did not have any intimate

relationships with women in Sri Lanka, because homosexuality is illegal in that country and she feared that her life would be at risk.

[6] In April 2009, the police arrested Ms. Murugesu and alleged that she had helped recruit and raise funds for the LTTE while working abroad. She was detained for several days and was sexually assaulted. The police released her with a warning that they would arrest her again if she failed to cooperate. Fearing for her safety, Ms. Murugesu applied for a visa to travel to Israel.

[7] Ms. Murugesu moved to Israel in 2010, and worked there for three years. Shortly after her departure, the Sri Lankan police informed her family that she must report to them when she returned. Ms. Murugesu expressed her fear of returning to Sri Lanka to her employer in Israel, who advised her to apply for protection in another country. Her employer helped her to obtain a work permit for Canada.

[8] Ms. Murugesu arrived in Canada in September 2013 on a one-year temporary foreign worker visa. After her visa expired, she applied for and was granted a three-year visitor permit, which was extended from December 2014 to March 2015. While in Canada, Ms. Murugesu formed an intimate relationship with a woman named Rubica. They were together for eight months, but then lost touch. In May 2015, two months after the expiry of her visitor visa, Ms. Murugesu applied for refugee protection in Canada.

III. The RPD's Decision

[9] The RPD found that Ms. Murugesu was not credible. It rejected her claim for the following reasons:

- a) The RPD drew a negative inference regarding Ms. Murugesu's sexual orientation because she failed to provide sufficient corroborative evidence of her relationships with two of her former partners – Patma in Lebanon and Rubica in Canada – and did not provide a reasonable explanation for failing to do so.
- b) The RPD found it implausible that Ms. Murugesu would fail to inquire about her Canadian Church's stance on homosexuality.
- c) The RPD drew a negative inference regarding Ms. Murugesu's subjective fear of persecution based on her failure to inquire about the possibility of making a refugee claim in Israel, and her failure to make a claim in Canada at the earliest opportunity.
- d) The RPD found that none of the risk profiles contained in the *United Nations High Commissioner for Refugees Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, 2009 [UNHCR Guidelines] applied to Ms. Murugesu. Specifically, the RPD found that she was not at risk as a returning failed asylum-seeker, and that she was not suspected of being a supporter of the LTTE. The RPD noted that Ms. Murugesu was able to leave Sri Lanka using her own passport following her alleged detention in 2009.

[10] In sum, the RPD was not persuaded that Ms. Murugesu had established her sexual orientation, or that she had a well-founded fear of persecution in Sri Lanka as a suspected supporter of the LTTE. Ms. Murugesu appealed the RPD's decision to the RAD.

IV. Decision under Review

[11] The RAD acknowledged its responsibility to conduct an independent assessment of the evidence, citing the applicable jurisprudence at the time of its decision (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, rev'd 2016 FCA 93). The RAD dismissed Ms. Murugesu's appeal for the following reasons:

- a) The RAD agreed with the RPD that there was insufficient credible and trustworthy evidence to support Ms. Murugesu's alleged sexual orientation.
- b) The RAD determined that the RPD had erred in drawing a negative inference regarding Ms. Murugesu's subjective fear based on her failure to claim protection in Israel. However, the RAD agreed that a negative inference could be drawn from her delay in claiming refugee protection in Canada.
- c) The RAD found that the RPD had failed to make explicit findings regarding Ms. Murugesu's allegation that she was detained in 2009, and her claim that the authorities had visited her home in 2010. Nevertheless, the RAD concluded that there was no credible evidence that she faced an ongoing risk as a suspected supporter of the LTTE. The RAD agreed with the RPD that her ability to enter and leave Sri Lanka using her own passport was significant.
- d) The RAD agreed with the RPD that Ms. Murugesu did not have one of the risk profiles contained in the UNHCR Guidelines. The RAD accepted that suspected LTTE members may be at risk of detention by the authorities, but found that there was insufficient evidence to establish that Ms. Murugesu was suspected of being a supporter of the LTTE.
- e) The RAD rejected Ms. Murugesu's argument that the RPD had improperly failed to conduct a separate analysis under s 97 of the IRPA.

V. Issues

[12] This application for judicial review raises the following issues:

- A. Did the RAD fail to assess Ms. Murugesu's cumulative risk profile?
- B. Was the RAD's finding that Ms. Murugesu had adduced insufficient corroborating evidence of her sexual orientation reasonable?
- C. Did the RAD err in its analysis under s 97 of the IRPA?

VI. Standard of Review

[13] After the RAD rendered its decision, the Federal Court of Appeal issued its judgment in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*]. Justice Gauthier noted at paragraph 78 that “the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law”, and that “[t]his translates into an application of the correctness standard of review”.

[14] If the RAD conducted, in substance, the kind of review subsequently endorsed by the Federal Court of Appeal in *Huruglica*, then the RAD's decision may be upheld (*Ketchen v Canada (Minister of Citizenship and Immigration)*, 2016 FC 388 at para 29). In this case, Ms. Murugesu accepts that the RAD correctly stated the nature of its role.

[15] The parties agree that the RAD's decision is reviewable by this Court against the standard of reasonableness (*Huruglica* at para 35). The Court must adopt a deferential approach and resist substituting its own analysis. If the decision is justifiable, transparent and intelligible, and falls

within the range of possible, acceptable outcomes, then it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VII. Analysis

A. *Did the RAD fail to assess Ms. Murugesu's cumulative risk profile?*

[16] Ms. Murugesu says that the RAD failed to assess her cumulative risk profile as an unmarried Tamil woman who had been previously detained as a suspected supporter of the LTTE, and an unsuccessful asylum-seeker returning from Canada. According to Ms. Murugesu, Canada is known in Sri Lanka as a hub for LTTE fundraising abroad, and her prolonged absence would likely arouse further suspicion in the minds of Sri Lankan authorities.

[17] Ms. Murugesu argues that the RAD overturned two important findings of the RPD: (1) that a negative inference could be drawn from her failure to seek refugee protection in Israel; and (2) that she had not been detained by Sri Lankan authorities in 2009 as a suspected supporter of the LTTE. She says that the RAD was obliged to consider how its rejection of these two central findings of the RPD changed her risk profile.

[18] According to the Minister of Citizenship and Immigration [Minister], viewed in the context of the decision as a whole, the RAD's refusal to draw an adverse inference from Ms. Murugesu's failure to seek refugee protection in Israel was of little consequence. The RAD was prepared to draw a similar adverse inference from Ms. Murugesu's failure to seek refugee protection in Canada at the earliest opportunity. The Minister also disputes that the RAD accepted that Ms. Murugesu was in fact detained in Sri Lanka in 2009 as a suspected supporter

of the LTTE. Regardless, the Minister notes that the RAD concluded that she is not currently suspected of being an LTTE supporter:

[51] The RAD finds that whether or not the Appellant's allegations concerning her arrest and detention in 2009 are true, it was open to the panel to find that no credible evidence was provided by the Appellant that she is being pursued by Sri Lankan authorities. The RAD further finds that the Appellant's ability to travel through Sri Lanka without constraint and to exit the country using her own passport is significant.

[19] Both the RPD and the RAD referred to the UNHCR Guidelines, which confirm that women and children "with certain profiles" are in need of ongoing protection. These include women who live in female-headed households and former LTTE cadres, both of whom are particularly vulnerable in the highly militarized North of Sri Lanka.

[20] The RAD noted the statement in the UNHCR Guidelines that there is no longer a need for group-based protection measures for Sri Lankans of Tamil ethnicity originating from the North. The RAD accepted that unsuccessful asylum-seekers may be at risk upon return, but then found that the only risk profile that might apply to Ms. Murugesu was as a failed asylum seeker with suspected links to the LTTE.

[21] The RAD's conclusion that Ms. Murugesu had provided no credible evidence that she is currently of interest to the Sri Lankan authorities was based on its consideration of the following: (1) she testified that she had no links to the LTTE; (2) she was able to pass through security checkpoints within Sri Lanka, and was permitted to leave the country using her own passport; (3) she did not leave Sri Lanka until eight months after her alleged detention, which was "more than

adequate time” for the authorities to arrest her if she had in fact been a suspected LTTE supporter; and (4) she did not seek refugee protection in Canada until after her visa had expired.

[22] In my view, the RAD’s conclusion that Ms. Murugesu is not currently being sought by the Sri Lankan authorities was reasonably supported by the evidence. While not determinative, it is open to the Board to draw an inference from the fact that an applicant was able to leave her country using her own passport (*Mahalingam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 470 at para 12; *Nadesan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 104 at para 10).

[23] A delay in making a refugee claim is a relevant consideration in assessing both an applicant’s credibility and her subjective fear (*Ortiz Garzon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 299 at para 30; *Goltsberg v Canada (Minister of Citizenship and Immigration)*, 2010 FC 886 at para 28). While delay is not in itself determinative, it “may, in the right circumstances, constitute sufficient grounds upon which to dismiss a claim” (*Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at para 14).

[24] Ms. Murugesu was aware that she could claim refugee protection in Canada, but she did so only after her visa expired. In these circumstances, it was open to the RAD to draw an adverse inference and conclude that Ms. Murugesu lacked a subjective fear of persecution (*Jeune v Canada (Minister of Citizenship and Immigration)*, 2009 FC 835 at para 15; *Peti v Canada (Minister of Citizenship and Immigration)*, 2012 FC 82 at para 42).

[25] Furthermore, the Minister points out that Ms. Murugesu did not allege any risk based on her cumulative profile before the RAD, nor did she ground her appeal on the RPD's failure to assess her risk as an unmarried woman who would constitute a female-headed household upon her return to Sri Lanka. The Minister says that the RAD cannot be faulted for failing to explicitly consider an alleged error committed by the RPD that was never put forward by counsel.

[26] Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257, places the onus on the appellant to identify in her submissions to the RAD the errors that form the grounds of the appeal, in addition to the location of the errors in the RPD's decision.

[27] In *Ghuri v Canada (Minister of Citizenship and Immigration)*, 2016 FC 548 [*Ghuri*], Justice Gleeson remarked in *obiter* that it is the responsibility of the appellant, not the RAD, to establish that the RPD erred in a way that justifies the RAD's intervention. It is not the RAD's function to supplement the weaknesses of an appeal (*Ghuri* at para 33, citing *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321 at paras 18-20 and *Huruglica* at para 103). Justice Gleeson concluded that "appellants before the RAD that fail to specify where and how the RPD erred do so at their own peril" (*Ghuri* at para 34). I agree.

B. *Was the RAD's finding that Ms. Murugesu had adduced insufficient corroborating evidence of her sexual orientation reasonable?*

[28] Ms. Murugesu argues that it was unreasonable for the RAD to draw an adverse inference from the lack of corroborating evidence to establish her sexual orientation. She notes that the RAD cited no other reasons for doubting her credibility regarding this matter, such as omissions or contradictions in her testimony.

[29] A refugee claimant's testimony is presumed to be true unless there is a valid reason to doubt its truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302 at para 2, [1979] FCJ No 248 (Fed CA)). As Justice Mosley stated in *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at paragraph 38, "a lack of corroborating evidence of one's sexual orientation, in and of itself, absent negative, rational credibility or plausibility findings related to that issue, would not be enough, in my opinion, to rebut the *Maldonado* principle of truthfulness".

[30] However, this Court has recognized an exception to the *Maldonado* principle. The Board may draw a negative inference regarding a claimant's testimony if she fails to produce evidence that the Board reasonably expects should be available in the claimant's circumstances, and does not provide a reasonable explanation for failing to produce that evidence (*Radics v Canada (Minister of Citizenship and Immigration)*, 2014 FC 110 at paras 30-32 [*Radics*]).

[31] In this case, it was open to the RAD to draw a negative inference from Ms. Murugesu's inability to provide supporting documentation with respect to a central aspect of her claim, as required by Rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256. Rule 11 states that claimants who do not provide acceptable documents must explain why they have not done so, and the steps they have taken to obtain them. Whether it is reasonable to require corroborating evidence depends on the facts of the case (*Dayebga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 842 at para 30).

[32] The RAD acknowledged that it may be difficult for claimants to provide corroborating evidence of their sexual orientation. However, the RAD noted that Ms. Murugesu had testified that she was still in contact with Patma, with whom she had been in a relationship for more than a decade, but had never sought to obtain a letter of support. When asked whether she had other corroborating evidence of their relationship, Ms. Murugesu said that she had photographs but they were in Sri Lanka. When asked why she had not asked her family to retrieve them, she said that she did not expect she would need them. In these circumstances, it was open to the RAD to conclude that the documentation should have been reasonably available, and to draw a negative inference from Ms. Murugesu's lack of effort to obtain it.

[33] When asked by the RAD whether she had attempted to contact Rubica, Ms. Murugesu said that they had lost touch after Rubica changed her telephone number. The RAD found this explanation to be unsatisfactory, given the many ways in which modern technology allows people to communicate. It was reasonably open to the RAD to reject Ms. Murugesu's explanation for her failure to produce corroborating evidence of her relationship with Rubica (*Radics* at para 32).

[34] Ms. Murugesu also argues that the RAD unreasonably drew a negative inference from her failure to make inquiries regarding her church's stance on homosexuality. The RAD is entitled to make findings of implausibility, but they must be rational and sensitive to cultural differences (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 44). The RAD's finding that it was implausible for Ms. Murugesu not to inquire into her church's views on homosexuality was neither rational nor grounded in any evidence. Counsel for the Minister

did not attempt to defend it. However, this error is not sufficient, on its own, to warrant this Court's intervention.

C. *Did the RAD err in its analysis under s 97 of the IRPA?*

[35] Subsection 97(1) of the IRPA defines persons in need of protection as persons in Canada whose removal to their country of nationality would subject them personally to a danger of torture, or a risk to their life or a risk of cruel and unusual treatment or punishment.

Ms. Murugesu complains that the RAD's rejection of her claim under s 97 of the IRPA was unreasonable.

[36] The RAD found Ms. Murugesu not to be credible with respect to her claims regarding her sexual orientation and the ongoing interest of the Sri Lankan authorities. The RAD held that she had submitted no compelling evidence to establish that there was any serious possibility that she would be at risk of death, or cruel and unusual treatment or punishment. The RAD therefore determined that a separate s 97 analysis was not required, and upheld the RPD's denial of her claim under both ss 96 and 97 of the IRPA. Given the RAD's adverse credibility findings, this was a reasonable analysis (*Lopez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 102 at para 46; *Dawoud v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1110 at para 44).

VIII. Conclusion

[37] For the foregoing reasons, I find that the RAD reasonably concluded that Ms. Murugesu provided no credible evidence that she is currently of interest to the Sri Lankan authorities as a

suspected supporter of the LTTE. Ms. Murugesu did not allege any risk based on her cumulative profile before the RAD, and the RAD cannot be faulted for failing to consider it. In addition, the RAD reasonably concluded that Ms. Murugesu did not adduce sufficient corroborating evidence of her sexual orientation. The application for judicial review is therefore dismissed.

[38] Neither party proposed that a question be certified for appeal, and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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