

Federal Court



Cour fédérale

Date: 20190405

Docket: IMM-4528-18

Citation: 2019 FC 419

Ottawa, Ontario, April 5, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**NIRUSHI SEARA WICKRAMASINGHE
WICKRAMASINGHE ARACHCHIGE DONA**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

Overview

[1] This is an application for judicial review of the August 22, 2018 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which, pursuant to s 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], confirmed the determination of the Refugee Protection Division [RPD] that the Applicant is neither a

Convention refugee nor a person in need of protection pursuant to s 96 and s 97, respectively, of the IRPA.

Background

[2] The Applicant is a citizen of Sri Lanka. In her Basis of Claim form [BOC], she claims that while working as journalist covering the activities of Sri Lanka's President, she leaked information to three other journalists concerning government financial corruption. Those journalists published the leaked information in the newspapers for which they worked. As a result, the Applicant began receiving calls accusing her of being the source of the leaked information and threatening to kill her, she was also followed and her home was watched. In late March 2017, she received a call from the Presidents' Security Division [PSD] asking that she attend at their offices. There, three PSD officers, including the lover of the President's daughter, accused her of disseminating information critical of government and threatened to kill her if she continued to do such things. The President's daughter then arrived at the meeting and stated that she knew what the Applicant had done, slapped the Applicant's face, pushed her, and warned her that she would be made to pay.

[3] The Applicant claims that she stopped going to work and went into hiding. Toward the end of March 2017 she received a telephone call from a member of the PSD who warned her that the PSD was planning to secretly murder her after two weeks. With the help of a friend who had connections with immigration and customs, the Applicant fled Sri Lanka on April 9, 2017, arriving in Canada the following day. Subsequently, her mother told her that unknown persons attended at her uncle's home, her friend's home and her aunt's home, asking about the Applicant.

She claims that she fears for her life at the hands of the PSD, the President's daughter, the daughter's lover, and other powerful politicians.

RPD Decision

[4] During oral submissions before the RPD, Applicant's counsel made an application seeking more time to search for documents that, if found, could be produced after the hearing. Specifically, for the newspaper articles that allegedly reported the leaked information as to government corruption. Having considered Rule 43 of the *Refugee Protection Division Rules*, SOR/2012-256 the RPD rejected the request because, although the articles were in print and online prior to the Applicant leaving Sri Lanka and the content was also otherwise available online, the Applicant had failed to search for the articles prior to the hearing date. Nor had she provided a reasonable explanation for failing to do so.

[5] The RPD found that the determinative issue was credibility. There were valid reasons to doubt the veracity of the facts as sworn by the Applicant, which rebutted the presumption of the truth of those facts. Specifically, in her testimony the Applicant omitted material aspects of her meeting at the PSD office which were contained in her BOC, and included information that was not contained in her BOC. The RPD found that these contradictions were not reasonably explained, and went to the core of her claim. The RPD also found that the Applicant had failed to make reasonable efforts to produce the newspaper articles reporting the information she allegedly leaked to third party media outlets. This information was important for establishing the reason why she was targeted and the failure to produce it undermined her credibility regarding her fear of persecution. Further, the Applicant was a "highly valued fugitive" who would be

pursued by the authorities to the highest extent possible. It was objectively unreasonable that, as she claimed, she was able to evade the airport border control system and leave Sri Lanka using her own passport by wearing a head scarf and bribing an immigration officer. Her departure significantly undermined the credibility of her claim that that she was being pursued by the PSD.

[6] The RPD also found the supporting documents provided by the Applicant, being newspaper articles concerning death threats from anonymous persons, a police report and a letter to the Chairman of the Working Journalist Association [Journalist Association], were all based on information she had provided to those entities. As the RPD had found the Applicant not to be credible, and the documents were also vague and general in nature, it afforded them little weight.

[7] The RPD concluded that while the Applicant had established that she worked as a journalist and was assigned to cover the President's activities, she had not established that she is being persecuted by the PSD or the President's daughter for leaking information to media outlets regarding corruption.

Decision Under Review

[8] Before the RAD, the Applicant did not seek to submit new evidence nor did she request an oral hearing.

[9] A large part of the RAD's decision is a restatement of the RPD's findings. The RAD noted that the RPD had found that the Applicant did not reasonably explain why she had omitted from her testimony that the President's daughter told the Applicant that she would be made to

pay, which she had included in her BOC. Nor did she reasonably explain the omission from her BOC that the President's daughter had asked the PSD personnel in attendance at the meeting with the Applicant why they had not yet killed the Applicant or that the PSD officer, who was the President's daughter's lover, had told the Applicant that she was being released because they could not kill her at the office but that they would take care of her. The RAD noted that the RPD also did not accept the Applicant's explanation that her memory came back to her clearly when retelling the story to the RPD, given that the incident occurred in March 2017 and would therefore have been fresher in her mind at the time she prepared her BOC, which, in turn, was closer in time to the incident than to the hearing before the RPD.

[10] In this regard, the RAD did not accept the Applicant's argument that the RPD's findings were unduly microscopic and overzealous, that the mere fact that she did not provide a word for word recitation of the BOC narrative was not a valid reason for impugning her allegations, or that it was reasonable for her to add details when questioned about the incident. The RAD found that the discrepancies were significantly serious to warrant the adverse credibility findings made by the RPD as the discrepancies went to the heart of her claim and her reasons for fearing persecution in Sri Lanka. It agreed with the RPD that the Applicant had not provided a reasonable explanation for the omissions in the BOC and in her testimony, and that she had not established on a balance of probabilities that she was called to a meeting at the PDS office at which her life was threatened.

[11] The RAD also found that the RPD did not err in finding that the Applicant's failure to provide the newspaper articles alleged to report the leaked information undermined her

credibility regarding her fear of persecution. It also agreed that her explanation, being that she had not tried to get the newspaper articles, even though they were reasonably available to her, because she intended no personal gain, to be unreasonable. The RAD stated that the Applicant was aware of the necessity of providing corroborative documents, as demonstrated by those that she did provide, and she was represented by experienced counsel. It was reasonable to expect that she would obtain the documents that she testified were available on the internet, and which went to the heart of her claim, but the Applicant made no effort to do so. Nor had she provided any supporting documentation such as a letter, affidavit or email from any of the journalists to whom she claimed to have leaked the information, or from her family or friends, to support her allegations. The RAD concluded that in the particular circumstances of the claim, and considering the Applicant's profile as an educated and experienced journalist, the failure to provide the articles was an egregious and deliberate omission. It agreed with the RPD that this seriously undermined the Applicant's credibility and also found that the alleged newspaper articles do not exist.

[12] As to the Applicant's exit from Sri Lanka, the RAD agreed with the Applicant that there was insufficient evidence to support the RPD's finding. However, the error was not fatal to the RPD's decision given its other credibility findings that went to the heart of her claim.

[13] The RAD also found that the RPD did not err in its assessment of her supporting documents. A newspaper article and police report did not link the threats made to the Applicant to her alleged reasons for fearing harm. The RPD found that little weight could be put on those documents to support the Applicant's claim that she was threatened by the PSD because she had

leaked information. The letter of complaint from the Applicant to the Journalist Association was not corroborative of her core allegations that she had leaked information, and it was also unclear why she would not have included that information in the letter. The RAD found that core aspects of the Applicant's claim were not credible and that her supporting documents did not indicate the reasons why she was being threatened or who was seeking to harm her. The RAD agreed with the RPD that little weight could be placed on the supporting documents to establish that the Applicant leaked information concerning corruption in government and, as a result, that she was being threatened.

[14] The RAD concluded that the Applicant had failed to establish, on a balance of probabilities, that she had leaked the information concerning government corruption to three fellow journalists who then wrote articles covering this information in their respective newspapers, or that she was threatened with harm by the PSD and the President's daughter. It found that there was not a serious possibility that she will be harmed in any way by her alleged agents of persecution should she return to Sri Lanka.

Issues and Standard of Review

[15] The Applicant submits that the RAD erred in failing to give proper weight to her supporting documents. Accordingly, in my view, the issue is whether the RAD's decision was reasonable and the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Abdul Salam*, 2018 FC 676 at para 10 citing *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93). Reasonableness is a deferential standard. Questions that come before administrative decision-

makers may not lend themselves to one particular result but may instead give rise to a number of possible, reasonable conclusions. In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

Analysis

Contextual Analysis

[16] The Applicant first submits that the RAD erred in finding that, because her supporting documents did not link the threats made against the Applicant to her alleged reasons for fearing harm, this permitted the RAD to afford that evidence low weight. As noted above, the Applicant's supporting documents are comprised of newspaper articles, a police report, and a letter of complaint from the Applicant to Journalist Association.

[17] More specifically, the Applicant submits that the RAD failed to conduct a contextual analysis of the fact that her supporting documents did not indicate the cause of her persecution. Her agents of persecution were the PSD and the President's daughter. Given the high level of impunity and corruption in Sri Lanka, had she informed the police or published the source of the threats made against her and the reasons why they were made, this would have reduced her likelihood of protection and could have led to further harm. She submits that her problems stem from the corruption she witnessed and the Presidential efforts to silence her. However, the RAD failed to assess the specific context that journalists are at particular risk in Sri Lanka and that such risk is augmented by the power held by the Presidential family, a claim she asserts is

supported by the 2017 Department of State Report “Country Reports on Human Rights Practices for 2017” [2017 US DOS Report]. Further, given that the Applicant did not make public the cause of the threats, it is understandable that she also did not disclose the information when she wrote to the Journalist Association.

[18] In my view, this argument cannot succeed.

[19] In her written representations, the Applicant references the 2017 US DOS Report as an example of a document that demonstrates that journalists are at particular risk in Sri Lanka (it is in fact the only document cited). In a footnote, she states that this document was before the RAD as a part of the National Documentation Package [NDP]. The Respondent points out that the Certified Tribunal Record [CTR] does not contain the 2017 US DOS Report. The NDP that was before the RPD, the index of which is found in the CTR, was the March 31, 2017 version. This included the 2016 US DOS Report, presumably as the 2017 report would be released in the spring of 2018. Although the 2017 US DOS Report would likely have been in existence at the time of the RAD’s decision in the fall of 2018, it was not contained in the CTR that was before the RPD. Nor did the Applicant seek to submit it as potential new evidence, pursuant to s 110(4) of the IRPA, which allows new evidence where it arose after the rejection of the person’s claim, it was not reasonably available, or the person could not reasonably have been expected to raise it in the circumstances. In response, the Applicant refers to *Saalim v Canada (Citizenship and Immigration)*, 2015 FC 841 at para 26 [*Saalim*], in which Justice Southcott found that the RAD has a duty to consider information contained in its own NDP.

[20] I note that in *Saalim* the applicant had argued before the RPD that females from minority clans were at objective risk of persecution in Somalia and, before this Court, it submitted that even when an applicant does not provide credible evidence, the RAD was still required to give proper consideration to documentary evidence of gender based violence.

[21] However, in these circumstances, even if the 2017 US DOS Report was notionally before the RAD and even if the RAD is obliged to consider information contained in its own NDP, this cannot assist the Applicant. As the Applicant acknowledges and as is apparent from the appeal record she submitted to the RAD, she did not argue that the RPD's failure to consider risks to journalists was in error and was a ground of appeal. Nor did she suggest that this required that the RAD conduct a contextual analysis of her supporting documents in the context of the documentary evidence. In fact, she made no reference to this risk or to any supporting country documentation evidence in her appeal to the RAD.

[22] Instead, she now offers this argument for the first time as an explanation for the finding of both the RPD and the RAD that her supporting documents do not explain why she was being threatened or who was threatening her. However, as stated by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v R K*, 2016 FCA 272 at paragraph 6, "... the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC

61, [2011] 3 S.C.R. 654 at paragraphs 23-25).” (Also see *Abdulmaula v Canada (Citizenship and Immigration)*, 2017 FC 14 at para 15.)

[23] This is elaborated by the Respondent who points out that, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 [*Alberta Teachers*], the Supreme Court of Canada found that courts have the discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so. Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal. Courts should respect the legislature’s choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and make its views known. This is particularly true where the issue raised for the first time on judicial review relates to the tribunal’s specialized function or expertise. Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Alberta Teachers* at paras 22–26).

[24] The RPD in its decision held that the supporting documents do not establish, on a balance of probabilities, the allegation that the Applicant received phone calls and had persons lurking around her house because she leaked confidential information about the corruption of the current government administration. The RPD then set out four reasons why it gave the supporting documents little weight, which include that “[t]he police reports, newspaper articles, and letter to the Chairman are vague and general, as they indicate that the threat is unknown, the perpetrators are unknown, and the reason for the threat is unknown.” Given the RPD’s reasons, the Applicant

knew that the fact that the supporting documents did not indicate the cause of her persecution was a reason that they were afforded little weight by the RPD. Yet, when she appealed to the RAD, the Applicant failed to raise her present argument about why sharing details about her circumstances with police and colleagues would have been unwise, either as an error in the RPD's reasons, or directing the RAD to any new supporting country conditions documentary evidence.

[25] As I understood the Applicant's argument, made when appearing before me, she asserts that she was not required to raise the contextual argument before the RAD because the RAD went further than her argument, and the RPD, and found that the newspaper article and the police report did not link the threats made to the Applicant to her alleged reasons for fearing harm. Given this finding of an absence of a link, a contextual analysis was required. In my view, there is no merit to this argument. The RPD found that the supporting documents did not establish that the threats were the result of the leaked information, or the reason for the threats. In other words, the absence of a link. The RAD accepted the RPD's findings and simply restated them in this regard. The RAD did not raise a new ground of appeal.

[26] Given these circumstances, for the Court to now consider the Applicant's argument based on documentary evidence of risk to journalists, which was not raised with the RPD or the RAD, and which is provided as an explanation for why her supporting documents did not address who was threatening her and why, and is raised for the first time on judicial review, would undermine Parliament's choice of the RAD as the first instance decision maker. This is particularly so as the argument falls squarely within the RAD's expertise and the Applicant offers no reasons for

having failed to raise it before the RPD or the RAD, even though she would have been alerted to the issue by the RPD's reasons. Accordingly, I am exercising my discretion and will not consider this argument. I also agree with the Respondent that, absent such argument, the RAD reasonably assessed the supporting documents and afforded them little weight for the reasons it set out.

Further, in my view, the RAD is not required to anticipate grounds of appeal that are not asserted and then scour the NDP for documentary evidence that might support that ground (see *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 20-24).

Source

[27] The Applicant also submits that the RAD erred in giving the supporting documents little weight on the grounds that the Applicant, who was found not to be credible, was the source of the information.

[28] In support of this position, the Applicant submits that it is perverse for the RAD to find that the documents should be given little weight on the basis that the Applicant was the source of the information, when she did not purport to have offered the information that the RAD thought was crucial, that is, to explain that she leaked sensitive information. In my view, even if the Applicant did not tell the police, the other journalists or the Journalist Association that she was being threatened because she leaked damaging information, the fact that the Applicant is the source of the information is still relevant. She submitted these documents in support of her claim, and presumably because she believes that their contents are relevant and material to its central tenet: that she leaked information about government corruption and is now at risk of harm from the PSD and the President's daughter. Therefore, to the extent that she is relying on these

documents to support her claim, the RAD is entitled to assess the weight and probative value that should be given to them.

[29] Significantly, and as noted by the Respondent, before the RAD assessed the supporting documents, it had already made a number of adverse credibility findings, which have not been challenged by the Applicant in her application for judicial review (*Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at paras 23–26; *Borubae v Canada (Citizenship and Immigration)*, 2018 FC 125 at para 16). For example, based on contradictions and omissions in her BOC and her testimony, the RAD agreed with the RPD that the Applicant had failed to establish that she was called to a meeting at the PSD office during which her life was threatened. As to her failure to provide the newspaper articles, which she claimed reported her leaked information – the heart of her claim – the RAD found that this was an egregious and deliberate omission, it seriously undermined her credibility, and the newspaper articles do not exist. Given these findings, the RAD was entitled to find that the Applicant’s credibility affected the weighing of her supporting documents (*Giron v Canada (Citizenship and Immigration)*, 2008 FC 1377 at para 11 [*Giron*]; *Tariq v Canada (Citizenship and Immigration)*, 2015 FC 692 at para 13(ix) [*Tariq*]; and *Sun v Canada (Citizenship and Immigration)*, 2017 FC 425 at para 17 [*Sun*]). Further, the RAD also found that little weight could be given to the supporting documents to establish that she had leaked the information as to government corruption and that she was being threatened as a result. In other words, regardless of source, the supporting documents did not contain corroborative information.

Unreasonable Credibility Findings

[30] The above finding ties into the Applicant's next two submissions. First, she submits that the RAD made an unreasonable credibility finding on the basis of what the supporting documents do not say, rather than what they do say (*Arslan v Canada (Citizenship and Immigration)*, 2013 FC 252 at para 88 [*Arslan*]). However, as the Respondent points out, unlike *Arslan*, here the RAD did not make a negative credibility inference on the basis of what the documents do not contain. Rather, the RAD gave the documents little weight based on its prior, and significant, negative credibility finding against the Applicant, together with the fact that the supporting documents do not indicate the cause of the Applicant's persecution. As such, the documents were insufficient to prove the Applicant's claims or overcome the negative credibility findings.

[31] Finally, the Applicant submits that the RAD erred by making credibility findings prior to having assessed all of the evidence. Specifically, the RAD prematurely rejected that the Applicant leaked the information before assessing the supporting documents. While the supporting documents do not indicate that the Applicant leaked the information, the Applicant submits that the RAD was obliged to consider all of the evidence and only then was it permissible for it to reach a finding. This argument is also without merit. The decision-maker is entitled to give documents that reflect statements made by an applicant a low probative value once a general negative credibility finding has been made against the applicant (*Giron* at para 11; *Tariq* at para 13(ix); and *Sun* at para 17). For this to be so, the decision-maker must necessarily be entitled to weigh an applicant's credibility prior to determining the weight given to documentary evidence.

[32] In sum, while the Applicant acknowledges that the RAD has the discretion to determine the weight to be assigned to the supporting documents, she submits that this determination must be grounded in proper legal principles and, if her arguments as to the assessment of the supporting documents were to prevail, then the RAD's other credibility findings could not stand.

[33] In my view, the Applicant has not established that the RAD's weighing of the supporting evidence was grounded on improper legal principles. Further, the RAD's weighing of that evidence was reasonable and it is not the role of this Court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61). Moreover, the RAD made clear and unchallenged negative credibility findings. These alone would be sufficient to support its decision as reasonable even if the RAD had erred in weighing the Applicant's supporting documents, which it did not.

JUDGMENT in IMM-4528-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. There shall be no order as to costs; and
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: NIRUSHI S. W. W. ARACHCHIGE DONA v. MCI

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: STRICKLAND J.

DATED: APRIL 5, 2019

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