Federal Court  Cour fédérale

Date: 20211101

Docket: IMM-4204-20

Citation: 2021 FC 1161

Ottawa, Ontario, November 1, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

UTHAYAKUMAR THANGAM ACHARY, MANJULA UTHAYAKUMAR, AND DANANJEYAN UTHAYAKUMAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicants are three members of a Tamil family from Sri Lanka – spouses Uthayakumar Thangam Achary and Manjula Uthayakumar and their son Dananjeyan (born in January 2000). There are two other children in the family: a daughter (born in May 1995) and an older son (born in December 1996).

[2] The applicants sought refugee protection in Canada on the basis of their fear of a gang member named Rajkumar and elements of the Sri Lankan army and police who, they alleged, were in league with Rajkumar and his gang. When the three applicants made their claims for protection in Canada in June 2017, the daughter was in Malaysia on a visitor's visa and the older son was in Australia on a student visa.

[3] The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") denied the applicants' claims on credibility grounds. The applicants appealed this decision to the Refugee Appeal Division ("RAD") of the IRB. In a decision dated July 31, 2020, the RAD affirmed the conclusion of the RPD and dismissed the appeal on the basis that the applicants had a viable internal flight alternative ("IFA") in Sri Lanka. The applicants now apply for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[4] In their appeal to the RAD, the applicants took issue with the RPD's adverse credibility findings and its assessment of risk flowing from their residual profile as failed Tamil asylum seekers. They also sought to file new evidence in support of their appeal. Before deciding the appeal, the RAD raised the issue of whether the applicants had an IFA in Sri Lanka, something the RPD had not addressed. The applicants were given the opportunity to provide written submissions on this issue.

[5] When it disposed of the appeal, the RAD refused to admit any of the new evidence tendered by the applicants. The RAD found the IFA issue to be determinative. It dismissed the

appeal on the basis that, accepting the applicants' core allegations to be truthful, a viable IFA was available in four identified locations in Sri Lanka.

[6] On this application for judicial review, the applicants have challenged the reasonableness of the RAD's decision on several grounds; however, it is only necessary to address one of them. In my view, the RAD's decision is unreasonable because there is a fundamental inconsistency between its reasons for refusing to admit some of the new evidence tendered by the applicants and its reasons for finding that the applicants have an IFA. This application must, therefore, be allowed and the matter returned for redetermination.

II. ANALYSIS

[7] The parties agree, as do I, that the substance of the RAD's decision is reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). This includes the RAD's determinations on the admissibility of new evidence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29) and the availability of an IFA (*Tariq v Canada (Citizenship and Immigration)*, 2017 FC 1017 at para 14).

[8] 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" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). An administrative decision maker's reasons are the means by which it communicates the rationale for its decision (*Vavilov* at para 84). Where reasons have been given, the decision must be justified by those reasons (*Vavilov* at para 86). Among other things, the decision "must be based on reasoning that

is both rational and logical" (*Vavilov* at para 102). For a decision to withstand review, the reviewing court must, among other things, "be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" (*ibid.*).

[9] The onus is on the applicants 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).

[10] I am satisfied that the RAD's decision is not internally coherent and rational because it contains a fundamental contradiction in the assessment of the evidence. To understand this flaw and its significance, it is necessary to set out some additional background.

[11] According to the family's narrative, their fear of Rajkumar stems from the latter's interest in the daughter. Rajkumar first noticed her at her school (he and his gang often hung around the school) and he was attracted to her. He wanted to marry her so that he would have access to the family's wealth (at the time, Mr. Achary owned a successful jewellery business in Colombo that had previously belonged to his father). In January 2014, after the daughter had steadfastly refused all his advances, Rajkumar and three others (an ex-army officer and two police officers) apprehended her at work, forced her into a van and beat her. Rajkumar then raped her in the van. After the attack, the daughter was pushed out of the van and left at the side of the road, severely injured. She was found by passersby, taken to hospital, and placed in intensive care for several days.

[12] Documentation relating to her hospital stay describes the daughter's injuries as the result of a motor vehicle accident. The applicants maintain that the records were falsified at the hospital in order to protect Rajkumar and his cohorts. They also maintain that they were advised and, in fact, threatened by hospital staff and police not to pursue a criminal complaint against Rajkumar.

[13] According to the applicants, shortly after the daughter returned home from the hospital, Rajkumar and three others forced their way into the family's home and attacked her again. They fled only when neighbours intervened.

[14] In March 2014, Rajkumar was arrested for trying to kidnap the daughter of a well-known Sinhalese businessman. The applicants heard that he was sentenced to three years in prison but he was released after a year. In February 2016, Rajkumar and some associates damaged the applicants' home with iron rods and sticks. He continued to threaten and harass the family and followed the daughter everywhere she went.

[15] As a result of the constant threats and harassment directed at the family, Dananjeyan was sent to Canada in July 2016. (His visitor's visa from an earlier trip to Canada with his parents was still valid.) He stayed with a family friend. In September 2016, the rest of the family moved from Kotahena to Colpetty, another municipality in the greater Colombo area. In February 2017, the older son was sent to Australia on a student visa. Mr. Achary closed his business and sold off some of his inventory to cover the family's expenses.

[16] Despite moving homes, Rajkumar found the family and continued to threaten and harass them. In March 2017, he came to their home brandishing a sword and looking for the daughter. She was there alone. She hid inside while Rajkumar made a commotion outside. Eventually neighbours persuaded Rajkumar to leave. As a result of this incident, on top of all the others, the parents decided that they and their daughter should leave the country. The daughter obtained a visitor's visa for Malaysia. She left Sri Lanka for Malaysia on March 24, 2017. That same day, her parents left for Canada. (They, too, still had valid visitor's visas from their previous trip to Canada.) They arrived in Canada the next day and reunited with their younger son. All three submitted inland claims for refugee protection on June 10, 2017.

[17] The applicants' claims were heard by the RPD on August 4 and September 28, 2017. At the time, the daughter was still in Malaysia. The applicants filed a letter from her dated August 1, 2017, in which she described the events that ultimately led to the family leaving Sri Lanka.

[18] In support of their appeal to the RAD, the applicants tendered a statutory declaration from the daughter dated January 11, 2018. It consists of seventeen numbered paragraphs. The first twelve paragraphs reiterate the narrative of her and her family's experiences with Rajkumar. Paragraph 13 sets out the daughter's reaction to learning that the RPD had rejected the refugee claims. She found it particularly upsetting that the RPD did not believe that she had been sexually assaulted and did not even mention her letter describing her experiences. Paragraphs 14 and 15 state the following:

> I am having a very difficult time in Malaysia, separated from my family and everyone that I know. I am staying at a female only

> hostel in Kuala Lumpur. I have not been able to continue my studies or work. I am relying on charity from my father's friend to pay for my accommodation and to meet my basic needs.
>
> I have only temporary status in Malaysia. My status is set to expire on February 15, 2018. I have been trying to find a way to extend the visa but so far, I have been unsuccessful. I also went to the UNHCR to file a refugee claim but I was informed that the office had stopped accepting new claims from Sri Lankan nations [*sic*] in January 2017. I remain in this difficult situation because I am petrified of returning to Sri Lanka. I am very afraid for my future.

[19] In paragraph 16, the daughter requests that Canadian authorities reconsider her family's claim for protection because their account is true and they have suffered greatly. In paragraph 17, the last paragraph of the statutory declaration, the daughter states that the contents of the document are true. As will be seen below, paragraphs 14 and 15 are the material parts of the statutory declaration for present purposes.

[20] For the sake of completeness, I note that the applicants also submitted as new evidence a statement from a Sri Lankan lawyer to demonstrate the efforts they had made to obtain corroborative evidence prior to the RPD hearing as well as notarized statements from two friends who had witnessed Rajkumar's harassment of the family.

[21] In their memorandum of argument on appeal, the applicants submitted that all the new evidence was admissible under subsection 110(4) of the *IRPA* because it post-dated the RPD hearing and it was relevant to the appeal. With respect to the daughter's statutory declaration in particular, the applicants submitted that she "wanted an opportunity to express her feelings to the RAD and also to describe her present difficult circumstances in Malaysia."

[22] The RAD did not admit the daughter's statutory declaration as new evidence (or any of the other new evidence, for that matter). The RAD found that the first twelve paragraphs of the statutory declaration were not new because they simply reiterated the contents of the daughter's earlier letter and the family's narrative. I do not understand the applicants to take issue with this finding, which is indisputably reasonable – indeed correct – in any event. The applicants do take issue with the RAD's determination with respect to the balance of the statutory declaration – particularly, paragraphs 14 and 15, set out above.

[23] The RAD dealt with these paragraphs as follows:

> The rest of the affidavit (paragraphs 13-17) passes 110(4), given the information arose after the RPD decision. She talks [of] her reaction to the decision, her status and difficulties in Malaysia and stresses that the incidents described by her parents are true. However, I do not find that these elements are relevant to her parents' claim because, as previously mentioned, simply because the RPD did not mention her letter, this does not mean that it did not consider that evidence. Further, the content of this portion of the affidavit does not assist in going toward establishing the parents' claim and the Appellants did not make any submissions addressing the relevance of this information. I do not find it relevant as their daughter is not a claimant/Appellant in Canada and as such it is not admissible under Raza/Singh.

[24] In short, the RAD found the daughter's circumstances to be irrelevant to the applicants' claim for protection. The problem with this determination is that it is inconsistent with the RAD's IFA analysis later in the decision.

[25] Apart from one particular incident (a phone call the applicants claimed to have received from a neighbour in September 2017 reporting that Rajkumar had been trying to locate them), the RAD accepted the applicants' narrative as truthful. However, it dismissed their appeal

because it found the existence of an IFA to be determinative. For present purposes, it is only necessary to consider the RAD's reasoning under the first part of the IFA test, that is: Would the applicants be at risk if they relocated to one of the proposed IFAs? (For the IFA test generally, see my discussion in *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paras 38-45 and the cases cited therein.)

[26] Applying the first part of the IFA test requires considering what would happen if something were true that is not currently the case – namely, that the parties seeking protection were living in one of the proposed IFAs. In this regard, the RAD reasoned as follows:

> In this case, the Appellants are being targeted primarily by Rajkumar, who has a close relationship with, and the backing of a politician named Mervin De Silva. According to both the narrative and the Appellants' testimony, Rajkumar's desires were to marry their daughter and to inherit the family's wealth, as the principal Appellant was the owner of a well-known and successful jewelry business in Colombo. The minor Appellant left Sri Lanka in July 2016 and the principal and associate Appellants as well as their daughter left Sri Lanka in March of 2017. Their daughter went to Malaysia. Hence, the object of Rajkumar's desire is no longer in the country and I have no evidence that she has returned to Sri Lanka. In addition, the principal Appellant testified that he completely closed his business because of the problems he was facing. As such, the reasons for Rajkumar's initial pursuit of the family no longer exist.

[27] The RAD reiterated this finding later in the decision, stating:

> I find that [the applicants] would not be at risk elsewhere in the other suggested IFA locations, particularly given the passage of time, their daughter's absence from the country, the closure of the business Rajkumar sought to take over and their failure to pursue criminal charges against him within the last three years, which is what Rajkumar wanted.

[28] In these passages, the RAD recognizes that the daughter's circumstances – in particular, her whereabouts – *are* relevant to the family's risk because they have a direct bearing on Rajkumar's motivation to seek out the family. This, however, is inconsistent with the RAD's reason for not admitting the material parts of the daughter's statutory declaration – that her circumstances are irrelevant.

[29] As reflected in the IFA analysis, the RAD understood that Rajkumar's reasons for pursuing the family are a material issue. It also understood that evidence of the family's circumstances is relevant to this issue. In light of this, it could not reasonably determine that, on the one hand, those circumstances have changed such that the reasons for pursuing the family "no longer exist" and the family would therefore be safe in the proposed IFAs and, on the other hand, determine that evidence of the daughter's circumstances is inadmissible because it is irrelevant.

[30] As a matter of relevance, evidence of the daughter's precarious circumstances in Malaysia was directly related to the question of whether, if the applicants relocated to one of the proposed IFAs, the threat against them would still exist. On its face, this evidence entailed that it could not simply be presumed, as the RAD did in its IFA analysis, that the daughter would not reunite with her family in the event that they relocated to one of the proposed IFAs.

[31] The RAD states that the applicants did not make any submissions on the relevance of this part of the daughter's statutory declaration. While this is not entirely true, it is the case that the applicants did not articulate a clear theory of the relevance of her evidence, either in their

original memorandum of argument (which, it should be recalled, was filed before the RAD raised the issue of an IFA) or in their subsequent IFA submissions. Nevertheless, this does not affect the fundamental flaw in the RAD's reasoning – that the RAD's own theory of relevance is applied inconsistently. In my view, the RAD reasonably determined that the family's circumstances – including the daughter's – are relevant to the applicants' risk in the proposed IFAs. It was therefore unreasonable for the RAD to take the opposite view regarding the daughter's circumstances in determining that paragraphs 14 and 15 of the daughter's statutory declaration are irrelevant.

[32] I acknowledge that that evidence may not have much probative value. By the time the RAD disposed of the appeal, the evidence was quite dated. As well, at its highest it shows only that, as of January 2018, the daughter's situation in Malaysia was precarious. And as the RAD pointed out, there was no evidence that the daughter had returned to Sri Lanka at the time the appeal was decided. However, the RAD based its admissibility determination on relevance, not probative value. It is not my role to reconstruct its reasoning in a more tenable form: see *Vavilov* at paras 87 and 96; see also *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 8-10. Similarly, it is not my role to speculate about what probative value the RAD would have assigned to the new evidence had it admitted that evidence instead of (erroneously) excluding it as irrelevant.

[33] Relatedly, I would also agree with the applicants that it was unreasonable for the RAD to conclude that the family no longer had sufficient wealth to be of interest to Rajkumar simply because Mr. Achary had closed his jewellery business. This is not a matter of weighing the

evidence differently than the RAD. There was no evidence that the family was no longer wealthy, nor was there any evidence that Rajkumar would not still perceive them as such in any event. The RAD simply inferred this from the fact that the business had been closed. However, this inference does not stand up to scrutiny; the conclusion does not follow from the premise as a matter of logic, common sense or common experience: see *Vavilov* at para 104.

[34] In summary, the RAD's determination that Rajkumar's reasons for pursuing the family no longer exist is unreasonable because it entails that new evidence was erroneously found to be inadmissible and because it rests on an unreasonable inference. Since that determination is central to the RAD's reasoning in support of its conclusion that the appeal should be dismissed, this calls the reasonableness of the decision as a whole into question: see *Vavilov* at para 100.

[35] Before concluding, I would add two further observations. First, since the matter must be reconsidered, it will be open to the applicants, if so advised, to renew their argument on appeal that the RPD erred in drawing an adverse inference from their failure to amend their Basis of Claim narrative to include the September 2017 telephone call. Second, it will also be open to the applicants to renew their argument for the admission of the other new evidence they tendered in support of their original appeal, if so advised. Since it was not necessary for me to address these issues, the fact that I have not done so should not be taken as agreement with the RAD's determinations in either respect.

III. CONCLUSION

[36] For these reasons, the application for judicial review is allowed. The decision of the Refugee Appeal Division dated July 31, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.

[37] The parties have not suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4204-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated July 31, 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

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