

Federal Court



Cour fédérale

Date: 20220224

Docket: IMM-640-21

Citation: 2022 FC 258

Ottawa, Ontario, February 24, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SACIDARAN MUTHIAH ALAIS GURUSAMY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada dated December 30, 2020. The RPD found the Applicant is neither a Convention refugee nor a person in need of protection pursuant

to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The Applicant is a citizen of Sri Lanka who alleged a fear of persecution based on his Tamil ethnicity.

[2] For the reasons that follow the application is granted.

II. **Background**

[3] The Applicant claimed that members of the Liberation Tigers of Tamil Eelam (LTTE) demanded money from his family on two occasions between 2002 and 2003 and again, on two occasions, between 2005 and 2008. They left when told that there was no money to be paid. In 2015, a uniformed officer summoned the Applicant to the police station. While there, he was shown photos of men whom he was unable to identify and was asked if he was receiving funds from abroad, to which he answered he was not.

[4] In early 2016, the police made another visit to the Applicant's home. While there, they made note of the names of his children and wife and other information. Starting to fear being harmed by the police, the Applicant travelled to Turkey where he found work on a bulk carrier. Due to poor working conditions, he transferred to another company and vessel. At the end of 2016, the Applicant left Turkey, flew to Colombia, and on to Mexico. He was not permitted to leave the airport in Mexico and was sent back to Columbia. After another attempt to enter Mexico, he was placed in detention where he remained for nine months. He returned to Sri Lanka in July 2017.

[5] The Applicant claims that on April 23, 2018 four unidentified men came to the Applicant's home, forced him into their vehicle, and drove to a cottage where they interrogated him. The men asked him the same questions he was asked by the police in 2015. They threatened and beat the Applicant before locking him in a room where he was left overnight. He was released the next day and returned to his home in Hatton.

[6] Fearing what may happen to him in the future, the Applicant left Sri Lanka with the assistance of a friend. He travelled through various countries but lost his passport and other documents while crossing from Colombia to Panama. He eventually entered the United States where he was taken to a detention centre on September 7, 2018 and held in detention for almost two months. During his time in detention, the Applicant experienced depression and received treatment and medication from a psychologist.

[7] While in the United States, the Applicant contacted his sister in Canada who arranged to pay a bond for his release. He was released on November 10, 2018 and made a claim for refugee protection upon arriving at the Canadian border.

[8] After arriving in Canada, the Applicant learned that police visited his mother-in-law at his home in Jaffna on July 18, 2018. The officer gave her a letter requiring the Applicant to report to the police station. His mother-in-law sent the letter to his wife, who later sent it to him.

[9] The RPD heard and decided the Applicant's claim for protection in December 2020. The determinative issue for the RPD was credibility. The panel's reasons for decision focused on the

Applicant's prolonged stay in Sri Lanka following his return in July 2017, his ability to freely enter and leave the country using his own passport, the lack of any evidence that the authorities had been looking for him since July 2018 and the fact that his wife and children continued to live in the same residence.

[10] The panel acknowledged that persons of Tamil ethnicity, and the Applicant in particular, experience discrimination in Sri Lanka. But the Applicant, the RPD found, had failed to demonstrate that this rose to the level of persecution and that he faces a serious risk of persecution if returned.

[11] In the result, the RPD concluded the Applicant had not satisfied the burden of establishing a serious possibility of persecution on Convention grounds, or that, on a balance of probabilities, he would be subject personally to a danger of torture or a risk to life or face a risk of cruel and unusual treatment or punishment, if he were to return to Sri Lanka.

III. **Issues and Standard of Review**

[12] The Applicant has raised a number of issues with respect to the panel's decision. In my view, they can all be summed up in the question of whether the RPD rendered an unreasonable decision.

[13] As determined by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference

with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arises in the present case.

[14] To determine whether the decision is reasonable, the reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

IV. Analysis

[15] The Applicant submits that the RPD failed to support its implausibility findings with reference to the evidence. His account of the facts, he argues, was well within the realm of what might reasonably be expected of someone in his circumstances and absent omissions and inconsistencies in his evidence, he is owed the presumption of truthfulness: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA).

[16] Notwithstanding the presumption, the burden remains on the Applicant to show that the RPD findings were unreasonable. The decision will be upheld if it exhibits a rational chain of intelligible analysis explaining the findings including any based on implausibilities.

[17] The RPD did not question the Applicant's decision to return to Sri Lanka after being detained in Mexico for 9 months. It did, however, place a great deal of emphasis on the fact that

following his return, the Applicant did nothing to act on his fear of persecution for ten months. The RPD found that it “seriously undermines the claimant’s credibility.”

[18] The Applicant relied on a psychologist’s report which suggested that the delay may have been due to the enduring impact of the detention on his mental health. The Applicant had declared, in his Basis of Claim form, that he went back to Sri Lanka when he began to suffer from depression after detention for 9 months in a Mexican prison. There was also evidence that he had been treated for depression while detained for a shorter period in a US facility. And at the hearing, the Applicant had testified he had not looked for another job in order to leave Sri Lanka because of his fear of being detained again.

[19] While it was open to the RPD not to give much weight to the psychologist’s report, prepared as it was in anticipation of the Applicant’s immigration proceedings, the panel in this instance failed to comment on the report entirely.

[20] As discussed by Madam Justice Heneghan in *Ibrahimov v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1185 delay is a relevant but not decisive factor in determining whether a refugee claimant has a subjective fear of persecution. Justice Heneghan concluded as follows at para 19:

Furthermore, in my opinion, when a claim is based on a number of discriminatory or harassing incidents which culminate in an event which forces a person to leave his country, then the issue of delay cannot be used as a significant factor to doubt that person's subjective fear of persecution. Cumulative acts which may amount to persecution will take time to occur. If a person's claim is actually based on several incidents which occur over time, the cumulative effects of which may amount to persecution, then

looking to the beginning of such discriminatory or harassing treatment and comparing that to the date on which a person leaves the country to justify rejection of the claim on the basis of delay, undermines the very idea of cumulative persecution.

[21] In this instance, the RPD failed to properly assess the Applicant's risk in relation to the events of April 23, 2018 namely his kidnapping, interrogation, and beating by Sri Lankan authorities. This was a central aspect of the Applicant's claim and the reason for his departure to seek protection abroad. It was the final and most severe event in a series that caused him to leave Sri Lanka. . It required greater attention from the RPD.

V. **Conclusion**

[22] I am satisfied that the RPD failed to mention and assess the effect of the psychologist's report on its determinative finding that the Applicant was not credible. The RPD also erred in failing to properly assess the central aspect of the Applicant's risk, namely his kidnapping, interrogation, and beating by Sri Lankan authorities in 2018. The RPD did not indicate whether it disbelieved his risk in relation to these events and therefore, failed to grapple with the most severe incident endured by the Applicant, which ultimately was the catalyst for his departure.

[23] For these reasons, the application must be granted and returned for reconsideration by a differently constituted panel. No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-640-21

THIS COURT'S JUDGMENT is that the application is granted and the matter is returned to the Refugee Protection Division for reconsideration by a differently constituted panel. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-640-21

STYLE OF CAUSE: SACIDARAN MUTHIAH ALAIS GURUSAMY V THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE TORONTO

DATE OF HEARING: JANUARY 20, 2022

JUDGMENT AND REASONS: MOSLEY J.

DATED: FEBRUARY 24, 2022

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