

Federal Court



Cour fédérale

Date: 20220421

Docket: IMM-764-21

Citation: 2022 FC 577

Ottawa, Ontario, April 21, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

UTHAYASANKAR KANAKARATHINAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a Pre-Removal Risk Assessment (PRRA), which found that he would not be at risk of persecution, torture or cruel and unusual treatment if he was returned to Sri Lanka, his country of nationality. The Applicant argues the Officer erred by failing to provide an oral hearing and failing to consider the country-conditions evidence.

[2] For the reasons that follow, I have concluded that the Officer's decision is not reasonable and the matter is remitted for redetermination by another Officer.

I. Background

[3] The Applicant is a 34-year-old male Tamil from Sri Lanka. In Sri Lanka, he resided in Mullaitivu, which was under the control of the Liberation Tigers of Tamil Eelam (LTTE). When the LTTE began forcibly recruiting young men, he fled to Negombo on the west coast of Sri Lanka. While there, he claims he was detained, assaulted, and interrogated by police, and extorted by the Eelam People's Democratic Party (EPDP). He left Sri Lanka and travelled to Singapore, Malaysia and Thailand, before arriving in Canada in October 2009 on the ship, the MV Ocean Lady, along with 76 other Tamil asylum seekers. A second ship, the MV Sun Sea, arrived shortly after, also transporting Tamil asylum seekers.

[4] In his refugee claim, he claimed fear of the Sri Lankan armed forces, the police, army security forces, paramilitary groups, white van operators, and the LTTE. He also claimed that the publicity surrounding the Ocean Lady would cause Sri Lankan authorities to identify him if he is returned.

[5] In 2012, the Refugee Protection Division [RPD] rejected the Applicant's claim on the grounds that the Ocean Lady was involved in human smuggling, and the Applicant – being a cook on the ship – aided the smuggling operations by providing a necessary component for the ship's voyage. The RPD noted that the Ocean Lady operation was organized by a known LTTE terrorist, an LTTE Sea Tiger, and that the captain of the ship was believed to be involved in

LTTE activities. The RPD concluded that the Applicant was a person referred to in Article 1F(b) of the Refugee Convention, and his claim for refugee protection was, therefore, rejected pursuant to s 98 of the *Immigration and Refugee Protection Act, SC 2001, c 27* [IRPA].

[6] In July 2014, the Applicant was interviewed by Al Jazeera in an attempt to bring awareness to his situation and those of young Tamil men. The Applicant states Tamil men and women continue to be persecuted at the hands of Sri Lankan authorities, on suspicion of being LTTE members, and that individuals who were on the MV Sun Sea and who were later deported to Sri Lanka have gone missing.

[7] The Applicant applied for a PRRA on October 11, 2019. The Applicant's mother, who resides in Sri Lanka, provided an Affidavit indicating that military intelligence officers came to her house in 2014, 2015, 2017, and 2019 looking for the Applicant. She states that the officers conducted a search of her home, and interviewed her at a police station. The officers informed her they were aware of the Applicant's participation in the Al Jazeera interview, and that he would be arrested if he ever returned to Sri Lanka.

[8] In support of his PRRA application, the Applicant provided a Wikipedia article titled, "*MV Sun Sea Incident*"; excerpts and commentary from various articles and reports; and a link to a YouTube video posted in 2018 containing an Al Jazeera interview. The application also references the 2014 Al Jazeera interview, but in an apparent oversight, the link to the interview was not provided.

II. PRRA Decision

[9] On April 1, 2020, the Applicant's PRRA application was rejected. The Officer accepted that the Applicant is of Tamil ethnicity and not a LTTE supporter, but found the Applicant would not be subject to a risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka. As the Applicant was excluded from refugee protection under s 112(3)(c) of the IRPA, the Officer only assessed the application on the basis of s 97(1) of IRPA.

[10] The Officer held there was no evidence to support the Applicant's fear that he would be perceived to be a member of the LTTE. The Officer wrote:

The applicant has not mentioned or provided evidence to indicate that he has participated in any LTTE support activities, demonstrations, rallies or financially supported the LTTE. I find that the applicant has not demonstrated *how* he would be perceived as an LTTE supporter. Furthermore, the applicant alleges that the authorities will have knowledge that he was on the Ocean Lady ship and treat him differently. However, the applicant has failed to provide evidence to indicate that the Sri Lankan authorities would have knowledge that he personally was on the Ocean Lady.
[Emphasis in original]

[11] The Officer also noted that in a 2009 Canada Border Services Agency [CBSA] interview, the Applicant indicated he left Sri Lanka with a valid passport and temporary exit visa, and got permission from the authorities. The Officer reasoned that individuals who were of interest to authorities would not be able to exit Sri Lanka on a valid passport, and therefore, the Applicant had not demonstrated he was a person of interest on the basis of his perceived belonging to the LTTE.

[12] The Officer dismissed the Wikipedia article as an open-sourced internet page, and therefore, not credible or reliable information.

[13] With respect to the YouTube video, the Officer noted that it was posted in 2018 and created in the United Kingdom [UK]. The Officer also noted he could not identify the participants as their identities were hidden with shadowing and voice changes. The Officer held “I do not find it plausible that the Sri Lankan authorities were made aware of this particular UK video and were able to identify the applicant.”

[14] Finally, the Officer assessed the risks that the Applicant might face on return to Sri Lanka. The Officer found that “former members of the LTTE face no legal barriers in public life including politics and elections”, and that monitoring is generally limited to high-profile members. The Officer also noted that processing at the airport can take several hours, during which returnees are free to use washrooms and talk to one another, and that returnees – like the Applicant – who departed Sri Lanka legally would not come to the attention of the authorities.

III. Preliminary Issue

[15] The Respondent argues that the Applicant’s failure to provide a personal affidavit in support of his application for judicial review is a “fatal flaw” which justifies dismissing the application without further consideration by the Court. The Respondent relies upon *Debbaneh v Canada (Citizenship and Immigration)*, 2019 FC 865 at para 9, where the failure to provide a personal affidavit in support of an application for judicial review was a fatal flaw that required

dismissing the application. The Respondent further notes that the Applicant's Affidavit provided on the PRRA application was never commissioned.

[16] The *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, at s 10 provides that to perfect an application for leave, an applicant shall include a supporting affidavit that verifies the facts relied on. Here, the application for judicial review was accompanied by an affidavit from the Applicant's legal counsel.

[17] The Applicant argues that a personal affidavit is not required as the asserted errors are on the face of the record (*Turcinovica v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164 at paras 12-14).

[18] In these circumstances and in light of the issues raised by the Applicant, I am satisfied that reference to the certified tribunal record is sufficient for the Court's consideration (*Oyadoyin v Canada (Citizenship and Immigration)*, 2020 FC 1195 at para 6).

IV. Issues

[19] The following are the issues for determination:

- A. Was there a breach of procedural fairness by the Officer?
- B. Is the Officer's decision reasonable?

V. Standard of Review

[20] The parties disagree on the standard of review applicable to the decision of the Officer not to hold an oral hearing. The Respondent argues that the standard of review is reasonableness, citing *Gandhi v Canada (Citizenship and Immigration)*, 2020 FC 1132, whereas the Applicant submits the standard of review is correctness, citing *Dunsmuir v New Brunswick*, 2008 SCC 9.

[21] There is a debate on the applicable standard of review in the PRRA context where the issue is the officer's failure to convoke a hearing pursuant to s 113(b) of the IRPA (see *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at para 13 and *Mamand v Canada (Citizenship and Immigration)*, 2021 FC 818 at para 19 versus *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11-12 and *Balog v Canada (Citizenship and Immigration)*, 2021 FC 605 at para 24). In this case, I need not decide this point as, for the reasons outlined below, I have concluded that the Officer did not err in failing to convoke an oral hearing.

[22] The balance of the PRRA decision is considered on the reasonableness standard. As stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], "A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks 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" (at para 99).

[23] Further, “[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it” (*Vavilov* at para 126).

VI. Analysis

A. *Was There a **Breach of Procedural Fairness** by the Officer?*

[24] The Applicant argues the Officer made credibility findings against both him and his mother, and, therefore, should have convened an oral hearing. The Applicant points to the Officer’s conclusion that it was not plausible that the Sri Lankan authorities were made aware of the UK Al Jazeera interview and were able to identify the Applicant as being an adverse credibility finding.

[25] The Applicant states in his Affidavit that he participated in an Al Jazeera interview in 2014, and that the authorities were able to identify him through this interview. However, through an apparent oversight, the Applicant provided no link to the video. The Applicant provided a link to a 3-minute video posted in 2018 in which two Tamil men based in the UK were interviewed, with their identities concealed.

[26] In my view, the Officer did not make a negative credibility finding against the Applicant on this issue. Rather, the Officer made an assessment of the sufficiency of the evidence offered by the Applicant, and concluded that it was not possible to identify the Applicant based on the

2018 video. The Officer cannot be faulted for the Applicant's failure to provide the 2014 interview video link.

[27] With respect to the argument that a negative credibility finding was made against the Applicant's mother, a credibility finding against a third party does not trigger the right to an oral hearing as this does not go directly to the Applicant's credibility (*Immigration and Refugee Protection Regulations*, SOR/2002-227, s 167; *Haji v Canada (Citizenship and Immigration)*, 2018 FC 474 at para 26; *Ansar v Canada (Citizenship and Immigration)*, 2019 FC 197 at para 25).

[28] I do not agree with the Applicant's argument that he was entitled to an oral hearing. There was no denial of procedural fairness.

B. *Is the Officer's Decision Reasonable?*

[29] The Applicant argues it was unreasonable for the Officer to conclude that there was insufficient evidence to support his fear that he is perceived to be an LTTE supporter. The Applicant argues that his mother's Affidavit and the country-conditions evidence was not reasonably considered by the Officer.

[30] His mother's Affidavit states that she was approached by authorities who were looking for information about the Applicant on multiple occasions. The Officer does not explain why this evidence was not accepted for what it says. Rather, the Officer states that "the applicant has identified the police approached his mother 3 times" (emphasis added), rather than

acknowledging that this evidence is from the Affidavit of the Applicant's mother. This same evidence is then, seemingly, disregarded when the Officer concludes that "the applicant has not provided evidence to support his fear that he is perceived to be LTTE."

[31] The Officer's treatment of the mother's Affidavit evidence is not clear or transparent and is, therefore, not reasonable.

[32] With regard to the country-conditions evidence, the Officer relied on the Department of Foreign Affairs and Trade, Country Information Report Sri Lanka, dated 2019, and concludes that this shows "in general previous supporters are able to live their lives without having any concerns for their safety".

[33] However, the reasons provided by the Officer do not demonstrate how the Officer engaged with the following contradictory country-conditions evidence submitted by the Applicant, which indicated that:

- "Tamils continued to complain of ethnic profiling, surveillance and harassment by police who suspected them of LTTE... links" (excerpt from *Amnesty International Report, 2016/2017*);
- Security forces regularly monitored or harassed members in the north and east, and especially young and middle-aged Tamil Men (excerpt from *US Department of State's Country Reports on Human Rights Practices 2016*);

- The *Prevention of Terrorism Act* continues to be used to arrest and detain Tamils, and arrests are still being used in the notorious white vans used by the previous government (excerpt from *Human Rights Watch*, 2017);
- “Tamils suspected of links to the [LTTE] continued [sic] to be detained under the PTA, which permits extended administrative detention and shifts the burden of proof onto the detainee alleging torture or other ill-treatment” (excerpt from *Amnesty International’s State of the World’s Human Rights 2016/2017*); and
- Two refugee claimants who arrived in Canada on the *Ocean Lady* or the *Sun Sea* were deported: one was imprisoned and the other disappeared (Al Jazeera article, 2014).

[34] Where a decision maker fails to address contradictory evidence, it can be inferred that the contradictory evidence was not considered (*Onungbogbo v Canada (Citizenship and Immigration)*, 2021 FC 1240 at paras 13-14). Further “while the [decision-maker] need not address all evidence, it must be alive to contradictory evidence” (*Varatharajah v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 149 at para 25, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)). The Officer’s blanket statement that they considered all the evidence before them is not sufficient (*Nasha Ragguette v Canada (Citizenship and Immigration)*, 2011 FC 1511 at para 33).

[35] Here, the Officer’s reasons do not address or engage with the contradictory country-conditions evidence that demonstrates that Tamil men continue to face persecution. In the

absence of an indication that the Officer was alive to this information or that it was considered, the decision is not transparent or justifiable.

[36] Relatedly, it is unreasonable for the Officer to conclude that since the Applicant was able to leave Sri Lanka using his own passport in 2009, that he would not be considered a person of interest to authorities if he were now to return. The evidence before the Officer was that the Applicant was perceived to be a member of the LTTE since leaving Sri Lanka. The fact that the Applicant was able to leave Sri Lanka over a decade ago does not engage with evidence of events that occurred post-2009.

[37] This application for judicial review is, therefore, granted and the matter is remitted for reconsideration by another officer. There is no question for certification.

JUDGMENT IN IMM-764-21

THIS COURT'S JUDGMENT is that this judicial review is granted and the matter is remitted for redetermination by a different officer. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-764-21

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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