

Federal Court



Cour fédérale

Date: 20220512

Docket: IMM-7140-19

Citation: 2022 FC 703

Ottawa, Ontario, May 12, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

AKASH BALAKUMAR

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated October 23, 2019, dismissing the Applicant's appeal and confirming the decision by the Refugee Protection Division [RPD], finding the Applicant is not a Convention refugee or a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Facts

[2] The Applicant is a 24-year-old citizen of Sri Lanka. He was born in India, where he has no legal status. He fears persecution at the hands of Sri Lankan authorities due to his profile. His profile on return to Sri Lanka would be that of a young Tamil male with parents from the North, returning as a failed refugee claimant, who does not have a National Identity Card [NIC], who had been detained by Sri Lankan authorities four times and twice being questioned about his association with the Liberation Tigers of Tamil Eelam [LTTE], who was beaten by authorities on one occasion and whose mother bribed him out of prison on a second, and who was in default of orders to report weekly to police. He submits this alleged profile exposes him as a person with perceived links to the Liberation Tigers of Tamil Eelam LTTE and one who is therefore at risk if removed to Sri Lanka.

[3] While the RPD found the Applicant not credible, the RAD rejected that conclusion.

[4] Therefore, the following facts are taken from the Applicant's BOC, which in the circumstances are accepted as true.

[5] In 2006, the Applicant's father returned to Sri Lanka from India where the family was living, but has been missing since. The Applicant's mother returned to Sri Lanka with the Applicant and his sisters in 2007 when he was 9 years old. His mother and 16-year-old sister at the time were sexually assaulted by Sri Lankan soldiers. The Applicant's sister fled to Canada in February 2008 and is now a Convention refugee.

[6] In June 2008, the Applicant returned to India with his mother, where they lived without legal status. After the civil war ended in Sri Lanka, the Applicant's mother decided they should return to Sri Lanka because it was difficult for her to work without status in India. The Applicant obtained fake passports and returned to Sri Lanka in June 2013. The Applicant alleged that while he was in Sri Lanka, he was harassed by Sinhalese men and thereafter arrested, detained and threatened by Sri Lankan authorities on four separate occasions, on two of which he was questioned about his connections to the LTTE. On one of these two occasions, the police called him in for an interview. He was also beaten, and on one occasion, his mother bribed police to obtain his release.

[7] After this incident, the Applicant and his mother travelled to India while they waited for an agent to take him to Canada. In November 2014, the Applicant fled to Canada with the help of the agent and made a claim for refugee protection. He was 17 years old.

[8] At his first RPD hearing, the Applicant's aunt was his designated representative and he was not represented by counsel. His claim for refugee protection was rejected by the RPD, and his appeal was rejected by the RAD in 2015. The Applicant's JR was granted on consent and the matter remitted by the RAD which ordered it back to the RPD for redetermination.

[9] In a decision dated May 14, 2018, the RPD rejected the Applicant's claim for refugee protection. The RPD determined the Applicant's testimony was not credible because of several alleged inconsistencies and his profile as a young Tamil male did not, in itself, expose him to a serious possibility of persecution. The Applicant appealed this decision to the RAD.

III. Decision under review

[10] On October 23, 2019, the RAD dismissed the Applicant's appeal. While it overturned the RPD's credibility findings, the RAD ultimately found the Applicant failed to demonstrate he faced more than a mere possibility of persecution upon his return to Sri Lanka.

[11] The RAD accepted the Applicant was arrested by police three times and was harassed by a Sinhalese man, and found the RPD erred in doubting these incidents occurred, without pointing to any contradictions, omissions or inconsistencies in the evidence. It also accepted he met with police in November 2013, at which meeting the Applicant says he was questioned a second time concerning any LTTE involvement.

[12] The RAD further determined the Applicant did not face a serious possibility of persecution in Sri Lanka simply because of his profile as a young Tamil male. I agree with this determination, taken in isolation. While the RAD accepted the Applicant's history of arrests, it found the authorities had not sought out his mother in Colombo despite his failure to report to the police. Based on this finding, the RAD concluded there was no indication that Sri Lankan authorities had a continued interest in him due to perceived links to the LTTE. Additionally, the RAD found there was nothing in the Applicant's profile that would give rise to a need for protection, as outlined in the objective evidence.

[13] The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka put in issue in this case were very dated (2012) and state a

person originating from an area previously controlled by the LTTE does not, in itself, result in a risk. While the Applicant's profile may expose him to questioning upon return to Sri Lanka, the RAD found this would not amount to a serious possibility of persecution. Again, taken in isolation this finding is unobjectionable.

[14] Lastly, the RAD found the Applicant would be able to establish his identity and nationality with his birth certificate, and the objective evidence indicated he would be able to apply for a NIC, the processing of which would take six months. Given the Applicant or his family do not have ties to the LTTE and there was no evidence the authorities were looking for him, the lack of a NIC in the meantime would not expose him to more than a mere possibility of persecution.

IV. Issues

[15] The Applicants submit the issues are as follows:

- A. Breach of fairness
 - i. Drawing conclusions based on credibility
 - ii. Failure to assess the Applicant's circumstances from the perspective of the agent of persecution
 - iii. Ignoring the Applicant's submissions
- B. Failure to properly assess the Applicant's profile
- C. Whether the panel made an unreasonable decision by ignoring evidence and in speculating about evidence

[16] Respectfully, the issue is whether the RAD's decision is reasonable. While the Applicant characterizes the first issue as a breach of fairness and failure to observe the principles of natural

justice, his arguments are more accurately characterized as an issue of the reasonableness of the Decision.

V. Standard of Review

[17] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada’s decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard. This involves factual and legal constraints that bear on the decision:

[31] 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” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). 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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100).

[Emphasis added]

[18] The Supreme Court of Canada in *Vavilov* at para 86 states, “it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies,” and provides guidance that the reviewing court decide based on the record before them:

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker’s approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

[Emphasis added]

[19] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

[128] Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis”

(*Newfoundland Nurses*, at para. 25), or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[Emphasis added]

VI. Analysis

A. *Is the Decision reasonable?*

(1) National Identity Card [NIC]

[20] The Applicant submits the RAD erred in its failure to reference his particular circumstances in finding he can apply for and obtain a NIC. The Applicant’s evidence was that the delay in the processing of his NIC when he returned to Sri Lanka in 2013 was caused by Sri Lankan security concerns, given his profile as a young Tamil man who had not lived in Sri Lanka for many years. He also stated in his Basis of Claim narrative he had not been issued a NIC to date.

[21] The Respondent submits the RAD reasonably found that despite not having a passport or NIC, the Applicant would be able to establish his identity with his birth certificate. The RAD pointed to objective evidence to support this finding and determined the Applicant had left Sri

Lanka prior to the normal processing times for the NIC and there was no evidence of attempts to follow up on the status of the application after he left Sri Lanka.

[22] With respect, in my view the RAD missed the point in this determination. The application for a NIC was filed by his mother in 2014 (when he was a minor), yet no NIC had been returned by the time the Applicant's mother left Sri Lanka in 2019. The issue was not whether or not he could apply again, but why no NIC was issued after such a long delay. The RAD made no reference to this in reaching its conclusion, and instead answered a different question, i.e., whether the authorities were looking for him in Sri Lanka. It seems to me the RAD did not grapple with the real issue before it in this respect as required by para 128 of *Vavilov*.

[23] I note the Applicant submits the RAD ought to have held a hearing or at least notified the Applicant of its concern before basing a finding on its inference he was not being looked for. In failing to do so, he submits the RAD failed to observe the principles of natural justice. I do not see this as a procedural fairness issue but, as noted, one of reasonableness per *Vavilov*.

- (2) Failure to assess the Applicant's profile from the perspective of the alleged agent of persecution i.e., Sri Lanka

[24] The Applicant submits the RAD failed to consider his profile as someone who is "perceived" to be linked to the LTTE and focused its assessment on a piecemeal analysis of whether the Applicant or his family had actual ties to the LTTE. The Applicant notes specifically he was detained and questioned about his connections to the LTTE before the Commonwealth

Summit in Colombo in November 2013, and was questioned about his ties to the LTTE once before when previously arrested.

[25] The Applicant submits the RAD unreasonably characterized the Applicant's past encounters with the police as harassment and failed to consider the nature of his arrests and treatment by the police as acts of persecution.

[26] The Respondent submits the RAD considered the Applicant's perceived links to the LTTE, but determined the majority of his encounters with the police stemmed from personal disputes. While the November 2013 encounter with the police related to an investigation into a potential LTTE attack, the Applicant was released without charges within a day, and there was no other evidence of continued interest in him. In oral submissions, the Respondent submitted the three earlier detentions were lawful.

[27] While I agree these actions do not of themselves constitute persecution, they are nonetheless quite relevant to the assessment of risk.

[28] The RAD also seems to have overlooked the fact that on one occasion the Applicant was beaten and on another his mother had to bribe him out of detention. I do not see these as characteristics of lawful detention.

- (3) Failure to consider the Applicant's submissions about his risk profile as a failed refugee claimant

[29] The Applicant submits the RAD erred in failing to consider the Applicant's submissions on his risk profile on a global or cumulative basis. In this connection he relies on a decision of Justice Gibson in *Boroumand v Canada (Minister of Citizenship and Immigration)*, 2007 FC

1219 [*Boroumand*]:

[63] While the conclusion reached by the Minister's delegate in this regard might have been reasonably open to her, I am satisfied that it simply was not open on the very brief analysis of risk in which she engaged. She ignored one basis of fear of return put forward by the applicant. She paid limited attention to one independent third-party document relied on by the pre-removal risk assessment officer. She ignored other third-party information relied on by the officer. There is no indication whatsoever that she fully analysed the extensive submissions made on behalf of the applicant to the officer and to her directly. Similarly, she failed to take into account paragraph 3(3)(f) of the IRPA and ignored the issue of cumulative impact of all of the bases of concern put forward by and on behalf of the applicant.

[64] Based on the foregoing analysis, I conclude that, whether based on a global review of the decision under review as a whole and on a standard of review of reasonableness *simpliciter*, or on the basis of a conclusion that the Minister's delegate's reasons for decision as a whole were simply inadequate given the significance of the decision to the applicant, where the standard of review would be correctness given that the adequacy of reasons is a matter of fairness or natural justice, I am satisfied that the decision under review was made in reviewable error.

[Emphasis added]

[30] The Respondent submits the RAD acknowledged the documentary evidence indicated the Applicant may be monitored upon his return to Sri Lanka but this alone did not rise to the level of persecution. Again, in isolation this is not objectionable.

[31] On balance I agree with the Applicant. The Supreme Court of Canada in *Vavilov* found that “[t]he principles of justification and transparency require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties” (at para 127).

[32] In this connection, the Applicant’s submissions before the RAD highlighted reports of the risk to returning Tamil failed refugee claimants, and more importantly his personal experiences with Sri Lankan police with his global or cumulative profile as 1) a young Tamil man with parents from the North 2) returning as a failed refugee claimant, 3) who was not issued a National Identity Card [NIC], and importantly, 4) who had been detained by Sri Lankan authorities four times and questioned about his association with the LTTE once generally and once very specifically, 5) who was beaten by authorities on one occasion (a point not mentioned by the RAD), 6) whose mother bribed him out of prison on a second occasion (not mentioned by the RAD), and 7) who was in default of orders to report weekly to police.

[33] While aspects of his global profile were considered by the RAD, I have concluded it failed to assess the Applicant’s profile cumulatively and globally as required by *Boroumand*. Thus I conclude the RAD failed to consider whether the various elements of his profile considered globally and cumulatively might result in more than a mere possibility of persecution: *Boroumand, supra* at paras 63-64; and see *Subramaniam v Canada (Minister of Citizenship and Immigration)*, 2022 FC 163 [per Favel J] at paras 49-54, and *KS v Canada (Minister of Citizenship and Immigration)*, 2015 FC 999 [per Southcott J] at para 42.

VII. Conclusion

[34] In my respectful view, the Applicant has established the Decision is unreasonable because the RAD failed to come to grips with and grapple with the central issue before it per *Vavilov* at para 127, and failed to consider the Applicant's profile globally and cumulatively as required by constraining jurisprudence of this Court. Therefore, the application for judicial review will be granted. I note the evidence in this case dates to 2019 and some to 2012; given the evolving situation in Sri Lanka per para 18 of the Decision, it is a case for new evidence on redetermination.

VIII. Certified Question

[35] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7140-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded to a differently constituted RAD for redetermination at which new evidence may be filed, no question of general importance is certified and there is no Order as to costs.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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