Federal Court Cour fédérale

Date: 20230322

Docket: IMM-3451-22

Citation: 2023 FC 400

Ottawa, Ontario, March 22, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

URU LIYANAGE DON PRASAD NISHANTHA GUNASINGHE ET AL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada dated March 21, 2022, which dismissed their appeal of the decision of the Refugee Protection Division [RPD] dated November 4, 2021. The RPD found that the Applicants are neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001,

c 27 [*IRPA*] . The determinative issue was the availability of an internal flight alternative [IFA] in Anuradhapura or Batticaloa, Sri Lanka.

[2] The Applicants assert that the decision of the RAD was unreasonable as: (a) the RAD erred in rejecting new evidence; (b) the RAD erred in denying the Applicants' request for an oral hearing; and (c) the RAD erred in reaching its determination that the Applicants had viable IFA cities in both Anuradhapura and Batticaloa.

[3] For the reasons that follow, I am not satisfied that the Applicants have demonstrated that the RAD's decision was unreasonable and accordingly, the application for judicial review shall be dismissed.

I. Background

[4] Uri Liyanage Don Prasad Nishantha Gunasinghe [Principal Applicant], his spouse Agra Sajeewani Gomes [Associate Applicant] and their two daughters [Minor Applicants] are citizens of Sri Lanka.

[5] In the narrative attached to his Basis of Claim [BOC] form, the Principal Applicant states that the Applicants fled Sri Lanka and came to Canada following incidents of harassment from a local council chairman named Sampath Chaminda Jayasinghe [SCJ], his cousin Sumith, his cousin's son Ganidu, and the Sri Lankan police on separate occasions. The Applicants state that they fear persecution at the hands of these agents of persecution due to the Principal Applicant's

support for the United National Party [UNP] and the fixation of Ganidu on the eldest Minor Applicant, Sanjini. The Applicants state that the agents have the connections and resources through the police to seek them out anywhere in Sri Lanka.

[6] The Principal Applicant alleged that he canvassed for and supported the UNP candidate during the February 2018 municipal elections in Sri Lanka. The Principal Applicant was asked by SCJ, a candidate from another party, to support him instead. When he refused, SCJ threatened the Principal Applicant. The Principal Applicant and a group of UNP supporters who were out campaigning were confronted and assaulted by SCJ's associates. The Principal Applicant tried to report the assault to the local Sri Lankan police at the Kahathuduwa police station but the police officer refused to help.

[7] After SCJ won the election and became the local town council chairman, the Principal Applicant alleges that SCJ began targeting the Applicants due to the Principal Applicant's opposition to him and because he had tried to make a police complaint against him. SCJ was also a local businessman and interfered in the Principal Applicant's business.

[8] In particular, the Applicants asserts that a member of SCJ's family, his cousin's son Ganidu, began to harass Sanjini at school. The harassment began with him following her and offering her love letters, but then escalated to unwanted physical contact to the point that Sanjini no longer wanted to attend school. A teacher spoke to Ganidu on one occasion, but school authorities did not want to be further involved. The Principal Applicant allowed Sanjini to stop attending school. He attempted to report a complaint, but the police stated that it was a civil

domestic matter and refused to file criminal charges. Both Ganidu's father and SCJ called the Principal Applicant attempting to pressure him into agreeing to a forced marriage between Ganidu and Sanjini. SCJ stated that he would stop negatively interfering with the Principal Applicant's business if the Principal Applicant agreed to the match. When the Principal Applicant refused, SCJ warned him that the continued refusal would result in him "losing" his daughter. The Principal Applicant took this as a threat against his daughter's safety. The Principal Applicant stated that he did not believe his family would be safe in Sri Lanka while Ganidu remained fixated on Sanjini. The Principal Applicant relocated his daughter to his cousin's home, nearby to Anuradhapura, while he made arrangements to have Sanjini attend school in Canada.

[9] In July 2019, the Principal Applicant hired an agent to apply to a school in Toronto and a visa for the Principal Applicant to accompany his daughter to Canada.

[10] In September 2019, Ganidu and a few of his friends showed up at the Principal Applicant's family home looking for Sanjini. The Associate Applicant was home at the time and asked them to leave. The boys cursed at her and threw rocks at their home.

[11] On November 17, 2019, the Principal Applicant and Sanjini came to Canada and on December 4, 2019, the Principal Applicant returned to Sri Lanka.

[12] Shortly after he returned to Sri Lanka, the Principal Applicant left for a business trip. While he was away, SCJ and his cousin came to their family home and asked the Associate Applicant about their daughter. The men were verbally abusive, slapped the Associate Applicant across the

face and threatened her. The Associate Applicant called the Principal Applicant asking him to return home immediately. The Principal Applicant cancelled his work trip and returned home on December 25, 2019.

[13] On December 26, 2019, the Principal and Associate Applicants attended the police station to make a complaint against SCJ and his cousin for assaulting the Associate Applicant. The police officer told them to return home and that they would deal with the matter.

[14] On December 28, 2019, two police officers came to the Principal Applicant's home asking for him to accompany them to the police station, refusing to indicate why. Once at the police station, the Principal Applicant states that he was detained, beaten and accused of trying to make a false complaint against SCJ and his cousin. A police officer held the Principal Applicant at gunpoint, ordering him to sign a document stating the Principal Applicant owed a debt to SCJ. The police officer informed the Principal Applicant that the fake "debt" would be forgiven if he agreed to marry his daughter to Ganidu and stop supporting the UNP. The police officer said that he had time to consider the proposal before they took further action to enforce the debt. The police officer warned the Principal Applicant not to discuss the incident with anyone or else his family would suffer. He was released from police custody later that day.

[15] On December 29, 2019, the Principal Applicant attended a private clinic for medical treatment required due to the beating he received from police officers.

[16] Shortly thereafter, the Applicants (other than Sanjini) fled to the Principal Applicant's cousin's house. They stayed there while the Principal Applicant made arrangements with the same agent to obtain visas to leave Sri Lanka. The agent moved the family to a village on the outskirts of Colombo where they stayed until preparations could be made for the family to leave for Canada. They ultimately arrived in Canada in February 2020 and the four Applicants filed a claim for refugee protection in April 2020.

[17] On November 4, 2021, the RPD rejected the Applicants' refugee claim, concluding that the Applicants did not face a serious risk of persecution or risk of harm as per section 97(1) of the *IRPA*. The determinative issue before the RPD was the finding that the Applicants had an IFA available to them in Anuradhapura and Batticaloa. The Applicants appealed the RPD's decision to the RAD, asserting that the RPD's decision was unreasonable as: (a) the RPD erred in its analysis concerning the reach and influence of the agents of persecution beyond their locality; (b) it did not perform any credibility analysis; (c) the Applicants would have to live in hiding in the IFA cities; and (d) the RPD did not consider the risk of harm to Sanjini.

[18] On appeal to the RAD, the Applicants presented three documents as new evidence: (i) a letter from the Associate Applicant's cousin dated December 4, 2021; (ii) a letter from the eldest Minor Applicant's friend and classmate, dated December 22, 2021; and (iii) a town council web page, dated December 7, 2021. The two letters indicated that a family member and a friend of the Applicants had encounters with Ganidu and the Sri Lankan police and that they were both still seeking out the Applicants. Both of these letters were received within weeks of the Applicants

receiving their negative RPD decision. The town council web page provided a list of the then-current council members.

[19] The RAD admitted the web page into evidence, noting that the council member list had been updated after the RPD decision and thus met the requirements of subsection 110(4) of the *IRPA*. The RAD also found that the web page appeared credible and relevant, as it demonstrated that SCJ continued to hold his political position despite the outstanding criminal charges the RPD identified. The RAD considered the new evidence and found that it still did not support that SCJ had influence outside of their locality.

[20] The RAD concluded that, while the balance of the new evidence met the requirements of subsection 110(4), the evidence lacked credibility. The RAD noted that they found it "too fortuitous" that within a few weeks of receiving their negative RPD decision (in which proceeding the Applicants had presented no evidence of any threats since December 2019), the Applicants received news that the agents of persecution were still seeking them despite not having done so in the almost two years since they had arrived in Canada. The RAD found that the context and timing of the alleged interactions were "highly suspect" in the circumstances. The RAD concluded that the letters submitted as new evidence were therefore not credible and inadmissible.

[21] The Applicants requested an oral hearing, which request was denied. The RAD stated that since the evidence was third-party documentation and it did not raise a serious issue with respect to the credibility of the Applicants, there was no basis to hold an oral hearing under subsection 110(6).

[22] In its decision, the RAD confirmed the RPD's finding that a viable IFA exists for the Applicants in Anuradhapura and Batticaloa. The RAD concluded that: (a) the RPD did consider the issue of police corruption and the RAD agreed that the evidence did not support that the Sri Lankan police force would assist SCJ in locating the Applicants throughout Sri Lanka; (b) it would be "preferable" if the RPD had commented on the credibility of the allegations but not doing so was not an error and the RAD accepted the core allegations as credible; (c) the evidence did not support the Applicants' position that they would have to live in hiding; and (d) the RPD considered language, education and employment factors and did not fail to consider the risk of harm to Sanjini in determining that none of the Applicants would face a risk of harm in the IFA cities.

II. <u>Issue and Standard of Review</u>

[23] The following issues arise on this application:

A. Whether the RAD erred in admitting new evidence and, relatedly, whether the RAD erred in denying the Applicants' request for an oral hearing on this issue; and

B. Whether the RAD's decision was reasonable.

[24] The reasonableness standard applies to all issues raised on this application [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Iyere v Canada (Citizenship and Immigration)*, 2018 FC 67 at para 16].

[25] When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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. The burden is on the party challenging the decision to show that it is unreasonable [see *Vavilov*, *supra* at paras 15, 83, 85, 99, 100]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

III. Analysis

A. *The RAD's refusal to admit the letters as new evidence and to hold an oral hearing was reasonable*

[26] Subsection 110(4) of the *IRPA* addresses the admission of new evidence on appeal to the RAD and provides:

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have	(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle

been expected in the circumstances to have presented, at the time of the rejection.	n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[27] Subsection 110(4) provides that the RAD can only consider new evidence if: (i) it arose after the RPD's decision; or (ii) if the evidence was not reasonably available at the time or the person could not reasonably have been expected to present it at the time of the RPD's negative decision. The strict statutory criteria reflect a restrictive approach to new evidence [see *Demberel v Canada (Citizenship and Immigration)*, 2016 FC 731 at para 31; *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at para 63]. The test set out in subsection 110(4) is disjunctive, meaning that the RAD must consider whether the new evidence fails to meet both conditions laid out in subsection 110(4) [see *Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 at paras 19-20]. Further, even if the Applicants' evidence falls into one of the two categories covered in subsection 110(4), the RAD still has the discretion to accept it or not [see *Olowolaiyemo*, *supra* at para 20]. However, if the RAD determines that the new evidence does not meet the requirements of subsection 110(4), the RAD has no discretion to admit the evidence [see *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at paras 23, 45].

[28] If the new evidence meets the express criteria of subsection 110(4), the RAD must also be satisfied that it meets the implicit criteria of credibility, relevance, materiality and newness as set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, albeit with some adaptations [see *Singh, supra* at paras 38 and 74].

[29] The Applicants assert that the RAD erred in not admitting the letters from the cousin and classmate as the letters met the legislative requirements of subsection 110(4), as they detail events that arose after the RPD hearing. The Applicants assert that the letters are relevant and probative as they relate to material allegations of the claim and both letters were signed, dated and accompanied by identity documents.

[30] I see no such error. The RAD accepted that the letters met the statutory requirements of subsection 110(4). However, meeting the statutory requirements is not the sole threshold for admissibility. The letters must also meet the *Raza/Singh* requirements and in this case, the RAD held that the letters lacked credibility. Where the RAD finds that the new evidence lacks credibility, the relevance and newness of the evidence is not determinative [see *Marquez Obando v Canada (Citizenship and Immigration)*, 2022 FC 441 at para 18].

[31] The Applicants further assert that, given the RAD's credibility concerns with the letters in terms of the circumstances in which they came into existence, the RAD was required to convene an oral hearing before determining that the documents were inadmissible. Having not been afforded an oral hearing, the Applicants assert that their procedural fairness rights were breached.

[32] I reject the Applicants' assertion. Subsection 110(6) of the *IRPA* provides that the RAD may hold an oral hearing if there is new documentary evidence that raises a serious issue with respect to the credibility of the Applicants that is central to the decision, and that would justify allowing or rejecting the refugee protection claim. Specifically:

Hearing	**Audience**
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois:
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[33] It follows from subsections 110(3), (4) and (6) of the *IRPA* that the RAD can only hold a hearing if there is new evidence that meets the criteria set out in subsection 110(4) and the implied criteria of credibility [see *Marquez Obando, supra* at paras 24 and 26]. This Court has repeatedly held that the RAD is not required to hold a hearing to determine whether a document presented as new evidence is credible, as a credibility finding on the admissibility of new evidence is not equivalent to a credibility assessment of an applicant [see *AB v Canada (Citizenship and Immigration)*, 2020 FC 61 at para 17; *Mohamed v Canada (Citizenship and Immigration)*, 2020 FC 1145 at paras 19-21; *Sunday v Canada (Citizenship and Immigration)*, 2021 FC 266 at paras 42-44; *Singh, supra* at para 44].

[34] The Applicants further assert that, even if the RAD was not obligated to hold an oral hearing, the RAD made unreasonable implausibility findings with respect to the credibility of the letters as this determination was based upon the time period in which the incidents occurred. The

Applicants assert that the RAD did not assess the contents of the letters or acknowledge that the allegations contained within the letters were consistent with the material allegations of the Applicants' claim. The Applicants assert that it may have been a coincidence that the events described in the letters occurred within weeks of the negative RPD decision but that this does not mean the incidents did not occur. The Applicants assert that it is unreasonable to reject evidence as not credible simply because the events it describes are unusual or improbable.

[35] I reject this assertion. Implausibility is a category of credibility finding and the RAD is entitled to draw conclusions based on implausibility [see *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 26]. Uncontradicted evidence may be rejected if it is not consistent with the probabilities affecting the case as a whole [see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 9-10]. However, implausibility findings should only be made in the clearest of cases, where the facts presented are outside the realm of what could reasonably be expected or the documentary evidence demonstrates the events could not have happened in the manner asserted by the claimant. Caution must be exercised in rejecting evidence on the basis of implausibility, given the concerns about subjectivity and cultural context [see *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7].

[36] This Court has equated 'clearest of cases' and 'could not have happened' language from *Valtchev* to situations where it is 'clearly unlikely' that the events occurred in the asserted manner, based on common sense or the evidentiary record [see *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 8; *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paras 10-11].

[37] Here, the RAD summarized the contents and source of each letter, acknowledged that the allegations within the letters went directly to the crux of the RPD's negative determination and noted that the letters were presented within weeks of the RPD making precisely the point in their negative decision that there was no evidence of any threats to the Applicants since December 2019. The guidance in *Raza* clearly states that the sources and circumstances in which the new evidence came into existence is part of the credibility analysis, which is exactly the analysis conducted by the RAD. The Applicants have not advanced any arguments that convince me that the RAD's conclusion was unreasonable in the circumstances.

B. *The RAD's determination of the existence of a viable IFA in Anuradhapura and Batticaloa was reasonable*

[38] The two-prong IFA test was described by Justice McHaffie in *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at paras 8-9 as follows:

> [8] To determine if a viable IFA exists, the RAD must be satisfied, on a balance of probabilities, that (1) the claimant will not be subject to persecution (on a "serious possibility" standard), or a section 97 danger or risk (on a "more likely than not" standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there: *Thirunavukkarasu* at pp 595–597; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12.
>
> [9] Both of these "prongs" of the test must be satisfied to conclude that a refugee claimant has a viable IFA. The threshold on the second prong of the IFA test is a high one. There must be "actual and concrete evidence" of conditions that would jeopardize the applicants' lives and safety in travelling or temporarily relocating to

> a safe area: *Ranganathan v. Canada (Minister of Citizenship & Immigration)*, [2001] 2 F.C. 164 (Fed. C.A.) at para 15.

[39] Turning to the first prong of the test, the Applicants assert that the RAD erred by failing to consider the ability of the agents of persecution to find the Applicants in the IFA cities and overlooked that local politicians have connections with higher-ranking politicians who have ties with corrupt police officials across the country. The Applicants point to documentary evidence stating that corruption remains a serious problem in the Sri Lankan police.

[40] The Applicants further submit that the RAD over-emphasized that the agents of persecution had not sought out the Applicants since their arrival to Canada, as a mere passage of time is not sufficient to conclude that the agents no longer have an interest in the Applicants. The Applicants submit that it would be likely that the agents of harm would not have located the Applicant's when they relocated to the Principal Applicant's cousin's home near Colombo before they came to Canada as it was for a brief period of time. The Applicants submit that this Court has been clear that it is not reasonable to speculate or rationalize the actions, motives, means and future intentions of the agents of persecution and it is an error to assume a persecutor would behave in a particular way. The Applicants further submit that it was unreasonable for the RAD to find that the agents of persecution do not have an ongoing interest in the Applicants while they have been in Canada as they may not be aware of any reprisals made due to their having been out of the country.

[41] I reject the Applicants' assertions. I find that there is nothing in the RAD's analysis of the first prong of the IFA test that requires the Court's intervention. The RAD considered both the National Documentation Package evidence as to the Sri Lankan police force and the Applicants'

submissions related thereto. The RAD noted the evidence, including the Principal Applicant's testimony, was that the agents of harm had access to a few corrupt local police officers. The RAD evaluated the evidence and determined that it did not support the argument that the Sri Lankan police would assist SCJ in locating the Applicants throughout Sri Lanka, which finding was reasonably open to the RAD to make. The RAD agreed that although the evidence showed SCJ remained the local council chairman, the Applicants had not provided sufficient objective evidence to demonstrate that he had influence beyond their own locality. Importantly, I note that the Applicants conceded before the RAD that they did not provide sufficient objective evidence to demonstrate that the chairperson had influence in the IFA cities.

[42] Further, I find that the RAD's consideration of the fact that the agents of harm had not attempted to locate the Applicants when they relocated to Anuradhapura, Colombo or Canada in determining that the agent of persecution lacked motivation to pursue the Applicants in the IFA cities was reasonable, given the absence of objective evidence that the agents of persecution remained interested in pursuing the Applicants [see *Cherednyk v Canada (Citizenship and Immigration)*, 2021 FC 873 at para 28].

[43] With respect to the second prong of the IFA test, the Applicants assert that the RAD overlooked the evidence that: (a) the Minor Applicants do not read or write Sinhala, making their ability to obtain an education in Sri Lanka more difficult; and (b) the Applicants (and in particular, Sanjini) would have to live in hiding in the IFA cities.

[44] I reject this assertion. The Applicants did not raise the issue of the Minor Applicants' ability to read or write Sinhala before the RAD and therefore it is not open to the Applicants to now criticize the RAD for not considering this argument. Moreover, contrary to the assertion of the Applicants, the RAD expressly considered the allegation that the Applicants would have to live in hiding in the IFA cities and provided an internally coherent and rational chain of analysis as to why the RAD rejected the allegation. I am not satisfied that the Applicants have established that, in making this finding, the RAD overlooked any particular piece of evidence.

IV. Conclusion

[45] I am satisfied that the RAD considered the evidence and explained its conclusions in light of the evidence, such that the RAD's decision bears the hallmarks of reasonableness in terms of justification, transparency and intelligibility. As the Applicants have failed to meet their burden of demonstrating that the RAD's decision was unreasonable, the application for judicial review shall be dismissed.

[46] The parties proposed no question for certification and I agree that none arises.

JUDGMENT in IMM-3451-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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