

Federal Court



Cour fédérale

Date: 20230717

Docket: IMM-2877-22

Citation: 2023 FC 974

Toronto, Ontario, July 17, 2023

PRESENT: Madam Justice Go

BETWEEN:

SURENTHIRAN SANMUGARASA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Surenthiran Sanmugarasa is a Tamil citizen of Sri Lanka. The Applicant's sister was kidnapped in 2004 and has not been seen since then.

[2] The Applicant claims that he fears Sri Lankan security authorities based on two grounds:

1) he accompanied his mother to attend demonstrations for missing Tamil persons; and 2) as a

Tamil fisherman from the Eastern region, he was perceived to be sympathetic to the Liberation Tigers of Tamil Eelam, and that he was harassed and assaulted by Sri Lankan soldiers for allegedly fishing without permission.

[3] The Refugee Protection Division [RPD] rejected the Applicant's claim on March 3, 2022 on credibility grounds, and after considering his residual profile, found that he is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Decision].

[4] The Applicant seeks judicial review of the Decision. I grant the application as I find that the RPD made unreasonable credibility findings.

II. Preliminary Issue

[5] As a preliminary issue, the style of cause shall be amended to reflect the correct Respondent.

III. Issues and Standard of Review

[6] The Applicant raises two main issues before this Court challenging the reasonableness of the Decision:

- A. Whether the RPD erred in its credibility analysis; and
- B. Whether the RPD erred in its residual profile analysis.

[7] In my view, the determinative issue is the RPD's error in its credibility analysis.

[8] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] 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. The onus is on the Applicant to demonstrate that the Decision is unreasonable: *Vavilov* at para 100. 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.

IV. Analysis

[10] The Applicant argues overall that the RPD’s credibility findings considered cumulatively warrant this Court’s intervention, as they were based upon peripheral issues and purported inconsistencies. Specifically, the Applicant challenges several credibility findings made by the RPD.

[11] I conclude that the RPD committed several reviewable errors, most notably as follows.

[12] First, I find that the RPD erred by impugning the Applicant’s testimony because he could not remember exactly what year he began accompanying his mother to the demonstrations for missing Tamil persons. While the Applicant initially testified that he began attending demonstrations in 2019, he later testified that he could not remember the exact date, but that it

was in 2018, after his brother left Sri Lanka. The RPD found that the Applicant's participation in these demonstrations was at the "core of the claim" and drew a negative credibility inference based on these concerns. In so finding, I agree with the Applicant that the RPD determined his claim "on the basis of a memory test", contrary to the Court's warning in *Sheikh v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 568 (TD) [*Sheikh*] at para 28.

[13] Having reviewed the audio recording of the RPD hearing, I note that the RPD Member at one point asked the Applicant to give an "approximate" date, and thereby acknowledged the Applicant's testimony that he could not remember the exact date when he started attending the rallies. It was unreasonable for the Member to then draw a negative inference from the Applicant's inability to recall the exact date, when the Member himself asked the Applicant for an approximate date.

[14] Further, while the Applicant could not remember the exact date, he did maintain consistently that he began attending these demonstrations after his brother left Sri Lanka. This was also consistent with his testimony that his mother went to demonstrations for missing people after his sister was kidnapped and went missing, and that after the Applicant's brother left, the Applicant then accompanied his mother to these demonstrations. Taken as a whole, the Applicant's testimony about his participation in the demonstrations was consistent, and the RPD's focus on the inconsistencies with respect to the start date was microscopic.

[15] Likewise, the RPD erred by taking issue with the Applicant's inability to recall specific dates with regard to his initial encounter with the Sri Lankan army and navy. The Applicant's

narrative and testimony indicate that this occurred on February 6, 2019, but he told United States [US] immigration officers during his Credible Fear interview that this encounter occurred in 2018. The Applicant cites the Court's comment in *Sivaraja v Canada (Citizenship and Immigration)*, 2015 FC 732 [*Sivaraja*] that a "failure to recall dates should not be the foundation of a credibility finding": at para 31. I agree that the same comment can be applied to the case at hand.

[16] I reject the Respondent's attempt to distinguish the case at bar from *Sivaraja* on the basis that the claimant in *Sivaraja* had a medical diagnosis of memory impairment, which the Court found "could have gone a long way to explaining many of the omissions and inconsistencies identified": at para 48. Regardless of the reason why the Applicant was unable to recall the exact date, the proposition that a claimant's credibility should not be impugned on the basis of a memory test still stands: *Sheikh* at para 28.

[17] Second, I find the RPD erred when it found inconsistencies based on the frequency of the army's visits to the Applicant's home in Trincomalee. The RPD noted that the Applicant's narrative indicated "a single time", but that he testified that the army regularly attended at his home in search of him every two to three days. I agree with the Applicant that the RPD appeared to have found inconsistencies where none existed.

[18] As the Applicant points out, his narrative did not indicate that the army came to his home "a single time." Instead, after describing going to the sea with his friend in Mullaitivu, the Applicant stated:

Few days after, the Army had been going home in search of me. They had come to know that I have been to the sea in Mullaitivu. They had ordered parents that I should report at the army camp when I return to Salli.

[Emphasis added]

[19] I agree with the Applicant that the use of the phrase that the army “had been going home” in search of him does not support the RPD’s finding that the Applicant claimed the Army had come to his home to search for him “a single time.”

[20] The Respondent argued at the hearing that the RPD reasonably noted the lack of details in the narrative with regard to the frequency of the army’s search and that it would be a “generous reading” of the above-quoted sentence to suggest that the army had come to the Applicant’s home more than once. I reject these arguments, as they are not the basis of the RPD’s finding, but are submissions made after the fact to bolster the Decision.

[21] Third, I find the RPD erred by making an unfounded implausibility finding when it stated:

I also find it implausible that, given the alleged significant interest in the claimant, the Sri Lankan authorities made no attempt to locate him at Mullaitivu despite knowing that he was living and fishing there, on the balance of probabilities.

[22] As this Court has repeatedly warned, implausibility finding should only be made in the “clearest of cases”: *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7.

[23] In this case, the Applicant gave evidence that he did not register his address in Mullaitivu, where he was caught fishing, and that his registered address remained in Trincomalee, where his family was from. The RPD did not reject this evidence in the Decision. As such, I agree with the Applicant that it is unclear why it was unbelievable that the authorities would search for him at his registered address, such that it was “outside the realm of what could reasonably be expected”: *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 11.

[24] The Respondent does not address the Applicant’s individual arguments over the various credibility findings made by the RPD, but argues overall that the RPD’s credibility findings were justified. The Respondent highlights all the inconsistencies and discrepancies that the RPD found between the Applicant’s Basis of Claim [BOC] narrative, testimony, and Credible Fear interview. The Respondent maintains that these inconsistencies were indeed related to core elements of the Applicant’s claim. As such, the Respondent argues that the RPD reasonably expected consistency in the Applicant’s evidence “to support key aspects of [his] claim, rather than peripheral ones”: *Olusola v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 46 at para 15; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 22.

[25] I reject the Respondent’s arguments in part based on the reasons that I have already provided.

[26] In addition, I agree with the Applicant that the RPD erred by making credibility findings based on marginal issues and minute inconsistencies. The RPD conducted a granular and

overzealous analysis of his claim, which this Court has found to be insufficient to erode an applicant's credibility: *Weng v Canada (Citizenship and Immigration)*, 2011 FC 422 at paras 18-19.

[27] The Respondent further argued at the hearing that even if the RPD erred with respect to its findings concerning the Applicant's inability to recall the exact dates, that particular error was not determinative of the Decision. Rather, the Respondent argued that the RPD rejected the claim based a number of credibility concerns on a cumulative basis. I am not persuaded by this submission. If, as the Respondent suggests, the Decision was based on the cumulative effect of the various negative credibility concerns, the fact that several of these concerns are found not to be reasonable also renders the Decision as a whole unreasonable.

[28] As I have already found reviewable errors with respect to certain key aspects of the RPD's credibility findings, it is not necessary for me to address the Applicant's other arguments challenging the RPD's negative credibility findings drawn from inconsistencies between his evidence, and his responses during the Credible Fear interview conducted by US authorities.

[29] I will simply note that my findings above may also cast doubt into the RDP's conclusion that the information provided to the US immigration officers is "markedly and materially" different from that contained within his narrative and testimony, in light of the microscopic approach adopted by the RPD.

[30] Given my conclusion with respect to the RPD's credibility findings, I need not review the RPD's residual profile analysis.

V. Conclusion

[31] The application for judicial review is allowed.

[32] The style of cause shall be amended to reflect the correct Respondent.

[33] There is no question to certify.

JUDGMENT in IMM-2877-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. The style of case is amended to name the Minister of Citizenship and Immigration as the Respondent.
4. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2877-22

STYLE OF CAUSE: SURENTHIRAN SANMUGARASA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 26, 2023

JUDGMENT AND REASONS: GO J.

DATED: JULY 17, 2023

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