

Federal Court



Cour fédérale

Date: 20231129

Docket: IMM-4834-22

Citation: 2023 FC 1598

Toronto, Ontario, November 29, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**ILANGANKOON MUDIYANSELAGE
NISSANKA ABAYARATHNE**

**VINODYA NIMSARANI ABHAYARATHNA
ILANGAKOON MUDIYANSELAGE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision by the Refugee Appeal Division [RAD] dated April 29, 2022 [Decision], which dismissed the Applicants' appeal from a decision of the Refugee Protection Division [RPD] dated November 2, 2021, and concluded that the Applicants

are neither Convention refugees nor persons in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application for judicial review is allowed, because, in arriving at its Decision, the RAD unreasonably failed to consider whether to hold an oral hearing and failed to consider the evidence of the Associate Applicant (as defined below).

II. Background

[3] The first Applicant named above [Principal Applicant] and the second Applicant, who is the Principal Applicant's daughter [Associate Applicant], are citizens of Sri Lanka, of Sinhalese ethnicity. They arrived in Canada in May 2019 and made refugee claims in October 2019, asserting fear of police in Sri Lanka and the Sri Lankan Army [SLM] based on imputed support of the Liberation Tigers of Tamil Eelam [LTTE].

[4] The Principal Applicant alleges that the events giving rise to their claims commenced in October 2014, when police officers attended at his home and beat him, accusing him of being associated with the LTTE, because he had provided medical supplies to the Trincomalee area. The Principal Applicant claims that the SLA arrested him in February 2015 and took him to a military camp where he was physically mistreated and was again accused of providing medical support to the LTTE. The Principal Applicant left Sri Lanka in June 2015 and travelled to the United States [US], where he remained until June 2016, when he returned to Sri Lanka.

[5] The Principal Applicant further alleges that, two days after his return to Sri Lanka, a police officer informed his wife that he was going to be arrested again. As a result, he went to live with his wife's parents and made plans to leave Sri Lanka again. He travelled to the US in September 2016, where he remained until he returned to Sri Lanka again in August 2018. The Principal Applicant also claims that in December 2016, while he was still in the US, the SLA took his wife and the Associate Applicant for questioning about him, in the course of which the SLA was abusive and made sexual comments towards his wife and daughter before releasing them.

[6] After his second return to Sri Lanka, the Principal Applicant alleges that the SLA came to his home again in October 2018 and took him for more questioning, accusing him of supporting the LTTE and the Tamil diaspora in the US. Subsequent to these events, the Principal Applicant left Sri Lanka for Canada on May 15, 2019, and the Associate Applicant followed on May 29, 2019.

[7] The RPD rejected the Applicants' claim, they appealed, and the RAD notified them that it wished to receive submissions on the issues of the Principal Applicant's re-availment to Sri Lanka and his failure to claim in the US. The Applicants provided those submissions on March 23, 2022. On April 29, 2022, the RAD released its Decision dismissing their appeal.

III. Decision under Review

[8] The RAD considered the admissibility of new evidence the Applicants presented, in the form of a Tamil Guardian news article, which outlined the arrest of four Tamil youth outside the

destroyed home of the LTTE leader ahead of his 64th birthday. While the RAD accepted that this evidence could not reasonably have been provided to the RPD, as it was presented in support of issues that were raised on appeal, the RAD found that it was not relevant. The Applicants argued that the article corroborated concerns about the Principal Applicant's return to Sri Lanka and failure to claim in the US. The RAD disagreed, concluding that the article was irrelevant to the issues of re-availment to Sri Lanka and delay in leaving, on which it had sought submissions and which issues the RAD found to be determinative.

[9] The RAD therefore rejected the article as new evidence and stated that, as it had no new evidence, it could not convene an oral hearing.

[10] The RAD reviewed the sequence of events alleged by the Principal Applicant, focusing upon his return to Sri Lanka on two occasions notwithstanding his allegations of previous persecution including events that occurred while he was in the US. The RAD concluded that these returns to Sri Lanka demonstrated a lack of subjective fear and undermined the credibility of his allegations.

[11] The RAD also noted the Principal Applicant's significant delay in leaving Sri Lanka after his second return there. While the last alleged incident of persecution occurred in October 2018, he did not leave Sri Lanka until some seven months later in May 2019, notwithstanding that he possessed a valid visa for the US that would have allowed him to leave immediately.

Furthermore, he was not in hiding during this period. Again, the RAD concluded that the delay

leaving Sri Lanka undermined the Principal Applicant's subjective fear and the credibility of his allegations.

[12] Finally, the RAD noted that the Principal Applicant remained in the US for a year between June 2015 and June 2016, without making a claim for asylum. Similarly, his second stay in the US lasted almost 2 years, and again he did not assert a claim. The RAD did not find credible his explanation that he failed to claim because he thought it would be difficult to succeed with Donald Trump as president. While the RAD acknowledged that failure to claim in the US was not a determinative issue, it found this failure to be another factor undermining the Principal Applicant's subjective fear and the credibility of his allegations.

[13] The Decision also records the RAD's observation that the Associate Applicant relies on the allegations of her father, the Principal Applicant, and has not made any allegations other than those provided by her father.

[14] The RAD concluded that the Applicants had not credibly established their allegations and that it did not believe their underlying narrative. As the Applicants had not credibly established their allegations of persecution under section 96 of the IRPA, the RAD also concluded that it was unnecessary to conduct a separate section 97 analysis. The RAD therefore dismissed the appeal and confirmed the decision of the RPD that the Applicants are neither Convention refugees nor persons in need of protection.

IV. Issues and Standard of Review

[15] The Applicants have not clearly articulated a list of issues for the Court's determination. I agree with the Respondent's submission that the Applicants' arguments can be grouped into the following issues:

- A. Did the RAD err in relation to the new evidence or whether to hold an oral hearing?
- B. Did the RAD err in relation to analysis of the Associate Applicant's claim?
- C. Did the RAD err in its subjective fear analysis?

[16] These issues are all subject to the reasonableness standard of review.

V. Analysis

Did the RAD err in relation to the new evidence or whether to hold an oral hearing?

[17] I agree with the Applicants that this issue raises a reviewable error on the part of the RAD. In response to the RAD's notice that it wished to receive submissions on the issues of re-availment to Sri Lanka and failure to claim in the US, the Applicants provided not only written submissions but two pieces of new evidence - the Tamil Guardian article, which was expressly mentioned in the Decision, and an affidavit from the Principal Applicant [Affidavit], which was not. In the Affidavit, the Principal Applicant provides explanations for his returns to Sri Lanka and failure to claim in the US. The Applicants' submissions requested a hearing to address any credibility issues arising from the new evidence.

[18] Unlike the Tamil Guardian article, which the RAD considered and rejected as new evidence, the Decision does not include an express determination whether the Affidavit was admitted into evidence. After analysing and rejecting the Tamil Guardian article, the RAD states that, as it has no new evidence, it cannot convene an oral hearing. As such, it is not particularly clear that the RAD recognized that the record before it included the Affidavit.

[19] As the Applicants' counsel argues, it may be that the RAD performed its subsequent analysis of the effects of the Principal Applicant's re-availment, failure to claim in the US, and delay in leaving Sri Lanka, based on the Applicants' submissions, without realizing that those submissions were supported by the Affidavit. Regardless, it is clear that the Principal Applicant's evidence in the Affidavit figured in that analysis, even if the RAD was not aware that it was addressing submissions with new evidentiary support. As such, the RAD's reviewable error is not so much failure to consider the Affidavit but rather failure to consider whether it should have invoked an oral hearing to assess the credibility of the Principal Applicant's evidence.

[20] The RAD's rejection of the Applicants' claim turned on credibility, as it concluded that the Principal Applicant's re-availment, failure to claim in the US, and delay in his final departure from Sri Lanka undermined his allegations of subjective fear and the credibility of his allegations as to the events supporting the Applicants' claim. In arriving at that conclusion, the RAD made a number of individual credibility findings, which necessarily (and at times expressly) involved adverse credibility determinations with respect to matters to which the Principal Applicant had deposed in the Affidavit. By way of example, the Applicant explained in the Affidavit that his failure to claim asylum during his second stay in the US was because of anticipated difficulty in

succeeding with such a claim during the Trump administration. The RAD found that this was not a credible explanation.

[21] In these circumstances, the RAD was required to exercise its discretion under section 110(6) of the IRPA to decide whether to hold a hearing on the basis that the Affidavit represented documentary evidence that raised a serious issue with respect to the Principal Applicant's credibility, that was central to the Decision, and that (if accepted) would justify allowing the claim. Authorities of this Court recognize the RAD's obligation to consider, and explain its reasoning, whether to hold an oral hearing, in circumstances where the requirements of section 110(6) appear to be engaged (see, e.g., *Kayitesi v Canada (Citizenship and Immigration)*, 2022 FC 638 at para 22; *Hundal v Canada (Citizenship and Immigration)*, 2021 FC 72 at paras 27-28). The RAD conducted no such analysis in relation to the Affidavit, and its failure to do so undermines the reasonableness of the Decision.

Did the RAD err in relation to analysis of the Associate Applicant's claim?

[22] I also agree with the Applicants that the RAD erred in rejecting the Applicants' claims without considering the Associate Applicant's evidence.

[23] The Associate Applicant testified before the RPD that she was sexually touched by the agents of persecution in the course of the December 2016 incident that occurred while the Principal Applicant was in the US. The Decision references this allegation in its explanation of the background to the Applicants' claims. However, in explaining its decision to dismiss the appeal of both Applicants, the RAD states that the determinative issue is credibility, which I

understand from the reasoning in the Decision to mean the credibility of the Principal Applicant based on his re-availment, failure to claim in the US, and delay. The RAD then explains that the Associate Applicant's appeal is dismissed, because the Associate Applicant relies on the allegations of her father, the Principal Applicant, and has not made any allegations other than those provided by her father.

[24] Later in the Decision, the RAD states, based on the Principal Applicant's re-availment, failure to claim in the US, and delay in leaving Sri Lanka, that "... the Appellants have not credibly established the allegations they have made, and I do not believe their underlying narrative". To the extent this represents (as the language suggests) an adverse credibility finding that relates not only to the Principal Applicant but also to the Associate Applicant, the RAD's reasoning is not intelligible, as it is not clear to me how the Principal Applicant's re-availment, failure to claim and delay can affect the Associate Applicant's credibility. Moreover, particularly as only the Associate Applicant (and her mother), not the Principal Applicant, were involved in the alleged December 2016 events, it was unreasonable for the RAD to dismiss the Associate Applicant's appeal without engaging with her testimony as to those events.

[25] Finally, the Applicants submit, and I agree, that it was an error for the RAD to reject the Principal Applicant's claim without considering the Associate Applicant's evidence. Even though the Principal Applicant was not privy to the December 2016 events, those events are linked to others in the overall claim narrative, and I find that the RAD was obliged to consider the Associate Applicant's testimony before rejecting the Principal Applicant's claim.

Did the RAD err in its subjective fear analysis?

[26] Having addressed the first two issues above, which require that this application for judicial review be granted and this matter remitted to another member of the RAD for redetermination in relation to both Applicants, it is not necessary for the Court to consider the third issue they have raised.

[27] I note that, at the hearing of this application, each party confirmed that no question for certification for appeal is proposed. As such, none will be stated.

JUDGMENT IN IMM-4834-22

THIS COURT'S JUDGMENT is that this application for judicial review is granted, the Decision is set aside, and the matter is returned to another member of the RAD for redetermination. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4834-22

STYLE OF CAUSE: ILANGANKOON MUDIYANSELAGE NISSANKA
ABAYARATHNE ET AL v MCI

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