Federal Court  Cour fédérale

Date: 20240328

Docket: IMM-3330-23

Citation: 2024 FC 501

Ottawa, Ontario, March 28, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

STEVEN KRISHAN SEBAMALAI
SEBAMALAI NAGARAJAH
DAMAYANTHY SEBAMALAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview and underlying decisions

[1] The applicants are Mr. Steven Krishan Sebamalai, his father Mr. Sebamalai Nagarajah, and his mother Ms. Damayanthy Sebamalai; they are all citizens of Sri Lanka who arrived in Canada in June 2018 and claimed refugee protection on the grounds that their profile as successful Christian Tamils caused them to be targeted for extortion and kidnapping on multiple

occasions. In fact, Mr. Sebamalai's two sisters (Mr. Nagarajah and Ms. Sebamalai's two daughters, to whom I will refer as the "sisters/daughters") arrived in Canada earlier, and had their refugee claims accepted, purportedly on the same basis now being claimed by Mr. Sebamalai and his parents.

[2] On June 2, 2022, and following the intervention of the Minister of Citizenship and Immigration, the Refugee Protection Division [RPD] determined that the father, Mr. Nagarajah, is a person referred to in Article 1F(b) of the United Nations *Convention Relating to the Status of Refugees* [Convention], there being serious reasons for considering that he had committed a serious non-political crime outside of Canada, and thus was excluded from refugee protection under section 96 and protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] pursuant to section 98 of the IRPA. The RPD also determined that Mr. Sebamalai and his mother Ms. Sebamalai are persons referred to in Article 1E of the Convention, i.e., persons having status in a country with rights and obligations similar to those having nationality of that country, and thus were also excluded from refugee protection under section 96 and protection under section 97 of the IRPA pursuant to section 98 of the IRPA; it would seem that Mr. Sebamalai and his mother (as well as Mr. Nagarajah for that matter) possess Overseas Citizen of India [OCI] status in India, which is substantially similar to the status of Indian nationals and provides them with a lifelong visa allowing them to enter, stay in, work in and leave India. The applicants appealed to the Refugee Appeal Division [RAD].

[3] The determinative issue for the RAD was exclusion under Article 1E of the Convention. On December 21, 2022, the RAD gave notice to the Minister and the applicants that it would be

considering new issues on appeal, *to wit*, the application of Article 1E to Mr. Nagarajah, credibility, well-foundedness, internal flight alternative and state protection. Before the RAD, the applicants did not submit new evidence, nor did they contest that they had OCI status in India. They argued primarily that the sisters/daughters, who also had OCI status in India, faced similar persecution, and that their refugee claims were granted separately in May and September 2021, by an RPD panel that in fact referenced the risk of persecution that the sisters/daughters would face as Christians living in India; the applicants argued that there was no real change of circumstances in India since the claims of the sisters/daughters were determined, and that consistency and logic favoured a similar decision in their case.

[4] On January 23, 2023, the RAD dismissed the appeal, having found that although the RPD had erred in determining that the Minister had met the onus of establishing that there were serious reasons for considering that Mr. Nagarajah had committed crimes outside of Canada, all three applicants were nonetheless excluded from refugee protection by the operation of Article 1E of the Convention and section 98 of the IRPA. In rendering its decision, the RAD acknowledged that in some areas of India, especially in states where Christians represent the minority and where the Bharatiya Janata Party [BJP] is prominent, the evidence suggests that the Christian minority faces a heightened risk of violence, with the number of attacks growing. However, the RAD concluded that the evidence would also suggest that in states where Christians represent the majority, between 70% and 90% of the population, and where the BJP is not in power—examples given were in Nagaland, Mizoram and Meghalaya—the applicants would not face a risk of violence and persecution. As regards the prior decisions of the RPD regarding the two claims of the sisters/daughters, the RAD determined that the version of the

National Documentation Package for India [NDP] relied upon by the RPD in those cases was an earlier version than the one relied upon by the RAD, and in any event, the RAD suggested that the previous RPD panel did not engage with the reports in the NDP regarding the states in India with large majorities of Christians; the RAD therefore took it upon itself to conduct its own analysis of the reports in the NDP. In the end, the RAD determined that, on the balance of probabilities, the applicants would not face a risk as Christians in India if they were to reside in a state where Christians are dominant. That decision of the RAD is the subject matter of the present application for judicial review.

II. Issues

[5] The applicants raise two issues, the first being whether the RAD's failure to follow the previous RPD decisions in respect of the sisters/daughters was reasonable, and the second being the RAD's analysis of the exclusion under Article 1E of the Convention and whether the RAD reasonably concluded that the Christian-populated areas of India are safe for the applicants.

III. Standard of review

[6] The appropriate standard of review for an RAD decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16–17). The Court's role is to examine the reasoning of the administrative decision maker and the result obtained to determine whether the 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).

IV. Analysis

A. *Was the RAD reasonable in departing from the RPD decision in respect of the sisters/daughters?*

[7] The applicants acknowledge that each refugee claim is to be assessed on a case-by-case basis, and that neither the RPD nor the RAD for that matter is bound by the determination of another panel in a previous case, even where the matters involve members of the same family (*Ruszo v Canada (Citizenship and Immigration)*, 2019 FC 296 at para 11); however, the applicants argue that there must be a reasonable explanation for differing conclusions reached in cases which are essentially similar and which involve the same family members. I agree with the principle postulated by the applicants. As stated by Justice Norris in *Ferko v Canada (Citizenship and Immigration)*, 2022 FC 1357 [*Ferko*] at paragraph 44, "where … there are substantial similarities between the circumstances of the claimant and those of others whose claims have been accepted, if a different outcome is to be reasonable, the decision maker must provide a reasoned explanation distinguishing the earlier positive decisions".

[8] The RAD's discussion and determination on this issue are limited to two paragraphs:

> [32] As the Appellants submit, the RPD made no reference in its reasons to the positive RPD decisions regarding the daughters in this family. As a result, it is not clear whether the RPD took these decisions into consideration. I can correct this potential error, however, and have done so by considering these decisions. I note that these claims were decided by the same RPD panel member on different dates. In both decisions, the RPD appears to have limited its consideration of the objective evidence to an earlier version of item 12.1 of the NDP. The RPD does not reference or engage with other reports in the NDP, although it recognizes that there are states in India with large majorities of Christians.
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> [33] The Appellants acknowledge that each refugee claim must be analyzed on a case-by-case basis. I have independently assessed

> their claims, considering their circumstances as OCI cardholders and the relevant objective evidence concerning the risk to Christians in India. On this basis, I find that they are excluded from claiming refugee protection under Article IE. Having made this finding, I need not consider the other new issues for which notice was given.
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> [Emphasis added.]

[9] The applicants argue that the evidence and claims of religious-based persecution of the sisters/daughters were very similar to their own claim, that they were also based upon the experience of their father, Mr. Nagarajah, that the entire family had the same OCI status in India, and that the RAD simply pointing to the fact that the NDP had been updated is no justification, in and of itself, not to follow the previous decisions as regards the sisters/daughters, given that those updates did not significantly alter the risk profile of the country for Christians.

[10] I must agree with the applicants. The RAD did not provide a reasonable explanation for distinguishing the two previous RPD decisions regarding the sisters/daughters' risk of religious-based persecution in India from that of the applicants; the sole common element determined by the RAD was the family's circumstances as OCI cardholders, and no comparisons were made or distinctions noted between the claim of the applicants and those of the sisters/daughters as regards the risk of violence in India that would suggest that the RAD even undertook such an exercise. There may well have been distinctions to make, possibly evidence that was submitted in the claims of the sisters/daughters that was absent in the claims of the applicants, however, no engagement with the elements of the claims was made that highlighted such differences. It should not be forgotten that it is not enough for the administrative decision to be justifiable; it must also be justified (*Vavilov* at para 86; *Paul v Canada (Citizenship and*

Immigration), 2022 FC 54 at para 16). The Minister argues that previous decisions regarding family members are not binding on a different decision maker; I agree. However, looking at the situation in *Arumaithurai v Canada (Citizenship and Immigration)*, 2022 FC 604 [*Arumaithurai*], a case cited by the Minister, I note that there were material differences between the earlier findings in respect of the two brothers and the case of the applicant in that matter. Justice Mosley stated specifically that the "Member implicitly took into account the distinguishing characteristics between the Applicant's case and those of his brothers" (*Arumaithurai* at para 16). Here, there is no suggestion that the RAD did just that.

[11] The RAD underscored that it was relying on a more up-to-date NDP. However, without saying more, that statement is unintelligible; without knowing to what extent the NDP was updated, one cannot understand whether any of such updates involved elements that could inform the risk profile of India in relation to the applicants as Christians. As was the case in *Ferko*, the RAD simply failed to consider that the applicants and the sisters/daughters relied to a significant degree upon the very same experiences to support their claims.

[12] Apart from the issue of whether reliance on an updated NDP justified the different conclusions that were drawn for the sisters/daughters and the applicants, the Minister argues that the RAD indeed considered the previous RPD decisions regarding the sisters/daughters, and found that the panel in those cases "does not reference or engage with other reports in the NDP, although it recognizes that there are states in India with large majorities of Christians." The Minister argues that what the RAD is saying is that, unlike the RPD in the case of the sisters/daughters, it engaged with the reports suggesting that the appellants would not, on a

balance of probabilities, face a risk of persecution as Christians in India if they moved to the predominantly Christian states. I do not quite follow the reasoning of the Minister; the RPD clearly recognized the existence of states in India with a large majority of Christians, and in any event, the RPD is deemed to have reviewed all the evidence. Consequently, for the RAD to suggest that the RPD did not consider reports that speak to the Christian experience in those states, and presumably the reduced risk of religious-based persecution against Christians, is perplexing.

[13] Given my finding on the first issue, I need not address the second. All in all, I have been convinced that the reasoning of the RAD in justifying its departure from the outcomes of the claims of the sisters/daughters is unsupportable and thus unreasonable. Therefore, the present application for judicial review must be granted.

JUDGMENT in IMM-3330-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, the decision of the RAD is set aside, and the matter is returned to be assessed by another panel.

2. There is no question to certify.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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