

Federal Court



Cour fédérale

Date: 20250129

Docket: IMM-677-24

Citation: 2025 FC 190

Toronto, Ontario, January 29, 2025

PRESENT: Madam Justice Go

BETWEEN:

**Ahamathu Zamhareer MOHAMATHU
ZUBAIR**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ahamathu Zamhareer Mohamathu Zubair [Applicant] is a citizen of Sri Lanka and a Tamil Muslim.

[2] The Applicant alleges he is at risk in Sri Lanka from the police in Kattankudy and the Terrorism Investigation Division [TID] due to his suspected connection to the 2019 Easter bombings. The Applicant left Sri Lanka for Canada on March 26, 2021, and filed a refugee claim.

[3] In support of his claim, the Applicant submitted a message form dated January 10, 2021, allegedly served on his father by the Kattankudy police stating that the police required the Applicant to appear before the TID on January 15, 2021 [Message Form]. The Message Form also indicated that the Applicant failed to attend on a previous date.

[4] During the Applicant's Refugee Protection Division [RPD] proceeding, the Minister of Public Safety and Emergency Preparedness [Minister] provided evidence in the form of a statutory declaration from an officer of the Canada Border Services Agency [CBSA] of the High Commission of Canada in Colombo [CBSA Declaration]. The CBSA Declaration indicates that the CBSA made a request of the Kattankudy police inquiring about any records against the Applicant, and that the Kattankudy police had responded by saying they had failed to find any records against the Applicant and could not find any record of the message having been issued.

[5] The RPD determined the Applicant is not a Convention refugee and is not a person in need of protection, citing credibility as the determinative issue. The Refugee Appeal Division [RAD] dismissed the appeal, also finding credibility to be the determinative issue [Decision]. In its reasons, the RAD assessed several pieces of new evidence and found them inadmissible. The RAD also found the CBSA Declaration credible and trustworthy and concluded the Message

Form (which the RAD referred to as a summons) was fraudulent. Finally, the RAD determined the Applicant is not at risk by virtue of being Muslim, having attended a protest in Canada, and being a failed asylum seeker for whom the CBSA inquired about with the Sri Lankan police.

[6] The Applicant seeks a judicial review of the Decision. For the reasons set out below, I grant the application.

II. Issue and Standard of Review

[7] The Applicant raises the following issues:

- a. The RAD erred in its credibility assessment in the following ways:
 - i. The Applicant was denied procedural fairness and was deprived a meaningful opportunity to respond to the information the CBSA received from the Kattankudy police;
 - ii. The RAD erred in its assessment of the information provided to the CBSA officer;
 - iii. The RAD made speculative findings; and
 - iv. The RAD erred in rejecting all of the Applicant's corroborative evidence solely on the basis of the CBSA officer's statement without assessing the evidence independently;
- b. The RAD erred in its assessment of the Applicant's residual profile and *sur place* claim; and
- c. The RAD erred in its assessment of the admissibility of the new evidence

[8] The Applicant does not address the standard of review in his written submission. The Respondent submits the standard of review is reasonableness.

[9] I find that the reasonableness standard applies when reviewing the merits of the Decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*].

A reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15. Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[10] Questions of procedural fairness are reviewed on a standard akin to correctness where the Court is to examine whether the process followed was fair, having regard to all the circumstances: *Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at para 54.

III. Analysis

A. *The Applicant was denied procedural fairness in the CBSA's failure to provide a copy of their request to the Kattankudy police and the RAD's failure to address the Applicant's procedural fairness concern*

[11] As noted above, the RAD relied on the CBSA Declaration for rejecting the Applicant's claim. The CBSA Declaration indicated that a CBSA officer sent a letter to the Kattankudy police on August 19, 2022 via electronic message requesting them to indicate if they had any records against the Applicant, "and to verify the accuracy and validity of the document listed at attachment A." The CBSA Declaration went on to state that the CBSA officer received a call on September 22, 2022 from a police sergeant at Kattankudy Police Station informing that they

failed to find any records against the Applicant, and that the police sergeant “could not find any record of the message (referred to as Exhibit A) having been issued at the Kattankudy police station.”

[12] The CBSA Declaration did not attach a copy of the letter the CBSA officer sent to the Kattankudy police, nor did it attach the “Exhibit A” that was referred to repeatedly.

[13] The Applicant argues that he was denied procedural fairness in the CBSA’s failure to provide him with effective notice, sufficient particulars, and a meaningful opportunity to respond to the information received from the Kattankudy police. The Applicant submits that the RAD further erred in relying on the CBSA’s Declaration to impugn the genuineness of the Message Form and in turn the Applicant’s credibility.

[14] As a starting point, I agree with the Respondent that the Applicant should not make new arguments that were not made before the RAD. The Respondent submits, and I agree, that the RAD cannot be impugned by the Court on the basis of an issue that was not challenged on appeal: *Wang v Canada (Citizenship and Immigration)*, 2023 FC 866 at para 22 and *Subramaniam v Canada (Citizenship and Immigration)*, 2022 FC 163 at para 44.

[15] I also agree with the Respondent that the Applicant did not object to the admittance of the Statutory Declaration at the RPD hearing.

[16] However, as counsel for the Applicant pointed out in oral submission, the Applicant's former counsel did, in his written submission on appeal to the RAD, take issue with the Minister's failure to provide the letter that the CBSA sent to the Sri Lankan authorities.

Specifically, the Applicant's former counsel submitted:

The RPD erred in failing to draw a negative inference because the Minister did not provide the letter sent to Lankan authorities. Since there was only a written response, it is submitted that an oral response is not reliable: was the information correctly understood by the Sri Lankan police (date of complaints?, spelling of name?). The B135 case states that the Crown has to make full disclosure.

[17] While the Applicant's former counsel's submission on the issue was brief and was somewhat confusing, they did assert that the Minister should have provided full disclosure to the Applicant. Counsel also cited *B135 v Canada (Citizenship and Immigration)*, 2013 FC 871 [B135] where Justice Harrington found that the level of disclosure owed to an applicant before the RPD must take into consideration the consequences of an adverse finding on the applicant. At para 26, Justice Harrington concluded: "At a bare minimum, if the Minister chooses to disclose evidence, that disclosure must be complete."

[18] The Applicant submits that the duty of procedural fairness required the RAD to give the Applicant a meaningful opportunity to respond to adverse evidence, citing *Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883 [Maghraoui]. The Applicant contends that without sufficient particulars about whether a timeframe was given, what was requested, and what information was shared, what database or office space was searched by who, the Applicant's ability to respond to this evidence and for the RAD to conduct a fulsome assessment of the police response and its reliability was compromised.

[19] The Applicant further argues that it is up to the Minister to present evidence that is complete, understandable, and reliable: *Karakachian v Canada (Citizenship and Immigration)* 2009 FC 948; *AB v Canada (Citizenship and Immigration)*, 2013 FC 134.

[20] Certain aspects of the Applicant's procedural fairness arguments are new, as they were not raised with the RAD, and as such I will not address them.

[21] However, the Applicant did complain about the Minister's lack of full disclosure before the RAD. More importantly, the RAD never addressed the Applicant's complaint about the lack of full disclosure in the Decision.

[22] As the Court noted in *Maghraoui* at para 22, "the principles of procedural fairness require that an applicant be provided with the information on which a decision is based so that the applicant can present his or her version of the facts and correct any errors or misunderstandings." While the Court noted that this duty "can be met without always having to furnish all the documents and reports the decision-maker relied on," the concern is "to ensure that the applicant has the opportunity to fully participate in the decision-making process by being informed of information that is not favourable to the applicant and having the opportunity to present his or her point of view:" *Maghraoui* at para 22.

[23] In this case, the Minister chose to disclose some but not all evidence regarding the steps taken by the CBSA to obtain information from the Kattankudy police. The CBSA Declaration confirmed a letter was sent from the CBSA, with an attachment, to the Kattankudy police by way

of electronic message. Yet the Minister failed to disclosure either of these documents. At the minimum, fairness would require the Minister to disclose the documents that the CBSA's request was based on and referred to in the CBSA Declaration.

[24] As the Court noted in *Maghraoui* at para 22, the greater the impact of the impugned decision, the stricter the procedural fairness requirement will be. In this case, the Decision rejecting the Applicant's refugee claim has a significant impact on the Applicant. The Minister's failure to provide full disclosure deprived the Applicant a meaningful opportunity to respond to adverse evidence against him. The RAD further exacerbated the procedural fairness breach by failing to address the Applicant's complaint about the lack of full disclosure.

[25] While the RAD's procedural fairness breach is serious enough to warrant granting the application, I will address some of the Applicant's arguments on reasonableness with a view to providing the newly constituted panel some guidance in their re-determination.

B. *The RAD engaged in speculative findings*

[26] The Applicant submits that the RAD made several speculative findings. I do not find all of the Applicant's submissions persuasive. However, I agree that the RAD engaged in speculative findings about the motivations of the Sri Lankan authorities, and about what a "reasonable agent of persecution" would do to pursue their investigation.

[27] At the RPD hearing, the Applicant was asked why the Sri Lankan police would have given the statement it did to the CBSA. The Applicant answered he did not know why and speculated that they might have lied to avoid “international eyes.”

[28] After dismissing the Applicant’s explanation as speculative, the RAD went on to engage in its own speculation by agreeing with the RPD that, were the Sri Lankan authorities actually interested in the Applicant, they would have stated as such to the CBSA, rather than telling them that they had no record of the Applicant nor the summons. The RAD also dismissed the Applicant’s argument that the RPD erred by making a finding based on what a “reasonable agent of persecution” would do. The RAD found the RPD’s finding was based on what the authorities had already stated.

[29] Notably, at para 30 of the Decision, the RAD found: “While it is possible that the Sri Lanka police may have lied to the CBSA, it is more likely, given the circumstances of the [Applicant] and in the context of the Easter attacks, that they did not provide false information in response to the CBSA inquiry.”

[30] As the case law confirms, while a panel is entitled to draw reasonable inferences from the evidence before it, it is not entitled to engage in speculation or conjecture that is not grounded in evidence.

[31] In *Jaballah (Re)*, 2016 FC 586 [*Jaballah*] at para 14, the Court elaborated on the difference between speculation and inference: “Drawing an inference amounts to a process of

reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one fact to the conclusion sought to be established.”

[32] In short, speculation requires a leap of faith: *Jaballah* at para 14. This was precisely what the RAD did in the case at hand. There was a gap between the RAD’s own acknowledgement about the possibility that the Sri Lankan police may have lied, and its ultimate conclusion that the Sri Lankan police would have advised the CBSA if they had a record of the Applicant. The RAD did not point to any evidence, nor provide any explanation for how it went from one finding to another. By contrast, the RPD considered the objective evidence about police misconduct in Sri Lanka and provided its reasons for why it found it is more likely for the police to indicate to the CBSA about the Applicant’s involvement in the Easter bombings when asked. The RAD engaged in no such analysis at all.

[33] I note that the Respondent does not address the Applicant’s argument about the RAD’s speculative findings, other than submitting that the RAD reasonably found the CBSA Declaration to be reliable. Given the RAD’s finding about the reliability of the CBSA Declaration stemmed from its speculation about the motivations of the Sri Lankan police, it follows that the RAD’s finding about the reliability of the CBSA Declaration cannot stand.

C. *The RAD's treatment of corroborative evidence was unreasonable*

[34] The Applicant submits that the RAD erred by rejecting his corroborative evidence solely on the basis of the CBSA Declaration without assessing the evidence independently.

[35] The Applicant provided several pieces of evidence to corroborate his claim but the RAD assigned no weight to any of these documents. Citing *Vavilov*, the Applicant submits that the RAD engaged in circular reasoning in rejecting the Applicant's evidence, and arbitrarily dismissed all of the corroborating evidence on the basis that there was one piece of conflicting evidence advanced by the Minister. In doing so, the Applicant submits the RAD erred.

[36] I agree.

[37] In his claim, the Applicant alleges that his home was raided on April 24, 2019 and he was arrested and detained for three days. The Applicant alleges he was interrogated and beaten by the police, but released on the condition that he report to the Kattankudy police twice a month, which he did for eight months.

[38] The Applicant further alleges that on October 16, 2020, the police arrested his uncle after seizing a vehicle in the uncle's car park business that they suspected was used by the bombers. His uncle remains detained.

[39] The Applicant also claims that on December 24, 2023, he went to the Kattankudy police station, where he was questioned and beaten by the TID before being released the next day and told to appear at the TID office in Colombo on January 7, 2021 for further questioning. The Applicant, fearing his life was in danger, instead decided to go into hiding. His parents made arrangements for him to leave Sri Lanka and go to Canada. After failing to appear at the TID office on January 7, 2021, the Applicant was served with the Message Form on January 10, 2021 to attend for questioning five days later. The Applicant states that on January 20, 2021, the police visited the Applicant's parents' home. The Applicant's father lied to the police, telling them the Applicant had travelled to Canada to study. The Applicant's father was taken to Kattankudy station to be questioned. On March 20, 2021, the Applicant alleges TID officers again visited his parents' home looking for him.

[40] The Applicant provided several pieces of evidence to corroborate his allegations, including:

- a. A letter from his father outlining the allegations and indicating that he had received "a letter" on January 10, 2021 for his son to appear, that his father lied to the police on January 20, 2021, and that the TID officers came to the father's house subsequently;
- b. A letter from his friend confirming that he provided shelter to the Applicant, when the Applicant was in hiding in 2021;
- c. A letter from his mosque president stating that he was aware of the threats the Applicant had faced at the hands of the police; and
- d. Medical documents showing injuries sustained to his hand.

[41] In his appeal, the Applicant argued that the RPD erred in failing to give full weight to his corroborative evidence. The RAD disagreed; its brief reasons are copied below:

[36] I do not agree with the [Applicant]. The core allegations of the [Applicant] have been rebutted by the CBSA declaration. The letter from the Mosque refers to learning of the [Applicant's] police detention through his family. There is no firsthand knowledge and those allegations have not been established. Similarly, the friend's letter refers to the [Applicant] being detained in connection to the Easter bombings, an allegation that had not been established. And the letter from the [Applicant's] father reiterates that he received the summons on January 10, 2021, a summons that I have determined to be fraudulent. The RPD was correct to assign no weight to these documents.

[37] The RPD also assigned no weight to medical documents, a newspaper article about a van seizure, and a newspaper article about the death of a suspect in the bombings in police custody that the [Applicant] claims to have known. The [Applicant] has not contested these findings. I have reviewed the RPD reasons, and I agree.

[42] In *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1583 at paras 25-26, the Court addressed the RAD's error of assessing credibility prior to assessing the corroborative evidence, and described it as a type of "circular reasoning" that shows a lack of "internally coherent reasoning" and undermines the reasonableness of the decision: *Vavilov* at paras 102-104. The Court further stated such an error is "contrary to the basic concept of corroborative evidence, which is to support or confirm the applicant's evidence."

[43] I find the RAD committed a similar error in the case at hand. Instead of conducting an independent assessment of the corroborating evidence presented to assess the credibility of the Applicant's allegations, the RAD erroneously relied on its finding based on the CBSA Declaration and then worked backward from its conclusion that the Applicant was not being sought by the police to reject all the other evidence.

[44] For instance, in rejecting the friend's letter, the RAD did not engage with the letter confirming the friend provided the Applicant shelter, a fact that may support the Applicant's allegation that he was being sought by the TID. Similarly, the letter from the Applicant's father described his own attendance at the police station and subsequent visits to their home from the police. Other than restating its finding that the Message Form was fraudulent, the RAD did not provide any other explanation for assigning the father's letter no weight.

[45] While it was open to the RAD to find the corroborative evidence insufficient to overcome its credibility concerns, the RAD's failure to analyze the corroborating evidence independently rendered the Decision unreasonable.

[46] In light of my findings above, I need not address the remainder of the Applicant's arguments.

IV. Conclusion

[47] The application for judicial review is allowed.

[48] There is no question to certify.

JUDGMENT in IMM-677-24

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. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-677-24

STYLE OF CAUSE: AHAMATHU ZAMHAREER MOHAMATHU ZUBAIR
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: JANUARY 14, 2025

JUDGMENT AND REASONS: GO J.

DATED: JANUARY 29, 2025

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