

Federal Court



Cour fédérale

Date: 20181009

Docket: IMM-642-18

Citation: 2018 FC 1006

Ottawa, Ontario, October 9, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

VINCENT ASEERVATHAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board rendered on January 17, 2018, denying the Applicant's refugee protection claim [Decision] after determining that he is not a Convention refugee or person in need of protection, pursuant to section 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant alleged persecution by members of the Liberation Tigers of Tamil Eelam [LTTE] and members of the Tamil Makkal Viduthalai Pulikal [TMVP], because he was the only Tamil operating a computer and repair shop in Kalmunai, Sri Lanka, and had refused to assist the two groups by repairing or giving them computers. The Applicant also alleged that his background as a young Tamil man from the eastern province of Sri Lanka has increased his risk profile, and that the Sri Lankan Army forced him to admit that he was a member of the LTTE and tortured him when he refused to do so.

[3] The Applicant seeks judicial review of the RPD Decision on the grounds that it is unreasonable. He submits that there was a breach of procedural fairness as a result of an interpretation error that was only discovered after the hearing. He further submits that the RPD failed to analyze whether the Applicant will be subjected to cruel and unusual treatment if he returns to Sri Lanka. He also argues that the RPD did not provide transparent reasons and made unreasonable credibility and implausibility findings with regard to the documentation of his computer store business and his abduction by members of the LTTE.

[4] For the reasons that follow, I find that there was no breach of procedural fairness and that the RPD's assessment of the evidence and conclusion that the Applicant would not face persecution in Sri Lanka were reasonable. As a result, the application is dismissed.

II. Facts

[5] The Applicant is a citizen of Sri Lanka who is Tamil by ethnicity. He came to Canada on September 9, 2011 and filed a claim for refugee protection, alleging that he was wanted by the LTTE, the TMVP and the Sri Lankan army.

[6] According to the Applicant, he opened a computer and repair shop in Kalmunai in 2006. He claims to be the only person of Tamil origin operating such a business. In May of that year, two men who identified themselves as members of the LTTE approached him demanding that he repair their computers. To avoid jeopardizing his business and facing trouble with the Sri Lankan army, the Applicant refused to help them. In response, the men threatened him with a gun, claiming that they would return. Later that night, they came to the Applicant's house and abducted him to an unknown location where he was asked again to repair the computers. He refused and was detained and beaten for three days. He was eventually returned to his home because of his aggravated medical condition. He sought refuge at his aunt's house to hide from the LTTE members who continued to look for him.

[7] The Applicant claims that in 2007, members of the TMVP, a paramilitary group working with the Sri Lankan army, came to his store and demanded that he give them eight to ten computers. The Applicant refused to comply because the sale of computers was his only source of income. He was threatened and accused of being a member of the LTTE. The members of the TMVP would return to his shop often, threatening him at gunpoint in front of his customers. The Applicant repeatedly refused to assist them.

[8] In August 2008, the Sri Lankan army rounded up the Tamil men in Kalmunai, including the Applicant, and took them to an army camp. The Applicant alleges that the Sri Lankan army tried to force him to sign a document admitting that he was a member of the LTTE and tortured him for two or three days because of his refusal. With the intervention of his family and friends, who insisted that he was not a member of the LTTE and bribed officers of the army, and the help of his principal and the priest and nuns from his church who advocated on his behalf, the Applicant was able to obtain his release from the army camp. Fearing further abuse, he sold his computer business and left Sri Lanka.

[9] The Applicant made his way to Hawaii in 2008 where he made a refugee claim. While waiting an appeal of his US asylum claim, he travelled to Canada, where some of his relatives reside, and made his refugee protection claim. The matter was heard by the RPD on January 8, 2018 and the Applicant's claim was denied on January 17, 2018.

III. RPD Decision

[10] The RPD considered the ownership of the computer shop to be central to the Applicant's claim because he alleged that he was specifically targeted in 2006 by the LTTE and in 2007 by the TMVP due to his business operations. In support of his claim, the Applicant tendered a permit for computer and equipment sales issued by the municipal council dated January 26, 2006, valid up to December 31, 2006. The RPD found that the Applicant had provided insufficient documentation to establish ownership of the business at the material time, which undermined his credibility. The RPD noted that when questioned about why he did not have additional permits for 2007 and 2008, the Applicant was unable to provide a reasonable

explanation other than to state that permits were not required to operate a computer business in his municipality. The RPD concluded that the Applicant's evidence was contradictory. The RPD noted that the Applicant was unable to provide further evidence to prove ownership, such as invoices, sales records or other documents. On a balance of probabilities, the RPD found that the Applicant's allegation that he owned and operated a computer shop was not credible.

[11] The RPD further concluded that the Applicant's allegations of being abducted and released after three days of captivity defied logic and strained credulity. The RPD found that it made little sense that the LTTE members would show discretion by waiting until night to abduct the Applicant from his home in front of his mother and return the Applicant to his home in a small municipality where almost everyone knew him, yet were reluctant to take him from his shop during the day because there were too many people around.

[12] The RPD noted that the Applicant gave inconsistent testimony when questioned about the lack of necessary tools to fix computers in the room in which he was placed during his abduction. The Applicant claimed that the LTTE members did not provide him with any tools because they knew that he would not cooperate with them. The RPD did not give any credibility to this explanation, given the concerted efforts made by the LTTE in order to have their computers repaired.

[13] Further, the RPD found discrepancies between the Applicant's testimony and his personal information form [PIF] in relation to the incidents he encountered with the TMVP. In the Applicant's PIF, he stated that the TMVP would threaten him at gunpoint in his store "every so

often”. However, during the hearing, the Applicant testified that he only encountered members of the TMVP twice, in July 2007 and in April 2008.

[14] In regard to the Applicant’s allegations of torture and detainment by the Sri Lankan army, the RPD gave little weight to a medical report as it was based on a self-report of abuse and the Applicant’s mother’s letter as it was untested and contradictory to the Applicant’s testimony.

[15] Due to the lack of corroborative evidence, the RPD found that the Applicant’s narrative of his detainment by the Sri Lankan army lacked credibility. The RPD rejected the Applicant’s explanations that he could not produce a letter from his school principal who advocated on his behalf because he is deceased, as the documentary evidence shows otherwise. In addition, the RPD did not believe the Applicant when he justified his inability to produce letters of support from the priest and nuns because they transferred to other churches, as he could have simply asked his church to forward his request to them.

[16] In analyzing the Applicant’s residual profile as a Tamil returning to Sri Lanka, the RPD noted that the documentary evidence indicates that the circumstances in Sri Lanka have changed and that simply being a young Sri Lankan Tamil is an insufficient objective basis for a refugee claim. The RPD relied on the 2012 Guidelines of the United Nations High Commissioner for Refugees [UNHCR] to conclude that although the Sri Lankan authorities subject refugee returnees to screening and questioning, a link with the LTTE was required for the Sri Lankan authorities to go beyond and mistreat them. Given that the Applicant clearly stated during the hearing that during his captivity at the army camp, the Sri Lankan army did not believe that he

was connected to the LTTE, but accused him of being connected solely to extort money from his family, the RPD found that the Applicant would not be subjected to risk to life, cruel and unusual punishment or danger of torture should he return to Sri Lanka.

IV. Issues

[17] The Applicant has raised a number of issues on judicial review, which will be analyzed in turn:

- A. Was there a real and significant error in the translation of the Applicant's testimony?
- B. Did the RPD err in its assessment of the Applicant's credibility?
- C. Did the RPD err by concluding that the Applicant would not face cruel and unusual treatment should he return to Sri Lanka?

V. Standard of Review

[18] The issues raised by the Applicant question the assessment by the RPD of the evidence in the case and the Applicant's credibility. They attract review on the standard of reasonableness. Considerable deference is owed to factual determinations made by the RPD and to its assessments of the credibility of witnesses. The Court will only interfere if the decision under review lacks justification, transparency or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if "the reasons

allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[19] The standard of review applicable to procedural fairness issues arising from difficulties experienced during the RPD hearing with an interpreter are to be reviewed on the standard of correctness (*Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161; *Goltsberg v Canada (Citizenship and Immigration)*, 2010 FC 886; *Sherpa v Canada (Citizenship and Immigration)*, 2009 FC 267).

VI. Analysis

A. *Was there a material error in the translation of the Applicant’s testimony?*

[20] The Applicant submits that there was a significant and fatal error of the translation of his testimony which prejudiced him when questioned about the Sri Lankan army’s belief regarding his association with the LTTE. The transcript of the hearing reflects that the RPD asked: “Do they believe you are a member of the LTTE?” to which the Applicant answered “They do not believe it”.

[21] Following the hearing, the Applicant retained an independent interpreter who filed an affidavit in support of the present application. The interpreter declares that the RPD’s question was mistranslated and was in fact worded in the negative as follows: “Do they believe you are

not a member of the LTTE?” The Respondent did not cross-examine the interpreter and does not dispute that the RPD’s question may have been incorrectly interpreted at the hearing, but submits that the alleged error is immaterial given the Applicant’s response to the question.

[22] In *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, the Federal Court of Appeal held that the interpretation provided to applicants must be continuous, precise, competent, impartial and contemporaneous and that it is not necessary for applicants to show they have suffered actual prejudice as a result of the breach of the standard of interpretation for the Court to interfere with the RPD’s decision.

[23] While the Applicant is not required to prove actual prejudice due to an error of translation, the error needs to be material to the RPD’s findings (*Mah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 863 at para 26; *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1028 at para 68). From my reading of the transcript, it is clear that the Applicant understood the gist of the RPD’s inquiry based on the previous questions posed to him. In response to an earlier question by the RPD, the Applicant stated that the Sri Lankan army would capture individuals, accuse them of being associated with the LTTE, and extort money from their families. Whether the RPD’s subsequent question about the Sri Lankan army’s belief of the Applicant’s association with the LTTE was formulated in the positive or the negative, it remains that the Applicant’s answer is unequivocal that the army did not believe that he was associated with the LTTE. In the circumstances, the Applicant has failed to establish that the RPD’s Decision is tainted by any misunderstanding of the Applicant’s evidence.

B. *Did the RPD err in its assessment of the Applicant's credibility?*

[24] The Applicant advances numerous arguments that the RPD erred in its credibility findings, highlighting that a different and more favourable inference or finding was available to it. It is well recognized, however, that the RPD has a margin of appreciation within the range of acceptable and rational solutions. It is the entirety of the evidence available on the record that must be assessed, applying common sense and human experience. The RPD considered the Applicant's oral testimony and the documentary evidence and made numerous detailed negative credibility findings.

[25] It is not my intention to go through each of these findings, but to address a few of the examples raised by the Applicant to explain why I conclude that the RPD's overall assessment of the evidence and the Applicant's credibility is not unreasonable.

(1) *Ownership of a Computer Business*

[26] The Applicant argues that the RPD erred by making a negative inference in respect of the absence of documents to support his allegations of ownership of the computer store. He claims that the permit issued in January 2006 was the best proof to establish ownership. Moreover, given the time frame of 9 years since the sale of his shop, he could not obtain the relevant documents. He adds that this information can be corroborated by his written declaration to the American authorities when he was seeking asylum in the United States. The Applicant reiterates that he ceased to renew his permit after 2006 because he learned that it was not required to

conduct his computer business. He claims that the RPD erred by speculating that the existence of these licences would necessarily demonstrate that the municipal laws would be enforced.

[27] The burden of proof was on the Applicant to support his application for protection. Given that the Applicant's ownership of a computer business was the sole basis for being targeted and subject to torture and abduction, it was important for the Applicant to provide evidence to corroborate his narrative. The RPD concluded that the Applicant failed to establish proof of ownership of the computer shop, given the insufficient evidence at hand. In addition, the fact that the Applicant indicated that he was a computer technician employed by "Real Lines" Computer Sales and Repair in his asylum claim in the United States added nothing to the Applicant's claim of ownership. No reviewable error has been established in the RPD's Decision with regard to the Applicant's ownership of the computer store.

(2) Allegations of Abduction and Torture

[28] The Applicant alleges that he was abducted in May 2006 by members of the LTTE and tortured because he refused to repair their computers. The RPD found that the Applicant's allegations defied logic and strained credulity. The Applicant argues that the RPD made unreasonable findings of implausibility and failed to apply the proper standard. In *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [Valtchev], Mr. Justice Francis Muldoon cautioned at para 7 that plausibility findings should only be made in the clearest of cases. The Applicant asserts that the RPD was unreasonable in assessing the actions of terrorist groups or the Sri Lankan army or the TMVP, basing its finding on a solely Canadian perspective of what is plausible.

[29] I start from the premise that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. In the present case, the Applicant has failed to establish that the RPD improperly injected its own perception of what constitutes rational behaviour without evidence to support its conclusions. The RPD's findings of credibility are entitled to considerable deference, given its ability to directly observe the witness' demeanour, its expertise and its central role as a fact-finder. It was open to the RPD to disbelieve the Applicant's story based on inconsistencies in his evidence, the absence of corroborating evidence, and lack of common sense. I find that there was considerable evidence to support the RPD's findings. Contrary to what was argued, the reasons provide ample justification, transparency and intelligibility.

(3) Lack of Corroborative Evidence

[30] The RPD drew an adverse inference from the Applicant's failure to provide corroborative letters and documents from individuals who helped him obtain his release from the Sri Lankan army camp, which was reasonably available to him. The Applicant argues that the RPD failed to consider his explanation that the individuals who helped him in Sri Lanka feared to write letters of support due to the consequences they would face from the government. I disagree.

[31] The Applicant evinced a shifting narrative to explain his failure to procure corroborative evidence. No reasonable explanation was provided as to why the priest and nuns, who advocated on the Applicant's behalf before the Sri Lankan army, would shy away from assisting the Applicant and provide corroborating evidence. It was open for the RPD to draw a negative inference due to the Applicant's lack of effort to obtain statements from these alleged witnesses.

C. *Did the RPD err by concluding that the Applicant would not face cruel and unusual treatment should he return to Sri Lanka?*

[32] The Applicant claims that the RPD erred by not conducting an explicit analysis of his claim pursuant to section 97 of the IRPA and did not provide transparent reasons in its negative decision on this matter. The Applicant relies on *Kailajanathan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 970 to assert that individuals who were being returned to Sri Lanka without LTTE association were also at risk. Moreover, the Applicant submits that the RPD did not consider the evidence that young Tamils with scars are more likely considered to be involved with the LTTE by the Sri Lankan authorities. There is no merit to this argument.

[33] In *Canada (Minister of Citizenship and Immigration) v Sellan*, 2008 FCA 381, the Federal Court of Appeal concluded that a general negative credibility finding is sufficient to dispose of a claim under both sections 96 and 97 of the IRPA, but that an applicant can rebut it by producing independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. In *Thevarajah v Canada (Citizenship and Immigration)*, 2018 FC 458 and in *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349, Mr. Justice Alan Diner stated that the RPD has a duty to consider whether there is a serious possibility of persecution of the applicant, specifically as a sole, young, Tamil failed-refugee returnee from Canada, as well as to analyze how an applicant would be perceived by the Sri Lankan authorities, despite not being truly associated with the LTTE.

[34] In the present case, the RPD found that the Applicant had not established a real or perceived link to the LTTE. In fact, the Applicant testified at the hearing that the authorities in

Sri Lanka do not believe he is a member of the LTTE or associated with the group. The RPD expressly found, after considering the Applicant's country condition documents, including those tendered post-hearing, that the Applicant would not be subjected to a risk to life, a risk of cruel and unusual punishment, or a danger of torture. I can find no error in the RPD's reasoning set out at paras 39 to 46 of the Decision.

VII. Conclusion

[35] For the reasons above, the application for judicial review is dismissed. As the parties did not propose any questions for certification, none will be certified.

JUDGMENT IN IMM-642-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is certified.

"Roger R. Lafrenière"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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