

Federal Court



Cour fédérale

Date: 20190507

Docket: IMM-4787-18

Citation: 2019 FC 596

Toronto, Ontario, May 7, 2019

PRESENT: Mr. Justice Campbell

BETWEEN:

DINESH NEWMAL PALLIYARALALAGE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The present Application for judicial review concerns a decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD], dated August 27, 2018. The RAD upheld a decision rendered by the Refugee Protection Division [RPD] which found that the Applicant is not a Convention refugee or a person in need of protection within the meaning of section 96 or subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant is a citizen of Sri Lanka. He alleged that he fears persecution on the basis that he had been wrongfully accused by the Sri Lankan military of committing crimes and supporting the Liberation Tigers of Tamil Eelam [LTTE].

[3] The RPD rejected the Applicant's claim for refugee protection on the basis that he lacked credibility. The RAD found some errors with the RPD's decision, but upheld a number of its credibility findings. The RAD also went on to make additional credibility findings of its own.

[4] The Applicant argues that the RAD breached his right to procedural fairness by making additional credibility findings outside of those made by the RPD. First, the RAD made a new finding that a newspaper article tendered in support of the Applicant's claim was not genuine. After upholding the RPD's finding that the article should be given little weight, the RAD stated:

[...] The RAD further finds, on a balance [of] probabilities, that the newspaper article is not genuine. The RAD notes that submitting a false or irregular document may have an impact on the weight assigned to other documents provided by the Appellant, especially when they are interrelated, and on the overall credibility of the Appellant.

(Decision, para 20)

[5] The RAD made additional new findings regarding apparent contradictions between the Applicant's statements at the Port of Entry [POE] and his Basis of Claim form [BOC]. The RAD states:

The Appellant stated at the POE that he was released from detention upon the payment of a bribe and that the Army came and talked to him after his release and told him that his friend had reported a couple of times as required and then went into hiding. He stated the Army came to the Appellant looking for the friend and told the Appellant that his friend didn't report; they warned the

Appellant not to report this encounter to the Human Rights Commission or it could be bad for him. However, the Appellant stated in his BOC that he was in hiding after his release. The RAD notes that the Appellant stated at the POE that he feared returning to Sri Lanka because the Army suspects that he must be helping his friend to report to the police and the Human Rights Commission; however, this fear is not indicated in his BOC. The RAD additionally notes that the Appellant stated in his Schedule A form that he was arrested by a cooperating Tamil organization which is inconsistent with his statement in his BOC that he was arrested by the Army.

The RAD notes that the Appellant indicated in his BOC that he was warned when he was released from detention not to mention what happened to him to any human rights organizations and that he then went into hiding. He further noted that while he was in hiding, he heard from his wife that his friend's wife was upset and was threatening to report what the Army had done to her husband to a human rights commission. Also noted was that while he was in hiding, he heard from his wife that the Army had come to his home looking for him because his friend had gone missing and failed to report, and they warned that if the Appellant did not talk to them he would be in trouble. This is inconsistent with his POE statement that the Army spoke directly to him about his friend being missing and that the Army feared that the friend would complain to the police and a human rights organization.

(Decision, paras 31-32).

[6] The Applicant argues that these were new credibility findings, to which he should have been given an opportunity to respond. In support of this position, he relies on the Court's decision in *Ojarikre*, where Justice Annis stated:

The Court is in agreement with the Applicant's submissions that the RAD does not possess the jurisdiction to consider an issue that, although fully canvassed before the RPD, was not relied upon in its decision and therefore was not the subject matter of the Applicant's appeal.

In addition to the arguments raised in the *Jianzhu* and *Ching* decisions, the Court notes that by raising an issue not determined

by the RPD and that was not the subject matter of an appeal by either party, the RAD infringed the Applicant's statutory procedural rights. The Applicant is deprived of her statutory right under subsection 110(4) to submit further evidence with respect to the new issue raised by the RAD, because she was not aware that the issue would be the subject of the RAD decision.

(Ojarikre v Canada (Minister of Citizenship and Immigration), 2015 FC 896 at paragraphs 20 – 21)

[7] The Applicant further relies on the following comments from Justice Hughes in *Husian*:

We come to the basis for sending the matter back to the RAD for re-determination. Had the RAD simply reviewed the findings of the RPD as to the adequacy of the Applicant's evidence and agreed with it, that would have ended the matter. It did not. For whatever reason, the RAD went on to give further reasons, based on its own review of the record, as to why the Applicant's evidence was not to be believed. It held, at paragraph 43, that it was unable to locate any evidence to support the Applicant's claim to also being a member of the Dhawarawayne clan. That was wrong; there is such evidence in the Responses to Information Requests. The comments by the RAD as to the differences in the spelling of the Applicant's name in the US proceedings versus the Canadian proceedings is nonsense: of course, there will be differences where a different alphabet and language is in question such as Somali and English. There are other errors.

The point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.

(Husian v Canada (Minister of Citizenship and Immigration), 2015 FC 684 at paras 9 – 10)

[8] The Respondent argues that there was no breach of fairness in this case. The Respondent argues that when an applicant's credibility is already at issue before the RPD, as it was in this case, the RAD does not need to provide notice when it finds an additional basis on which to question the Applicant's credibility using the evidentiary record before the RPD. In support of

this position, the Respondent relies on the Court's decision in *Adeoye v Canada (Minister of Citizenship and Immigration)*, 2018 FC 246 at paragraphs 11-15.

[9] In my view, the Applicant is correct that the RAD breached procedural fairness by making new credibility findings without providing him notice and an opportunity to respond. As a result, I find that the decision was rendered in reviewable error.

JUDGMENT in IMM-4787-18

THIS COURT'S JUDGMENT is that the decision presently under review is set aside, and the matter is referred back to a differently constituted panel for determination.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4787-18

STYLE OF CAUSE: DINESH NEWMAL PALLIYARALALAGE v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: CAMPBELL J.

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