Federal Court  Cour fédérale

Date: 20191202

Docket: IMM-6507-18

Citation: 2019 FC 1540

Ottawa, Ontario, December 2, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SIVATHASAN SIVAGNANAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judicial review application arises from a decision of the Refugee Protection Division [RPD] rejecting the applicant's claim for refugee status. The RPD concluded that the applicant does not meet the requirements of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA]. The application is made pursuant to section 72 of IRPA.

I. The facts

[2] Given the "shotgun approach" taken by the applicant in this application, which seeks to find fault with discrete elements of the decision rendered by the RPD, a short summary of the facts is needed, but reference will be made to facts as part of the review of RPD decision.

[3] The applicant is a Sri Lankan citizen of Tamil ethnicity and he resided in that country prior to his arrival in Canada in 2011. He is married and has two children. He lives in Canada while the family lives in the north of Sri Lanka where the Tamil population is concentrated.

[4] Other than providing a letter from his wife stating that the Eelam People's Democratic Party [EPDP] came looking for the applicant a few times since he left his country, the applicant alleges specific instances of harassment and harm suffered, he claims, at the hands of the EPDP prior to his departure.

[5] Thus, in September 2006, the applicant claims to have paid EPDP members some money after an extortion demand was made at his home. He claims that there was a demand for money and individuals tried to take his vehicle. In April 2010, the applicant claims that the EPDP again came to his home and asked for his vehicle so that they could use it in canvassing for the election. Since the vehicle was not at his home, he was accused by his assailants of hiding it. These individuals also beat him and told him that he was a Liberation Tigers of Tamil Eelam [LTTE] supporter. Some time in August 2011, the applicant and some neighbors gave chase to an individual whom they suspected of being a thief. The applicant believed the individual was a

member of the EPDP because of a similar incident involving presumably an EPDP member, he claims, had taken place in the neighborhood. The applicant was arrested and the police accused him, as well as his neighbours, of being LTTE supporters. Finally, some time after the August 2011 incident, the applicant asserts that members of the EPDP tried to kidnap him as they tried to pull him out of his vehicle. The kidnapping was not successful because the applicant's shouting attracted a crowd. Following that latest incident, the applicant went into hiding. He left Sri Lanka on September 9, 2011, assisted by the arrangements made by his father.

II. Decision under review

[6] The Refugee Protection Division decision came on December 5, 2018. The panel concluded that the applicant is not a convention refugee or a person in need of protection and, accordingly, rejected the claim. For the RPD, there were two key issues: first, whether the claimant had a well-founded fear of persecution and, second, whether the capital of Sri Lanka, Colombo, is a viable internal flight alternative.

[7] It appears that the only evidence of some current interest on the part of the EPDP, after seven years, came from a letter from the applicant's wife, dated October 28, 2018, stating that the EPDP came looking for him on two or three occasions since 2011. The RPD is of the view that past occurrences, as well as the letter of the applicant's wife, do not demonstrate a continued interest in the applicant. The panel notes that the applicant was able to leave Sri Lanka on his own passport and experienced no difficulty leaving his country of origin in September 2011.

[8] The RPD noted that some of the difficulties encountered by the applicant appear to be at the hands of the EPDP. When individuals came to his residence in December 2006 to extort money, they were aware that the applicant had just come back from working abroad, in Doha, for three years. He was targeted because of the belief he had accumulated some (modest) wealth from his work abroad. Similarly, when they tried to take his vehicle, the EPDP members were paid money. The encounter in April 2010 was allegedly connected with the 2010 elections in Sri Lanka, as the EPDP supporters sought to use the applicant's vehicle for the purposes of canvassing for the election. When they found out that the vehicle was not at the applicant's home, they accused him of being an LTTE supporter and mistreated him.

[9] As for the incident of August 2011 where an individual was chased down because he was suspected of being a thief, the RPD notes that "(i)t was not clear as to why the police had accused the claimant and his neighbours of being LTTE supporters for having chased the individual". With respect to this incident, the RPD states that "(t)he panel finds that the claimant did not really "know" that the man he was involved in chasing was a member of the EPDP, but speculated based on a similar incident that occurred in the neighbouring town" (RPD decision, para 15). In the view of the RPD, that constitutes insufficient evidence to draw a conclusion about the affiliation of the person having been chased.

[10] The same kind of comment is made with respect to the incident where the applicant claims there was an attempt to kidnap him. It is seen by the RPD as being rather ambiguous. For the RPD, "it was not clear how the claimant knew that the men who tried to pull him out of his vehicle were members of the EPDP, or that, in fact, they were actually trying to kidnap, and not

simply trying to steal his vehicle, since members of the EPDP had tried to take his vehicle on two previous occasions" (RDP decision, para 16).

[11] Given the number of alleged incidents involving EPDP members, the RPD looked into the origins of that organization. It concludes that the EPDP was a political party originally formed in the late 80's to fight alongside the LTTE, but allied itself with the government later on and operated as a paramilitary outfit supporting the military forces against the LTTE. It appears to have changed its allegiance from a former Tamil militant group to a pro-government paramilitary group. In fact, it morphed into a group taking on the characteristics of criminal gangs after the war ended. The US Country Reports 2014 is quoted as saying that "[t]here were persistent reports that the EPDP … engaged in intimidation, extortion, corruption, and violence against civilians in the Tamil-dominated district of Jaffna …" (RPD decision, para 19). The RPD notes the very much-diminished influence of the EPDP. One reads at paragraph 21 the following:

> [21] The panel further notes that recent country documents found in the latest National Documentation Package, 30 April 2018, such as the US Department of State Report, 20 April 2018; the Amnesty international Report, 22 February 2018; the Freedom House Report on Sri Lanka for 2017; and the Human Rights Watch World Report, January 2018, make no mention of the EPDP. The 2015 election in Sri Lanka saw the EPDP win only one seat.[10] It would appear that the EPDP's power, at least political, has been diminished and as highlighted in *Country Reports 2014*,[11] its activities are focused in the Tamil-dominated north of the country. [Footnotes omitted.]

[12] The RPD also comments on the letter of the applicant's wife of October 2018, which claims that the EPDP came looking for her husband on two or three occasions since 2001. The letter does not specify when those alleged visits took place and, furthermore, how the wife knew that the people were actually representatives of the EPDP. Not only is the letter silent on what

must be two key features, i.e. when the visits took place and how the visitors can be said to be EPDP representatives, but the RPD expressed concerns about the fact that this documentary evidence was created by a family member (*El Bouni v Canada (Minister of Citizenship and Immigration)*, 2015 FC 700 [*El Bouni*]). The *El Bouni* Court is quoted at pragraph 23 of the RPD decision:

> I find that confirmatory evidence of family members and friends, which is not subject to cross-examination, is not highly probative or credible evidence. Highly probative evidence is intrinsically well-presented evidence from independent sources confirming a material fact in the matter.

Evidently, the wife's letter was not given significant weight given the lack of details on key elements of the story and the fact that it came from someone who has an interest in the matter.

[13] The RPD concludes that the EPDP may have had influence while the conflict in Sri Lanka was ongoing; but it ended in 2009. There is in the view of the RPD "insufficient recent evidence that they continue to be a significant force or have their previous level of connection to the security forces and government" (RPD decision, para 25). The RPD expresses the view that even where there was interaction between the applicant and the EPDP that interaction was essentially one of a criminal nature, based on extortion and intimidation. That is in line with the Country Reports 2014, which noted that the EPDP increasingly took the characteristics of a criminal gang. It follows in the view of the RPD that the risk faced by the claimant "is one generally faced by most Tamils, especially in the north of Sri Lanka, where the Tamil population in the country is most concentrated" (RPD decision, para 26).

[14] The decision then proceeds to examine whether there is for the applicant an internal flight alternative [IFA] in Colombo, the capital. The Refugee Protection Division concludes that there is such an alternative. In the context of addressing the IFA, the RPD commented on the sufficiency of the evidence of the EPDP being associated with the army or some other government agency. Furthermore, the claimant's profile is a limited one. Because of the importance put by the applicant in his submissions on paragraph 29 of the RPD decision, I reproduce it in its entirety:

> [29] The claimant has also stated that he would be "in trouble" in Colombo because the police in Colombo would be informed of his presence there by the EPDP, and would target him because he is a suspected LTTE sympathizer. The panel finds that there is insufficient evidence to conclude that the EPDP is currently associated with army or any other government agency. While the EPDP may have had a direct relationship with state agents, the panel finds that there is insufficient evidence to conclude that the EPDP is currently working with the army or police. Further, the panel will demonstrate in the next section, the claimant's profile is not one that will attract negative attention by the authorities. While the panel acknowledges that the authorities will initially note that he has been abroad for some eight years living in the Tamil diaspora, they will find that he is not wanted for any crimes, that he left the country legally, and that any interaction with authorities in the past did not indicate any support for or significant involvement with the LTTE. The panel, therefore, finds that the claimant will not experience any significant difficulties or face persecution were he to return to Sri Lanka and settle in Colombo.
>
> [My emphasis.]

[15] The RPD then proceeded to consider more fully the claimant's risk profile. It found that there is "no evidence for authorities to conclude that he is opposed to the government: or in any way supportive of pro-LTTE activities" (RPD decision, para 30). There is therefore insufficient evidence to conclude that the authorities would have adverse interest in the applicant.

[16] Given that the situation in Sri Lanka continues to be less than perfect, the RPD considers the applicant's risk profile. In so doing, it considers that it has to determine whether the claimant faces more than a mere possibility of being harassed or harmed by Sri Lankan authorities if he returns to Sri Lanka.

[17] In the case of the applicant, the RPD concludes that the claim of an on-going interest in the applicant is not supported by the evidence: accordingly his fears are not well founded. The letter from the applicant's wife is said to be unreliable.

[18] The RPD finds in a report from the United Kingdom's Home Office of August 2016 a number of conclusions reached by the UK Tribunal in assessing independent reports regarding returnees to Sri Lanka. Is quoted at paragraph 36 of the decision what is being portrayed as the Tribunal's key findings:

> The government's present objective is to identify Tamil activists in the Diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state enshrined in Amendment 6(1) to the Sri Lankan Constitution in 1983, which prohibits the 'violation of territorial integrity' of Sri Lanka. Its focus is on preventing both (a) the resurgence of the LTTE or any similar Tamil separatist organisation and (b) the revival of the civil war within Sri Lanka.[21] [footnotes omitted]

There is no direct ties between the applicant and the LTTE nor is there a history of opposition to the government on his part. He does not have the profile of a person, as found by the UK Tribunal, that is of interest in Sri Lanka.

[19] Having concluded that there were no concerns as to potential LTTE ties prior to the applicant's departure from Sri Lanka in 2011, there is no evidence to suggest that the Sri Lankan government has now any such concerns. The focus is on Tamil separatism and the destabilisation of the unitary Sri Lankan state. Hence, "the panel finds that the claimant is not, on a balance of probabilities, a person who would be perceived to be linked to any pro-LTTE factions by the current Sri Lankan government, and determines that he does not have good grounds to fear persecution as a failed asylum-seeker were he to be returned to Sri Lanka" (RPD decision, 39). The formal conclusion is framed as "the panel determines that the claimant has not satisfied the burden of establishing a serious possibility of persecution on Convention grounds, or that, on a balance of probabilities, he would be subject personally to a danger of torture, or face a risk of cruel and unusual treatment or punishment, if he were returned to Sri Lanka" (RPD decision, para 41).

III. Arguments and analysis

[20] I have presented at some length the reasons for the RPD decision because context is in my view important, given the various challenges launched against the decision by this applicant. In my view, read as a whole together with the record that was before the RPD, the decision is not unreasonable and, therefore, the judicial review application must be dismissed.

[21] The first issue raised on this judicial review application is the applicant's contention that the RPD held the applicant to a higher standard than what is required by law. As I understand it, the argument is that a standard of correctness applies to the RPD's identification of the test that must be applied in the circumstances of the case. The applicant advances in support of that

proposition the case of *Sivagnanasundarampillai v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1109 [*Sivagnanasundarampillai*]. I note that the case does not provide any analysis, relying exclusively on *Conka v Canada (Minister of Citizenship and Immigration)*, 2018 FC 532 [*Conka*], at paragraph 11. However, the judge in *Conka* did not resolve the issue of "correctness or reasonableness" leaving the issue to another day. In other words, the cases relied on do not discuss at any length the validity of the proposition. Be that as it may, the issue is predicated on the wrong test having been applied. I am far from certain that this is what was done in this case and that the RPD applied the wrong test.

[22] Here, the applicant claims that the test of "serious possibility" of persecution on Convention grounds was not applied by the RPD. The applicant contends that the RPD required that it be proven by the applicant persecution as opposed to the serious possibility of persecution. I am afraid the applicant may be misreading the decision. The argument is largely based on the use of the words "will" in paragraph 29 of the RPD decision. The applicant readily concedes that the test as expressed at paragraph 41 of the RPD decision is correctly presented; the burden on an applicant is that of establishing a serious possibility of persecution. Relying on *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, 41 Imm LR (3d) 263 [*Alam*], the applicant says that the test as expressed at paragraph 41, which he says is correct, is different from what appears at paragraph 29. I have already reproduced paragraph 29 in its entirety at paragraph 14 of these reasons for judgment.

[23] Paragraph 29 of the RPD decision, when read in context and together with the record before the RPD does not elevate the test. It merely concludes, on the evidence, that the

claimant's profile is not one that will attract negative attention. It is a finding of fact that is expressed in that fashion. Similarly, the RPD finds as a matter of fact that the applicant will not face significant difficulties or persecution if he were to settle in Colombo, as an internal flight alternative. That does not elevate the burden on an applicant that he has to prove persecution, as opposed to a serious possibility. Rather the RPD finds that not only there is no serious possibility but there is in effect no possibility on this record. He who can do the more, can do the least. In effect, the RPD speaks in terms of certainty that the claimant will not attract negative attention or will not experience persecution if returned to his country of origin. It is not that the applicant is forced to meet a higher threshold. It is rather that the RPD concludes that the threshold has not been met given its conclusions on the facts of this case. If there is not even a possibility that the applicant will attract negative attention and that he will not face persecution, as stated at paragraph 29, it stands to reason that he will not face a serious possibility.

[24] Of course, one may disagree with the conclusions, reached on the facts, that the attention of the authorities will not be attracted or that if the applicant settles in Colombo, he will not experience any significant difficulties. However, that disagreement must go beyond the mere disagreement and must reach the level of not being reasonable. It is for the applicant to satisfy that onus that the conclusions are outside of possible, acceptable outcomes and that the decision making process was not transparent, intelligible and did not provide for a justification. But such is not the argument here. The applicant sees the use of the words "will" as an expression of an elevated test for the applicant. That is simply not what paragraph 29 is about, or states. It simply says, as a matter of fact, that the profile will not attract attention and that the IFA is an option

because the applicant will not face persecution in Colombo. It cannot be inferred from these words that the applicant must prove persecution.

[25] The applicant took issue with a statement found at paragraph 16 of the RPD decision where the RPD questions how the applicant knew who his assailants were when the applicant claims there was an attempt at kidnapping him. For the RPD, it was not clear whether that was in effect an attempt at kidnapping the applicant, rather than simply trying to steal his vehicle since members of the EPDP had tried in the past, to requisition the vehicle. The applicant considers that it is a mistake of fact to be unclear as to whether or not assailants were EPDP members because he testified before the panel that "they told me we are from the EPDP and they more or less put me in their motorcycle, I started screaming" (Certified Tribunal Record, p. 340). Evidently, the RPD was not completely satisfied with that statement made by the applicant. The panel questions whether this was a kidnapping as opposed to simply getting the vehicle as had been attempted in the past and, presumably, found rather odd that if it was a kidnapping attempt, the assailants would have stated who they are from in the middle of what must have been chaos. At any rate, I cannot find how this could constitute an unreasonable finding opening the door to a successful judicial review application. Not accepting that there was an unsuccessful kidnapping does not strike me as falling outside of the range of possible or acceptable outcomes.

[26] Next, the applicant takes issue with the fact that the claimant's wife's letter is not given the weight it should have received. The applicant focusses his attention on paragraph 23 of the RPD decision where the member finds support in the case of *El Bouni*. It is stated that evidence of family members or friends may not be highly probative. However, it should be noted that at

paragraph 22 of the same decision, the RPD notes that the visits to the home in Sri Lanka of the claimant's wife are not reported with any kind of precision (for instance when they would have occurred and in what circumstances) and it is completely unknown how the claimant's wife would have been able to identify these individuals as being representatives of the EPDP.

[27] The applicant claims that the *Cruz Ugalde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 458 [*Cruz Ugalde*] decision of this Court should be preferred to the *El Bouni* decision. I am afraid that the applicant gives the *Cruz Ugalde* decision more weight than deserved. In it, the Court simply states that "jurisprudence has established that, depending on the circumstances, evidence should not be disregarded simply because it emanates from individuals connected to the persons concerned" (para 26).

[28] It is obvious that the quality to be given to a letter coming from a self-interested person may still carry significant weight, depending on the circumstances and, indeed, the contents of the letter. I cannot see how, in the circumstances of this case, it was not open to the RPD to reach the conclusion that a letter that does not provide key information is less probative and is not to be given significant weight. Paragraphs 22 and 23 of the decision must be read together. A trier of fact is entitled to give weight to the evidence presented, which is what was done by the RPD. Given the circumstances of this case, this Court must defer to a finding of that nature where the explanation is not limited to the source of the evidence but also to the intrinsic value of it. This is not a letter that was produced years ago, but it was rather produced in October 2018 for the purpose of supporting a refugee claim. The Supreme Court, on numerous occasions recently, has referred to common sense and human experience as being available to the trier of fact to assess

the evidence and draw inferences (*R. v Calnen*, 2019 SCC 6; *R. v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000; *R. v Nur*, 2015 SCC 15, [2015] 1 SCR 773). This is not a novel proposition. It has deep roots in our law. A trier of fact may rely on human experience and common sense to conclude on evidence that fails to provide key indicia of reliability such as the granularity of that evidence.

[29] The applicant also complains that in spite of having checked the box in his personal information form where he is claiming protection as a person in need of protection because he faces a danger of torture (CTR, p. 26, box 30) the decision does not address squarely the risk of torture. The applicant notes that the matter was raised by his then counsel before the RPD, where counsel argued that the risk of torture at section 97(1)(a) of IRPA is not affected by the dichotomy between generalized and personalized risk at section 97(1)(b) (CTR, p. 360 at line 33).

[30] It is very much unclear what is the relevance of torture as opposed to the generalized risk. It is true that the RPD found that the EPDP has become an organization whose nature has morphed into that of a criminal gang. As such, Tamils faced the generalized risk of being targeted. This does not rise to the level of persons in need of protection as per section 97(1)(b).

[31] However, the RPD found that the applicant is not in danger of torture, nor face a risk of cruel and unusual treatment or punishment if he were to return to Sri Lanka. That finding must be considered in light of the preceding 40 paragraphs of the decision where the RPD concludes that this applicant will not attract negative attention and will not experience any significant

difficulties. That finding implies that neither section 96 nor section 97 of IRPA are in play. It is not enough to tick a box. The issue must have an air of reality in order to require some significant attention. On this record, one is hard pressed to see what could have been expected from the RDP in view of a general allegation not supported by evidence.

[32] It must be remembered that the RPD makes, in effect, three findings in its decision:

1. In essence, the EPDP has lost influence in Sri Lanka, according to the evidence available;

2. The EPDP's activities have gone from a paramilitary outfit supporting previous governments, and in particular until the end of the hostilities in Sri Lanka in 2009, to being in the nature of a criminal gang operating for its own economic benefit;

3. The applicant's profile is not one that is of interest to the authorities.

[33] On the evidence before the RPD, it found that the applicant's "interactions with individuals whom the claimant believes were members of the EPDP were of the criminal nature" (RPD decision, para 26). That, says the RPD, is a risk faced generally by most Tamils, especially in the north of Sri Lanka.

IV. Conclusion

[34] The applicant in this case had to satisfy the Court that the decision that was made in his case was unreasonable, as the notion is understood at paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. He failed to consider the decision as a whole,

looking instead for some errors that in his view could justify the granting of the judicial review. As the Supreme Court found in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, at paragraph 54:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

[35] The RPD decision in this case would have benefited from a more systematic approach which could have alleviated the concerns that emerged in this judicial review application. However, the reasons, once considered in view of the record before the RPD, must be shown to reach a result that is not reasonable. That is a burden that is on the shoulders of every applicant. This applicant was unable to discharge that burden through his line by line treasure hunt for error. The judicial review application must therefore be dismissed. The parties are of the view that no certified question of a serious issue of general importance emerges. I agree.

JUDGMENT in IMM-6507-18

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that ought to be certified.

"Yvan Roy
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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