Federal Court Cour fédérale

Date: 20201015

Docket: IMM-4471-19

Citation: 2020 FC 968

Ottawa, Ontario, October 15, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

LASITHA UDAYA KUMARA SENADHEERAGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Senadheerage seeks judicial review of the dismissal of his claim for asylum. I am granting his application, for two inter-related reasons. First, the decision-maker found certain parts of his narrative implausible, without providing a firm basis for this finding. Second, it found that Mr. Senadheerage failed to provide corroborative evidence, without explaining why corroboration was required in the circumstances and why such evidence would be reasonably available.

[2] In giving my reasons for so concluding, I attempt to synthesize this Court's case law on the requirement for corroboration.

I. Background

[3] Mr. Senadheerage is a citizen of Sri Lanka who claimed asylum in Canada, alleging the following facts. He is a civil engineer and worked for some time in another country. Upon returning to Sri Lanka in June 2017, he began employment with a business owned by a prominent businessman with close connections to the government then in power.

[4] He quickly discovered that the business engaged in some illegal activities. In July 2017, he was arrested and questioned by the Criminal Investigation Department [CID] of the Sri Lankan police. He was beaten and held in custody for three days. He was released only after he agreed to speak about the illegal activities in which the business was engaged. He undertook to report to the CID every month.

[5] Immediately after his release, thugs in the service of the businessman visited his house, where he lived with his parents, wife and child. He was absent at that time, but the thugs said to his mother that they would come back for him. Upon learning of this, Mr. Senadheerage went into hiding and arranged for his parents, wife and child to move in with relatives in two different cities. A few days later, he left for the United States.

[6] While Mr. Senadheerage was in the United States, he learned that the CID visited his house in August 2017, when he failed to report to them. He told a friend in Sri Lanka about what

had happened to him. That friend then relayed the story of his persecution to opposition politicians, who used it publicly to embarrass the government, as it involved a businessman closely associated with the government. Mr. Senadheerage then learned from another friend that the businessman said that he would kill him if he found him. In February 2018, he learned that both the CID and the businessman's thugs visited his empty house, searching for him. At that time, he decided to make his way to Canada, where he claimed asylum.

[7] In a short decision, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected Mr. Senadheerage's claim. The RPD held that it was unbelievable that the CID would have acted as it did if it were really looking for Mr. Senadheerage. As to the businessman or his thugs, there was no evidence that they had any interest in harming him. Most importantly, the RPD found that Mr. Senadheerage has an internal flight alternative [IFA] in the two cities where members of his family have relocated, essentially because no one had sought to harm them there and objective country information suggested that the police would be unable to find him if he relocated.

[8] The Refugee Appeal Division [RAD] of the IRB dismissed Mr. Senadheerage's appeal. For reasons that I will analyze in more detail below, the RAD found that there was insufficient evidence that either the CID or the businessman's thugs had any remaining interest in harming Mr. Senadheerage. The RAD also confirmed the RPD's analysis with respect to the IFA.

[9] Mr. Senadheerage now seeks judicial review of the RAD's decision.

II. Analysis

[10] On an application for judicial review in immigration and refugee matters, the standard of review is reasonableness: *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. One aspect of the *Vavilov* framework is of particular relevance to this case. Even though the reviewing court may look to the record to understand the basis for the decision, the decision itself must be justified, not only justifiable. Thus, it must exhibit a rational chain of analysis that complies with the legal constraints bearing on the decision-maker: *Vavilov*, at paragraphs 102-107.

A. *Assessment of the Evidence*

[11] Mr. Senadheerage challenges the RAD's assessment of his evidence. He alleges that the RAD erred in finding his story implausible, in rejecting his corroborative evidence and in requiring additional corroboration. For the following reasons, I agree that the RAD committed some of these errors. As a result, the RAD's decision does not exhibit a rational chain of analysis, which makes it unreasonable according to the *Vavilov* framework.

(1) Implausibility Findings

[12] The RAD's first ground for finding that Mr. Senadheerage had no well-founded fear of persecution is that both the CID and the businessman's thugs had lost any interest in him. Among the reasons for that conclusion, the RAD stated that if they still had interest in Mr. Senadheerage, the CID and the thugs would have looked for members of his family and, in the

case of the CID, friends and co-workers. Moreover, the RAD found that it was illogical that the CID would have gone to Mr. Senadheerage's house in February 2018, as they would have known that he had left the country. It also stated that the CID would no longer be interested in Mr. Senadheerage, as he was no longer employed with the business suspected of illegal activities and could therefore not provide any new information about these illegal activities.

[13] These are implausibility findings. In substance, the RAD is saying that the events cannot have happened as recounted by Mr. Senadheerage.

[14] This Court, however, has set a high threshold before immigration decision-makers can make a finding of implausibility. Such a finding may be made only in the "clearest of cases:" *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*]; see also *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at paragraph 26. In *Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901 [*Al Dya*], my colleague Justice Nicholas McHaffie reviewed the case law with respect to this issue since *Valtchev* was rendered. He noted that "the unusual or improbable does occur, and that it is unreasonable to reject evidence as not credible simply because the events it describes are unusual:" *Al Dya*, at paragraph 35.

[15] In *Valtchev*, at paragraph 7, Justice Muldoon explained when implausibility findings may be made:

> …plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant.

[16] Indeed, in *Al Dya*, the main basis for the implausibility finding was that the applicant's statements were contradicted by the National Documentation Package [NDP].

[17] In the present case, the RAD did not explain the basis for its implausibility findings. It did not point to any specific information in the NDP for Sri Lanka that would contradict Mr. Senadheerage's account of the events. The findings appear to be based on the RAD's own views of what is likely or unlikely. In doing so, however, the RAD did not consider the distinction between plausibility and likelihood, which is at the core of cases such as *Valtchev* and *Al Dya*.

[18] The RAD found the February 2018 visits to Mr. Senadheerage's empty home implausible. It assumed that the agents of persecution would have known, at that time, that he had left the country – the CID because it is a national organization, and the thugs because of their close connections with the government. There is, however, no evidence providing a reasonable basis for an inference in this regard. Moreover, there is nothing inherently implausible in the CID's and the thugs' failure to question Mr. Senadheerage's family members. They may not have known their whereabouts, as they were allegedly in hiding. They may have unsuccessfully attempted to find them. Lastly, the CID may have had reasons to remain in contact with Mr. Senadheerage despite the fact that he left his job, such as being a witness for the eventual prosecution of the businessman. In short, the RAD assumes too many unknown facts and, in doing so, leaves the realm of reasoning to enter that of speculation.

[19] While the RAD may have formed a view about the CID's or the thugs' most likely course of action, this is not one of the "clearest of cases" in which it could find that Mr. Senadheerage's

account was implausible. In fact, the RAD's findings amount to speculation about what a "reasonable agent of persecution" would do. This Court has repeatedly cautioned against such reasoning: *Venegas Beltran v Canada (Citizenship and Immigration)*, 2011 FC 1475 at paragraph 8; *Reyad Gad v Canada (Citizenship and Immigration)*, 2011 FC 303 at paragraph 11; *Soos v Canada (Citizenship and Immigration)*, 2019 FC 455 at paragraphs 12-16.

[20] Thus, I find that this aspect of the RAD's decision is unreasonable.

(2) Lack of Detail or Corroboration

[21] A second basis for the RAD's rejection of Mr. Senadheerage's claim is the vagueness or lack of corroboration of crucial aspects of the claim. In particular, Mr. Senadheerage failed to provide any documentary evidence supporting his testimony regarding the death threats the businessman made against him, which were relayed to him by a co-worker. Moreover, he failed to provide a letter or an affidavit from his mother, with whom he still has contact, even though his mother is his only source of information with respect to significant events, including the CID's and the thugs' visits to the house in 2017 and 2018. Given the lack of such a letter, the RAD found that the February 2018 visits did not occur.

[22] In my view, the RAD's decision is unreasonable in significant respects. While there might have been some valid reasons to require corroboration with respect to some issues, the RAD appears to have started from the premise that there is a general requirement for corroboration. As a result, I am unable to discern a rational chain of reasoning in the decision. To show why this happened, I first need to review in some detail the general principles regarding the

requirement for corroboration in immigration and refugee cases. To use *Vavilov*'s language, I must identify the legal constraints bearing on the decision-maker.

(a) *Corroboration: General Principles*

[23] The law of evidence typically does not require testimony to be corroborated by written documents. Only exceptionally is written evidence required to prove certain categories of facts. The IRB, however, frequently requires asylum claimants to corroborate their claim with written evidence. There are good reasons for this. The Canadian government is usually unable to investigate events taking place in foreign countries. It is difficult to obtain independent verification of the alleged persecution. Requiring corroboration helps ensure that refugee protection is granted to those who deserve it.

[24] Not all elements of a claim for asylum are susceptible of corroboration. As acts of persecution are typically illegal or immoral, one cannot expect agents of persecution to provide written evidence of their deeds. They may actively try to suppress or withhold such evidence: *Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at paragraph 7 [*Ndjavera*]. Third parties who witnessed acts of persecution may put themselves at risk if they provide written statements. When asylum claimants allege that the police failed to protect them, it is pointless to require a police report certifying this: *Fontenelle v Canada (Citizenship and Immigration)*, 2011 FC 1155 at paragraphs 46-47. Moreover, asylum seekers may not be able to carry documentary evidence with them when they go through "refugee camps, situations in war-torn countries, cases of discrimination and situations in which refugee claimants have only a very

short time to escape their persecutors:" *Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at paragraph 36 [*Fatoye*].

[25] Thus, requiring corroboration may be a manner of granting "fair consideration to those who come to Canada claiming persecution" while "maintain[ing] the integrity of the Canadian refugee protection system," both of which are purposes of the *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(2) [the Act]. Such a requirement, however, must be properly calibrated, to avoid putting claimants in an impossible situation. This calibration has proven to be a difficult exercise. In the following paragraphs, I will attempt to provide some clarity by synthesizing this Court's case law on the issue.

[26] A significant number of decisions take the position that corroboration is only required where the claimant's credibility is in doubt for reasons other than the mere lack of corroboration: *Dundar v Canada (Citizenship and Immigration)*, 2007 FC 1026 at paragraph 22; *Ortega Ayala v Canada (Citizenship and Immigration)*, 2011 FC 611 at paragraphs 19-21 [*Ortega Ayala*]; *Ndjavera*, at paragraph 6; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at paragraphs 62-65 [*Chekroun*]; *Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at paragraphs 36, 43 and 56; *Horvath v Canada (Citizenship and Immigration)*, 2018 CF 147 at paragraph 24 [*Horvath*]; *McKenzie v Canada (Citizenship and Immigration)*, 2019 FC 555 at paragraphs 54-55. Reasons for doubting credibility and requiring corroboration may include contradictions in the claimant's testimony before the RPD or the implausibility of the alleged facts. Thus, as my colleague Justice John Norris stated, " There is no general requirement for corroboration and a panel errs if it makes an adverse credibility finding on the basis of the

absence of corroborative evidence alone:" *Chen v Canada (Citizenship and Immigration)*, 2019 FC 162 at paragraph 28. In other words, lack of corroboration must not become the "seed of incredibility:" *Ortega Ayala*, at paragraph 20.

[27] The absence of a general requirement for corroboration is usually considered a corollary of the well-known presumption of truthfulness established by the Federal Court of Appeal in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at 305 (CA): "When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness." Requiring corroboration in the absence of a pre-existing "reason to doubt" would effectively reverse the *Maldonado* presumption. See, for example, *Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at paragraphs 19-20; *Durrani v Canada (Citizenship and Immigration)*, 2014 FC 167 at paragraph 6; *Ortega Ayala*, at paragraph 21; *Chekroun*, at paragraph 65.

[28] Moreover, the IRB may dismiss a claim for lack of corroboration only if it would have been reasonable in the circumstances to require the claimant to obtain corroborative evidence. Thus, the corroboration analysis is a two-step process. First, one must inquire whether a shortcoming in the evidence triggers a requirement for corroboration. Second, one must ask whether the corroborative evidence was reasonably available or whether the claimant provided a satisfactory explanation for its absence. These two steps are apparent in the following excerpt from *Horvath*, at paragraph 24:

> Corroborative evidence was only required if the RAD had (1) reason to doubt the Applicants' claim and (2) the corroborating evidence could reasonably be expected to be available […].

[29] There is, however, another line of cases giving a broader scope to the requirement for corroboration: see, for example, *Singh v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 556 at paragraph 9; *Ryan v Canada (Citizenship and Immigration)*, 2012 FC 816 at paragraphs 19-20; *Radics v Canada (Citizenship and Immigration)*, 2014 FC 110 at paragraphs 30-32; *Luo*, at paragraph 21, and the cases cited therein. It is often framed as an exception to the rule that, absent credibility concerns, no corroboration is needed. It is nicely summarized in *Fatoye*, at paragraph 37:

> … when corroborative evidence should reasonably be available to establish the essential elements of a refugee protection claim and there is no reasonable explanation for its absence, the administrative decision maker may draw a negative inference with respect to credibility based on the claimant's lack of effort to obtain this evidence.

[30] Such a general requirement for corroboration is usually grounded in rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256, which reads as follows:

11. The claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.	**11.** Le demandeur d'asile transmet des documents acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

[31] In effect, this line of cases takes the two-step approach outlined above and reverses the order of the questions. Whether corroborative evidence is reasonably available becomes the trigger for the requirement for corroboration, instead of an excuse for not fulfilling a requirement triggered for independent reasons. Thus, under this approach, there is a risk that corroboration

becomes an open-ended requirement. If this happens, little would remain of the presumption of truthfulness established by the Federal Court of Appeal in *Maldonado* and decision-makers would be able to dismiss a claim by effectively saying “I don’t believe you” without any specific reason. In other words, what is branded as an exception would effectively engulf the rule that there is no general requirement for corroboration.

[32] Yet, there is a kernel of truth in this second line of cases. Rule 11 establishes a requirement for documentary evidence and cannot simply be ignored. If the IRB is prevented from requiring corroboration unless there is a doubt concerning the claimant’s credibility, a claim could be accepted in the absence of any documentary foundation. Ensuring the integrity of the immigration system may require corroboration in a broader range of cases than those where credibility is already affected. Balancing the goals of the Act invites us to find common ground between the two lines of cases. In my view, this can be done through broadening the categories of cases in which corroboration may be required, while implementing appropriate safeguards.

[33] The first of these safeguards relates to substance. The two-step approach outlined above is sound and well established. It should not be reversed. That means that a decision-maker must always identify an independent ground for requiring corroboration. However, the relevant grounds are not restricted to the traditional categories of credibility or implausibility. I do not intend to give a closed list of what these grounds might be. Later in these reasons, I suggest that the fact that a large portion of the claim is based on hearsay may be a valid reason.

[34] The second safeguard relates to reasons. Decision-makers must explain why they require corroboration. Where they do so on grounds of credibility or implausibility, it goes without saying that they must give reasons for these findings: *Hilo v M.E.I.* (1991), 15 Imm L R (2nd) 199 (FCA). But this is true as well where other grounds are invoked. The duty to give reasons prevents the requirement for corroboration from becoming a disguised expression of unsupported disbelief.

[35] The third safeguard relates to process. While rule 11 puts the burden on the claimant to provide “acceptable documents” or explain why they were not available, it does not define what these documents are and what “other elements of the claim” need to be supported. Yet, as this Court has frequently noted, there is no general requirement for corroboration. As a result, claimants may not know in advance the elements for which the decision-maker will require corroboration. Requiring corroboration without prior notice may give the impression of moving the goalposts. Thus, a decision-maker who is of the view that corroboration is required in respect of a specific issue should put the matter to the claimant at the hearing. This will provide the claimant a genuine opportunity to explain why documentary evidence was not reasonably available. See *Elamin v Canada (Citizenship and Immigration)*, 2020 FC 847 at paragraph 19; see also, by analogy, *Jurado Barillas v Canada (Citizenship and Immigration)*, 2019 FC 825.

[36] To summarize, a decision-maker can only require corroborative evidence if:

1. The decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant's credibility, implausibility of the applicant's testimony or the fact that a large portion of the claim is based on hearsay;

2. The evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it.

(b) *Application to the Facts*

[37] Applying this framework, I find that some aspects of the RAD's analysis with respect to corroboration are unreasonable.

[38] The RAD gave very succinct reasons for requiring corroboration of the death threats made by the businessman and relayed to Mr. Senadheerage by a co-worker, simply noting that this was "important information." In my view, a more fulsome explanation was needed to justify a need for corroboration. There is no discussion of potential explanations for the lack of corroborative documents, even though one can easily understand that the co-worker would be reluctant to sign a document attesting to the death threats. A detailed summary of the RPD hearing prepared for Mr. Senadheerage's counsel does not show that he was questioned on this matter. Thus, it was unreasonable for the RAD to require corroboration with respect to the death threats.

[39] The RAD also noted the lack of corroboration of the CID's and the thugs' visits to Mr. Senadheerage's house at various moments. It stated that "it is reasonable to expect some sort of corroboration of these events given that they go to the heart of the claim and because he has provided other supporting documentation." Elsewhere in the decision, the RAD notes that Mr. Senadheerage remains in contact with his mother and could have obtained a letter from her.

[40] In making these remarks, the RAD appears to have reversed the two-step approach outlined above and focused on the presumptive availability of corroborative evidence as a ground for requiring corroboration. Moreover, Mr. Senadheerage was not questioned on these issues at the hearing before the RPD and was not afforded an opportunity to explain why he could not obtain, for example, a statement from his mother.

[41] Nevertheless, one understands that the RAD was concerned with the fact that Mr. Senadheerage did not himself witness any of the events allegedly taking place after the CID released him. As a result, large parts of the claim were based only on hearsay. Pursuant to section 170(*g*) and (*h*) of the Act, hearsay is admissible before the RPD, provided it is considered "credible or trustworthy." Ensuring the trustworthiness of hearsay may be valid grounds for requiring corroboration.

[42] I am concerned, however, that the RAD may have required corroboration because of its flawed implausibility findings, instead of a desire to buttress the trustworthiness of hearsay. None of this is made explicit in the decision. The RAD did not make any explicit negative

credibility findings. It did not follow the legal framework outlined above. As a result, its decision "fail[s] to reveal a rational chain of analysis:" *Vavilov*, at paragraph 103.

[43] I must also say that the fact that Mr. Senadheerage provided some documentary evidence is not grounds for requiring additional corroboration. The availability of some evidence does not prove the availability of other evidence.

(3) Rejection of Corroborating Evidence

[44] Mr. Senadheerage also challenges the RAD's rejection of a newspaper article and a lawyer's letter corroborating some of his allegations. I am unable to agree with him. The RAD analyzed that evidence and provided reasons for giving it little weight. In substance, the RAD noted that the evidence was vague as to the events involving Mr. Senadheerage and did not appear to match his narrative. Having reviewed the evidence, I find that the RAD's conclusions were not unreasonable.

[45] There is, however, a puzzling omission in the RAD's decision. No mention is made of a letter from a friend to whom Mr. Senadheerage revealed his story. The friend explains that he relayed the information to members of the opposition, who used it to slander the government. Mr. Senadheerage explicitly asked the RAD to consider this letter. The RAD should have responded to this argument. Its failure to do so may not, alone, have rendered its decision unreasonable. Nonetheless, it contributes to the decision's overall unreasonableness.

(4) Summary

[46] To summarize, the RAD’s analysis of the evidence is flawed in many respects. The RAD does not provide a reasonable explanation for its implausibility findings. While some aspects of the case might justify a requirement for corroboration, the RAD’s analysis overlooks crucial issues and does not evince a rational chain of analysis. I am unable to say what decision the RAD would have reached had it not made those errors. As a result, I must send the case back for redetermination.

B. *Internal Flight Alternative*

[47] The Minister, however, argues that the RAD’s IFA finding stands independently of its conclusion regarding Mr. Senadheerage’s lack of a well-founded fear of persecution. Thus, according to the Minister, the rejection of Mr. Senadheerage’s claim for asylum was inevitable and the decision should be confirmed on that sole basis. I disagree.

[48] In many cases, the IRB uses an IFA as the main ground for dismissing a claim. In other cases, such as this one, it is an alternative ground. This means that if, contrary to the IRB’s findings, the claimant really has a well-founded fear of persecution, he or she may escape persecution by moving to a different part of the country.

[49] When an IFA is used as an alternative ground, care must be taken to separate the IFA analysis from that of the well-founded fear of persecution: see, by analogy, *Chaudhry v Canada (Citizenship and Immigration)*, 2020 FC 902 at paragraph 21. Indeed, at the IFA stage, the

decision-maker must assume that his or her decision regarding persecution is wrong. One must assume that the claimant has a well-founded fear of persecution in one part of the country and proceed to determine if that fear extends to the whole country. If the decision-maker fails to make the distinction, the IFA analysis becomes a mere restatement of the findings with respect to persecution.

[50] In this case, it appears that the RAD confused the two issues, at least in significant part. The main ground for the IFA finding is "the lack of credible, probative evidence that the agents of persecution are actively seeking him out and have retained an interest in harming him." But that misses the mark. The RAD had to assume the opposite. The real question is, what if the agents of persecution still want to harm Mr. Senadheerage? Would he be able to protect himself by moving to another part of the country? The RAD does not directly address that question.

[51] The RAD gave other reasons for its IFA finding. I am, however, unable to say that it would have come to the same conclusion had it not made the error identified above. Thus, I cannot sustain the decision on the basis of the IFA finding.

III. Conclusion

[52] As several aspects of the RAD's decision are unreasonable, the application for judicial review will be allowed and the matter will be sent back for redetermination.

JUDGMENT in IMM-4471-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is returned to the Refugee Appeal Division for redetermination.

3. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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