Federal Court  Cour fédérale

Date: 20211116

Docket: IMM-3846-19 and IMM-3848-19

Citation: 2021 FC 1245

Toronto, Ontario, November 16, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

THESHANTH THAVAKULARATNAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Theshanth Thavakularatnam, applied for judicial review of two decisions made under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] The first decision was made on March 13, 2019, by an inland enforcement officer (the "officer") of the Canada Border Services Agency ("CBSA"). He decided to write a report under

subsection 44(1) that identified the applicant as possibly inadmissible to Canada on the basis of serious criminality under paragraph 36(1)(*a*) of the IRPA.

[3] The second decision was made on March 29, 2019, by a delegate of the Minister of Public Safety & Emergency Preparedness (the "Delegate") under IRPA subsection 44(2) to refer the Officer's report to the Immigration Division for an inadmissibility hearing.

[4] The applications for judicial review were heard concurrently. The applicant submitted that both decisions were unreasonable and that the officer did not provide procedural fairness to the applicant before writing the report under subsection 44(1).

[5] For the reasons that follow, I conclude that both applications must be dismissed. I am not persuaded that the process leading to the officer's decision to write a report under subsection 44(1) was procedurally unfair. In addition, the officer did not fetter his discretion. He reached a decision that was reasonable on the standards required in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Because the applicant's challenge to the Delegate's decision under subsection 44(2) turns on the outcome of his challenge to the officer's decision, the two applications will be dismissed.

I. Facts and Events Leading to this Application

[6] The applicant is a citizen of Sri Lanka and a permanent resident of Canada. He was born in Germany.

[7] The applicant's parents are also permanent residents of Canada. The family arrived in Canada in 2000 from Germany after fleeing the civil war in Sri Lanka. They successfully applied for refugee status. The applicant is therefore a protected person in Canada.

[8] Until his incarceration at Joyceville Institution, the applicant lived with his parents in the Malvern neighbourhood of Scarborough, Ontario. He has no siblings. He has never been to Sri Lanka.

[9] In December 2017, the applicant was convicted of robbery and aggravated assault, contrary to the *Criminal Code*, RSC 1985, c C-46. In January 2018, the applicant was convicted of possession of a firearm with ammunition and possession of an unauthorized firearm, contrary to the *Criminal Code*. His custodial sentence for these offences totalled 46 months, to be served concurrently.

[10] On November 14, 2018, the officer delivered a letter to the applicant advising him that he may be inadmissible to Canada under paragraph 36(1)(*a*) of the IRPA and that a decision to allow him to remain in Canada or to seek a removal order issued against him would be made in the near future. The next step in the process was to review his circumstances. The officer requested that he present himself for an interview that same day at 9:30 AM. The officer interviewed Mr. Thavakularatnam either that day or the next. The officer took handwritten notes during the interview.

[11] The applicant sent a handwritten letter to the officer dated November 15, 2018. A date stamp confirms it was received by CBSA on December 6, 2018.

[12] The applicant retained legal counsel. By letter dated December 4, 2018, counsel confirmed receipt of a copy of the officer's letter to the applicant dated November 14, 2018 and requested an additional 30 days to provide submissions to the officer.

[13] By email on December 4, 2018, the officer agreed to the extension of time for submissions until January 11, 2019. The officer also advised that he interviewed the applicant at Joyceville Assessment Unit near Kingston, Ontario on November 15, 2018, and that there was "no other disclosure related to his case at this time".

[14] The applicant's counsel made submissions to the officer by letter dated January 11, 2019. These submissions were detailed, comprising just over 12 single-spaced pages. The submission also included numerous attachments.

[15] Counsel's letter dated January 11, 2019 also confirmed her understanding from previous correspondence that the officer did not have any disclosure to provide and requested disclosure if the officer intended to rely on any documentation for his assessment other than what has been provided by the applicant with his submissions. Counsel also requested additional time to make further submissions following the anticipated receipt of a report from the applicant's parole officer.

[16] By email on January 14, 2019, the officer confirmed his receipt and review of 140 pages of written submissions. He agreed to an extension for further submissions until February 25, 2019. The officer also stated:

> There is no disclosure from CBSA at this time. The CSC Criminal Profile, CSC Correctional Plan, The Ministry of Community Safety and Correctional Services Canada Pre-sentence Report, and the judges reasons for sentence will be considered when making the decision on whether to write an A44 report. Those documents are all either public record or represent third-party information that is not for CBSA to disclose. However, I have confirmed with his Parole Officer that CSC discloses all of those reports to the subject routinely which is the case in Mr Thavakularatnam's situation as well. He was provided with a copy of his CSC criminal profile and CSC Correctional Plan by his Parole Officer in December 2018 upon their completion.

[17] By letter dated February 25, 2019, counsel for the applicant made additional submissions to the officer.

[18] Overall, the applicant requested that the officer issue a warning letter to the applicant and not prepare a report under section 44 of the IRPA. To support this position, he provided considerable information to the officer in addition to his own handwritten letter and counsel's two letters dated January 11, 2019 and February 25, 2019. The additional information included:

- a statutory declaration from his father explaining the family's flight from Sri Lanka to Canada by way of Germany, their limited ties to Sri Lanka and his parents' limited ability to communicate in English. His father characterized the applicant as their "lifeline to the outside world";

- 15 letters of support attesting to the applicant's good character;

- certificates of completion for various programs offered at Joyceville Institution;
- country condition evidence for Sri Lanka; and
- a letter from the applicant's Correctional Programs Officer at Joyceville Institution.

II. Decisions under Review

A. *The Officer's Decision*

[19] The officer prepared a report dated March 13, 2019, under subsection 44(1) of the IRPA. That provision provides that an officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts. The report shall be transmitted to the Minister.

[20] The officer reported that the applicant was a permanent resident and was, in the officer's opinion, inadmissible pursuant to paragraph 36(1)(*a*) of the IRPA on grounds of serious criminality. The report referred to the applicant's convictions in December 2017 and January 2018.

[21] The officer's reasons were contained in another document entitled "A44 Narrative Report", also dated March 13, 2019 (the "Narrative Report"). It appears to be a CBSA form that allowed the officer to complete sections for information about the applicant, including sections for background information, relatives in Canada, reportable convictions, the circumstances of the allegations, the person's establishment, humanitarian and compassionate factors, potential for

rehabilitation and the officer's recommendation and rationale. The officer in this case inserted content into each of these sections. (Other sections had no relevant content for present purposes.)

[22] Section 9 of the Narrative Report contained the officer's recommendation and rationale. It first set out a short chronology of events from the interview in November 2018 to the receipt of counsel's submissions on February 25, 2019. It confirmed that the officer had read the submissions from the applicant's counsel dated January 11, 2019 and February 25, 2019 in their entirety.

[23] The officer recognized that the applicant was a protected person in Canada, so he would not be removed to Sri Lanka without a "danger opinion". The officer found that it was not his place to make an assessment of those dangers in the Narrative Report, as the danger opinion process would thoroughly consider and weigh the danger that the applicant presented to Canada versus the danger that would be presented to him upon return to Sri Lanka.

[24] The officer noted that the applicant stated during the interview that he was a member of a gang, which was also indicated in his Correctional Services Canada Criminal Profile and was confirmed by the Toronto Police Service. The officer found that the applicant's "convictions are extremely serious and involve firearms that are for his gang". The officer briefly described the circumstances of the applicant's convictions for armed robbery and aggravated assault, which were related to an "incident of organized crime (gang) violence".

[25] The officer recognized that the applicant had been in Canada since the age of 4 and had never been to Sri Lanka.

[26] In a passage that was the focus of the submissions at the hearing of this application, the officer stated:

> He does appear to be remorseful for his crimes and recognizes that by avoiding negative associates will be his best chance to change his life in the future. His family is even committed to moving away from the Malvern area they reside to keep him away from negative associates. However, Mr Thavakularatnam during interview seemed to minimize his own role in the crimes that he was convicted. During interview he spoke about being taken advantage of by older friends that he thought were cool. He stated that they would make him hang on to their guns and he was just doing what he was made to do. However, he completely failed to mention that he was the one that shot a victim in the leg with a gun during an armed robbery of the victim's gold chain. He failed to indicate that when the police arrested him holding the gun for his Hood Hustle gang partners that the Police had been watching him because he was the suspect in the previously mentioned armed robbery shooting. While he mentioned that he had a loaded gun in a busy mall, he did not mention that when arrested a violent struggle ensued with Police when he resisted arrest and one of the officers had a serious permanent injury resulting from that struggle. While it is conceivable to believe that hanging out with negative associates influenced him into a life of gang violence and crime it does not diminish the personal responsibility that must be attributed to his primary role in these very serious crimes.
>
> He is a violent organized criminal gang member that has demonstrated a repeated pattern of possessing prohibited handguns and a willingness to use them. Gun violence in Toronto has become a very serious problem costing many people their lives as well as fear and a lack of stability for residents. To issue Mr Thavakularatnam a warning letter would be unreasonable and would not reflect the gravity or seriousness of his crimes.

[27] The officer concluded, after stating that he considered the objectives of the IRPA as well as the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, by recommending an inadmissibility hearing with an eventual outcome of a deportation order.

B. ***The Delegate's Decision***

[28] Subsection 44(2) of the IRPA provides that if the Minister is of the opinion that the report in subsection 44(1) is well-founded, the Minister may refer the report to the Immigration Division for an inadmissibility hearing (subject to an exception that does not apply here).

[29] In this case, the Minister's Delegate made a referral under subsection 44(2). Having reviewed the officer's report dated March 13, 2019, concerning the applicant, the Delegate referred the report to the Immigration Division for an inadmissibility hearing to determine whether the applicant is a person described in paragraph 36(1)(*a*) of the IRPA.

[30] The Delegate noted the applicant's criminal convictions and found that the officer's report was "well founded in fact and law". The Delegate stated that he had "considered the H and C [humanitarian and compassionate] factors in this case and … concluded that they are not sufficient to overcome the seriousness of the criminality." The Delegate set out facts about the applicant and his family. The Delegate stated that the "circumstances surrounding his convictions are extremely serious and involve a firearm that are for his gang. He has demonstrated a repeated pattern of possessing prohibited handguns and willingness to use them". To the Delegate, "[t]hese factors outweigh any mitigating factors surrounding the H&C

considerations", which were "not significant enough to outweigh the severity of the criminal activity".

III. Standards of Review

[31] Issues of procedural fairness are reviewed without deference to the decision maker, essentially on a correctness basis. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49, 54 and 56; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 28.

[32] The standard of substantive review of an administrative decision was described in *Vavilov*. Both parties made submissions based on the reasonableness standard in that decision of the Supreme Court.

[33] In conducting a reasonableness review, a court considers the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process (i.e. the rationale) that led to the decision and the outcome: *Vavilov*, at paras 83, 86.

[34] The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually to understand the basis on

which the decision was made, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 31.

[35] The reviewing court does not determine how it would have resolved an issue on the evidence, nor does it reassess or reweigh the evidence on the merits: *Vavilov*, at paras 75, 83 and 125-126. The task of the reviewing court is to assess whether the decision maker reviewed and drew conclusions from the evidence and submissions in a manner that conforms to *Vavilov* principles.

[36] The onus to demonstrate that the decision is unreasonable is on the applicant: *Vavilov*, at paras 75 and 100; *Canada Post*, at para 33.

IV. Analysis

[37] The applicant submitted that the officer did not provide him with procedural fairness in making the decision to write a report under subsection 44(1). Specifically, the officer interviewed the applicant and took handwritten notes during the interview, which he did not disclose and did not mention in the documents he told the applicant's counsel he would be considering when deciding whether to make a report. The applicant claims he had a reasonable expectation, in law, that the officer would not consider the interview in deciding whether to write the report.

[38] The applicant also submitted that the officer fettered his discretion in writing the section 44 report because he found that a humanitarian and compassionate ("H&C") assessment of hardship could only occur during a Minister's danger opinion and therefore failed to conduct that assessment.

[39] The applicant further contended that the officer's decision under IRPA subsection 44(1) was unreasonable because he erred in finding that the applicant did not take personal responsibility for his crimes, ignored evidence of rehabilitation and failed to demonstrate a balancing of positive and negative factors that would explain why he made the decision.

[40] The respondent disagreed, arguing that no violation of procedural fairness had occurred, the officer did not fetter his discretion and the officer's decision was reasonable.

[41] The respondent did not submit that these judicial reviews were premature. Neither party referred to the Federal Court of Appeal's recent decision in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81, which concluded that the judicial review applications of decisions under IRPA section 44 in that appeal were premature. I am also aware that Justice Manson has recently distinguished *Lin* and determined the merits of an application for judicial review of decision under section 44: *XY v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 831, at paras 42-48. Because the issue was not raised in these applications, I will render a decision on the basis of the parties' arguments.

[42] The parties did not address the admissibility of the affidavits of the applicant and the officer filed in this Court. Both affidavits in part attempted to shore up the filing party's arguments on the merits of this application. However, evidence that was not before the decision maker and that goes to the merits of the matter is not admissible: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at paras 19-20; *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, at para 52. I will not refer to the evidence that goes to the parties' positions on the merits. The affidavits also included evidence that appeared to fall within the exception permitting evidence related to the Court's ability to review the decision for procedural unfairness: *Association of Universities and Colleges of Canada*, at para 20(b). I will refer to that evidence for context, but I do not need to rely on either affidavit to reach conclusions on procedural fairness.

A. ***Procedural Fairness***

[43] The applicant submitted that he requested full disclosure of all documents and information that the officer intended to review in making his decision. However, the officer did not refer to or disclose his handwritten notes taken during the November 14, 2018 interview with the applicant and did not disclose that he would be relying on that interview. In addition, the applicant was not aware of the contents of the notes before making his submissions to the officer.

[44] Specifically, the applicant noted that his counsel's letter dated January 11, 2019 requested that the officer provide any documentation he intended to rely upon. The officer responded by email on January 14 but did not mention the handwritten interview notes. On this basis, the

applicant submitted that the officer's specific representations in this case caused the applicant to have a legitimate expectation that the officer would not consider his interview notes. The applicant relied on *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, at paras 94-95.

[45] The applicant also submitted that he relied on the officer's email to his detriment. In his affidavit filed on this application for judicial review, the applicant testified that he, his counsel and his family discussed "how to logistically get an affidavit prepared and signed while [he] was in detention, to describe what took place in the interview". He testified that because the officer "did not indicate he was considering the interview, we stopped making preparations for my affidavit". The applicant also testified in his affidavit that the officer did not write everything down and set out various specific responses to matters stated in the officer's Narrative Report. He commented that the officer's "summary" of the interview was not an accurate reflection of what occurred because he "spoke for longer" about the effect of his removal on his parents and did not tell the officer that he was part of a gang but rather that the special intelligence officers in the jail had identified him as such.

[46] The respondent's position was that procedural fairness did not require the officer to disclose his interview notes to the applicant. The respondent submitted that the duty of procedural fairness was at the low end of the spectrum during the section 44 process and required only that the applicant have an opportunity to make submissions and know the case against him (referring to *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 FCR 3 (Snider J), at para 72 and *Sharma v Canada (Public Safety and Emergency*

Preparedness), 2016 FCA 319, [2017] 3 FCR 492, at para 29). The respondent also argued that the applicant knew that the interview would be considered because the officer's November 14, 2018 letter said so, and the officer's December 4, 2018 email clearly implied the obvious—that the interview would be considered. The respondent further contended that the notes were not extrinsic evidence because the applicant was a participant in the interview and had been advised that he could have counsel present—who would have taken notes. On this submission, the applicant chose to proceed without counsel, a choice that did not create a disclosure requirement. Lastly, the respondent submitted at the hearing that the non-disclosure had no impact on the outcome. Considering the contents of the communications from the officer, the applicant could not have believed that the interview would not be considered and could have confirmed if he was unsure. The respondent filed an affidavit from the officer on this application that responded to the applicant's testimony about what was and was not stated during the interview, including how long the applicant spoke about his parents.

[47] I am not persuaded that the process followed by the officer was unfair to the applicant.

[48] First, the procedural fairness required at the stage of a section 44(1) report is on the low end of the spectrum: *Sharma*, at para 29 and 34; *Hernandez*, at paras 70-72; *Jeffrey v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1180 (Crampton CJ), at para 30.

[49] Second, the procedural fairness decisions of this Court confirm that the scope of disclosure that must be provided is limited: *Durkin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 174 (Barnes J), at para 17 (no obligation to disclose information that a

party already knows) and para 18 (can only demand disclosure if the information is "material and otherwise unknown and unavailable"); *Jeffrey*, at paras 24-27 and 30; *Slemko v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 718 (Walker J), at para 36; *Mannings v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823 (Kane J), at paras 105 and 110; and *XY*, at paras 95-96. In this case, the source of the information in the undisclosed handwritten notes was the applicant himself and he was aware during the interview that the officer was taking notes.

[50] Third, a legitimate expectation based on a government representation about procedure that complies with the requirements of *Agraira* may enhance or refine the level of procedural fairness to which an individual is entitled: see e.g. *Sharma*, at para 26; *Agraira*, at paras 94-96; *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at paras 68-69. In addition, proof of reliance is not required: *Mavi*, at para 68.

[51] However, in this case, I am not persuaded that the applicant had a legitimate expectation that the officer would not consider the contents of the interview. The officer's letter to the applicant dated November 14, 2018, made clear the purpose of the interview for the purposes of a possible inadmissibility report under section 44. The officer provided that letter to the applicant's counsel on November 30, as she confirmed on December 4, 2018. The officer referred to the interview in his email on that date. Neither the applicant's request for disclosure on January 11, 2019 nor the officer's response by email on January 14, 2019, explicitly mentioned the interview or the officer's notes of it. In my view, neither counsel's letter nor the contents of the officer's email was sufficient to dislodge the clear, prior representation,

understanding and expectation that the officer would consider the November 14, 2018 interview. In other words, to address directly the applicant's submission based on *Agraira*, I do not believe the representation in the officer's January 2019 email was sufficiently clear, unambiguous and unqualified to create a legitimate expectation that the officer would not consider what the applicant told him during the interview, given what had already been communicated to the applicant and his counsel in the November 2018 letter.

[52] Fourth, to assuage any lingering doubt about procedural fairness to Mr. Thavakularatnam, I have reviewed the officer's handwritten notes in the Certified Tribunal Record and considered the applicant's substantive concerns. I am not persuaded that the officer's handwritten notes would have assisted the applicant or his counsel even if they had been disclosed before the applicant completed his submissions to the officer.

[53] First, the officer handwrote his notes on a partly-completed A44 Narrative Report form. The handwritten contents are reflected in the final version. The notes do not contain the officer's own observations at the time or his assessment in the Recommendations and Rationale section of the final Narrative Report. To the extent that the applicant is concerned about the officer drawing erroneous conclusions about remorse from the applicant's failure to give answers that acknowledged his personal responsibility, I note that the officer's handwritten notes refer to what the applicant did say, not to what he did not say.

[54] Second, the applicant made no specific submissions about how the notes would have assisted him. I do not see how they would have materially assisted him with respect to the

officer's conclusion on the applicant's lack of remorse or taking responsibility for his actions. Mr. Thavakularatnam's position about his remorse was repeatedly articulated to the officer. His handwritten letter dated November 15, 2018 to the officer stated that he had made mistakes and was "really remorseful" and "sorry for my actions that I did that put me in prison". Counsel's written submissions on January 11, 2019, stated that he was "truly remorseful". The applicant's submissions to the officer after the officer's January 14 email, made by letter dated February 25, 2018, focused almost entirely on the applicant's remorse and taking responsibility, with no fewer than 6 references to remorse in that two-page letter, together with additional references to the applicant's regret and his mistakes.

[55] In short, the applicant's position that he was remorseful could hardly have been advanced more thoroughly after the interview than it was. The officer referred to his remorse in the report.

[56] Lastly, on other subjects raised in relation to the interview that the applicant challenges, the officer had other evidence of the applicant's involvement with a gang from outside the interview. In addition, even if the applicant spoke longer about his parents during the interview, the written submissions to the officer on January 11, 2019 referred many times to his parents, including the impact of his possible removal on his parents. The submissions included:

- they would have "little support" without him,
- his incarceration has been "tremendously difficult on his parents who have had to rely on a hodgepodge of help from other community members in his absence" because they have no close blood relatives in Canada and speak little English, and

- his removal would “condemn his parents to a life without any support” as the applicant is an only child and their main support.

[57] Accordingly, I conclude that the applicant has not shown that the process was procedurally unfair.

B. ***Substantive Review of the Decisions***

(1) The Officer’s Decision

(a) *Did the officer fetter his discretion under IRPA subsection 44(1)?*

[58] The applicant submitted that the officer fettered his discretion in writing the report under subsection 44(1). After making detailed submissions on the legislative framework and the scope of the officer’s discretion to write a report in relation to a permanent resident of Canada, the applicant contended that the officer did not account for any of the evidence related to H&C factors, particularly that the applicant would suffer hardship on return to Sri Lanka. According to the applicant, the officer failed to understand the elements of a “danger opinion” made under paragraph 115(2)(*a*) of the IRPA, incorrectly assuming that the same evidence relevant to his discretionary decision not to write a section 44 report is also relevant to a danger opinion. On this submission, the officer fettered his discretion by refusing to consider any hardship relating to the applicant’s removal to Sri Lanka.

[59] The respondent’s position was that the officer did not fetter his discretion. Rather, the officer did consider H&C factors, including hardship on removal, and did so reasonably.

[60] In my view, the applicant's argument cannot succeed. His submission is premised on the argument that the officer misunderstood whether he could, in law, take into account hardship arising from the applicant's removal to Sri Lanka. I see no such legal error in the officer's reasoning. The officer referred to an eventual danger opinion because the applicant is a protected person in Canada. He found that the weighing of danger in Canada versus danger in Sri Lanka would occur at that stage. He did not find that he could not consider hardship or H&C factors when deciding to write a section 44 report.

(b) *Was the officer's decision reasonable under Vavilov standards?*

[61] To support his position that the officer's decision was unreasonable, the applicant made several arguments related to the officer's consideration and treatment of the evidence. Before addressing them in turn, I will make some overall comments about the assessment of reasonableness that apply to all of them.

[62] On this judicial review application, the Court's task is not to determine whether it agrees or disagrees with the officer's decision, or with his reasoning, or with his assessment of the evidence. A reviewing court is not permitted to review and reweigh the evidence before the officer or determine what it would do with that evidence and change the result if it disagrees. Put another way, judicial review requires a review of the reasonableness of the decision, not a reconsideration of the whole case and all its evidence to determine the Court's opinion about the correct reasoning and result.

[63] The Court's role is to ensure that the decision – which in this case was whether to write a report under subsection 44(1) – was reasonable in that it displays the characteristics of intelligibility, transparency and justification. To make that determination, the officer's decision, and its reasons, must be assessed in light of the record: *Vavilov*, at paras 91-96.

[64] In *Vavilov*, the Supreme Court held that a court on judicial review must ask whether the decision is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, at paras 85, 99 and 105-106. One fundamental flaw that may render a decision unreasonable arises when a decision is in some respect "untenable in light of the relevant factual and legal constraints that bear on it": *Vavilov*, at para 101. The evidentiary record and the factual matrix may act as constraints on the reasonableness of a decision. A decision may be jeopardized if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at para 125-126; *Canada Post*, at para 61.

[65] In my view, the officer's decision to write a section 44 report in this case meets the standard of reasonableness in *Vavilov* and *Canada Post*.

[66] First, the applicant maintained that the officer's decision was unreasonable because he erred in determining that Mr. Thavakularatnam did not take personal responsibility for his crimes. The applicant submitted that this conclusion occurred due to alleged omissions in the applicant's answers to the officer's questions during the interview on November 14, 2018 at Joyceville. Referring to his affidavit filed in this Court, the applicant made submissions about the way the officer posed questions and argued that the officer never posed a direct question about

whether the applicant took personal responsibility for his actions. The applicant's affidavit contained expanded answers. The applicant also referred to evidence showing his remorse that was not mentioned in the officer's Narrative Report.

[67] In my view, the officer made no such reviewable error. It was open to the officer to reach the conclusion he did on the record. On one hand, there was evidence from the applicant that he took responsibility for his crimes and that other people who knew or worked with him, such as his parole officer, found him remorseful. There was evidence that he acknowledged his mistakes and poor choices. There was also evidence suggesting that he did not take full responsibility for his conduct.

[68] As revealed in the long except from the officer's Recommendation and Rationale in the Narrative Report (set out in paragraph 26 above), the officer expressly stated that the applicant appeared remorseful for his crimes. While the applicant focused his submissions on this paragraph, an earlier section (circumstances of allegations) had already noted that during the interview, the applicant stated that at age 18 he got pulled into bad gang activity and that "I was very young and guys were 25-26 years old and they brain washed me and gave me guns to hold. That is how the guns got in my possession. They weren't mine … I was taken advantage of by older members …" These statements in the officer's Narrative Report were taken, almost verbatim, from the officer's contemporaneous handwritten notes of the interview. The statements are also consistent with the applicant's handwritten letter dated November 15, 2018 to the officer, which stated in part that he was "introduced to these guys who were 26 years and older

and they brain washed me and influenced me to do bad things… They would use me to hold guns and drugs because I was young and just went along with it".

[69] Returning to the officer's Recommendation and Rationale in the Narrative Report, the officer considered the applicant's description of events at the interview in light of additional evidence from other sources, including the applicant's Criminal Profile from Correctional Services Canada. That additional evidence was set out at length earlier in the Narrative Report and was not contested on this application. It confirmed that the during the commission of his offences, the applicant shot the victim of the robbery in the leg and that a police officer was injured when the applicant was later apprehended in a shopping mall while carrying a loaded gun. The officer therefore compared the information provided by the applicant during the interview with information obtained from the applicant's Criminal Profile, and described factual gaps between them that were important to the officer. The officer's reasoning implied that the applicant did not tell him the whole story or did not take full responsibility for his actions.

[70] It is important to note that the officer's stated observation in the Narrative Report was that while it was "conceivable to believe that hanging out with negative associates influenced him into a life of gang violence and crime", that did not "diminish the personal responsibility that must be attributed to his primary role in these very serious crimes". That conclusion, which expressly recognized the applicant's perspective, was open to the officer on the record as it concerned the decision at issue. The evidence of the applicant's remorse and assumption of personal responsibility did not so constrain the officer to require a different conclusion for a decision to write a report under IRPA subsection 44(1).

[71] The applicant's second submission on unreasonableness was that the officer failed to consider and analyze the evidence related to rehabilitation more generally. His memorandum to this Court referred at length to that evidence. However, the officer did not ignore the evidence related to rehabilitation. In a section entitled "Potential for Rehabilitation" in the Narrative Report, the officer noted the applicant had completed programs at Joyceville, had finished a business course and a CPR course while in prison, had a possible job after his release and a youth worker committed to helping him find one, and he continued to have the support of his parents and family. Elsewhere, the officer made observations about rehabilitative prospects. He noted:

- In his sentencing decision, Ontario Superior Court Justice Akhtar noted that the applicant had the support of his family, presented letters of support, was a youth offender, and verbalized remorse for his actions;

- the applicant "was able to finish high school and was accepted to George Brown College before becoming involved with the gang";

- the applicant's "family is committed to moving away from the Malvern area… to keep him away from negative associates"; and

- as noted already, the applicant did "appear remorseful for his crimes and recognize[d] that … avoiding negative associates will be his best chance to change his life in the future".

[72] While the officer could have done a more detailed analysis and considered additional evidence, the failure to do so did not render the officer's decision to write the section 44(1) report unreasonable.

[73] Third, the applicant argued that the officer ignored evidence of hardship to others, particularly Mr. Thavakularatnam's parents. He contended that the Court should infer from the officer's silence on the issue that the decision was made without regard to the evidence, referring to the principles in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), [1999] 1 FC 53 (Evans J).

[74] This submission on hardship is directly connected to the officer's ability to consider H&C factors. The discretion under subsection 44(1) to consider H&C factors, if any exists, is limited. There is ordinarily no obligation to do so. In *McAlpin*, Chief Justice Crampton stated that if "H&C factors are considered by an officer in explaining the rationale for a decision that is made under subsections 44(1) or (2), the assessment of those factors should be reasonable, having regard to the circumstances of the case": *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422, [2018] 4 FCR 225, at para 70 (#2-4). See also *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363, [2017] 3 FCR 354 [*Melendez 2016*] (Boswell J), at para 34; *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1131 (Kane J), at para 31; *Yavari v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 469 (Pentney J), at para 41; and *Zhang v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 746 (Ahmed J), at para 20.

[75] In *McAlpin*, the Chief Justice noted the important distinctions between the H&C provisions in IRPA section 25 and the inadmissibility provisions in section 36: *McAlpin*, at paras 64-65. As Justice Boswell noted in *Melendez 2016*, an H&C analysis under section 44 need not be as extensive or comparable to the analysis on an H&C application under section 25: *Melendez 2016*, at para 34 (#5). I agree.

[76] In his *McAlpin* reasons, Chief Justice Crampton restated and refined the approach to assessing an officer's consideration of H&C factors under section 44, based in part on Justice Barnes's decision in *Melendez 2016*. Crampton CJ found that in cases of serious criminality, an officer has no obligation to consider H&C factors: *McAlpin*, at para 72. If the offences at issue fall at the "lower end of the spectrum" contemplated by IRPA subsection 36(2) and are therefore of a "less serious nature", an officer's failure to consider "*prima facie* compelling" H&C factors raised by the individual affected may render the decision unreasonable: *McAlpin*, at paras 72-78.

[77] Unlike *McAlpin*, the present case concerns serious offences under paragraph 36(1)(*a*), not offences under subsection 36(2) that are of a less serious nature. The officer was not obligated to consider the applicant's H&C factors.

[78] I agree with the applicant that, looking at the Narrative Report as a whole, the officer did not expressly recognize all of the hardship points raised in counsel's written submissions, particularly about how his parents would cope without their son and that the applicant speaks Tamil but not Sinhala. The officer mentioned some of the H&C factors (those raised by the applicant during the interview) in the H&C section of the form and mentioned that the applicant

speaks Tamil. The officer conducted no express analysis of the H&C factors in the Recommendation and Rationale section of the form—like the officer in *McAlpin*: at paras 82-83. However, because he had no obligation to take such factors into account in reaching his decision to write the report, I cannot conclude that his decision was unreasonable solely on this basis. Taking the analysis a step deeper into the *Vavilov* framework: in my view, despite his parents' apparent linguistic and other challenges without him during his incarceration and if he is removed from Canada, the evidence about their hardship did not constitute a constraint that compelled a different outcome on the officer's decision to write a report under subsection 44(1).

[79] Accordingly, the applicant's submissions on H&C factors do not succeed.

[80] The applicant's final submission was that the officer failed to explain properly why he made the ultimate decision to write the report under subsection 44(1). According to the applicant, the officer simply listed positive and negative factors, and stated his conclusion, without any reasoning. I do not agree. In my view, the officer's decision included a logical line of reasoning and a clear conclusion for deciding to write the report. He concluded that the applicant was a "violent organized criminal gang member that has demonstrated a repeated pattern of possessing prohibited handguns and a willingness to use them". He expressly also found that writing a warning letter, as the applicant proposed, was not sufficient.

[81] For these reasons, I conclude that the applicant has not demonstrated that the officer's decision to write a report under subsection 44(1) was unreasonable on the standards set out in *Vavilov* and *Canada Post*.

(2) The Delegate's Decision

[82] The applicant submitted that because the officer's decision to write the report under subsection 44(1) was unreasonable, it was also unreasonable for the Delegate to rely on it to refer the officer's report to the Immigration Division under subsection 44(2). In other words, as his counsel properly confirmed at the hearing, the applicant's challenge to the Delegate's decision under subsection 44(2) was dependent on the outcome of his challenge to the officer's decision under subsection 44(1). The applicant made substantially the same legal and evidentiary submissions on both applications.

[83] Having concluded that the applicant has not demonstrated that the officer's decision to write the report was unreasonable, it follows that his application for judicial review of the Delegate's decision must also be dismissed.

V. Conclusion

[84] For these reasons, the applications for judicial review are dismissed. Neither party proposed a question for certification and none is stated.

JUDGMENT in IMM-3846-19 and IMM-3848-19

THIS COURT'S JUDGMENTS are that:

1. The applications for judicial review are dismissed.
2. No question is certified for appeal in either proceeding under paragraph 72(*d*) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3846-19 AND IMM-3848-19
STYLE OF CAUSE:	THESHANTH THAVAKULARATNAM v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 11, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
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