

Federal Court



Cour fédérale

Date: 20220208

Docket: IMM-4850-19

Citation: 2022 FC 155

Ottawa, Ontario, February 8, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

RAJEEVAN MARIYASEELAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada dismissed Rajeevan Mariyaseelan's refugee claim on grounds of credibility, finding he had not been detained and violently interrogated by the Sri Lankan military as he claimed. The RPD based its negative credibility inferences on asserted inconsistencies in Mr. Mariyaseelan's testimony about the order of events in the interrogation, whether a weapon had been used on

both days of the interrogation, and the relationship with an individual that prompted his detention. In doing so, the RPD disregarded an affidavit from Mr. Mariyaseelan's aunt based on concerns about interpretation.

[2] For the following reasons, I agree with Mr. Mariyaseelan that two of the RPD's four central credibility findings were unreasonable. One was based on an asserted inconsistency in Mr. Mariyaseelan's evidence that a review of the testimony shows did not exist. The other was based on Mr. Mariyaseelan not having mentioned a peripheral fact in an interview at his port of entry (POE). Given the importance of these findings to the RPD's conclusion that the interrogation did not occur and the relationship did not exist, I find these errors render the RPD's decision unreasonable and require the matter to be redetermined. As a subsidiary matter, I also agree with Mr. Mariyaseelan that the RPD's grounds for disregarding the aunt's affidavit, a key piece of corroborative evidence, were unsound.

[3] The application for judicial review is therefore granted and Mr. Mariyaseelan's refugee claim is referred back to the RPD for redetermination by a differently constituted panel.

II. Issues and Standard of Review

[4] The parties agree that the RPD's determination of a refugee claim is reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17, 23–25.

[5] In challenging the reasonableness of the RPD's decision, Mr. Mariyaseelan raises the following issues:

- A. Did the RPD unreasonably find Mr. Mariyaseelan's testimony to lack credibility?
- B. Did the RPD unreasonably ignore certain evidence?
- C. Did the RPD unreasonably conclude that Mr. Mariyaseelan lacked subjective fear of persecution in Sri Lanka based on his decision to flee to Canada rather than Qatar?
- D. Did the RPD unreasonably assign little weight to Mr. Mariyaseelan's aunt's affidavit?

[6] In my view, the first of these issues is determinative of this matter. I will therefore not address the second and third issues. I will, however, address the fourth issue regarding the affidavit, since it pertained to a significant piece of corroborative evidence.

III. Analysis

A. *The RPD's credibility analysis was unreasonable*

(1) Mr. Mariyaseelan's refugee claim

[7] Mr. Mariyaseelan asserts that officers of the Sri Lankan army interrogated and beat him over the course of three days in March 2018. He claims the army suspected he was a supporter of the Liberation Tigers of Tamil Eelam (LTTE) because of his connection with an individual named Mathi Alagan, who the army believed to be a member of the underground LTTE.

Mr. Mariyaseelan claims to have met Mr. Alagan in December 2017 when playing badminton in

Qatar, where he was working as a planning engineer. The two exchanged contact information, initially since Mr. Alagan asked Mr. Mariyaseelan about potential jobs with his company in Qatar, and subsequently since they were both returning to Sri Lanka in early 2018 and Mr. Alagan suggested they might meet. Mr. Mariyaseelan says the army suspected and detained him because his contact information had been found in Mr. Alagan's phone.

[8] Mr. Mariyaseelan claims he was questioned about Mr. Alagan during interrogations over three days, which included being tied upside down and beaten with a plastic pipe, and being suffocated with a plastic bag over his head. He was released only after his aunt arranged a payment of 300,000 rupees. The army officers demanded he report to the army camp once a month after his release to help them find Mr. Alagan's other associates in the underground LTTE. A friend arranged an agent to help him flee Sri Lanka. He flew to the United States, where he had a pre-existing visa, and then came to Canada.

[9] Mr. Mariyaseelan's refugee claim was eligible to be referred to the RPD despite arriving from the United States, since his sister is a permanent resident of Canada: *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.5(b)(ii). However, he had no right of appeal to the Refugee Appeal Division and therefore seeks judicial review of the RPD's refusal of his claim: *Immigration and Refugee Protection Act [IRPA]*, s 110(2)(d)(ii).

(2) The RPD's grounds for refusal of the refugee claim

[10] The RPD considered the determinative issue to be Mr. Mariyaseelan's credibility. The RPD found the central event in Mr. Mariyaseelan's narrative, his detention and interrogation by

the Sri Lankan army, did not occur. It reached this finding based on negative credibility inferences it drew based on two aspects of his evidence regarding the interrogation: (a) whether he was beaten with a plastic pipe on both days of his interrogation; and (b) when during his interrogation he was shown photographs of Mr. Alagan. The RPD went on to draw two further negative credibility inferences, based on Mr. Mariyaseelan's evidence regarding (c) why his contact information was in Mr. Alagan's phone; and (d) his decision to flee to Canada rather than returning to Qatar, which the RPD also found showed he had no subjective fear.

[11] Mr. Mariyaseelan accepts that the RPD may have reasonably concluded that there was an inconsistency in his evidence about the use of a plastic pipe during his interrogation. However, he challenges the remainder of the RPD's credibility findings, and argues it would be unreasonable to rely on the first asserted inconsistency to disbelieve the entirety of his evidence.

- (3) The credibility findings regarding the photographs and contact information were unreasonable

[12] Assessments of credibility are a central part of the fact-finding process. As with other factual findings, the Court will not interfere with such assessments absent exceptional circumstances: *Vavilov* at para 125. Credibility findings are often described as being given "significant deference": *N'kuly v Canada (Citizenship and Immigration)*, 2016 FC 1121 at para 21. This emphasizes that within the reasonableness framework, decision makers are given considerable latitude in making credibility findings, which should not be lightly interfered with: *Ikeme v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 21 at para 15; *Vavilov* at paras 88–90. At the same time, credibility findings are not "immune from review," and must be

clearly articulated and justified on the evidence: *N'kuly* at para 24; *Valère v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1200 at para 14.

[13] Despite the deference due to the RPD's credibility findings, I find that the RPD's adverse credibility inferences based on the timing of when Mr. Mariyaseelan was shown photographs of Mr. Alagan and his evidence about why his contact information was in Mr. Alagan's phone were unreasonable. In the circumstances, I need not address the RPD's finding that Mr. Mariyaseelan lacked both subjective fear and credibility because he fled to Canada rather than returning to Qatar, which Mr. Mariyaseelan identifies as his third issue.

Asserted inconsistency regarding when photographs of Mr. Alagan were shown

[14] The RPD stated that Mr. Mariyaseelan's oral testimony at the hearing was that during his first day of interrogation, he was tied up and *then* shown a picture of Mr. Alagan. It contrasted this with his Basis of Claim (BOC) narrative, which stated he was shown the picture *before* being tied up. The RPD found it "highly unlikely that the claimant would mistake the timing of first seeing the picture of the cause for his internment," rejected the explanation given for the discrepancy and drew a negative inference with respect to his credibility.

[15] Mr. Mariyaseelan notes that this Court has criticized the reliance on peripheral inconsistencies such as the order of events during interrogation and torture: *Wardi v Canada (Citizenship and Immigration)*, 2012 FC 1509 at paras 14–19. He argues that the timing of when he was shown the photographs of Mr. Alagan was a peripheral matter. While persuasive, I need not address this contention, since a review of the evidence shows there was no inconsistency in

Mr. Mariyaseelan's evidence. I note that in reaching this conclusion, I have the benefit of the transcript of the hearing, which I recognize the RPD did not have at the time of its decision.

[16] When discussing the first day of interrogation, Mr. Mariyaseelan said he was asked about Mr. Alagan and told the interrogators they met playing badminton. He said he was also asked about giving money to the LTTE, and responded that he did not have any connection with them and did not give them any money. The following exchange then occurred:

Q. Okay. What was their reaction?

A. They did not believe and they did ask me again and again. They told that you and him, both of you, are on vacation at the same time and your place is Jaffna and he is also from Jaffna so you might have connections. Again and again, they asked about that and they hit me. They said that your contact ought to be caught from his phone and they said you got this identity card only when you were 20 years old. They told that and they tied me upside down and beat me and they asked me and they told, why did you come at the same time? Then they put a plastic bag over my head and I was unable to breath[e] and then they asked.

Q. What else did they ask?

A. They asked, they showed these photos and some other people's photos and they asked whether I knew them. I told them that I knew only him.

Q. Did they show you the photo after they tied you up or before?

A. Before that.

Q. Why did you just testify that it occurred after they had tied you up?

A. They were asking that question again and again and my IC [identity card] was a Jaffna IC. I told them that I got... they said that you've got this IC only when you were 20 years old. At the time, they got mad. Then only they tied me up and beat me.

- Q.** Okay. My question to you is that when you testified you said that they tied you up and beat you and then showed you photos of Mathy. But when I asked you whether they had done it before or after they tied you up in your Basis of Claim, it indicates that they showed you the photo before you were tied up.
- A.** Yes, they showed me before but I was telling continuously what happened after that.
- Q.** Why didn't you say they showed you before though? You were describing the events as they occurred and then you said that after they had tied you up then they had showed you the photo?
- A.** Because I missed, I did not say about the photos or that's why I told it after.

[Emphasis added.]

[17] On my reading of the transcript, Mr. Mariyaseelan's initial answer about the photographs was in response to the question "What else did they ask?" At no time did he say, as the RPD appears to have believed, that the interrogators showed him the photographs *after* being tied up. As a result, the RPD's questions, in which it suggested to Mr. Mariyaseelan that he had testified to being shown the photographs after being tied up, were based on an incorrect assertion regarding his testimony. This incorrect assertion was put to Mr. Mariyaseelan three times. His testimony, however, was consistent that he was shown the photographs before being tied up. The fact that the RPD's question "What else did they ask?" came after its question about the interrogators' reaction to his denial of connection with the LTTE does not create any sort of temporal inconsistency in Mr. Mariyaseelan's evidence.

[18] The RPD's conclusion on this issue was based on an asserted but nonexistent inconsistency that was put to Mr. Mariyaseelan in the form of incorrect assertions regarding his

testimony. It goes without saying that where prior evidence is put to a witness as a contradiction, what is put to them must be a fair and accurate statement of their evidence. In my view, with the benefit of the transcript of the hearing, it is clear that the RPD's credibility finding on this point was unsupported by the evidence and was unreasonable.

[19] This credibility finding was central to the RPD's findings regarding Mr. Mariyaseelan's credibility, and in particular its conclusion that the detention and interrogation did not occur. The RPD based that conclusion on the combined effect of its findings about the use of the plastic pipe and the timing of the photographs:

Given that the claimant incorrectly described the order of events in the interrogation, and given that the claimant did not describe being hit by a weapon despite his mentioning in his BOC that he was, the panel finds that the detention did not occur.

[Emphasis added.]

[20] The Minister argued at the hearing that the concern about the use of the plastic pipe was the RPD's principal finding. I note that this contradicts the Minister's written submission that the RPD's finding "was based on the total impact of both major and minor omissions in his evidence." In any event, I must accept the RPD's express statement in its reasons above that it based its finding that the detention and interrogation did not occur on these two inconsistencies. Given that one of them was unreasonable, I cannot conclude that the RPD's assessment would have been the same based on the asserted inconsistency about when a plastic pipe was used in the beating.

Evidence regarding the relationship with Mr. Alagan

[21] The RPD also drew a negative inference based on Mr. Mariyaseelan's evidence about his relationship with Mr. Alagan and his claim that the Sri Lankan army suspected him because his contact information was in Mr. Alagan's telephone. The basis for the adverse inference was that Mr. Mariyaseelan did not advise an immigration officer during an interview at his POE *why* his contact information was in Mr. Alagan's phone.

[22] Notes of the POE interview show that Mr. Mariyaseelan was asked a variety of questions about his personal information, citizenship, potential grounds of inadmissibility, family details, and entry into the United States. Most of these had short answers. At the end of the interview, Mr. Mariyaseelan was asked why he was asking for Canada's protection, and he provided a brief summary of his narrative regarding his detention, interrogation, and beating. This included his statement that he had met Mr. Alagan playing badminton, that the two had exchanged contact information, that Mr. Alagan had asked about potential jobs, and that the interrogators had asked about Mr. Alagan. It did not, however, specify that the two had again exchanged contact information in early 2018 because they were both visiting Sri Lanka at the same time and Mr. Alagan had suggested a meeting.

[23] The RPD found it unlikely that Mr. Mariyaseelan "who is well-educated and sophisticated, would not have mentioned the reason that his contact information was in Mathi's phone to Canadian authorities, given that it was the main reason he was detained in Sri Lanka." Given this, the lack of other "clear substantiation" of the relationship with Mr. Alagan, and the

“previous issues with credibility” addressed above, the RPD found that Mr. Mariyaseelan had not established that the two had arranged to meet or that he had given Mr. Alagan his address.

[24] This Court has confirmed that the RPD should be careful not to place undue reliance on POE statements given the circumstances surrounding the taking of the notes and their purpose: *Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 19, citing *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 51. Nonetheless, inconsistencies between an applicant’s statements in a POE interview and those given before the RPD may support an adverse finding of credibility “if the omission concerns an element that is central to the claim”: *Eze* at para 20.

[25] I agree with Mr. Mariyaseelan that the fact that he was detained because his contact information was in Mr. Alagan’s phone was an important aspect of his narrative, but that *why* it was in his phone was considerably less important. This is particularly so in respect of the second reason that Mr. Alagan had his contact information. In my view, the RPD’s conclusion that Mr. Mariyaseelan was less credible because the POE interview notes refer to one of the reasons Mr. Alagan had his contact information, but not both, falls in the category of unreasonably focusing on a peripheral omission. Indeed, it is unclear that the RPD recognized that Mr. Mariyaseelan had referred to one of the reasons, but not both.

[26] Given the RPD’s reliance on this peripheral omission, combined with its reliance on the “previous issues with credibility,” one of which I have found unreasonable, I conclude that the

RPD's adverse credibility inference, and its resulting conclusion that Mr. Mariyaseelan had not established his relationship with Mr. Alagan, was unreasonable.

[27] The foregoing negative credibility inferences were central to the RPD's decision. The flaws in the decision are thus more than merely superficial or peripheral to the merits. Rather they are sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100.

[28] Given my conclusions on these issues, I need not address the RPD's finding that Mr. Mariyaseelan's decision to flee to Canada, rather than to return to Qatar where he had temporary status, showed a lack of subjective fear and affected his credibility. I should not be taken to have reached any conclusions regarding the reasonableness of this finding.

B. *Treatment of the aunt's affidavit*

[29] While the foregoing is sufficient to dispose of this application, I make the following observations regarding the RPD's treatment of the affidavit provided from Mr. Mariyaseelan's aunt. This was an important piece of evidence, as it purported to corroborate central elements of Mr. Mariyaseelan's claim, including the arrival of the army officers to her house, their apprehension of Mr. Mariyaseelan, her and her husband's efforts to get him released, the payment of the 300,000 rupee bribe, Mr. Mariyaseelan's condition upon release, and his decision to flee to Canada.

[30] Mr. Mariyaseelan's aunt does not speak English. However, the affidavit was prepared and submitted in English, and signed by an attorney and notary public in Sri Lanka acting as a commissioner of oaths, with the following jurat:

The contents of the foregoing affidavit were read over and explained by me in Tamil to the affirm, who understood and placed her signature in front of me in the City of Mannar, on this day 21st of January, 2019.

[31] The RPD stated three concerns with this affidavit: (i) it provided no indication of the lawyer's knowledge of English or his ability to interpret; (ii) it does not state it was interpreted, only that the claimant "understood" and signed it; and (iii) Mr. Mariyaseelan did not know whether the lawyer was an interpreter or not. As a result, the RPD was not satisfied that the aunt understood what was put to her or knew what she was swearing. It therefore said that it gave the affidavit "little weight," although effectively it disregarded the affidavit in its entirety.

[32] I note that the process of translating the contents of an affidavit to a person before it is sworn is generally recognized as an appropriate approach to getting evidence from a person who does not speak the language of the affidavit. This was accepted in proceedings before this Court even prior to the introduction of Rule 80(2.1) of the *Federal Courts Rules*, SOR/98-106, which expressly provides for the approach: *Momcilovic v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 998. Rule 80(2.1) provides that the affidavit shall (a) be translated orally for the deponent by a "competent and independent interpreter" who has taken an oath as to the performance of their duties; and (b) contain a jurat, known as a "jurat of translation," that confirms the affidavit was sworn by interpretation by the interpreter who had taken the oath: *Federal Courts Rules*, Rule 80(2.1), Forms 80B, 80C.

[33] The *Federal Courts Rules* do not, of course, apply to proceedings before the RPD. The RPD has its own rules, which do not address affidavits from someone who does not speak English or French, although they do speak to the translation of documents that are not in English or French: *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], Rule 32(1). As Mr. Mariyaseelan points out, the *IRPA* confirms that the RPD “is not bound by any legal or technical rules of evidence”: *IRPA*, s 170(g). Rather, the RPD may base its decision on evidence it considers “credible and trustworthy in the circumstances”: *IRPA*, s 170(h).

[34] I agree with Mr. Mariyaseelan that the RPD took an overly stringent approach to the jurat of translation. To begin, it is difficult to understand the RPD’s concern that the affidavit does not state that it was interpreted to the aunt. The jurat of translation expressly says that the affidavit was “read over and explained [...] in Tamil” to the aunt by the lawyer who commissioned the affidavit. An English document cannot be “read over” in Tamil without being interpreted. If the RPD was looking for the particular word “interpreted” or “translated” in the jurat, this appears to be putting form over substance in a manner inconsistent with subsection 170(g) of the *IRPA*.

[35] Based on the questions put to Mr. Mariyaseelan at the hearing, the RPD’s concern about the lawyer being “an interpreter” related to whether he was a “certified interpreter.” Even in this Court, it is not clear that the person who interprets an affidavit invariably needs to be “certified,” or to have the profession of interpreter, in order to be “competent and independent,” only that they understand the two languages: *Federal Courts Rules*, Rule 80(2.1), Form 80B. While an interpreter’s abilities and qualifications are reasonably relevant to whether the evidence they have interpreted is credible and trustworthy, neither the *IRPA* nor the *RPD Rules* impose any

predefined qualification or certification. The evidentiary rules in RPD proceedings, designed to recognize that evidence in support of refugee claims may come from a variety of places in a variety of forms, should not impose formal evidentiary burdens not found in either the *IRPA* or the *RPD Rules*.

[36] I also cannot agree with the RPD's statement that the affidavit provides "no indication" of the lawyer's knowledge of English, given the language in which the affidavit was drafted, the lawyer's own statement that he read over and explained it to the aunt in Tamil, and the lawyer's English-language jurat. Mr. Mariyaseelan testified that the lawyer had himself prepared the affidavit in English. I agree with Mr. Mariyaseelan that weight must be given to the lawyer's assertions that the affidavit had been read to the aunt in Tamil and understood by her. It certainly would have been preferable for the jurat of translation or an accompanying declaration to have expressly confirmed the lawyer's ability to speak English and Tamil. However, the RPD appears to have ignored relevant evidence pertaining to the very issue it was considering, namely the degree to which the affidavit reliably represented the sworn evidence of the aunt.

[37] The RPD effectively disregarded the affidavit in its entirety based on concerns about the lawyer's English language abilities, without considering all of the relevant indicia of reliability in the affidavit and Mr. Mariyaseelan's evidence. While it was essential for the RPD to ensure that the evidence before it was "credible and trustworthy in the circumstances," in my view, the RPD took an overly "legal or technical" approach to their assessment of the reliability of the evidence contained in the affidavit.

[38] As a final point on this issue, Mr. Mariyaseelan also refers to sections 52 to 54 of the *Canada Evidence Act*, RSC 1985, c C-5, and suggests that foreign affidavits are presumed to be valid. I agree with the Minister that these provisions do not assist Mr. Mariyaseelan in this case. Section 53 confirms that oaths taken outside Canada by a judicial officer such as a commissioner of oaths are “as valid and effectual” as if they had been taken in Canada. Section 54 states that foreign documents and affidavits are to be admitted in evidence without proof of seals, stamps, or signatures. In the present case, the RPD did not take issue with the authenticity of the affidavit, nor question the signature or official character of the lawyer who commissioned it. The concern was, in essence, with the jurat of translation, a matter that may equally be of concern in respect of an affidavit sworn in Canada.

IV. Conclusion

[39] For the foregoing reasons, the application for judicial review is allowed and Mr. Mariyaseelan’s application for refugee protection is remitted to the RPD for redetermination by a differently constituted panel.

[40] Neither party proposed a question for certification. I agree that no question meeting the test for certification arises in the matter.

JUDGMENT IN IMM-4850-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The decision of the Refugee Protection Division dated July 11, 2019 is set aside and Rajeevan Mariyaseelan's application for refugee protection is remitted to the Refugee Protection Division for redetermination by a differently constituted panel.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4850-19

STYLE OF CAUSE: RAJEEVAN MARIYASEELAN v THE MINISTER OF
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PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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JUDGMENT AND REASONS: MCHAFFIE J.

DATED: FEBRUARY 8, 2022

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