

Federal Court



Cour fédérale

Date: 20220307

Docket: IMM-5645-20

Citation: 2022 FC 312

Ottawa, Ontario, March 7, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

**SAMPATH KUMARA WIJEKOON
WIJEKOON MUDIYANSELAGE**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Wijekoon Mudiyansele, is a refugee claimant from Sri Lanka, who fears persecution at the hands of the police. Mr. Wijekoon Mudiyansele's refugee claim was refused by the Refugee Protection Division ("RPD") on the grounds that he had an Internal Flight Alternative ("IFA") in Colombo, in part due to the RPD's finding that the police who had

arrested, detained and tortured him had been acting in a rogue and unofficial capacity. Mr. Wijekoon Mudiyanseleage appealed this decision to the Refugee Appeal Division (“RAD”). The RAD found that the RPD had erred in its determination that it was a rogue act by the police, but still held that Mr. Wijekoon Mudiyanseleage had an IFA in Colombo, on different grounds than the RPD.

[2] The central issue before the RAD was the change of circumstances since Mr. Wijekoon Mudiyanseleage had fled Sri Lanka. The RAD found that both the change in the government in Sri Lanka and the death of the government official, who Mr. Wijekoon Mudiyanseleage was accused of assisting with fraud, meant that the police would no longer be motivated to persecute him in Colombo. It is the RAD’s decision that is being challenged on this judicial review.

[3] Mr. Wijekoon Mudiyanseleage made two principal arguments: first, that the RAD relied on an unfounded speculation that the police as an institution would no longer pursue Mr. Wijekoon Mudiyanseleage because of the change of government and the MP’s death; and second, that the RAD’s IFA analysis focused on the local police despite the national structure of the Sri Lankan police force.

[4] I find the RAD’s analysis of the impact of the change of circumstances to be unreasonable. This was the determinative issue in the RAD’s IFA analysis. I agree with Mr. Wijekoon Mudiyanseleage that the RAD’s analysis is based on speculation, without a grounding in the evidence.

[5] Based on the reasons set out below, I grant this judicial review.

II. Background Facts

[6] Mr. Wijekoon Mudiyansele is a Sinhalese citizen of Sri Lanka.

[7] In the lead up to the 2015 national election, Mr. Wijekoon Mudiyansele's sister's business received a contract to produce 8,000 t-shirts for a local Member of Parliament ("MP"), Salinda Dissanayake ("MP Dissanayake"), in support of then-President Mahinda Rajapaksa. Mr. Wijekoon Mudiyansele was working at the business at the time. He spoke directly with MP Dissanayake in procuring the contract, and understood that they were paid a higher price than normal because the MP wanted the t-shirts in a hurry.

[8] In January 2015, President Rajapaksa lost the election and President Maithripala Sirisena was elected into office. On May 5, 2015, Mr. Wijekoon Mudiyansele was taken to the local police station where he was interrogated for two hours about his contract with MP Dissanayake for the t-shirts. President Rajapaksa and his party were being investigated for crimes committed during the 2015 election, which included the use of corruptly-obtained funds. Mr. Wijekoon Mudiyansele was accused of laundering money for MP Dissanayake.

[9] Mr. Wijekoon Mudiyansele was released the next day. He began to make arrangements to leave the country.

[10] Approximately one month later, on June 5, 2015, Mr. Wijekoon Mudiyansele was detained, interrogated and tortured by the police. He was questioned about his business dealings with MP Dissanayake. He was released when his father paid a bribe two days later. Upon his release, Mr. Wijekoon Mudiyansele was forced to sign two documents, one of which was blank and the other he was not permitted to read, and was instructed to report to the Financial Crimes Investigation Division in Colombo before July 10, 2015, in order to lodge a corruption complaint against MP Dissanayake.

[11] Mr. Wijekoon Mudiyansele fled to his uncle's house and then was able to leave the country on June 28, 2015.

[12] On July 11, 2015, a police officer came to Mr. Wijekoon Mudiyansele's house to arrest him as he failed to report to Colombo. Mr. Wijekoon Mudiyansele's father lied and said he did not know where he was. The officer assaulted his father.

[13] On June 30, 2016, Mr. Wijekoon Mudiyansele made a refugee claim in the United States. Following the 2016 US election, Mr. Wijekoon Mudiyansele feared deportation and decided to enter Canada where he made a refugee claim on July 1, 2018.

[14] In a decision dated July 4, 2019, the RPD rejected Mr. Wijekoon Mudiyansele's claim. The RPD found him to be credible, but that he was likely subject to extortion and political targeting by rogue local agents and therefore the police officers would not be motivated to locate him in Colombo. The panel concluded that he had a viable IFA in Colombo.

[15] Mr. Wijekoon Mudiyansele appealed this decision to the RAD.

[16] The RAD asked for further submissions from the parties about the significance of the change of government in Sri Lanka and also the recent death of MP Dissanayake. In November 2019, the government in Sri Lanka had changed; the Prime Minister was now former-President Mahinda Rajapaksa (who MP Dissanayake had supported) and his brother, Gotabaya Rajapaksa was now President. MP Dissanayake had also died in August 2019. These change of circumstances were not addressed by the RPD.

[17] In a decision dated October 7, 2020, the RAD confirmed the RPD's decision and rejected Mr. Wijekoon Mudiyansele's appeal on the basis that there was a viable IFA in Colombo, but on a different basis than the RPD. The RAD found that the RPD had erred by finding that Mr. Wijekoon Mudiyansele and his family were subject to attacks by rogue officers, and concluded that the officers were acting in an official capacity. The RAD, however, found that because the government had changed and MP Dissanayake had now died, the police would no longer have a motivation to persecute Mr. Wijekoon Mudiyansele in the proposed IFA.

III. Issues and Standard of Review

[18] The only issue raised on judicial review is with respect to the RAD's determination that there was an IFA available.

[19] Both parties agree that this decision is to be reviewed on a reasonableness standard. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019

SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

[20] The key issue is whether it was reasonable for the RAD to rely on the change of government and the death of MP Dissanayake as a basis to find that the police would no longer be motivated to persecute Mr. Wijekoon Mudiyansele. I find that the RAD's analysis of this issue was based on speculation without evidentiary support.

[21] The RAD found that while it was likely that Mr. Wijekoon Mudiyansele would be questioned by the police at the airport upon arrival into Colombo, he would be able to explain to the police that his previous arrest was politically motivated due to the targeting of those who were believed to have supported the former President and current Prime Minister. The RAD found that once this was explained to the police, there was "only a very small possibility that the police at the airport would have an interest in pursuing the matter at all." The RAD assumed that because initial police interest in Mr. Wijekoon Mudiyansele was politically motivated, their interest in him would cease following the change in government.

[22] As noted by Justice Diner in *Soos v Canada (Minister of Citizenship and Immigration)*, 2019 FC 455 [*Soos*], "what someone will do in the future is by definition speculative. Certainly, the Board is entitled to make reasoned inferences based on the evidence before it" (at para 13).

The inferences must, however, be based on clear and non-speculative evidence (*Soos* at para 14; *He v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1089 at para 8).

[23] While I agree with the Respondent's argument that the authorities may no longer be interested in Mr. Wijekoon Mudiyansele for the purposes of incriminating MP Dissanayake and the Rajapaksa's party, Mr. Wijekoon Mudiyansele was accused of participating in corrupt business dealings and failed to comply with police directions—a crime in itself, regardless of the political objective. Moreover, in the course of his detention and torture, he was forced to sign a blank document, and therefore does not know to what he has allegedly confessed.

[24] The RAD did not point to evidence to show that due to the change in government, the police would no longer be interested in investigating past alleged criminal activity. The RAD made its finding on the assumption that the authorities would only be interested in Mr. Wijekoon Mudiyansele for the sole purposes of its political objectives. It failed to consider that Mr. Wijekoon Mudiyansele was accused of participating in criminal activity himself and also failed to comply with police directions to report to the Financial Crimes Division in Colombo, and therefore may still be at risk despite the change in government.

[25] The RAD's determination essentially rested on the view that Mr. Wijekoon Mudiyansele need only explain that his previous arrest to the police was politically motivated and the police would accept this explanation, without anything more. In the context of this record, where the RAD accepted that the Sri Lankan police engage in human rights abuses and

had done so in Mr. Wijekoon Mudiyansele's case, this finding, without any other evidentiary foundation, is unreasonable.

[26] The Respondent argued it was inaccurate to say that there was no evidence to support the RAD's finding on the impact of the change in government on the police's actions. The Respondent pointed to the RAD's reference to Mr. Wijekoon Mudiyansele's mother's affidavit in which she refers to a conversation she had with MP Dissanayake where he advised that Mr. Wijekoon Mudiyansele should leave the country until the "political animosity subsides". This information from MP Dissanayake prompted Mr. Wijekoon Mudiyansele and his family to arrange for his departure from Sri Lanka. But before he was able to act on this advice and leave the country, Mr. Wijekoon Mudiyansele was arrested, detained and tortured.

[27] At best, this evidence demonstrates that, at that time, MP Dissanayake thought that eventually the Sirisena government would stop targeting those it believed had supported the former Rajapaksa government. The evidence does not, however, at all address what is at issue here - the unsupported inference that the police, as an institution, would no longer be interested in a person with past criminal activity if it is explained to them that their arrest had been politically motivated.

[28] The application for judicial review is granted. Neither party raised a question for certification and I agree that none arise.

JUDGMENT IN IMM-5645-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The matter is sent back to the Refugee Appeal Division to be re-determined by a different Member; and
3. No question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5645-20

STYLE OF CAUSE: SAMPATH KUMARA WIJEKOON WIJEKOON
MUDIYANSELAGE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 13, 2021

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: MARCH 7, 2022

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