Federal Court  Cour fédérale

Date: 20220406

Docket: IMM-3401-21

Citation: 2022 FC 485

Ottawa, Ontario, April 6, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

THANEESWARAN KRISHNAPILLAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of an adverse Pre-Risk Removal Assessment [PRRA] by a Senior Immigration Officer [Officer] dated May 27, 2020, which however was not delivered to the Applicant until May 5, 2021 [Decision].

II. Facts

[2] The Applicant is a 52-year old Tamil male from the North of Sri Lanka. He is married with two sons and a daughter. One son applied for refugee protection in 2019 and is a refugee in Canada. The other two children and his wife live in Jaffna, Sri Lanka.

[3] The Applicant arrived in Canada in December 2010 and filed a claim for refugee protection shortly thereafter. The Applicant's refugee claim was based on him being forced to work for the Liberation Tigers of Tamil Ealam [LTTE] and the government later arresting him due to his alleged connection to the LTTE. He stated he was arrested several times and beaten by the authorities.

[4] However, the RPD found the Applicant's story was fabricated and that he was not targeted by the government or police in Sri Lanka. Moreover, the Sri Lankan government had declared victory over the LTTE in 2009, and the RPD found the Applicant would not be at risk if returned. His application was refused in March 2013.

[5] At and around that time many countries including Canada, applauded what appeared to be peace in Sri Lanka after a brutal civil war. However, the peace subsequently broke down, and Canadian officials determined the Sri Lankan government was engaged in "soft ethnic cleansing" targeting Tamils from the North: see *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 244. The situation in Sri Lanka was and continues to be fluid, and it was unsafe to rely on outdated country condition documents. For that and other reasons, judicial review was granted in

that and other cases. These cases underlined the importance of a timely PRRA – one that assesses country conditions close to the time an unsuccessful claimant might be removed from Canada. A PRRA Officer is the last line of risk assessment, subject to a CBSA removal officer's limited discretion.

[6] In the present case, the Applicant submitted an H&C application which was refused in February 2015. He filed a second H&C application in May 2018, which was refused in May 2021. The Applicant's application for leave to judicially review the second H&C application was refused in November 2021.

[7] The Applicant applied for a PRRA in July 2019, which is the subject of this judicial review. The PRRA Officer rejected the Applicant's PRRA by reasons dated May 27, 2020.

[8] For unknown reasons the PRRA Decision was not delivered to the Applicant until May 5, 2021.

III. Decision under review

[9] The PRRA application required the Officer to consider new evidence arising since the 2013 RPD decision. This comprised numerous articles outlining changed country conditions in Sri Lanka. Generally speaking, the new country condition reports filed by the Applicant indicate a deterioration of conditions for people with his profile, namely a Tamil male from Northern Sri Lanka returning as a failed asylum seeker who had unsuccessfully sought refugee status against Sri Lanka in Canada.

[10] The Officer found the Applicant had not sufficiently demonstrated he will be perceived by the Sri Lankan government as having a link to the LTTE. The Officer found the Applicant had not submitted any evidence to show he may be perceived as an LTTE sympathizer, nor had he submitted information indicating he may be of interest to the Sri Lankan authorities, such as a warrant, police report or letters from the government. The Officer noted the Applicant has five siblings in Sri Lanka but did not indicate whether any of them had issues with regard to the Applicant being a perceived member of the LTTE. Moreover, his perceived LTTE link was the basis of his refugee claim, which was found not credible. Therefore, the PRRA Officer concluded the Applicant did not submit sufficient evidence that he is perceived to be connected to the LTTE in Sri Lanka.

[11] The Officer also considered an Amnesty International article submitted by the Applicant indicating the Sri Lankan government is more likely to readily associate those who are failed asylum seekers as LTTE supporters. The Officer acknowledged that various sources indicate some returnees from Western countries have faced abuse but found the evidence shows these are individuals with known connections to the LTTE, were engaged in people smuggling, or have criminal records. The Officer concluded there was little evidence to indicate the Applicant would reasonably be perceived to hold such a profile.

[12] That said the PRRA Officer accepted that the Applicant's reports indicated "a deterioration of conditions for people with" the his profile.

[13] However and to the contrary, the Officer noted the "most recent" documentary evidence indicates failed asylum seekers of Tamil ethnicity are not generally at risk in Sri Lanka, citing a 2020 UK Home Office report. Moreover, the Officer found the 2020 UK Home Office report was more current than the Amnesty International article relied upon by the Applicant – which it was by only two years, not the five years stated by the Officer. The Officer found there was little evidence to suggest the Applicant would be at risk due to being a failed asylum seeker in Canada because the country conditions have changed since the Amnesty International article was published in 2017.

IV. Issues

[14] The Applicant submits the issues are as follows:

A. Applying the definition:

i. using the wrong threshold test under s. 96 of the IRPA to assess whether the Applicant has a well-founded fear of persecution;

ii. applying the definition under s. 96 of the Act; Was the impugned Decision based on an internally coherent reasoning;

B. Reliance on the evidence:

i. selectively relying on documentary evidence; and

ii. failing to assess the application on the basis of current evidence.

[15] Respectfully, the only issue is whether the Decision is reasonable.

V. Standard of Review

[16] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[17] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[18] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and

> attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
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> [Emphasis added]

VI. Analysis

A. *Did the Officer apply the wrong legal test under s. 96?*

[19] The Applicant submits the Officer erred in applying a standard of probability which is the wrong legal test under section 96 of *IRPA.* While the Officer set out the test correctly in some places, they set out the wrong test in other places. Therefore, the Applicant submits the Officer did not understand the test, see *Naredo v Canada (Employment and Immigration),* [1981] FCJ No 1130 [per Heald, Urie JJA, MacKay JA dissenting] at para 3 [*Naredo*].

[20] The Respondent submits the Officer applied the correct test regarding forward-looking risk of persecution or personal harm after weighing the Applicant's profile against recent country condition evidence. Counsel says applying these tests, the Officer reasonably found the Applicant's profile did not give rise to either a well-founded fear of persecution or a personalized risk without actual ties to the LTTE or having a criminal record. The Respondent submits this Court has cautioned against fixating on "semantics without considering the decision as a whole in addition to the context in which the impugned words appear" within the context of the test to be applied to refugee claims (*Halder v Canada (Citizenship and Immigration),* 2019 FC 922 [per Favel J] at paras 48-49, citing *Thiyagarasa v Canada (Citizenship and Immigration)*, 2016 FC 48 [per LeBlanc J as he then was] at para 25; *Nageem v Canada (Citizenship and Immigration),*

2012 FC 867 [per Rennie J as he then was] at para 27; *Mutangadura v Canada (Citizenship and Immigration)*, 2007 FC 298 [per Phelan J] at para 9).

[21] I find constraining law establishes that the legal threshold and applicable test to demonstrate a well-founded fear of persecution under section 96 of *IRPA* is "serious possibility" or "reasonable chance", i.e., more than a mere possibility. This is distinct from the standard of proof for findings of fact which is a "balance of probabilities", see *Gebremedhin v Canada (Minister of Citizenship and Immigration)*, 2017 FC 497 [per McVeigh J] at para 28. See also *Jeyaratnam v Canada (Citizenship and Immigration)*, 2018 FC 1244 [per Russell J] at para 45.

[22] I disagree with the Respondent that the issue is one of semantics. The issue is critical and determinative: it is the threshold the Applicant must meet under section 96 of *IRPA*. The Officer applied both the correct and an incorrect risk threshold as seen from the following:

- p. 4 of Decision: "Section 96 of *IRPA* requires that the applicant demonstrate that he has more than a mere possibility of persecution…" Court comment: this is the correct test;
- p. 10 of Decision: "The applicant has not sufficiently demonstrated that he will be perceived by the Sri Lankan government as having a link to the LTTE. He has not submitted any evidence to show he may be perceived as an LTTE sympathizer ….Or may be of interest to the government." Court comment: both the correct test and an incorrect risk threshold are contained in the same paragraph; "may" is correct, "will be" is not;
- p. 10 of Decision: "As such I find that the applicant has not submitted sufficient evidence that he is perceived as connected to the LTTE in Sri Lanka." Court comment: This is not the correct test;

- p. 11 of Decision: “I find that the applicant would not be at risk in Sri Lanka due to him being a returning asylum seeker from Canada.” Court comment: This is not the correct test;

- p.12 of Decision: “I have little evidence before me to suggest that the applicant would be at risk due to being a failed asylum seeker….” Court comment: This is not the correct test;

- p. 12 of Decision: “I find that the applicant has not sufficiently demonstrated that he is at risk in Sri Lanka.” Court comment: This is not the correct test.

[23] As noted, the test for establishing a well-founded fear of persecution in the context of the definition of a Convention refugee is articulated by the Federal Court of Appeal in *Adjei v Canada (Minister of Employment and Immigration),* [1989] 2 FC 680 at para 5 as being whether there are “good grounds” or “reasonable chance” that persecution could take place if a person is returned to their country of origin. This is now put as “more than a mere possibility” of persecution. This means there must be more than a minimal possibility but there need not be more than a 50% chance or probability.

[24] I agree the Officer stated the correct tests for sections 96 and 97 in the opening and closing paragraphs of the Decision. However, the wrong tests appear numerous times in between.

[25] This inconsistency gives rise to reviewable unreasonableness. I say this because and to paraphrase the Federal Court of Appeal in *Naredo* at para 2, the Officer erred in terms of constraining law by imposing a requirement that the Applicant is or would be subject to persecution where the statutory definition required only that they establish “a well-founded fear of persecution”. The test imposed by the PRRA Officer is a higher and more stringent test than

that imposed by statute. In these circumstances, I am not able to safely conclude which test ultimately drove the Decision at hand, or that if the Officer applied the proper test to the Applicant's factual situation he or she would have arrived at the same result.

B. *Did the Officer reasonably apply the section 96 analysis?*

[26] In terms of the Officer's alleged unreasonable application of the section 96 analysis, the Applicant notes Justice McHaffie's judgment in *Fodor v Canada (Citizenship and Immigration),* 2020 FC 218 [*Fodor*]:

> [19] The Federal Court of Appeal has long held that a claimant to Convention refugee status (a) need not show that they have themselves been persecuted in the past; (b) may show a fear of persecution through evidence of the treatment afforded similarly situated persons in the country of origin; and (c) need not show that they are more at risk than others in their country or other members of their group: *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250, 1990 CanLII 7978 (FCA) at paras 17-19. These principles have been reiterated in cases such as *Pacificador v Canada (Minister of Citizenship and Immigration),* 2003 FC 1462 at paragraphs 73-75; *Somasundaram v Canada (Citizenship and Immigration),* 2014 FC 1166 at paragraphs 20-23; and *Bozik v Canada (Citizenship and Immigration),* 2017 FC 920 [*Bozik I*] at paragraphs 3-7.

[27] In this connection, I am concerned with the Officer's application of the section 96 analysis when the Officer found the following, with my comments after each:

> 1. There was no specific evidence of government interest in the Applicant. Court comment: This issue is a matter personal to this Applicant, however, the Officer may have overlooked that applicants may establish their claim by showing they come within a group at risk such that their profile must also be considered. This has been the case in Tamil claims as well (*Y.S. v Canada (Citizenship and Immigration,* 2014 FC 324 [per Russell J] at para 64-65). In

particular, persons seeking protection are not required to show that they are personally at the required level of risk if they have the profile of a group that meets the test, see *Navaratnam v Canada (Citizenship and Immigration),* 2015 FC 244 at para 12, and see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 53;

2. The Applicant's five siblings had no issues in Sri Lanka with regard to the Applicant being a perceived member of the LTTE. Court comment: This was not the profile advanced and established by the Applicant which was that of a Tamil male from the North returning as a failed asylum claimant. As such this finding did not come to grips with the issue before the PRRA Officer as required by *Vavilov* at para 128;

3. The Applicant did not have a well-founded fear of persecution now because the RPD did not believe his account of prior mistreatment when it determined his claim in 2013. Court comment: I am not persuaded of the relevance of this observation because the Applicant no longer asserts his profile as an LTTE supporter. The profile he advances is a Tamil male from the North of Sri Lanka returning as a failed asylum seeker from Canada. It is this profile that an Officer must grapple with per *Vavilov* in the redetermination to be Ordered.

[28] I am also concerned with the timeliness of the PRRA and its consideration of other than up-to-date country condition evidence. The Officer recognized the situation in Sri Lanka was deteriorating for Tamils from the North who are returning. While I make no determination, which is for the Officer, I may say that considerable evidence to this effect was supplied to the Officer by the Applicant in February 2020, six months after the PRRA was submitted. The Officer dated the Decision May 27, 2020. However, the Decision was withheld for almost a year. During that time, as might be concluded from the Applicant's submissions to this Court, it appears conditions may have further deteriorated for persons in the Applicant's position. I would not normally consider new evidence on judicial review, but this was not objected to and filled in

the gap left by the unexplained one-year delay in releasing the Decision. To the extent reasonably possible, a PRRA should be based on up-to-date country condition evidence.

[29] From the information filed at this hearing and before the PRRA Officer, it seems to me the situation in Sri Lanka is once again fluid, which emphasizes the need for timely and up-to-date PRRA assessment. In particular, I note there is a new Prime Minister, Mahinda Rajapaksa and a new President, the Prime Minister's brother Gotabaya Rajapaksa elected and appointed in 2019.

[30] I am not satisfied this Applicant had the benefit of a timely up-to-date PRRA assessment, as per Justice Favel in *Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2018 FC 247:

> [27] The Applicant's argument that the Officer made an unreasonable conclusion regarding country conditions is persuasive. Each case needs to be decided on its own facts. This Court has held that Sri Lanka is a country where the conditions are continuously changing (*Navaratnam v Canada (Minister of Citizenship and Immigration*), 2015 FC 244 per Brown J at para 13).
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> [28] Where a decision maker fails to consider recent country condition evidence and bases a risk conclusion on outdated country conditions, such decision is unreasonable (*Rasalingam v Canada (Minister of Citizenship and Immigration*), 2017 FC 718 per Diner J at paras 19-20). While not every aspect of the evidence of country condition evidence needs to be explained, it should be considered fully.
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> [29] On the face of it, the Officer deferred to the RPD's conclusion that country conditions were improving instead of considering the "significant package of documentary material which consisted of internet and news articles as well as publications which discuss various topics such as torture, rape, disappearance, human rights abuses, impurity, detention, returnees, country condition etc." In short, there was more recent evidence

> before the Officer to illustrate that conditions were not improving. In my view, this is one of the reasons the PPRA Decision is unreasonable.
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> [Emphasis added]

VII. Conclusion

[31] On balance, I have concluded the Decision must be set aside because it is not in accordance with constraining law and jurisprudence as set out above and therefore is unreasonable. The parties are at liberty to file new evidence at the redetermination Ordered in this case. There are other important issues in this case, but I decline to deal with them because judicial review is being ordered.

VIII. Certified Question

[32] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3401-21

THIS COURT'S JUDGMENT is that this application for judicial review is granted, the Decision is set aside, the matter is remanded to a different decision-maker for redetermination, new evidence may be filed on the redetermination, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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