

Federal Court



Cour fédérale

Date: 20220408

Docket: IMM-59-21

Citation: 2022 FC 513

Toronto, Ontario, April 8, 2022

PRESENT: Madam Justice Go

BETWEEN:

KOBINATH PANCHALINGAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Kobinath Panchalingam [Applicant] made a refugee claim under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on the grounds that he was targeted by the Sri Lankan army as a young Tamil male. By a decision dated December 7, 2020, the Refugee Protection Division [RPD] rejected his claim, finding that he lacked credibility [the

Decision]. As the Applicant was unable to appeal to the Refugee Appeal Division, he now seeks judicial review.

[2] I find the RPD either ignored or misconstrued evidence and the Decision lacks justification, intelligibility and transparency. As such, I grant the application.

II. Background

A. *Factual Context*

[3] As the RPD rejected the claim on credibility grounds, the facts leading to the Applicant's claim are in dispute.

[4] The Applicant's claim is based on fear of the Sri Lankan army, who he alleges detained and beat him in both 2009 and 2018 as he is a Tamil man from northern Sri Lanka, and is suspected to be a member of the Liberation Tigers of Tamil Eelam [LTTE].

[5] During the civil war in Sri Lanka, the village in which the Applicant and his family were living was bombed by the Sri Lankan army. One of the Applicant's brothers was killed by an army bomb. For about 11 days in 2009, just prior to the end of the civil war on May 18, 2009, the Applicant was detained at an army camp. He was beaten and then released to his family.

[6] On April 2, 2018, the Applicant was arrested at his house by the army, detained for three days, and beaten on two of those days. According to the Applicant, the army believed that his

brother, who had died in 2009, was a member of the LTTE and thus the Applicant might have connections to the LTTE.

[7] A friend of the Applicant's father, Jerry, bribed the army to release the Applicant. Jerry drove the Applicant to Jerry's house to stay for a week, and facilitated natural medicine treatment for the Applicant's injuries. Jerry then drove the Applicant to Colombo to hide until the Applicant fled the country a few weeks later. In August of 2018, the Applicant arrived in the United States and made an asylum claim. On November 27, 2018, the Applicant entered Canada and claimed refugee protection.

B. *Decision under Review*

[8] The RPD assessed the Applicant's claim under s. 96 of the *IRPA*, relative to his ethnicity as a Tamil male with a suspected political opinion as a LTTE supporter, and group membership as a family member of his deceased brother suspected to have been a LTTE supporter. The RPD found that he lacked credibility, as he did not have an explanation for why the army would target him in 2018 almost ten years after the end of the civil war. The RPD also found that the Applicant had no objective evidence about Jerry, and he did not establish that he was of interest to the Sri Lankan authorities or on their "stop list" of people who are prevented from leaving Sri Lanka. The RPD examined whether there was an objective basis that would place the Applicant at risk, and found that he did not fall into one of the four risk categories identified in a United Kingdom [UK] Home Office report.

III. Issues and Standard of Review

[9] The Applicant argues: (1) that the RPD unreasonably required knowledge of actions of third parties, i.e. why the army would target him, (2) that the RPD unreasonably required objective evidence about Jerry, the man who helped the Applicant escape, (3) that the RPD unreasonably assessed documentary evidence relating to Sri Lanka's "stop list", (4) that the RPD ignored evidence, and (5) that the RPD unreasonably assessed risk based on country condition evidence.

[10] The parties agree that these issues are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[11] 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. The onus is on the Applicant to demonstrate that the RPD decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para 100.

IV. Analysis

[12] It is not necessary to analyze all the arguments raised by the Applicant. I will address three issues which led me to conclude that this matter must be sent back for redetermination.

A. *The RPD erred in its analysis of the objective evidence concerning Jerry, the man who helped the Applicant escape*

[13] The Applicant testified that when he was detained by the Sri Lankan army in 2018 his father's friend, Jerry, helped him escape by bribing the army, as well as getting him treatment for his injuries and helping him leave Sri Lanka.

[14] According to the Decision, the RPD Member asked the Applicant if he had an affidavit from Jerry, and the Applicant responded that he did not have any contact information for Jerry and had to contact Jerry through his father. The Member asked the Applicant why he did not have Jerry's contact information if he had worked with Jerry for 6-7 years and had stayed at his house for one week after being released; the Applicant responded that he had not thought about contacting Jerry. The Member rejected this explanation, found that the Applicant had not provided a satisfactory explanation for why the letter from the Applicant's father did not mention Jerry, and concluded that Jerry did not exist.

[15] There were several errors with the RPD's finding with respect to Jerry.

[16] First of all, contrary to the RPD's finding, Jerry was in fact mentioned in the letter from the Applicant's father. In relation to the Applicant's 2018 arrest, his father stated: "I got him released by paying RS two lakhs with the help of Jerry, a friend of mine."

[17] Further, another letter on record, this one from a Member of Parliament [MP] in Sri Lanka, also stated that the Applicant was released "with the help of his father's friend Jerry's [*sic*] financial support that was offered to army intelligent [*sic*] personnel as ransom."

[18] The above quoted evidence directly contradicts the RPD's findings that "there is no reference to Jerry in the father's letter of support." The RPD's finding that "Jerry did not exist" and that "the event involving Jerry – the detainment of April 2018 – did not take place" hinged in large part on its erroneous finding of lack of reference to Jerry in the father's letter of support. As the basis of those findings was contradicted by the evidence before the RPD, it calls into question the reasonableness of the RPD's finding.

[19] The Respondent argued at the hearing that the Decision noted that the Applicant testified that his father's letter did not make reference to Jerry. It is unclear to me what the RPD meant by that as it went on to find:

The panel notes that there is no reference to Jerry in the father's letter of support and there is no satisfactory explanation for this from the claimant.

[20] The RPD's finding would suggest that it too did not believe there was reference to Jerry in the father's letter of support.

[21] The Respondent also argued at the hearing that the MP's letter was merely hearsay. However, since the Decision did not mention the MP's letter at all, it is speculative on the part of the Respondent to suggest why the letter was assigned no weight.

[22] The Respondent further submitted that it was reasonable for the RPD to require documentation given Jerry's involvement was a central part of the Applicant's claim, and that the RPD should be asking questions about him. I accept that the RPD should be able to question a claimant on the central part of their claim. But here, the Decision did not explain why the RPD

did not accept the Applicant's claim about Jerry, other than the presumed lack of documentary evidence.

[23] According to *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at para 36, a decision maker can only require corroborative evidence if either: (1) the decision maker sets out an independent reason for requiring corroboration, e.g. doubts about credibility, implausibility, or hearsay; or (2) the individual is unable to provide a reasonable explanation for not obtaining evidence that would be reasonably expected to be available. I agree with the Applicant that the RPD did not indicate why his explanation regarding not contacting Jerry directly was not satisfactory and in essence placed an unreasonable expectation on him to provide objective evidence about Jerry. As the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status notes, often refugee claimants will be unable to support their claim with documentary proof.

[24] Even if I were to find a failure to offer documentation "is a correct finding of fact", as the Court stated in *Miral v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 7571 at para 23: "it cannot be linked to the applicant's credibility in the absence of evidence to contradict the allegations." The RPD failed to set out a reasonable independent justification for requiring evidence corroborating Jerry's existence. Absent contradictions or other marks of negative credibility, the RPD erred in rejecting the Applicant's testimony on Jerry.

[25] If what the Decision really meant was that the letter from the father did not provide details about what Jerry did to support the Applicant's claim, such finding would still be

unreasonable. As Justice Campbell noted in *Mahmud v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8019 (FC) at para 11, a decision maker erred by rejecting evidence “not for what they say, but for what they do not say.” To be clear, however, the Decision did not even conduct such an analysis of the father’s letter, as the RPD member erroneously concluded that Jerry’s name was never mentioned in the first place.

[26] The Respondent argues that the RPD’s analysis is consistent with the case law, in particular the principle that “where there is a valid reason to doubt the claimant’s credibility or where the claimant’s story is implausible, the lack of documentary evidence can be a valid consideration for the purposes of assessing credibility if the applicant is unable to provide a reasonable explanation for the lack of corroborative evidence”: *Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 [*Luo*] at para 20.

[27] However, in this case, the RPD did not doubt the Applicant’s credibility **because** there was a lack of documentary evidence. Instead, the negative credibility finding was made by the RPD **in spite of** the documentary evidence. Besides, I cannot discern from the Decision the RPD’s reasons for doubting the Applicant’s credibility or the implausibility of his claim - other than its conclusion about the lack of documentary evidence. Either the RPD Member ignored or misconstrued the evidence before her, or the Decision was not supported by intelligible and rational reasoning, and the outcome was reached on an improper basis; either way, the Decision cannot be allowed to stand: *Vavilov*, para 86.

[28] Further, as Justice Strickland in *Luo* at para 21, a case cited by the Respondent:

... a failure to provide corroborating documentation is only a proper consideration for the decision-maker, in this case the RPD, where there are valid reasons to doubt a claimant's credibility, or where the decision-maker does not accept the claimant's explanation for failing to produce documentary evidence when it would be reasonably expected to be available (*Radics* at para 30). In that circumstance, 'precision was required as to the nature of the documentation expected and a finding made to that effect' (*Rojas* at para 6).

[29] In my view, the Decision lacks the precision that is required to understand not only the RPD's finding that the Applicant was not credible, but also its rejection of the Applicant's explanation about the so-called lack of documentary evidence about Jerry.

[30] As *Vavilov* has made clear at para 102, "the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic." In this case, the RPD's findings in regard to the Applicant's credibility or the lack thereof was simply unintelligible.

B. *The RPD ignored evidence of persecution of the Applicant*

[31] The Applicant argues that the RPD failed to address the possibility that even if a portion of the evidence may be exaggerated, there is additional evidence that could support the claim, i.e. support letters addressing his persecution by the Sri Lankan authorities, which the RPD did not address.

[32] It is trite law that when a decision maker fails to address contradictory evidence, an inference can be drawn that the contradictory evidence was not considered or was overlooked:

Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration) (1998), [1999] 1 FC 53 at para 17.

[33] When finding that the Applicant “is not a person of interest to the Sri Lankan authorities”, the RPD Member did not address the letter from the MP in Sri Lanka. This letter confirmed the Applicant’s two arrests, and stated that the army has gone to the home of the Applicant’s family since he left Sri Lanka to threaten them to tell of his whereabouts. The MP’s letter continued:

The situation here has not been changed even after the change of rule and as a result, every supporters of Tamil parties of former LTTE members and its supporters or innocent people face threats in the name of investigations. So many youths, who were small boys at the time of final war, are being arrested now for they are now trying to reawaken the LTTE movement.

[34] The MP’s letter was not mentioned anywhere in the Decision. The lack of mention of this letter led me to conclude that it was ignored by the RPD Member, which enabled her to reach a conclusion that was contradicted by the ignored evidence.

C. *The RPD unreasonably assessed risk based on country condition evidence*

[35] The RPD concluded that there was no objective basis on which the Applicant would be at risk in Sri Lanka. The RPD notes that the National Documentation Package [NDP] identified four risk groups: (1) actual or perceived individuals who play a significant role in post-conflict Tamil separatism, (2) journalists or human rights activists who have criticized the government, (3) individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, and (4) a person whose name appears on a

computerised “stop list” accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. The RPD concluded that the Applicant had provided no credible evidence that he fell into any of those groups.

[36] The Applicant argues that this finding is problematic because it makes reference to the UK Home Office Report, which relies on a finding made by a UK tribunal rather than an independent non-governmental organization. The Applicant also argues that the RPD relied on only one report and did not engage with the rest of the NDP.

[37] While I agree with the Respondent that it was open to the RPD to prefer certain pieces of evidence over others, as the role of the RPD is to weigh and assess the evidence as the independent finder of fact, I find in this case the RPD Member has overlooked evidence in the NDP that contradicted her findings, most notably documents indicating that Tamils who were former or suspected former members of LTTE reported being monitored and harassed by security forces in Sri Lanka.

[38] One of the documents referenced by the RPD was an Immigration and Refugee Board Response to Information Request, which stated that returnees are “systematically” questioned by the authorities or “placed under surveillance.”

[39] While the Applicant denies having ever supported the LTTE, I reject the Respondent’s argument that only supporters of the LTTE are at risk, given that the evidence refers also to the risks faced by those with perceived LTTE connection.

[40] It is not my role to reweigh the evidence. But I agree with the Applicant that by not referencing any of the evidence that supports the Applicant's claim, while focusing only on one document that appears to point to the opposite direction, the Decision seriously lacks justification, transparency and intelligibility within the decision-making process.

V. Conclusion

[41] The application for judicial review is granted and the matter is returned for redetermination by a different Member of the RPD.

[42] There is no question to certify.

JUDGMENT in IMM-59-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is returned for redetermination by a different Member of the RPD.
3. There are no questions to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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