

Federal Court



Cour fédérale

Date: 20220616

Docket: IMM-3563-21

Citation: 2022 FC 919

Ottawa, Ontario, June 16, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

WASANTHA SARAMBAGE JAYARATHNA

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. **Overview**

[1] The Applicant challenges a decision of the Refugee Appeal Division [RAD], which concluded that he is neither a person in need of protection nor a Convention refugee pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because he failed to establish his identity. The Applicant argues that the RAD erred in its assessment of his

identity documents. Further, the Applicant asks the Court to accept new evidence, not before the RAD, that he argues could not have been obtained sooner.

[2] As explained in more detail below: (a) the Applicant's argument do not support a basis, recognized in the applicable jurisprudence or consistent with its principles, for admitting new evidence that was not before the RAD; and (b) this application for judicial review is dismissed, because the RAD's decision is reasonable.

II. Background

[3] The Applicant, a citizen of Sri Lanka, seeks refugee status in Canada, claiming fear that if he returns to Sri Lanka he will be at risk of harm from the police, Buddhist monks, and gang members, all of whom he says were involved in threatening and harming him before he was forced to flee the country.

[4] In 2015, the Applicant purchased a fish stall and began buying fish from wholesale suppliers and reselling it at his stall. He states that he purchased the stall from a local politician and was then extorted by supporters of that politician in order to maintain his stall in the market. The Applicant also says that he was extorted by Buddhist monks belonging to the Bodu Bala Sena who told him that, as a fellow Buddhist, it was against their religion to participate in the buying and selling of fish.

[5] The Applicant also states that, in October 2015, he visited a nightclub and witnessed a group of masked, armed men enter the venue and begin attacking the patrons. While he was

attempting to flee the building, he says he was approached by one of the attackers, who took off his mask and revealed that he was a friend. Following the attack, the Applicant went to the hospital to seek medical attention. While there, the police interviewed him about the interaction with his friend, which he denied. He says that he was subsequently threatened by the police, other authorities, and those associated with the attack at the nightclub.

[6] The Applicant made arrangements to flee Sri Lanka with the assistance of a smuggler in December 2015 and claimed refugee status in Canada.

[7] In a decision dated January 3, 2020, the Refugee Protection Division [RPD] rejected the Applicant's claim, with the determinative issue being the Applicant's identity. The RPD considered the documents the Applicant had provided to establish his identity, including birth registration documents, his driver's license, and his fish stall ID card. The RPD noted the absence of security features on the birth documents and fish stall ID card as well as the poor condition of the driver's license.

[8] The RPD also noted the absence of important identity documents such as the Applicant's National Identity Card [NIC] and passport, as well as what it considered to be insufficient explanations regarding the whereabouts of these documents. The RPD gave little weight to letters from the Applicant's friends and wife attesting to his identity. Ultimately, the RPD concluded that the Applicant had failed to establish his identity on a balance of probabilities with reliable and trustworthy evidence, and it dismissed his claim. The Applicant appealed to the RAD.

III. **Refugee Appeal Division Decision**

[9] In a decision dated April 29, 2021, the RAD dismissed the Applicant's appeal.

[10] In relation to the Applicant's identity documents, the RAD noted that no passport had been provided and that the Applicant had testified that it is possible that the agent he worked with to flee the country had applied for one on his behalf, as this person had a passport for the Applicant that was used to exit Sri Lanka. The RAD observed that, when asked about the whereabouts of this passport during the hearing, the Applicant stated that the agent had kept it and that he did not try to get a copy of it or to obtain it from the agent after he came to Canada, as they no longer had contact.

[11] The RAD concluded that the lack of evidence regarding any attempts by the Applicant to inquire into the status of the passport or to determine whether a valid passport had been issued to him were unreasonable, particularly considering that he had been questioned about it at the RPD hearing. The RAD found the Applicant's explanations for the lack of such efforts unsatisfactory, as he had been notified that identity was an issue and was represented by counsel, who presumably would have told the Applicant about the importance of identity documents. The RAD also noted that over a year had passed since the Applicant's claim was rejected by the RPD, and still no efforts had been made to inquire into the status of his passport.

[12] Regarding the Applicant's NIC, the RAD noted what the RPD had identified as inconsistent testimony by the Applicant about its whereabouts. The RAD considered counsel's

argument that these statements were not inconsistent but found the Applicant's testimony on this issue to be evolving and lacking clarity.

[13] The RAD found the absence of the Applicant's NIC to be of concern in the circumstances. It noted the Applicant's submission before the RPD, claiming that the NIC number is also on his birth certificate, driver's license, fish market ID, and certificate of residence. However, the RAD agreed with the RPD that there was no NIC number on the birth certificate. Regardless, the RAD found that the purported NIC number, in and of itself, was insufficient evidence of the Applicant's identity. The RAD also found that there was no evidence in the record about the Applicant's efforts to confirm the existence of his NIC. The RAD concluded that the absence of the Applicant's NIC, or, in the alternative, a reasonable explanation for what became of his NIC, as well as the absence of evidence as to efforts made to confirm its existence, further detracted from his credibility with respect to his identity.

[14] Regarding the Applicant's driver's license, the RAD accepted the RPD's findings about the card, including that it was faded and the biometric chip was attached to the back of the card with tape. It concluded that the poor condition of the card was not sufficient to find that the document was not genuine, but that the card's condition was cause for concern as to its ability to confirm the identity of the holder. Again, the RAD noted that the Applicant had not attempted to authenticate the license, despite being on notice of the RPD's concerns. It rejected the Applicant's argument that the RPD could have had the document authenticated, noting that the onus is on the Applicant to furnish acceptable documents. The RAD concluded by affording the driver's license little weight.

[15] The RAD also afforded little weight to the birth registration documents. On its own analysis, it found that there was no reason to doubt the authenticity of the documents, but it stated that, even if they were genuine, there was insufficient evidence on the record to link the name on them to the Applicant. The RAD observed that these documents contained no biometric information to reliably link the documents to the bearer and concluded that the fact that the documents appeared to be issued in the Applicant's birth year was not compelling evidence of their connection to the Applicant.

[16] Regarding the fish stall ID card, the RAD disagreed with the RPD's analysis surrounding a discrepancy in the Applicant's testimony as to the stall number. The RAD found that this discrepancy was reasonably explained and was therefore insufficient to doubt the genuineness of the document. However, the RAD found that the card was not government-issued, contained a photo that was not visible, and had no security features or biometric information.

[17] Finally, the RAD afforded little weight to letters from the Applicant's spouse, which it found did not address efforts by either of them to obtain identity documents. It similarly afforded little weight to letters from the Applicant's friend and from the Brampton Buddhist Mission Centre, as well as character certificates, as these documents were unsworn and contained no authentication features.

[18] In dismissing the appeal, the RAD concluded that the totality of the evidence was insufficient to establish the Applicant's identity. Further, it reasoned that he had not provided reasonable explanations for his lack of sufficient identity documents and had not demonstrated

that he had made reasonable efforts to obtain identity documents, despite being in Canada for over five years, being represented by counsel, having been duly notified of the RPD's concerns about his identity, and having had ample time to do so.

IV. **Issues and Standard of Review**

[19] The Applicant raises two issues for the Court's consideration:

- A. Whether the Court should admit new evidence regarding the Applicant's identity; and
- B. Whether the decision of the RAD was reasonable.

[20] No standard of review applies to the question of whether the Court should admit new evidence. As suggested by the articulation of the second issue, the substance of the RAD's decision is subject to the standard of reasonableness.

V. **Analysis**

- A. *Whether the Court should admit new evidence regarding the Applicant's identity*

[21] In support of this application, the Applicant has sworn an affidavit dated June 25, 2021, which states that his common-law partner recently went to the complex where his fish stall was located and was able to retrieve his original NIC. She sent it to him by courier, and the affidavit attaches a copy of the NIC and courier packaging, which the Applicant seeks to have admitted

into evidence in this application for judicial review. His affidavit also offers explanations as to why his partner was unable to obtain the NIC sooner.

[22] Both parties rely on the decision of the Federal Court of Appeal in *Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 [*Namgis First Nation*] at para 7, which explains that the normal rule, subject to limited exceptions, is that only material that was before the administrative decision maker is admissible on judicial review. Attempts to file evidence with the reviewing court, that go to the merits of an administrative decision and that was not before the decision-maker, must be rebuffed.

[23] However, the Applicant notes that *Namgis First Nation* also explains that the normal rule must be applied flexibly and that it admits of exceptions, certain recognized categories of which are identified in that authority (at paras 8-10). He submits that the present case represents exceptional circumstances, in that the NIC is one of the key identity documents, which the Applicant's failure to provide resulted in the RAD's dismissal of the appeal, and the document is now available. The Applicant argues that, with the availability of this document, the issue of his identity can now be resolved or at least better assessed by the RAD.

[24] I accept that the normal rule, precluding the admission of new evidence on judicial review, must be applied flexibly and that the categories of exceptions recognized in prior jurisprudence are not closed. However, *Namgis First Nation* explains that the exceptions apply where the receipt of evidence by the reviewing court respects the differing roles of the reviewing court and the administrative decision-maker (at para 9). For example, affidavit evidence is

sometimes necessary to bring to the attention of the court procedural defects that cannot be found in the evidentiary record before the administrative decision-maker, so that the court can fulfil its role of reviewing for procedural fairness (see, e.g., *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[25] In contrast, the purpose for which the Applicant seeks to introduce the NIC into evidence goes directly to the merits of his claim for refugee protection, the assessment of which is the role of the RAD. It would be inconsistent with the differing roles of the RAD and this Court sitting in judicial review to admit this evidence that was that not before the RAD.

[26] I note that the Applicant also submits that this evidence is relevant to what he argues represents an issue of procedural fairness in the RAD's decision. He relies on *Nchelem v Canada (Citizenship and Immigration)*, 2016 FC 1162 [*Nchelem*] at paras 13-15, which invoked the exception that applies when evidence is introduced to support an allegation of procedural fairness. In that case, the Court admitted a letter that had not been before the officer, considering an application for a postgraduate work permit, because it illustrated the evidence that could have been provided to the officer had the applicant been afforded an opportunity to do so.

[27] However, the reasoning in *Nchelem* turned on the Court's conclusion that the officer had a duty of fairness to inform the applicant of concern that practicum courses undertaken by the applicant represented unauthorized work in Canada, so as to afford him an opportunity to respond to that concern. The difficulty with the Applicant's reliance on *Nchelem* is that the argument he raises in the present case is not actually one of procedural fairness.

[28] The Applicant submits that the RAD breached procedural fairness, in that it reviewed his evidence microscopically and held him to a higher than appropriate standard as to the evidence necessary to establish his identity. He relies on *Sheikh v Canada (Citizenship and Immigration)*, 2008 FC 176, in which the Court identified a breach of procedural fairness in the Immigration and Refugee Board's treatment of documentary evidence. The Court noted that, while the overall burden is upon an applicant to make out his case, one cannot anticipate how demanding a panel may be. As a document apparently emanating from a foreign authority is presumed to be valid, procedural fairness required that the applicant be informed of the panel's concerns and given an opportunity to meet them (at paras 9-10).

[29] I accept that, where a decision-maker doubts the genuineness of a document, this may give rise to a procedural fairness requirement to alert the applicant to this concern and afford an opportunity to address it. However, this principle does not apply to RAD's reasoning in the case at hand, which turned not on the genuineness of the documentary evidence upon which the Applicant relied, but rather upon its probative value in establishing his identity.

[30] In support of his position that the RAD held him to a higher than appropriate standard as to the evidence required to establish his identity, the Applicant also refers to authorities in which the rejection of refugee claimants, who relied on categories of documentation similar to those presented by the Applicant, was found to be unreasonable. For instance, in *Kathirkamu v Canada (Citizenship and Immigration)*, 2003 FCT 409 [*Kathirkamu*] at para 36, the Court found that the Convention Refugee Determination Division erred in its treatment of the applicant's identity documentation that included a birth certificate and postal identity card. The Court concluded that

the panel had applied a perverse and capricious standard to these identity documents, by rejecting them because there was no evidence that they would satisfy Sri Lankan authorities as a substitute for a valid NIC. However, the Court does not characterize this finding as an issue of procedural fairness, and I would not regard it as such.

[31] By way of further example, the Applicant also relies on *Shokunbi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 557 [*Shokunbi*] at paras 11-14, in which the Court found that the Immigration and Refugee Board's rejection of a driver's license as probative evidence of identity was patently unreasonable. However, again, the Court does not characterize this issue as one of procedural fairness. Indeed, the language employed by the Court demonstrates that it was analysing the reasonableness of the Board's decision, albeit against the patent reasonableness standard of review applicable under the administrative law of the day.

[32] I will return to these authorities later in these Reasons, when assessing the Applicant's arguments surrounding the reasonableness of the RAD's decision. However, for present purposes, I conclude that they do not assist the Applicant in asserting that his arguments raise issues of procedural fairness that would permit introduction of new evidence. His arguments relate to the RAD's assessment of the evidence, and the new evidence of the NIC cannot be used to challenge that assessment (see *Nchelem* at para 14).

[33] Finally, the Applicant relies on *Omar v Canada (Solicitor General)*, 2004 FC 1740 [*Omar*] at paras 7-8, in which Justice Pinard concluded that exceptional circumstances existed, which justified an exception to the general principle of exclusion of evidence extrinsic to the

record before the decision-maker. That case involved an application for judicial review of a pre-removal risk assessment [PRRA] decision, in which Justice Pinard had previously heard and granted a motion for a stay of removal. In support of his submissions on irreparable harm in the stay motion, the applicant had introduced new evidence of risk that had not been before the PRRA officer. When subsequently addressing the application itself, Justice Pinard concluded that it was necessary to consider this new evidence before the applicant's removal and sent the matter back to a different PRRA officer for determination.

[34] It is not particularly clear whether *Omar* identified a reviewable error in the PRRA officer's decision. Rather, the outcome in that case appears to turn on the fact that, in determining the stay motion, the Court itself had found, based on the new evidence, that the applicant would suffer serious risk to his life and/or security if he were removed from Canada. Against the backdrop of that determination, the Court concluded that a further PRRA was necessary. I agree with the Respondent's submission that *Omar* is distinguishable from the case at hand, where there has been no determination, by the RPD, RAD or the Court, that the Applicant is at risk. The present case falls squarely within the general rule that new evidence is not admissible on judicial review.

B. Whether the decision of the RAD was reasonable

[35] As previously noted, the Applicant argues that the RAD erred by placing a heightened burden on him in relation to proof of his identity. He cites a large number of authorities in support of this position. The Respondent submits that, while the Applicant has identified numerous cases in which the Court found that the relevant decision-maker erred in its assessment

of identity documents, this approach to challenging the RAD's decision is not helpful, as the Applicant has not shown that these cases are factually analogous to the present case.

[36] I find considerable merit to the Respondent's characterization of the Applicant's submissions. For instance, the Applicant cites a number of authorities for the principle that documents issued by a foreign state are presumed to be valid. As noted earlier in these Reasons, this principle does not assist the Applicant, as the RAD's analysis turned on at the sufficiency of the identity evidence, not findings that it was not genuine.

[37] Similarly, and again as previously observed, the Applicant also refers to authorities in which the rejection of refugee claimants, who relied on categories of documentation similar to those presented by the Applicant, was found to be unreasonable (see, e.g., *Kathirkamu* at para 36; *Shokunbi* at paras 11-14; *Selvarasu v Canada (Citizenship and Immigration)*, 2015 FC 849 at para 34; *Ratheeskumar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1232 at paras 28-30). However, each of these decisions turned on particular reviewable errors identified by the Court in the reasoning of the administrative decision-maker. These authorities do not support any general proposition that it is unreasonable for the RPD or RAD to decline to accept particular categories of documentation as sufficient evidence of a refugee claimant's identity.

[38] I do not find the authorities cited by the Applicant to undermine the reasonableness of the particular reasoning on which the RAD based its determination that the Applicant had not established his identity. The RAD found that the totality of the evidence tendered by the Applicant was insufficient to establish his identity, i.e., he had not demonstrated on a balance of

probabilities that he is who he says he is. In relation to the principal identity documents upon which the Applicant relies (the drivers license, birth documents, and fish market identity card), the RAD's conclusion was based significantly on its inability to link these documents to the Applicant. The RAD considered these documents and the Applicant's testimony surrounding them and explained why it did not afford them sufficient weight to establish his identity. As the Respondent submits, while the Applicant disagrees with the weight afforded to his evidence, that does not represent a basis for the Court to intervene in judicial review.

[39] It is also clear that the RAD's decision turned significantly on its conclusion that the Applicant had not provided reasonable explanations for being unable to provide a copy of his passport or NIC and, in particular, his failure to demonstrate reasonable efforts to obtain these documents, despite being in Canada for over five years, being represented by counsel, and having been duly notified of the RPD's concerns about his identity. Again, the Applicant disagrees with the RAD's conclusion, but his arguments do not undermine the reasonableness of its analysis. He submits that he has now obtained his NIC and that this demonstrates adequate efforts to obtain identity documentation. However, as explained earlier in these Reasons, this evidence, which was not before the RAD, cannot assist the Applicant in challenging its decision.

[40] Having found no reviewable error by the RAD, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3563-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3563-21

STYLE OF CAUSE: WASANTHA SARAMBAGE JAYARATHNA
V THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

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