

Federal Court



Cour fédérale

Date: 20220802

Docket: IMM-3414-21

Citation: 2022 FC 1150

Ottawa, Ontario, August 2, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SUWENTHIRAN IYAMPILLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Suwenthiran Iyampillai, seeks judicial review of the decision of a Senior Immigration Officer (“Officer”) of Immigration, Refugees and Citizenship Canada dated April 28, 2021, denying the Applicant’s application for a Pre-Removal Risk Assessment (“PRRA”) pursuant to subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”). In accordance with paragraph 112(3)(b) of the *IRPA*, the Applicant could not claim

refugee protection under section 96 of the *IRPA*, as he has been found inadmissible under subsection 36(1) of the *IRPA* due to serious criminality.

[2] The Applicant submits that the Officer breached his procedural fairness rights by denying him an oral hearing. The Applicant also submits that the Officer unreasonably assessed the evidence of his risk profile.

[3] For the reasons that follow, I find the Officer's decision to be unreasonable. I therefore grant this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 47-year-old citizen of Sri Lanka and of Tamil ethnicity. The Applicant and his wife, Ajantha Nithiyathasivam, have three daughters: one born in Sri Lanka in June 2005 and the other two born in Canada in September 2007 and February 2012.

[5] In Sri Lanka, the Applicant and his wife lived in the north part of the country, an area controlled by the Liberation Tigers of Tamil Eelam ("LTTE") during the latter part of the Sri Lankan civil war fought between the LTTE and the Sinhalese-dominated Sri Lankan government. In 2002, the couple moved to the city of Vavuniya during a ceasefire. The Applicant states that the area was controlled by government forces and paramilitaries who were

suspicious of Tamils who came from LTTE-controlled areas, like the Applicant and his wife. The Applicant states that his wife was arrested and interrogated several times.

[6] In 2003, the Applicant and his wife were married. Since the Applicant's wife's family lived in Western countries, the couple was considered wealthy and were subjected to extortion demands from the LTTE and paramilitaries.

[7] In January 2007, the Applicant fled Sri Lanka with his wife – who was pregnant at the time - and their daughter. While the Applicant was deported back to Sri Lanka, his wife and daughter were able to reach Canada, made refugee claims, and are now Canadian citizens.

[8] Upon his return to Sri Lanka, the Applicant claims he was interrogated by authorities and told he could not live in Colombo. He returned to Vavuniya. In 2008, the LTTE detained the Applicant and his parents paid a ransom to secure his release. As a perceived single man from an LTTE area, the Applicant states that he was under suspicion from the authorities, harassed at checkpoints, and picked up in roundups. In May 2009, as the Sri Lankan government was defeating the LTTE, the police detained and tortured the Applicant for five days on suspicion of him assisting the LTTE.

[9] On March 10, 2011, the Applicant states that the Sri Lankan army detained him for 12 days and tortured him on suspicion of having worked for the LTTE. He was released on a bribe.

[10] In July 2011, the Applicant fled Sri Lanka on a fake Canadian passport. He arrived in Canada on July 15, 2011 and made a claim for refugee protection.

[11] The Applicant waited over six years for a refugee hearing before the Refugee Protection Division (“RPD”) that was never scheduled. In the interim, his wife sponsored him and he became a permanent resident on July 13, 2016. He subsequently withdrew his refugee claim.

[12] In March 2017, the Applicant was convicted of dangerous operation of a motor vehicle under paragraph 249(1)(a) of the *Criminal Code*, RSC 1985, c C-46 (the “*Criminal Code*”).

[13] In 2019, the Applicant was convicted of sexual assault under section 271 of the *Criminal Code*. The Applicant received a 2.5-year incarceration sentence. The conviction rendered him inadmissible pursuant to paragraph 36(1)(a) of the *IRPA*. The Applicant subsequently lost his permanent resident status and became subject to an enforceable removal order.

[14] In February 2021, the Applicant applied for a PRRA, which was restricted to section 97 of the *IRPA* due to his inadmissibility.

B. *Decision Under Review*

[15] In a decision dated April 28, 2021, the Officer refused the Applicant’s PRRA. The Officer found a lack of evidence demonstrating that the Applicant fits the profile of a person who the Sri Lankan authorities would know or perceive to be associated with the LTTE, either personally or through familial or diasporic connections.

[16] In rejecting the Applicant's future risk in Sri Lanka, the Officer found the Applicant's allegations of past victimization by paramilitaries to be random criminal events, noting that the Applicant had not provided corroborative evidence to demonstrate that he had been personally targeted. The Officer also found that there was little evidence to support the Applicant's multiple assertions regarding past incidents of detention and torture. The Officer concluded that these events did not occur and that the Applicant is not currently of interest to the Sri Lankan authorities.

[17] The Officer considered all of the documentary evidence provided by the Applicant and noted that many of the documents were unrelated to his situation. The Officer acknowledged evidence of the current friction between Tamils and Sinhalese in Sri Lanka, and that Tamils are subjected to some police and governmental discrimination and violence. While the Officer noted that Tamils are often perceived as being associated with the LTTE, this was found to be a generalized risk. The Officer also found that Tamils at risk possess profiles that go beyond residency in the north of Sri Lanka.

[18] The Officer acknowledged that failed refugee claimants may come to the attention of Sri Lankan authorities upon return to Sri Lanka and accepted that the Applicant may face questioning at the airport due to his time spent in the West. However, the Officer determined that the Sri Lankan authorities do not systematically monitor or apprehend returned refugee claimants or assume they are affiliated with the LTTE. The objective documentation also does not indicate that Tamil males from northern Sri Lanka are automatically subjected to torture or

serious mistreatment upon their return to Sri Lanka, even if they are failed refugee claimants returning on temporary travel documents.

[19] Furthermore, the Officer found that the documentary evidence indicates that failed refugee claimants are not targeted solely for their ethnicity, but rather due to their personal or familial connections to the LTTE (including links to Tamil diaspora communities). The Officer also noted that the Applicant withdrew his refugee claim in Canada and is therefore not a failed refugee claimant. Given this, the Officer found insufficient evidence to demonstrate that the Applicant has perceived ties to the LTTE or that he fits the profile of someone the authorities would target on return, despite his profile as a Tamil male from the north.

III. **Preliminary Issue**

[20] The Applicant identifies the Respondent in this application as the Minister of Immigration, Refugees and Citizenship. The proper Respondent is the Minister of Citizenship and Immigration (*IRPA*, section 4(1); *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, section 5(2)). Accordingly, the style of cause is hereby amended with immediate effect.

IV. **Issue and Standard of Review**

[21] The sole issue in this application for judicial review is whether the Officer's decision is reasonable.

[22] The parties both submit that the applicable standard of review for the Officer's decision is reasonableness. I agree. 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 the merits of an administrative decision and I do not find that the issue raised warrants a departure from this presumption (at paras 10, 16).

[23] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[24] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

V. Analysis

[25] The Applicant submits that the Officer failed to consider his personal risk profile with respect to his refugee claim, his unlawful exit from Sri Lanka, his lengthy stay in Canada, and his associations with a large Tamil diaspora and refugee family members. The Applicant notes that in the decision, the Officer accepts the documentary evidence that Sri Lankan authorities target Tamils who have family members connected to the LTTE, as well as Tamils with links to LTTE-supportive Tamil diaspora communities. The Officer also relied on country condition evidence that indicates that those with real or perceived links to the LTTE may be at risk. Despite this, the Officer failed to consider the Applicant's perceived affiliation to the LTTE in assessing his risk profile, and failed to consider the country condition documentation indicating that Canada has a large LTTE-supportive Tamil diaspora. The Applicant also argues that the Officer unreasonably relied on his withdrawn refugee claim to doubt the veracity of his allegations, and that the Officer failed to sufficiently link the fact that he left Sri Lanka on a fake passport to the country condition evidence indicating that returnees who exited unlawfully may be detained and tortured.

[26] To support his position, the Applicant relies on *Suntharalingam v Canada (Citizenship and Immigration)*, 2014 FC 987, in which this Court found that the RPD erred by not considering whether an applicant was at risk based on the objective documentary evidence simply because it did not believe the applicant was targeted by the authorities for a perceived association to the LTTE (at para 47). At paragraph 49, this Court notes: “[...] credibility concerns cannot determine the issue of whether there is a serious possibility of persecution of the claimant in his capacity as a failed refugee claimant returnee.”

[27] The Applicant further relies on *Alexander v Canada (Citizenship and Immigration)*, 2020 FC 313 (“*Alexander*”) to argue that it was unreasonable of the Officer to base their risk assessment solely on whether he had past LLTE affiliation, as the Officer was required to assess his forward-looking risk. At paragraph 10 of *Alexander* this Court finds that the RPD downplayed the risk associated with returning from countries with large Tamil diaspora such as Canada:

[...] the RPD downplayed the Applicant's risk by stating that torture is reserved to those suspected of LTTE involvement in Sri Lanka. In doing so, the RPD ignored material objective evidence to the effect that the fact of claiming refugee protection overseas, particularly in countries considered to have a huge Tamil diaspora like Canada, could itself form the basis for suspicion of having LTTE links, or lead to mistreatment.

[28] The Respondent submits the Officer correctly identified that the Applicant is not a failed refugee claimant. The Officer’s decision did not hinge on this fact, but rather on the finding that the Applicant did not demonstrate he has the profile of someone who faces risk on return to Sri Lanka. The Respondent notes the Officer’s finding, based on country condition documentation, that Tamil males from northern Sri Lanka do not automatically face torture or serious mistreatment on return, even if they are failed refugee claimants. Likewise, the Respondent submits that the Applicant failed to provide sufficient evidence to demonstrate his personal risk associated with his refugee family members, his affiliation with the Tamil diaspora, or his unlawful exit from Sri Lanka. The Respondent further notes that the Applicant’s wife and daughter were granted Convention refugee status in 2008, which coincided with a period of active conflict between the LTTE and Sri Lankan government. As such, the Respondent maintains the Officer’s decision is justified, transparent, and intelligible.

[29] I agree with the Applicant's position. I find that the Officer failed to justify their reasoning for finding the Applicant did not meet the risk profile of someone who would be targeted by the Sri Lankan authorities upon return to Sri Lanka. This is particularly true given how the Applicant's allegations align with the risks identified by the Officer through their review of the country condition evidence.

[30] In their decision, the Officer acknowledged the possibility that the Applicant could be questioned at the airport due to his time spent in Canada. The Officer also recognized that failed refugee claimants returning to Sri Lanka can be brought to the attention of the authorities upon return, and that individuals from large Tamil diaspora communities and those with family members associated with the LTTE are at particular risk of danger. The Officer noted that the Applicant is a Tamil male from the north part of Sri Lanka, yet found that he is not a failed refugee claimant because he withdrew his refugee claim, and therefore "does not fit the profile of individuals who are systematically targeted by the authorities on return from overseas." The Officer also found insufficient evidence that the Applicant faces a risk based on his personal political profile, or that the Applicant "has been perceived to have ties to the LTTE or that he experienced any problems due to such perceived ties." The Officer's decision further states:

[...] I note that he had previously made a refugee claim in Canada but withdrew it once his spousal application was approved. In the absence of evidence that demonstrates he is wanted by the authorities or otherwise directly supports his allegations of risk, I find that on a balance of probabilities, these events did not occur and therefore I do not find the applicant is wanted by the authorities for being a supporter/worker for the LTTE.

[Emphasis added]

[31] Based on the objective country condition evidence and the Applicant's sworn statement, I find the Officer's conclusions to be unintelligible and unjustified. In my view, the Officer unreasonably reduced the Applicant's alleged experiences of torture and unlawful detention to a generalized risk. In doing so, the Officer failed to truly grapple with how the Applicant's alleged risk factors may translate into a personalized risk, and instead relied on a broad finding that the Applicant failed to adduce sufficient evidence to substantiate his assertions of risk. As was brought to my attention by the Applicant's counsel during the hearing, the Officer also failed to address documentary evidence that contradicts the Officer's conclusions with respect to how returnees to Sri Lanka with suspected ties to the LTTE are treated upon return.

[32] I also agree with the Applicant that it was illogical of the Officer to focus on the Applicant's withdrawal of his refugee claim to support the conclusion that the alleged incidents of torture and detention did not occur. In my view, it was reasonable of the Applicant to withdraw his refugee claim after he obtained permanent residence status through spousal sponsorship. As was rightly noted by the Applicant's counsel during the hearing, the distinction drawn by the Officer in this case – that the Applicant is not a failed refugee claimant because he withdrew his refugee claim – is not a meaningful one, given the length of time the Applicant has been in Canada, and the evidence that he is a Tamil from northern Sri Lanka with perceived ties to the LTTE. In this case, the Applicant's withdrawal of his refugee claim does not mean he no longer meets the profile of someone who would seek refugee protection in Canada, and someone who the Sri Lankan authorities would target as such.

[33] Furthermore, the Applicant's sworn statement, which is presumed to be true and which was not disputed by the Officer, describes his past experiences of being arrested, detained, and tortured on the basis of his perceived association with the LTTE. His wife and daughter are also said to have received Convention refugee status due to similar circumstances and experiences. It is unclear to me what types of persuasive evidence the Applicant could have feasibly obtained and presented, seeing as he fears the very government in control of the documents the Officer presumably wished to see. While the onus remains on the Applicant to prove his case, the Officer fails to indicate what evidence would have been sufficient to supplement the allegations outlined in the Applicant's sworn statement. I also find that the Respondent's argument that the Applicant's family members may have gotten their refugee status due to the active conflict in Sri Lanka in 2008 is an attempt to bolster the Officer's scant personal risk analysis. The Officer's decision does not address this possibility and instead fails to consider whether the Applicant's allegations may be supported by the success of his wife and daughter's refugee claims.

[34] Additionally, a review of the Officer's decision suggests that the Officer's reasoning and review of the Applicant's situation may have been clouded by the Applicant's criminal history. It must be stressed that the Officer was not tasked with determining whether the Applicant has the moral aptitude of a person who should be permitted to remain in Canada. The Officer was tasked with assessing the Applicant's future risk of torture and persecution on return to Sri Lanka. The Officer's complete rejection of the Applicant's sworn statement indicating such risk, based on multiple experiences over several years, is demonstrative of the Officer's failure to focus on the required elements of a PRRA.

[35] Overall, I find that despite considering a variety of country condition evidence related to the Applicant's allegations, the Officer failed to sufficiently account for the Applicant's personal risk. As such, I find the Officer's decision is not based on an internally coherent and rational chain of analysis that is justified in relation to the facts and the law (*Vavilov* at para 85), and is therefore unreasonable.

[36] Having found that the Officer's decision is unreasonable, it is unnecessary to address the Applicant's arguments regarding a breach of procedural fairness.

VI. **Conclusion**

[37] For the reasons above, I find the Officer's decision to be unreasonable. Accordingly, this application for judicial review is allowed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3414-21

THIS COURT’S JUDGMENT is that:

1. This application for judicial review is granted. The decision is set aside and the matter is referred back for redetermination by a different officer.
2. The style of cause is hereby amended to reflect “The Minister of Citizenship and Immigration” as the proper Respondent.
3. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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