

Federal Court



Cour fédérale

**Date: 20220808**

**Docket: IMM-5895-20**

**Citation: 2022 FC 1180**

**Ottawa, Ontario, August 8, 2022**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**KEERTHANAN SIVAKUMAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant is a 29-year-old Tamil and a citizen of Sri Lanka. He entered Canada on March 14, 2011 and filed a refugee claim that was refused on April 3, 2013.

[2] On January 4, 2019, the Applicant submitted a Humanitarian and Compassionate (H&C) application that is the subject of this review. It was his third such application. The application was refused on July 2, 2020 (the Decision).

[3] In this application, the Applicant seeks to have the Decision set aside and sent back for re-determination by a different Senior Immigration Officer (the Officer).

[4] For the reasons that follow, I find the Applicant failed to meet their onus to show the Decision is unreasonable.

[5] Therefore, this application will be dismissed.

## II. **Previous Applications**

[6] The Applicant submitted two previous H&C applications without the assistance of counsel. Both of the applications were refused. He subsequently filed an application for a Pre-Removal Risk Assessment (PRRA) with the assistance of counsel.

[7] The PRRA and the current H&C application were submitted by former counsel for the Applicant. They were both considered and refused by the same Officer. The PRRA was refused on July 2, 2020 and the H&C was refused on January 4, 2020.

### III. Preliminary Issue

[8] The Respondent objects to the inclusion of multiple documents in Exhibit E of the Applicant's affidavit, as they were not before the Officer. The Respondent submits that they do not come within any of the exceptions to the general rule that evidence not before the decision-maker will not be considered on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para. 20.

[9] I have reviewed the Applicant's affidavit and find that pages 318 to 397 of Exhibit E were not before the Officer at the time this H&C application was determined. I find they do not fall into any of the exceptions set out in *Access Copyright*. Therefore, I will not consider them in this review.

### IV. The Decision

[10] The Officer considered the Applicant's hardship submission that as a returning Tamil to Sri Lanka, who had left the country illegally, he would likely be perceived to be a supporter or sympathizer of the Liberation Tigers of Tamil Eelam (LTTE). As such, he would face intense screening and likely be placed on a "stop list" or "watch list" at the airport. This would include harassment and discrimination in all aspects of his life, including monitoring and harassment from Sri Lankan security forces.

[11] The Officer acknowledged reading the country condition documentation submitted by the Applicant but found more recent documentation existed as of the time of writing the Decision. The Officer placed more weight on the more recent documentation because it was “more current and therefore more accurate and reliable”.

[12] The Officer concluded, “[a]lthough the applicant may face some hardship in Sri Lanka on the basis of his Tamil ethnicity, I find that overall country conditions indicate that the applicant will likely face minimal discrimination from Sri Lankan security authorities or from the Sinhalese majority.”

#### V. Issues

[13] The Applicant alleges the Officer breached procedural fairness by rejecting his country condition evidence and preferring their own research. The Applicant says the Officer considered that evidence selectively.

[14] The Applicant also alleges that either the Officer did not consider the H&C grounds he put forward or, the evidence was unreasonably considered.

[15] The Respondent submits there is no indication that the Officer ignored the Applicant’s evidence. The Officer simply preferred the more up to date country condition documentation found in the National Documentation Package.

VI. **Standard of Review**

[16] The presumptive standard of review of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, is reasonableness:

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2015 SCC 65 [Vavilov] at para 23.

[17] As set out later in these reasons, I find the Officer did consider the Applicant's submissions and evidence and did not selectively rely on country condition documents.

[18] The Applicant has not persuaded me that the Decision was arrived at in a procedurally unfair manner. As a result, none of the exceptions to the presumption set out in *Vavilov* apply.

[19] The standard of review of this Decision is reasonableness.

[20] A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. It does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem: *Vavilov* at para 83.

[21] 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. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[22] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *Vavilov* at para 125.

## VII. Analysis

[23] The Applicant’s submissions included an affidavit by the Applicant detailing their mistreatment in Sri Lanka before arriving in Canada on March 14, 2011. Six supporting letters from family members were submitted, as were several supporting documents. Many of those documents had been submitted with the Applicant’s Pre-removal Risk Assessment application that was determined by the same Officer.

[24] A fundamental principle when considering an H&C application is that the Officer making the humanitarian and compassionate determination must substantively consider and weigh all the relevant facts and factors before them: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25.

[25] The Applicant submits the Officer did not meet this requirement.

[26] I have found otherwise.

[27] The Officer made specific findings addressing each of the Applicant's submissions: his profile, the factors he raised of discrimination and adverse conditions for Tamils in Sri Lanka as well as his establishment in Canada, and the best interests of his 6-year-old niece.

[28] The Officer indicated that they had reviewed the evidence adduced by the Applicant. Regarding country condition documentation, the Officer found that "more recent documentation exists at the time of this writing". The Officer reasonably stated they preferred to "place more weight on information that is more current, and therefore more accurate and reliable".

A. *Hardship*

[29] The Officer found that the Applicant did not provide evidence in support of his allegation that he will be perceived by the Sri Lankan authorities as an LTTE member or supporter. The Officer was not persuaded that the Applicant would face any ill-treatment on that basis.

[30] The Officer acknowledged "discrimination and adverse conditions for Tamils in Sri Lanka" were factors put forward by the Applicant. After considering country condition documents, the Officer found there is "no systematic policy of discrimination" against Tamil returnees and Tamil returnees "face a low risk of societal discrimination upon return to their communities." The Officer gave positive consideration to evidence demonstrating that the Applicant "may encounter some discrimination upon returning to Sri Lanka."

[31] The Officer found there was no evidence that the Applicant is wanted by the Sri Lankan authorities because of outstanding criminality or that he departed Sri Lanka using false documentation.

[32] The Officer also found that the Applicant's possession of a recently issued valid Sri Lankan passport further mitigated any possible unfavourable interactions the Applicant might have with Sri Lankan authorities.

[33] The Officer noted the Applicant denies being a member or supporter of LTTE but indicates he will be perceived as one. The Officer observed that the Applicant did not provide any documentary evidence, aside from their detailed affidavit, that corroborated the allegation that he will be perceived as an LTTE member or is a person of interest to the Sri Lankan authorities.

[34] The Officer found there was insufficient evidence to persuade them that the Applicant's skills as a truck mechanic in Canada are obsolete and non-transferrable to Sri Lanka or that he would be unable to use his experiences in Canada to obtain work to support himself.

[35] The Officer was of the opinion that the hardship associated with the Applicant's "separation from his Canadian family may be mitigated by the fact that the applicant's parents and other siblings continue to reside in Sri Lanka, and (*sic*) who may be able to lend him social support in his attempts to re-establish in Sri Lanka."



[36] Having reviewed the documents in the underlying record, I find the Officer's assessment of the hardship that the Applicant could face in Sri Lanka was reasonable.

B. *Establishment/Best Interest of the niece (BIOC)*

[37] The Officer noted the Applicant has resided in Canada for over 9 years and there was no evidence that he had attempted to evade or frustrate immigration authorities.

[38] The Officer found the Applicant has strong, close familial ties with his uncle, aunt and cousins with whom he resides and who appear to be the Applicant's immediate family. The Applicant also has a sister, with a 6-year-old daughter, with a certain level of interdependency.

[39] The Officer recognized that the Applicant's level of participation in his niece's life would be significantly diminished if he returned to Sri Lanka but found that there was insufficient evidence to indicate the best interests of the niece would be significantly and adversely affected.

[40] The Officer found the Applicant's professional conduct and development, and economic independence were well supported by documentary evidence, and weighed positively in the Applicant's favour.

[41] Neither party made written submissions with respect to the Officer's analysis of establishment or BIOC.

[42] I find the Officer's assessment of the Applicant's establishment in Canada and the BIOC analysis was reasonable.

C. *Failure to conduct independent research properly*

[43] The arguments in this area overlap with the hardship arguments as they each concern the possible risk of harm to the Applicant as a returning refugee who may be perceived as being LTTE.

[44] The Applicant argues that there was no consideration of his evidence. He says the Officer was obligated to consider his evidence from 2016, 2017 and 2018, and if they were rejecting it, to explain why.

[45] The Officer confirmed they had read the Applicant's country condition documents. The short explanation of why the Applicant's evidence was considered but rejected is the one provided by the Officer: it was less current than the evidence the Officer relied upon.

[46] The Officer is not required to mention every piece of evidence and every argument that was advanced by the Applicant. Failure to mention relevant evidence on an important point, or evidence on such a point that contradicts an officer's conclusions, may constitute a reversible error: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 1998 CanLII 8667. However, the Applicant's evidence does not contradict the Officer's findings. The Officer's newer evidence, taken from the same sources as the Applicant's evidence, supports the Officer's findings.

[47] The two reports the Officer relied on were each more current than the reports submitted by the Applicant, the latest of which was dated in 2018.

[48] The Officer relied on sections 4.1 and 4.2 of the Report of an EU Home Office Fact-finding Mission to Sri Lanka dated January 20, 2020 (the Home Office Report). Those sections address the treatment of returnees generally and returnees with links to the LTTE specifically. Generally, failed asylum seekers are questioned at the airport by immigration officials and may be passed to the Criminal Investigation Department at the airport.

[49] The Officer also relied on section 5.46 of the Australian Department of Foreign Affairs and Trade (DFAT) Country Information Report on Sri Lanka dated November 4, 2019 (the DFAT Report). Section 5.46 indicates that returnees, including failed asylum seekers, face a low risk of societal discrimination upon return to Sri Lanka.

[50] The Home Office Report relied on information gathered during the week of September 28 – October 5, 2019 and the DFAT Report is dated November 4, 2019.

[51] In the Decision, the Officer excerpted sections of the two reports. Regarding perceived links to the LTTE the Officer set out several excerpts. Subsection 4.2.2 of the Home Office Report is the most succinct:

4.2.2 The Attorney General's Department and the Criminal Investigation Department told the FFT that former LTTE cadres would only be of interest if there was a pending criminal case against them and that mere membership of the LTTE would not make someone of interest, this was also confirmed by an NGO.

[52] I note that there is no evidence that the Applicant has a criminal record or pending criminal case.

[53] The Officer also excerpted two sections from the DFAT Report addressing failed asylum seekers returning to Sri Lanka:

5.46 DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the Criminal Investigation Department. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.

5.50 DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities. DFAT further assesses that, where it occurs, surveillance of returnees can contribute to a sense of mistrust of returnees within communities.

[54] The Officer recognized that the Applicant may face some hardship in Sri Lanka as a Tamil but found, based on the country condition documents, it would likely be minimal. I find that was a reasonable conclusion to have drawn based on the evidence in the underlying record.

## VIII. Conclusion

[55] Contrary to the Applicant's allegations, I find that the Officer considered the evidence he presented and stated their reasons for each finding made in the Decision.

[56] There is no internal inconsistency in the reasons. The reasons are justified, transparent and intelligible. The Applicant can understand how and why the Officer reached the conclusion that they were not satisfied that the considerations presented by the Applicant justified an H&C exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c27.

[57] For all the reasons set out above, I am satisfied that the Decision is reasonable.

[58] This application is dismissed.

[59] There is no serious question of general importance for certification.

**JUDGMENT in IMM-5895-20**

**THIS COURT'S JUDGMENT is that:**

1. This application is dismissed.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5895-20

**STYLE OF CAUSE:** KEERTHANAN SIVAKUMAR v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY WAY OF VIDEOCONFERENCE

**DATE OF HEARING:** OCTOBER 28, 2021

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** AUGUST 8, 2022

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