Federal Court Cour fédérale

Date: 20221103

Docket: IMM-5180-21

Citation: 2022 FC 1502

Ottawa, Ontario, November 3, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SHANMUGATHEES SHANMUGARAJAH

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 of a decision by a Senior Immigration Officer [Officer] of the Humanitarian Migration Office, dated June 11, 2021 [Decision]. The Officer rejected the Applicant's application for a Pre-Removal Risk Assessment [PRRA] by finding he would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka.

II. Facts

[2] The Applicant is a 26-year-old Sri Lankan national of Tamil ethnicity from the North. He fears mistreatment by Sri Lankan authorities due to perceived ties to the Liberation Tigers of Tamil Eelam [LTTE], stemming from the Applicant's brother allegedly interacting with LTTE supporters in early 2010, and his profile as a returning failed asylum claimant. His claim was rejected. Hence this application for judicial review.

[3] The issue in this case is the sufficiency of evidence.

[4] It is important to note the Officer had the benefit of both written and oral testimony from the Applicant. He filed additional affidavits from both his mother and aunt, albeit the same as his brother filed in Swiss proceedings in which his brother was granted refugee status. There were additional documents, including a letter from Sri Lankan police Criminal Investigaion Department [CID], directing him to turn himself in for questioning and further instructing he will be arrested for non-compliance.

[5] Importantly, particularly given the centrality of evidence in this case, the Officer made no adverse credibility finding either in terms of the written or oral evidence of the Applicant, the affidavit evidence or the documentary evidence including the CID's written demand to interrogate him arrest for non-compliance.

[6] In his uncontradicted narrative, the Applicant states that in early 2010, his older brother had a group of three friends over at their family home for a period of three days and two nights. In June 2010, the Applicant's brother was arrested, beaten and interrogated by army intelligence officers because of his affiliation with these three individuals. The Applicant was subsequently informed his brother's friends were LTTE supporters, and was likewise being accused of affiliation with the LTTE. The Applicant's brother was released on conditions on June 4, 2010. The Applicant initiated a complaint with the police and Human Rights Commission, but "nothing came" of it.

[7] Around December 26, 2013, the Applicant's brother was kidnapped for questioning by army intelligence officers, at which time the brother was beaten again. The Applicant's brother was released the following morning and sent by his mother to live in India for his safety.

[8] On January 14, 2014, intelligence officers came to the Applicant's family home searching for the Applicant's brother. The Applicant's evidence is that he was interrogated, beaten, and threatened with death if he did not disclose his brother's whereabouts. Following his detention, the Applicant was released and instructed not to report the incident to police or seek any medical attention.

[9] The Applicant was detained twice more in January 2014 and three times in February 2014.

[10] The Applicant began experiencing health problems, specifically fainting and stomach pain which he suspects were the result of the abuse. Without divulging his encounters with intelligence officers, his doctors were unable to identify any issues. No medical evidence was filed although the Applicant said he underwent unsuccessful surgery.

[11] The Applicant's brother returned to Sri Lanka in May 2017 because their mother had fallen ill, and to attend their sister's wedding in July 2017.

[12] In August 2017, army intelligence officers came into town searching for the Applicant's brother, however he was absent attending their uncle's funeral in a different city.

[13] As a result, the Applicant was interrogated and "mistreat[ed]" for two days. The Applicant was also told that officers would attend his home again in two days at which time he had to divulge his brother's location.

[14] The Applicant's mother subsequently sent the Applicant to live with a relative in another village, where he allegedly remained in hiding for 16 months. The Applicant's mother informed authorities he had fled the country.

[15] Upon receiving a tip about his whereabouts, armed forces arrived at the gates of the relative's home in search of the Applicant. The Applicant fled the property and eventually ended up staying with a family friend elsewhere.

[16] The Applicant's mother arranged his escape from Sri Lanka in the Spring of 2019. The Applicant travelled to the United States by way of Turkey, Colombia, Panama and Ecuador.

[17] The Applicant crossed into the United States in approximately July 2019 and was detained by immigration authorities. The Applicant crossed into Canada in December, 2019.

III. Decision under review

A. *Interactions with authorities*

[18] The Officer took particular issue with the Applicant's allegations regarding the interest authorities took in the Applicant and his brother, specifically after the three-year gap between the 2010 and 2014 incidents. In the Officer's view, the Applicant did not identify a catalyst for the interest that authorities took in the client three years after the initial interaction. Likewise, the Applicant did not indicate during his oral hearing a basis for the renewed interest in 2017 and 2019. The Officer accepted that the client's unclear responses to questions regarding the renewed interest may have been the result of speaking through a translator; however, the Officer stated nonetheless that the Applicant did not provide any indication that he did not understand the line of questioning, and ultimately stated that there had been no additional occurrences or altercations that had resulted in renewed attention from authorities.

[19] Neither was the Officer convinced that the authorities continue to have an interest in the Applicant in the present day. In the Officer's view, the Applicant's response to questioning regarding his submission of a letter from "Police Headquarters" demanding his attendance was

not straightforward and constituted speculation as to whether authorities knew the Applicant was out of the country. The Officer found there was little evidence to suggest that the CID had followed up with the Applicant since his failure to attend the police station and came to the determination that the Applicant had left the country. I note the genuineness of the CID letter was not questioned by the Officer. In summary on this point, based on evidence that was not in the record which the Officer considered should have been filed by the Applicant, and notwithstanding the oral and or written testimony of the Applicant in respect of which no adverse credibility finding was made, the Officer held they were unable to conclude whether the Sri Lankan police continue to have an interest in the Applicant.

B. *Insufficient Corroborating Evidence*

[20] On this point, the Officer found that evidence of the personalized mistreatment faced by the Applicant were limited to his own statements. Once again this finding was based on what was not on the record. I remind that the Officer made no adverse credibility finding in respect of any of the Applicant’s written, oral or documentary evidence in support of these allegations.

[21] The Officer noted the Applicant did not submit documentation evidence pertaining to the medical treatment for his injuries. As such, the Officer could not conclude that the Applicant had availed himself to medical attention, nor that he had presented with signs of physical abuse. This finding was also contrary to the Applicant’s evidence.

[22] The Officer found fault with the Applicant’s failure to advance corroborating evidence, such as affidavits from family members who would have had first-hand knowledge of the

mistreatment that the Applicant indicates that he had endured. In the Officer's view, neither of the affidavits submitted by the Applicant provided corroborate evidence of the incidents of mistreatment that the Applicant has indicated to have personally experienced in 2014 or 2017. Once again this is a finding based not on the evidence but what was not in the evidence. This is also a finding that is inconsistent with the oral and written evidence of the Applicant and the affidavits he filed in support, in respect of which no adverse credibility findings were made.

C. *Profile upon return*

[23] The Officer was unable to conclude, once again based on an alleged lack of sufficient corroborating evidence, that the Applicant would more than likely experience mistreatment on the basis of his perceived ties to the LTTE were he to return to Sri Lanka.

[24] The Officer acknowledged country condition evidence outlined potentially harsh treatment by Sri Lankan authorities, but noted that this process serves to deter criminal or terrorist activities.

[25] However, the Officer did not deal with the fact the country condition evidence spoke not only of the harsh treatment by police and army personnel, but also of the harsh treatment including harassment and discrimination against Tamils from the North such as the Applicant.

[26] The Officer also relied on a dated country condition document from 2017 that suggested the situation for failed asylum seekers was improving in light of global monitoring of the

situation, and that there was no indication that the treatment and questioning experienced by failed asylum claimants reaches the threshold of torture or cruel and unusual punishment.

[27] As it relates to the mistreatment of Tamils and especially Tamils from the North entering Sri Lanka, the Officer said they were unable to conclude that the Applicant would likely experience mistreatment based on the instances of insufficiency of evidence noted above. This was due to the Applicant's failure to indicate whether he had any affiliation with any Tamil diaspora groups while outside the country, notwithstanding this was not an argument made by the Applicant.

[28] Additionally, the Officer said they could not conclude that the circumstances affecting the broader ethnic Tamil population would correspond to the specific circumstances of the Applicant without persuasive evidence, such as an arrest warrant or court order. In this connection, and unreasonably as I find later in these Reasons, the Officer found the CID letter demanding he appear for interrogation under pain of arrest was not analogous to an arrest warrant.

[29] Additionally, the Officer found that there was "little" evidence to conclude the Applicant is wanted for matters beyond questioning pertaining to his brother or that the letter he received constitutes a warrant for arrest. As such, the Officer stated they were unable to conclude the Applicant faces more than a mere possibility of arrest and questioning upon re-entering Sri Lanka.

[30] In summary, the Officer concluded the Applicant will face questioning upon his return to Sri Lanka, given that it is standard procedure to confirm the identities of those that may attempt to avoid arrest warrants and court orders – an unreasonable finding given the error with respect to the CID letter not being analogous to a warrant as will be seen - but the Officer concluded the Applicant has not demonstrated that he has been named in any such document.

IV. Issues

[31] This issue is the reasonableness of the Decision.

V. Standard of Review

[32] The standard of review in this case is reasonableness. 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, [2019] 4 S.C.R. 653 [*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*).
>
> [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).
>
> [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]

VI. Analysis

A. *Corroborating evidence of risk*

[33] The Applicant submits generally that the officer's failure to consider the objective and corroborating evidence of risk was unreasonable, particularly in light of the Applicant's perceived links to the LTTE.

[34] The Applicant correctly points out that to establish a risk of persecution, an applicant does not need to demonstrate a "personalized risk" but rather that they are part of a group that is persecuted. In this regard, the Applicant cites this Court's decisions in *Ramasamy v Canada (Citizenship and Immigration)*, 2016 FC 473 and *Rasalingam v Canada (Citizenship and Immigration)*, 2017 FC 718. In *Ramamsamy*, Justice Tremblay-Lamer states:

> [26]To establish risk of persecution, an applicant does not have to demonstrate a 'personalized risk', but can simply establish that he

> or she belongs to a group that is persecuted, or that is likely to be (*Salibian v Canada (Minister of Employment and Immigration)*, 1990 CanLII 7978 (FCA), [1990] FCJ No 454 (FCA); *Navaratnam*, para 12).

[35] In *Rasalingam*, Justice Diner states:

> [22] This statement is without basis. The Applicant did not need to present 'objective' country condition evidence that he would face targeted risks if he is sent back to Sri Lanka (given that the Officer placed no weight on the family and lawyer's evidence from Sri Lanka that spoke to personalized risk). Rather, personal risks can be inferred by circumstantial evidence by the fact the he is a member of a group that is being targeted (*Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 at para 53; *Kanakasingam* at para 20).
>
> [23] Given that the Decision was unreasonable with respect to something as central as overlooking country condition evidence relating directly to the key issue the Officer needed to assess - namely the risk of death, extreme sanction, or inhumane treatment - there is no need to decide the other issues raised with respect to the treatment of the 'personalized' evidence – in this case medical, as well as from the family and lawyer.

[36] With respect, the Applicant is correct on the constraining law in this connection. The Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 [*Kanthasamy*] expressly holds that direct evidence is not necessary to establish risk of discrimination and related hardship. The majority per Justice Abella states:

> [52] The Officer agreed to consider the hardship Jeyakannan Kanthasamy would likely endure as discrimination in Sri Lanka against young Tamil men. She also accepted evidence that there was discrimination against Tamils in Sri Lanka, particularly against young Tamil men from the north, who are routinely targeted by police. In her view, however, young Tamils are targeted only where there is suspicion of ties to the Liberation Tigers of Tamil Eelam, and the government had been making efforts to improve the situation for Tamils. She concluded that "the

onus remains on the applicant to demonstrate that these country conditions would affect him personally".

[53] This effectively resulted in the Officer concluding that, in the absence of evidence that Jeyakannan Kanthasamy would be personally targeted by discriminatory action, there was no evidence of discrimination. With respect, the Officer's approach failed to account for the fact that discrimination can be inferred where an applicant shows that he or she is a member of a group that is discriminated against. Discrimination for the purpose of humanitarian and compassionate applications "could manifest in isolated incidents or permeate systemically", and even "[a] series of discriminatory events that do not give rise to persecution must be considered cumulatively": Jamie Chai Yun Liew and Donald Galloway, Immigration Law (2nd ed. 2015), at p. 413, citing *Divakaran v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 633.

[54] Here, however, the Officer required Jeyakannan Kanthasamy to present direct evidence that he would face such a risk of discrimination if deported. This not only undermines the humanitarian purpose of s. 25(1), it reflects an anemic view of discrimination that this Court largely eschewed decades ago: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 173-74; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 318-19 and 321-38.

[…]

[56] As these passages suggest, applicants need only show that they would likely be affected by adverse conditions such as discrimination. Evidence of discrimination experienced by others who share the applicant's identity is therefore clearly relevant under s. 25(1), whether or not the applicant has evidence of being personally targeted, and reasonable inferences can be drawn from those experiences. Rennie J. persuasively explained the reasons for permitting reasonable inferences in such circumstances in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714:

> While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a

> particular applicant would face on return . . . . This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis […] [para. 12 (CanLII)]

[Emphasis added]

[37] Given these principles I conclude it was unreasonable for the Officer to require direct or corroborative evidence as the Officer did multiple times on multiple issues throughout the Decision.

[38] Respectfully, constraining law (i.e., law that must be applied by the tribunal) is that "applicants need only show that they would likely be affected by adverse conditions such as discrimination. Evidence of discrimination experienced by others who share the applicant's identity is therefore clearly relevant under s. 25(1), whether or not the applicant has evidence of being personally targeted, and reasonable inferences can be drawn from those experiences."

[39] I see no reason to treat the assessment of discrimination under section 25 of *IRPA* differently from the assessment of discrimination under sections 96 and particularly 97 of *IRPA*. In this respect, the Supreme Court in *Kanthasamy* at para 56 relied on Rennie J. (as he then was) who in the Supreme Court's words "persuasively explained the reasons for permitting reasonable inferences in such circumstances in *Aboubacar v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 714" [Emphasis added]:

> While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular

> applicant would face on return . . . . This is not speculation, rather it is a reasoned inference, of a non-speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis […] [para. 12 (CanLII)]

[40] In this case, the Officer failed to consider or apply the doctrine of reasonable inferences. Such inferences were open to the Officer given the written, oral and documentary evidence of the Applicant in respect of which no adverse credibility findings were made. He was entitled to any benefit in that respect.

[41] Therefore, and in my respectful view the Applicant's circumstance as a returning failed asylum seeker was not adequately assessed.

[42] Nor indeed was the rather compelling narrative adequately assessed, which was likewise not subject to any adverse credibility finding.

[43] The Applicant also notes this Court has recently taken judicial notice of the "ethnic profiling, surveillance and harassment" faced by ethnic Tamils in Sri Lanka. In *Ratnasingam v Canada (Citizenship and Immigration)*, 2020 FC 274, Justice Pamel states:

> [4] The Applicants are citizens of Sri Lanka and of Tamil ethnicity. In Sri Lanka, Tamils are often victims of ethnic profiling, surveillance and harassment by state actors and certain pro-government political actors.

[44] The Applicant further submits *Gopalapillai v Canada (Citizenship and Immigration)*, 2019 FC 228, for the proposition that:

> [12] This, however, misses the mark. A well-founded fear of persecution need not be based on actual political opinion. A perceived political opinion suffices. The Supreme Court of Canada explained this in *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 at 747:
>
> > […] the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.

[45] In this case, the Applicant submits and I agree the Officer did not reject his risk profile on the basis of his Applicant's testimony, but only on alleged insufficiency of evidence to corroborate the Applicant's perceived links with the LTTE and targeting by the authorities on that basis, despite a finding that the 2010 incident had been corroborated. In this case those were not required.

[46] Given the jurisprudence outlined, the Applicant submits that a perceived link to the LTTE would suffice, and that such a link existed in this case. As such, in the Applicant's view, the Officer's analysis was unreasonable. The Applicant further affirms these principles in citing this Court's decision in *Sathasivam v Canada (Citizenship and Immigration)*, 2016 FC 408, which states:

> [14] In the present case, the applicant does not claim a risk of extortion due to his status as a Sri Lankan who is perceived to be wealthy, but rather as a Sri Lankan who is also a young Tamil male from the north of the country. In *Gunaratnam v Canada (Citizenship and Immigration)*, 2015 FC 358, under similar

circumstances, Justice Russell addressed at length the issue of the particularized risk of extortion faced by young Tamil males, based on threats of denunciation as LTTE supporters, concluding that the Board had made a reviewable error in failing to make an assessment on this basis:

> [53] What is missing from the analysis, in my view, is a consideration of the evidence from the Applicant and the US DOS Report that it is young, Tamil males from the north who are being targeted in this way. There is no discussion by the Board of other groups or races being targeted in this way, and it is clear that both the EPDP and the Karuna group are specifically targeting young, Tamil males because they can threaten them by denouncing them as LTTE supporters to the government.
>
> [54] This activity does not strike me as either extortion that is without racial targeting, or a risk that is faced generally by other individuals in Sri Lanka.
>
> […]
>
> [58] I do not see how the Board was able to conclude that this is a risk faced generally by others in Sri Lanka. The evidence before the Board indicates that the EPDP and the Karuna group are not targeting the Applicant solely for economic purposes. Rather, they are targeting young, Tamil men from Jaffna because they can use the threat of denunciation to support their extortion demands. <u>This particular risk, extortion with a threat of denunciation as an LTTE supporter, can only be faced by Tamil males. So the Board needs to explain how a group targeted, at least in part, for reasons of race can qualify for the exception under s. 97(1)(b)(ii) of the Act.</u>
>
> [59] I think that this alone requires that the matter be sent back for reconsideration. The Applicant has raised several other issues but I do not think I need to consider all of them. The Board reaches a fundamental conclusion that the Applicant does not fit the profile of someone at risk from the government in Sri Lanka if he is sent back. <u>However, I see no full examination and discussion</u>

> of the Applicant as someone who has been detained three times and accused of LTTE connections, and who the Karuna group has detained, beaten and threatened to report to the government as an LTTE supporter if he does not pay the monies demanded (which he has failed to do) (CTR at 634):
>
> > A failure to do that will result you…telling the army that you are a supporter of LTTE and then they said that if I were to get handed over to the army they would torture me and they would continue to detain me.
>
> [60] I can find nothing in the evidence to suggest this kind of thing does not happen. The Board's own evidence says that those at risk include "persons suspected of having links with the LTTE." If the Karuna group carries through with its threat, then the Applicant will be suspected of having such links.

[Emphasis in original]

[47] I appreciate each case is different and earlier decisions of this Court do not constitute evidence. However, decisions of this Court concerning similarly placed individuals, for example, Tamil males from the North returning generally and particularly as failed asylum seekers to Sri Lanka, are cautionary dispositions that may usefully assist Officers carrying out their duties.

[48] The Applicant also takes issue with the Officer's reliance on an absence of an arrest warrant or court order to find that the Applicant would not face issues upon re-entry into Sri Lanka. The Applicant submits that this finding shows a disregard for objective evidence on Sri Lanka, a misapprehension of the meaning behind the CID letter and a perception of the Applicant has having ties to the LTTE. With respect, I agree. The CID's letter is an unconditional demand and threat of arrest. In my view, this CID letter is tantamount to a warrant:

it is to the same effect with the same consequences: a command to attend enforced by arrest. It was unreasonably speculative for the Officer to discount the CID's demands based on the lack of a further letter or follow-up by Sri Lankan authorities – there was no evidentiary basis for these considerations.

[49] On the basis of the foregoing I have concluded the Decision is not reasonably such that judicial review will be granted.

[50] A number of other issues were canvassed by both parties, however it is not advisable to decide them.

VII. Conclusion

[51] In my respectful view, the Applicant has established the Officer's decision was unreasonable in its assessment of risk posed to members of the group with which the Applicant identifies. Therefore, the Application for judicial review must be granted.

VIII. Certified Question

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

JUDGMENT in IMM-5180-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded to a differently constituted decision-maker for 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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