

Federal Court



Cour fédérale

Date: 20221117

Docket: IMM-4576-20

Citation: 2022 FC 1573

Ottawa, Ontario, November 17, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**KAPILA AMARKOON WIJAYALATH
PEDIGE
NIRMALA DEEPANI PATHIRATHNA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the “RAD”], dated August 26, 2020 [the “Decision”], which dismissed the Applicants’ appeal and upheld the decision of the Refugee Protection Division of the Immigration and Refugee Board [the “RPD”], dated December 14, 2018.

[2] The RPD and the RAD found that the Applicants were neither Convention Refugees nor persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[3] The Applicants, Kapila Amarkoon Wijayalath Pedige [the “Principal Applicant”], a 45-year-old male, and Nirmala Deepani Pathirathna [the “Associate Applicant”], a 48-year-old female, are citizen of Sri Lanka. The Applicants are married and have a daughter.

[4] The Applicants claim to fear persecution based on their perceived political opinion as being opposed to the Sri Lankan government and conversion from Buddhism to Christianity. According to the Principal Applicant, the discrimination in Sri Lanka began when he protested an electricity board [the “Electricity Board”] project in his Sri Lankan district in 2008. He believed the project was damaging the environment to the benefit of a single influential individual. Because of his opposition, the Principal Applicant claims that Sri Lankan authorities pursued and abused the Applicants during the period from 2008 to 2010. On one such occasion, the Associate Applicant claims Sri Lankan police physically and sexually assaulted her.

[5] The Associate Applicant left Sri Lanka for a job in Israel in March 2010. The Principal Applicant moved to Israel on September 09, 2012 to join her.

[6] While they were in Israel, Sri Lankan authorities purportedly continued harassing the Applicants’ family. The Associate Applicant returned to Sri Lanka for a holiday with the

Applicants' daughter on August 26, 2012. During this time, Sri Lankan police allegedly raided the Applicants' Sri Lankan home and sexually abused the Associate Applicant.

[7] The Associate Applicant left Sri Lanka, leaving her daughter with the Principal Applicant's parents. They arrived in Canada in July 2013 on valid work permits and claimed refugee protection in February 2015.

[8] The history of these refugee proceedings is extensive. At the outset, the Minister of Citizenship and Immigration intervened pursuant to subsection 170(e) of the *IRPA* and to make submissions with respect to the Applicants' credibility.

[9] The RPD originally denied the Applicants' claims in a decision dated June 11, 2015. That denial was appealed to the RAD. On September 23, 2015, the RAD allowed the appeal and, pursuant to paragraph 111(1)(c) of the *IRPA*, returned the matter to the RPD for reconsideration. The RAD held that the RPD erred in its initial determination because the RPD failed to provide clear and transparent reasons and failed to consider the Applicants' religious persecution claim.

[10] The RPD reconsidered and denied the Applicants' refugee claims in a decision dated December 14, 2018. The determinative issues for the RPD were the Applicants' lack of credibility and the absence of both a subjective and objective well-founded fear of persecution.

[11] The RPD noted that an applicant's testimony is presumptively credible, but found, in this instance, that material evidence rebutted that presumption. The Applicants waited 17 months

after entering Canada before making their refugee claims. The Principal Applicant's explanation was that the Applicants thought they would be eligible for permanent residency at the end of their stay, however, there was no evidence that the Applicants ever inquired about obtaining permanent resident status. Furthermore, the Applicants failed to seek protection while in Israel and the Associate Applicant voluntarily returned to Sri Lanka twice between 2010 and 2012. From this, the RPD drew a negative inference with respect to the Applicants' credibility and subjective fear of persecution.

[12] The RPD also found there was no objective component to the Applicants' claimed fear of persecution. The RPD made the following relevant determinations:

- i. If Sri Lankan authorities were pursuing the Applicants, the Principal Applicant would not have been as willing to conduct public interviews as he was.
- ii. The land that the electricity project was to encroach on belonged to the Principal Applicant's father and brother. The Electricity Board had offered compensation for damaging the family property but the Principal Applicant felt it was inadequate. The RPD accepted that there had been a dispute about whether the Electricity Board had a right to encroach on private land, but there was nothing in the evidence to suggest the Applicants could not return to Sri Lanka and resolve any outstanding issues.
- iii. The Principal Applicant was not the leader of the protest. The evidence was that the Principal Applicant's brother had written to and received communication from a Sri Lankan human rights commission about the dispute.

- iv. A 2014 Sri Lankan warrant for the Principal Applicant's arrest in relation to an offence of assault was unrelated to the Principal Applicant's anti-government electricity protest as the warrant was issued years after the protests took place.
- v. The Associate Applicant had lied about physical and sexual assault by Sri Lankan police in order to embellish the refugee claim and include herself as a victim of persecution.
- vi. The evidence relating to the political persecution claim was "totally untrustworthy and lacking in any credibility" and, on the balance of probabilities, the events as described by the Applicants never occurred.

[13] The RPD also rejected the Applicants' religious persecution claim. The RPD found that while the Applicants may face challenges in practising their Christian faith in their village, had an Internal Flight Alternative to the district of Colombo.

[14] The RPD rejected the Applicants' refugee claims. The Applicants appealed to the RAD. In the Decision dated August 26, 2020, the RAD upheld the RPD decision. The Applicants ask the Court to set aside this decision and remit the matter for reconsideration by a different panel of the RAD.

III. Decision Under Review

[15] For the most part, the RAD accepted the RPD's reasoning and affirmed the RPD's decision.

[16] The RAD found that there was no serious possibility of persecution due to the Applicants' conversion to Christianity. The evidence was that the Applicants had not experienced any religious persecution during their time in Sri Lanka, despite the fact that they were actively practicing their faith. Evidence from the National Documentation Package did not indicate that mere Christian converts were persecuted in Sri Lanka.

[17] The RAD also denied the Applicants' political persecution claim. The RAD, similar to the RPD, found that the Applicants failed to explain their 17-month delay in seeking asylum in Canada and this delay undermined their claims of a subjective fear of persecution.

[18] The RAD found the Applicants had failed to establish an objective component of a well-founded fear of persecution. The RAD found that:

- i. The RPD was correct in finding that the Principal Applicant did not play a central role in the 12-year-old electricity dispute. The Principal Applicant's claim that he had written documents in relation to the dispute but used his brother's name at the advice of a Sri Lankan lawyer was without merit.
- ii. The 2014 arrest warrant was worthy of little weight for several reasons:
 - (a) the Principal Applicant had failed to mention the warrant in the initial basis of claim form;

- (b) the Principal Applicant's evidence about the first time he was allegedly detained in 2008 and subsequent the court processes was confusing and evolving;
- (c) the Principal Applicant had no documentation to corroborate his assertion that the arrest warrant was issued after he missed his fourth court appearance;
- (d) the six-year gap between the dispute and the issuance of the warrant strained credulity;
- (e) there was no evidence of any further arrest warrants; and
- (f) there was no evidence that Sri Lankan authorities had persecuted any other protesters.

iii. A letter from a Sri Lankan lawyer meant to corroborate the Applicants' version of events was worth little weight as there was no indication of the lawyer's relationship to the Applicants. Moreover, the letter provided little information regarding the dates of the relevant events and the names of the relevant individuals involved.

iv. A death certificate provided for the Principal Applicant's father stated that his cause of death was heart attack due to an assault, but did not provide information about the motive for the assault.

- v. The Associate Applicant faced no prospective risk. Given the RPD's conclusion that Sri Lankan authorities were not in pursuit of the Applicants from 2008 through 2010, the RPD committed no error in rejecting the Associate Applicant's claim. A medical note advanced by the Applicant as proof of abuse was of low probative value because it showed only that she was at one point treated for a burn. If the Associate Applicant had a subjective fear of persecution in Sri Lanka, it is unlikely she would have returned to the country of her own volition as she did on two occasions between 2010 and 2012.

IV. Issues

[19] Was the Decision reasonable?

V. Standard of Review

[20] The standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 25].

VI. Analysis

[21] The Applicants do not contest the RAD's finding with respect to the religious persecution claim.

[22] However, the Applicants argue that several aspects of the RAD's decision with respect to the political persecution are unreasonable. Several of these arguments amount to critiques of the RAD's assessment of the evidence. The Applicant claims the RAD erred in its assessment of:

- A. the Principal Applicant's testimony respecting the role he played in the dispute with the Electricity Board;
- B. a 2014 arrest warrant;
- C. a lawyer's letter;
- D. a death certificate of the Principal Applicant's father; and
- E. a medical note presented by the Associate Applicant as evidence of assault.

[23] In each case, the RAD reasonably weighed the evidence and provided a rational explanation for why it was of limited probative value. The RAD found that the Principal Applicant's testimony that he had played a central role in the electricity project dispute was rebutted by documents that showed his brother was the leader of the opposition to the project. The RAD provided several reasons for not finding a nexus between the 2014 arrest warrant and the 2008 dispute, including the six-year gap in timing. It found the lawyer's letter as lacking relevance as there was no indication how the lawyer knew the Applicants or how he knew of the

events he was allegedly verifying. The letter was sparse on details, lacking dates or relevant names of people involved.

[24] The RAD did not discount the death certificate of the Principal Applicant's father; it accepted that he had died of an assault-induced heart attack. However, the RAD observed that it was of low probative value to the Applicants' claims of persecution, as there was no evidence of the motivation for the assault. The RAD similarly assigned low probative value to the Associate Applicant's medical note. Although the note showed the Associate Applicant had been treated for a burn, it did not show how the injury came to be. Sufficiency of the evidence was questioned by the RAD on a reasonable basis.

[25] The RAD's assessment with respect to the evidence was clear, reasonable and entitled to deference; it is not the role of this Court to reweigh and reassess evidence on judicial review [*Vavilov* at paragraph 125].

[26] The Applicants make two further arguments that go beyond the RAD's consideration of the evidence and to the core of the RAD's analysis. First, the Applicants argue that the RAD erred by finding the Applicants lacked a subjective fear of persecution because the Applicants delayed in claiming refugee protection. The Applicants claim that an applicant does not need to seek immediate protection when there is no risk of removal.

[27] While delay in making a claim is an important consideration, it is seldom dispositive. Whether or not weighing delay against an applicant is reasonable is a fact-specific inquiry [*Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at paragraph 14].

[28] Based on the facts in this case, the RAD reasonably drew a negative inference from the Applicants' delay. The Applicants arrived in July 2013 Canada on valid work permits but allege not to have sought refugee protection until February 2015 because they anticipated achieving permanent resident status. However, there was no evidence that they had ever inquired about or consulted with anyone about the requirements for permanent residency. Moreover, the Applicants also did not claim asylum during their time in Israel.

[29] Second, the Applicants argue that the RAD erred by failing to consider the Associate Applicant's case independently by improperly importing findings from the Principal Applicant's claim.

[30] I find no such error in the RAD's analysis. Each of the Applicants' claims in this case relied on a similar version of events. Namely, Sri Lankan authorities had pursued and abused them and their family following an environmental protest instigated by the Principal Applicant. The RAD rejected this version of events. It was reasonable for the RAD to import those findings into the analysis of the Associate Applicant's claim.

[31] The application is dismissed.

JUDGMENT in IMM-4576-20

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4576-20

STYLE OF CAUSE: KAPILA AMARKOON WIJAYALATH PEDIGE,
NIRMALA DEEPANI PATHIRATHNA v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 15, 2022

JUDGMENT AND REASONS: MANSON J.

DATED: NOVEMBER 17, 2022

APPEARANCES:

MAUREEN SILCOFF FOR THE APPLICANTS

ALLISON GRANDISH FOR THE RESPONDENT

SOLICITORS OF RECORD:

SILCOFF, SHACTER FOR THE APPLICANTS
TORONTO, ONTARIO

ATTORNEY GENERAL OF FOR THE RESPONDENT
CANADA
TORONTO, ONTARIO