

Federal Court



Cour fédérale

Date: 20231003

Docket: IMM-1231-22

Citation: 2023 FC 1326

Ottawa, Ontario, October 3, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

**SENTHILKUMAR SUBBAIYAN
MURUGAN SUBRAMANIYAN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicants are citizens of India. They sought refugee protection in Canada on the basis of their fear of persecution in India as gay men. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the claim on credibility grounds.

[2] The applicants appealed this determination to the Refugee Appeal Division (RAD) of the IRB. In a decision dated January 19, 2022, the RAD agreed with the RPD that the applicants lacked credibility. The RAD therefore dismissed the appeal and confirmed the RPD's determination that the applicants are neither Convention refugees nor persons in need of protection.

[3] The applicants now apply under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) for judicial review of the RAD's decision. They submit that the decision was made in breach of the requirements of procedural fairness and that it is unreasonable.

[4] For the reasons that follow, I am not persuaded that the decision was made unfairly or that it is unreasonable. This application for judicial review will, therefore, be dismissed.

II. BACKGROUND

[5] The applicants claim to have been in a same-sex relationship together for almost 30 years.

[6] Senthilkumar Subbaiyan was born in Thanjavur, Tamil Nadu, India, in February 1976. Murugan Subramaniyan was born there in June 1972. They attended the same secondary school in Thanjavur and became friends.

[7] The applicants described the start of their romantic relationship in their Basis of Claim (BOC) narratives in identical terms:

After school we were both engaged in farming. We had to sleep in the same shed during the night to protect our crops from robbery during the harvesting season. We took turns sleeping while the other kept watch. During this time, we engaged in homosexual relations.

[8] According to the applicants, they were able to keep their relationship a secret until May 2013. One night, police in a nearby village discovered them having sex in their truck. (They had gone to the village to sell farm produce and were staying in the truck overnight.) The applicants claim that the police detained them and beat them. They were released the next morning. When they returned to their village, people were already aware of the incident. (According to the applicants, the police had contacted their village headman to verify their identities.) The applicants found themselves ostracized in their local community.

[9] In October 2013, both applicants left India for Saudi Arabia to work as drivers. They continued their relationship there. Both applicants state in their narratives that, since they each had a single room, “[t]here were no problems meeting each other and having sex.” In January 2017, the applicants returned to their village in India and took up farming again.

[10] According to the applicants, the people of the village were curious to know if they were still continuing their homosexual relationship and set about spying on them. On February 7, 2017, they were seen having sex in a farming shed. When this was reported to the police, the applicants were arrested and beaten.

[11] The applicants decided they had to leave India. With the assistance of an agent, Mr. Subbaiyan obtained a visitor's visa for Canada. He arrived in Canada on July 1, 2017. Mr. Subramaniam went to live in the state of Kerala until he was able to leave India. He arrived in Canada on December 2, 2018. He explained that he could not leave India sooner because he did not have the financial resources to do so. Together, the applicants submitted claims for refugee protection in April 2019.

III. STANDARD OF REVIEW

[12] The applicants challenge both the fairness of the procedure by which the RAD dealt with one aspect of their appeal as well as the RAD's decision on the merits of the appeal. There is no dispute about how the Court should approach these issues on judicial review.

[13] First, to determine whether the procedure followed by the RAD met the requirements of procedural fairness, the reviewing court must conduct its own analysis of the process the decision maker followed and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Perez v Hull*, 2019 FCA 238 at para 18; and *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para. 14. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The ultimate question is whether the applicants knew the case to meet and had a full and fair chance to respond

(*Canadian Pacific Railway Co* at para 56). No deference is owed to the RAD in this regard (*Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 45). The burden is on the applicants to demonstrate that the requirements of procedural fairness were not met.

[14] Second, the RAD's decision on the merits of the appeal is reviewed on a reasonableness standard. When applying this standard, the reviewing court must begin its inquiry "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 84, internal quotation marks and citation omitted). 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). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125).

[15] The onus is on the applicants to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

IV. ANALYSIS

[16] The RAD upheld the RPD's determination that the applicants are neither Convention refugees nor persons in need of protection for three main reasons relating to their lack of credibility. The applicants have not established any basis to interfere with the RAD's assessment.

[17] First, the RAD agreed with the RPD that the applicants had not given a credible account of their relationship. The RAD found: "Twenty-eight years is a long time to make memories and develop a deep understanding of another person yet the Appellants could only speak of their physical relationship and when pushed to discussed other aspects of their relationship, they spoke in platitudes." This conclusion is reasonably supported by the record and explained by the RAD in clear and transparent reasons. The applicants submit that the RAD did not mention everything they had said about their relationship but none of the missing details are sufficiently material to call the reasonableness of the RAD's conclusion into question.

[18] Relatedly, the RAD reasonably determined that, separate and apart from the nature of their relationship, the complete absence of evidence to corroborate the applicants' claim to have spent years together in India and in Saudi Arabia (e.g., photographs of the two of them together) undermined the credibility of their narrative. The RAD reasonably rejected the applicants' explanation that they did not have any photographs of themselves together because any such photographs would have put them at risk. The RAD stated: "While I appreciate there might be some risk associated with certain photographs, the Appellants testified that they attended the

same school, played on the same soccer team and had friends in India. It would seem likely to me that a photograph of them in a group setting might exist.” The applicants have not established any basis to interfere with this conclusion.

[19] Second, the RAD found that there was a material discrepancy between the applicants’ narratives and information they had provided in their respective Schedule A Background/Declaration forms. Specifically, according to the applicants, their relationship began when they were working on a farm together yet, for the relevant period, neither applicant mentioned doing agricultural work in his Schedule A. Instead, both described themselves as self-employed drivers.

[20] When asked about this at the RPD hearing, Mr. Subbaiyan attempted to clarify that he and Mr. Subramaniyan had worked on Mr. Subbaiyan’s family farm and driving a truck was among their responsibilities. The RPD did not find this evidence persuasive and drew an adverse finding about the applicants’ credibility from the inconsistency. On appeal, the applicants challenged this finding as based on an unduly “microscopic” analysis of the evidence. The RAD disagreed, finding that their failure to mention working in agriculture in their Schedule A forms undermined the credibility of their account of how their relationship began, which is an essential part of their narrative. This finding was reasonably open to the RAD and is justified by reasons that are transparent and intelligible.

[21] Third, the RAD found that, when interviewed by a Canada Border Services Agency (CBSA) officer in April 2019, the applicants had given materially different accounts of how

Mr. Subramaniyan had travelled to Toronto after landing in Vancouver in December 2018.

Mr. Subramaniyan told the CBSA officer that he had flown from Vancouver to Toronto.

According to Mr. Subbaiyan, on the other hand, Mr. Subramaniyan had taken the bus. In the RAD's view, if the applicants were in a genuine relationship as they claimed, it was unlikely that there would be this discrepancy in their accounts. Having been separated from one another for some 18 months, the circumstances of their reunion would surely be memorable.

[22] The applicants challenge both the fairness and the reasonableness of this determination. Some additional background is necessary to put these issues in context.

[23] While their appeal was pending, the RAD informed the applicants that it was concerned about the apparent discrepancy in the information they provided to the CBSA officer (which the RPD had not addressed) and gave them an opportunity to respond. The applicants responded by each providing an affidavit addressing the RAD's concern as well as submissions from their counsel. (The RAD had also raised a second concern which the applicants also addressed but it does not figure at all in the decision.)

[24] In their response, the applicants explained that the original plan had been for Mr. Subramaniyan to take the bus from Vancouver to Toronto, but this plan changed "suddenly" at the Vancouver airport, when he found a cheap flight to Toronto. Mr. Subramaniyan stated that he had spoken to Mr. Subbaiyan from the Vancouver airport but only before his plans had changed. He did not speak to Mr. Subbaiyan again until after he landed in Toronto. For his part, Mr. Subbaiyan explained that the interview with the CBSA officer was very confusing for him.

He thought he was being asked about the original plan for how Mr. Subramaniyan would be getting from Vancouver to Toronto, not how he in fact had travelled.

[25] The RAD does not find the applicants' explanation for the discrepancy in their accounts to be sufficient. It also notes that "their explanation leads to more questions about their evidence." One is that there is nothing in the CBSA officer's notes of the interview to suggest that the officer was interested in the original travel plan as opposed to how Mr. Subramaniyan had actually travelled from Vancouver to Toronto. (The officer's notes record that Mr. Subbaiyan was asked "How did he come to meet you?" and, with the assistance of an interpreter, Mr. Subbaiyan responded "Vancouver to Toronto by bus. He called me from Vancouver.") Another additional question is how, given the alleged last-minute change of plans, the agent in India who had arranged Mr. Subramaniyan's travel to Canada would have known to send someone to the Toronto airport to collect his passport, as Mr. Subramaniyan claimed had happened in his April 2019 interview with the CBSA.

[26] The applicants submit that the RAD breached the requirements of procedural fairness by not informing them of these additional concerns and providing them with an opportunity to respond. I do not agree. The RAD's concerns arose from the applicants' own evidence and were entirely foreseeable. In any event, the applicants have failed to explain how they were prejudiced by the way the RAD proceeded. Even assuming for the sake of argument that they did not anticipate the RAD's additional concerns, the applicants have said nothing about how they would have attempted to meet these concerns, if only they had known about them. In short,

the applicants have failed to establish that they did not know the case they had to meet and that they did not have a full and fair chance to respond.

[27] Nor do I agree that the RAD's assessment of this factor is unreasonable. The RAD explained that, while this detail is immaterial to the applicants' claim to be at risk because of their sexuality, "it does go directly to their knowledge of each other which underpins their entire claim." (The RAD also noted that, according to the CBSA officer's notes, when interviewed in April 2019, Mr. Subbaiyan could not remember Mr. Subramaniyan's last name.)

[28] It was open to the RAD to find that Mr. Subramaniyan's arrival in Toronto would have been a memorable event for the applicants if, as they claimed, they were long-term romantic partners who had been reunited after a lengthy separation. It was open to the RAD to find that there was a material discrepancy in the applicants' accounts of this event. It was also open to the RAD to reject the applicants' explanations for the discrepancy in their accounts. Finally, it was open to the RAD to therefore conclude that this discrepancy suggested that they were not, in fact, long-term romantic partners, as they claimed. All of these findings are justified by reasons that are transparent and intelligible. The applicants have not established any basis to interfere with them.

[29] The RAD also concluded that the corroborative evidence the applicants produced was not sufficient to overcome its credibility concerns.

[30] Some of that evidence concerned the applicants' having volunteered at the 2019 Toronto Pride Weekend. The RAD found that this evidence had limited probative value, since the event is open to everyone. This determination is not unreasonable. That being said, I agree with the applicants that the RAD should not have drawn an adverse inference from the fact that, in their photographs of the event, the applicants appeared "very sombre and serious" and, by implication, were insufficiently celebratory. Nothing in the record reasonably permitted the RAD to pass judgment on the applicants' demeanor in this way. Likewise, the RAD's finding that the applicants may have "attended" the event, but they did not "participate" in it, is a distinction without a difference. As well, the RAD should not have found that the applicants' admission that, in all the time they had been living in Canada, they had not made any efforts to meet other people in the gay community, "undermines their claim to be gay men." As IRB Chairperson's *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics* notes, among the stereotypes or assumptions decision makers should not rely on is that "SOGIESC individuals would actively participate in LGBTIQ2 culture in Canada or be involved in, or aware of, community organizations and groups" (at para 6.1). Nevertheless, in my view, these are peripheral flaws in an analysis that is otherwise justified in light of the evidence, law, and policy that constrained the decision maker.

[31] The applicants also relied on other photographs showing them together in Toronto. The RAD found that the photographs appeared to be staged and depicted only a few different occasions despite the length of time the applicants had been in Toronto together (almost two-and-a-half years by the time the RPD heard their claims). The RAD also agreed with the RPD that two letters from people in India who claimed to know of the applicants' relationship were

entitled to some weight but were insufficient to establish that the applicants have been in a long-term same-sex relationship, as they claim. The applicants have not demonstrated that these determinations are unreasonable.

[32] Nor have the applicants established any error in the RAD's assessment of their *sur place* claim. As the RAD reasonably noted, there was little in the applicants' own accounts of their lives in Toronto capable of supporting a *sur place* claim.

[33] Finally, the applicants had challenged the RPD's decision in a number of respects that the RAD did not find it necessary to address. As I have explained, the RAD's ultimate determination is reasonably supported by the points on which it relied; the failure to address these additional issues does not impugn the overall reasonableness of the decision.

V. CONCLUSION

[34] For these reasons, the application for judicial review will be dismissed.

[35] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-1231-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1231-22

STYLE OF CAUSE: SENTHILKUMAR SUBBAIYAN ET AL v THE
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PLACE OF HEARING: TORONTO, ONTARIO

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