

Federal Court



Cour fédérale

Date: 20231011

Docket: IMM-2656-22

Citation: 2023 FC 1351

Ottawa, Ontario, October 11, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

SATHISHKUMAR ELANGO VAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a 30-year-old citizen of India of Tamil ethnicity. He entered Canada on a visitor visa in March 2019. In December 2020, he submitted a claim for refugee protection. The applicant alleged that he had a well-founded fear of persecution as a long-time supporter of the Marumalarchi Dravida Munnetra Kazhagam (MDMK), an Indian political party known for its support for Sri Lankan Tamils and which has been alleged to have been sympathetic to the

Liberation Tigers of Tamil Eelam. The applicant also alleged that he had a well-founded fear of persecution because, beginning in 2015, he had taken a romantic interest in a higher-caste girl, something her family strongly opposed.

[2] The applicant's claim was heard by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) on December 16, 2021. The RPD rejected the claim in a decision dated February 25, 2022. In doing so, the RPD found under subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) that there is no credible basis for the claim and, under section 107.1 of the *IRPA*, that the claim is manifestly unfounded.

[3] The applicant now applies under subsection 72(1) of the *IRPA* for judicial review of the RPD's decision. He submits that the no credible basis and the manifestly unfounded findings are unreasonable. He also submits more generally that the RPD's decision to reject the claim is unreasonable.

[4] There is no question that the manifestly unfounded finding, which is not supported by any analysis at all, is unreasonable. The respondent submits, however, that this finding is severable from the no credible basis finding. The applicant does not disagree. The principal issue, then, is whether the no credible basis finding is also unreasonable.

[5] As I explain in the reasons that follow, I am not persuaded that the RPD's finding that there is no credible basis for the applicant's claim is unreasonable.

II. BACKGROUND

[6] The applicant was born in June 1993 in the town of Mannargudi in the state of Tamil Nadu. According to his Basis of Claim narrative, after completing high school in April 2008, the applicant worked full-time in farming until he left for Canada. His family were long-time supporters of the MDMK and he would attend party-organized protests from time to time.

[7] The applicant claims that in December 2018, he was detained by police and questioned about two Sri Lankan Tamil workers he employed on his farm. According to the applicant, he was detained overnight, physically and verbally abused, and accused of employing ex-militants. He was released only after his father paid a bribe to the police.

[8] The applicant also claims that in 2015, he had met a higher-caste girl online. The two have never met in person. Sometime in or after November 2018, the girl's parents checked her phone and learned about the relationship. Then, on January 10, 2019, the police took the applicant to a local station, physically abused him, and warned him about ever having a relationship with a higher-caste woman. The applicant states in his narrative that he "understood that the family of my girlfriend is behind this action of the police."

[9] With the assistance of an agent, the applicant obtained a visitor's visa for Canada. He left India for Canada in March 2019.

[10] In April 2019, there was a series of bombings in Sri Lanka. According to the applicant's narrative, although Islamist groups were believed to be responsible, the authorities in Tamil Nadu took this as an opportunity to harass and intimidate MDMK party members and supporters. Police went to the applicant's home and questioned his parents about his whereabouts. The applicant feared that he would still be of interest to the police if he returned to India.

[11] As well, the applicant feared that his girlfriend's parents would kill him if he returned. As he explained in his narrative, he was unwilling to end the relationship with his girlfriend but even if she married someone else, his presence in India "may change her mind at any time and it would be a disgrace for their family."

[12] As noted above, the applicant did not submit a claim for refugee protection until December 2020, some 19 months after he arrived in Canada.

III. STANDARD OF REVIEW

[13] The parties agree, as do I, that the RPD's decision should be reviewed on a reasonableness standard. 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from a 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).

[14] *Vavilov* also holds that, “Where the impact of a decision on an individual’s rights and interests is severe, the reasons provided to that individual must reflect the stakes” (at para 133). The importance of the potential impact of the decision on the affected individual in a reasonableness analysis was underscored recently in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 76.

[15] There can be no doubt that a decision on a claim for refugee protection has a significant impact on the claimant’s rights and interests. Where the claim is rejected, the adverse consequences are multiplied if the RPD also finds that the claim has no credible basis or is manifestly unfounded. This is because either finding precludes the usual right of appeal to the Refugee Appeal Division (RAD) of the IRB: see *IRPA*, paragraph 110(2)(c). As a result, the claimant’s only recourse is an application for leave and judicial review to this Court. Additionally, unlike when an adverse decision by the RAD is challenged on judicial review, the claimant’s removal from Canada is not stayed automatically while a timely application for judicial review is pending: see *Immigration and Refugee Protection Regulations*, SOR/2002-227, subsection 231(1). (These serious consequences also entail that the threshold for a no credible basis or a manifestly unfounded finding is high. I return to this point below.)

[16] To set aside a decision on the basis that it is unreasonable, 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). Put another way, it is not sufficient simply to point to errors in the decision maker’s reasons; the errors must be material to the outcome (*BCE Inc v Québecor Média Inc*, 2022 FCA 152 at para 43).

IV. ANALYSIS

[17] The RPD states its overall conclusion as follows:

In view of the claimant’s lack of credibility and the insufficiency of the supporting evidence, I find there is no credible basis for the claim that the claimant faces a serious possibility of persecution in India or that he is a person in need of protection, since he is unlikely to face a danger of torture or risk to life or of cruel and unusual punishment. This claim for refugee protection is manifestly unfounded and under subsection 107(1), I am therefore required to reject it.

[18] As mentioned above, a finding that there is no credible basis for a claim for refugee protection or that the claim is manifestly unfounded has serious consequences for the claimant. As a result, the threshold for making either of these findings is high (*Ramón Levario v Canada (Citizenship and Immigration)*, 2012 FC 314 at para 18; *Yuan v Canada (Citizenship and Immigration)*, 2018 FC 755 at para 45; *Rejuyan v Canada (Citizenship and Immigration)*, 2023 FC 642 at para 23).

[19] The RPD’s manifestly unfounded finding can be dealt with briefly. The passage quoted above in paragraph 17 is all the RPD says about this issue. The decision is completely bereft of analysis to explain why the RPD was of the opinion that the claim is clearly fraudulent, as is required before a manifestly unfounded finding may be made: see *IRPA*, section 107.1; see also

Warsame v Canada (Citizenship and Immigration), 2016 FC 596 at paras 26-32. The finding that the claim is manifestly unfounded must be set aside as unreasonable.

[20] The more difficult question is whether the RPD's no credible basis finding is also unreasonable.

[21] Subsection 107(2) of the *IRPA* provides as follows:

(2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim

(2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

[22] Discussing the phrase "no credible basis" as it appeared in previous legislation, the Federal Court of Appeal held that the RPD "should not routinely state that a claim has 'no credible basis' whenever it concludes that the claimant is not a credible witness" (*Rahaman v Canada (Minister of Citizenship and Immigration)*, [2002] 3 FC 537, 2002 FCA 89 at para 51). This principle applies equally the subsection 107(2) of the *IRPA*. The RPD may find that there is no credible basis for a claim only if there is no credible or trustworthy evidence that could support recognition of the claim. If the RPD finds that there is any credible or trustworthy evidence that could support a positive determination, it "cannot find there is no credible basis for the claim, even if, ultimately, the Board finds that the claim has not been established on a balance of probabilities" (*Ramón Levario* at para 19).

[23] In the present case, the RPD concluded in no uncertain terms that the applicant was not a credible witness. It found that his account of his alleged detention by police in December 2018 was filled with inconsistencies and evolved under questioning. The RPD concluded with respect to this alleged incident that the applicant “is not accurate, honest and credible.” Likewise, with respect to the applicant’s account of his relationship with his higher-caste girlfriend, the RPD “had the impression the claimant was making up his testimony as he went along” and that he “is fabricating his story.” Furthermore, in examining the applicant’s explanation for why he waited so long before submitting a claim for refugee protection in Canada, the RPD concluded that the applicant “is not willing to be accurate and honest no matter what it is he testifies about.”

[24] These are harsh conclusions but the applicant has not persuaded me that there is any basis to interfere with them. Especially on matters touching on credibility, the RPD is in a more advantageous position than a reviewing court (*Vavilov* at para 125). Assessments of credibility are “quintessentially questions of fact” and the relative advantage of an administrative decision maker who heard the *viva voce* evidence “must be respected” (*Dr. Q v College of Physicians and Surgeons of British Columbia*, [2003] 1 SCR 226, 2003 SCC 19 at para 38).

[25] The applicant has not identified any material evidence that the RPD fundamentally misapprehended or failed to account for. While I agree that the RPD’s reference (at paragraph 22 of the decision) to the applicant being charged by police after he and his girlfriend were seen together at a protest march is erroneous, I consider this error to be peripheral. Nor has the applicant established any failures of rationality in the RPD’s credibility analysis. The applicant points out that at one point the RPD finds that “there is no clear and unequivocal

evidence that the claimant is likely to be persecuted or killed as a result of an honour killing.” I agree with the applicant that this statement is potentially problematic because it appears to reflect an erroneous view of the legal test for granting refugee protection. Nevertheless, since the RPD rejected all of the applicant’s evidence in its entirety, I am not persuaded that this error impugns the overall reasonableness of the decision. Apart from these specific flaws, the applicant’s arguments on review essentially ask me to reweigh the evidence and reach a different conclusion than the RPD concerning the applicant’s credibility. This is not the role of a court conducting judicial review under the reasonableness standard.

[26] Before leaving this point, I would echo the respondent’s concerns about the applicant’s attempts to challenge the RPD’s factual determinations in the absence of a transcript of the hearing. As I have discussed elsewhere, this puts both the Court and the respondent at a significant disadvantage (*Zararsiz v Canada (Citizenship and Immigration)*, 2020 FC 692 at paras 61-64). Perhaps more to the point, it leaves the applicant at a disadvantage as well, since he bears the onus of demonstrating that the RPD’s assessment of his testimony is unreasonable (*Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 640 at para 14). The applicant said nothing about why he did not provide a transcript of the hearing. On the basis of what he did provide, the applicant has not persuaded me that the RPD’s adverse credibility findings are unreasonable.

[27] As stated above, if a claim for protection is supported by other evidence besides the claimant’s testimony, a determination that the claimant lacks credibility is not sufficient to support a no credible basis finding (*Chen v Canada (Citizenship and Immigration)*,

2015 FC 1133 at para 16). The decision maker must also find that there is no other credible or trustworthy evidence on which it could have made a favourable decision. Only then may the decision maker conclude that the claim has no credible basis (*Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 53).

[28] Besides his testimony, the applicant tendered very little evidence to support his claim: a letter from his father dated September 24, 2021; a letter from an official with the MDMK dated September 25, 2021; a letter from the applicant's friend dated September 24, 2021; and a letter from a friend of the applicant's girlfriend dated September 25, 2021.

[29] The RPD addressed each of these items of evidence. It gave a letter from the applicant's father no weight because it simply repeated the applicant's narrative. Likewise, the RPD found that the letter from the MDMK official was also merely a "bald recitation" of the applicant's narrative. The RPD gave the letter from the applicant's girlfriend's friend no weight because it does not mention the caste distinction between the applicant and his girlfriend; indeed, it "leaves the impression there is none." The RPD gives the letter from the applicant's friend no weight because it does not disclose the sources of the information it relates (apart from a conversation with the applicant's father about one detail), it does not affirm that the author believes what is set out in letter is true, it is written "without solemnity," and it simply mimics much of what is in the applicant's narrative.

[30] In my view, it was open to the RPD to find that none of this evidence was sufficient to support a positive determination of the claim. The RPD reasonably determined that the letters

from the applicant's friend and from the MDMK official, which simply repeated the applicant's narrative without any explanation of the authors' sources for the information they were relating, lacked the independence necessary for them to have any probative value. This is largely true of the letter from the applicant's father as well. While the RPD appears to have overlooked at least one detail that would have been a matter of first hand knowledge on the father's part – the payment of a bribe to secure the applicant's release from police custody in December 2018 – I am not persuaded that this undermines the overall reasonableness of the RPD's assessment of the letter. Finally, given the centrality of the caste differences between the applicant and his girlfriend to the applicant's claim, it was not unreasonable for the RPD to give the letter from the friend of the applicant's girlfriend no weight because it omitted this material fact. On the applicant's own account, the friend was aware of this fact and the conflict it allegedly caused with the girlfriend's parents. In any event, considering the contents of the letter as a whole, it was not unreasonable for the RPD to find that it was insufficient to support a positive determination. The RPD could certainly have said more about the letter but I am not persuaded that, overall, its assessment of the supporting evidence is unreasonable.

[31] Critically, the RPD did not find that some or even all of the applicant's documentary evidence was deserving of some weight but fell short of establishing the claim; rather, it concluded that none of it was entitled to any weight. Thus, it cannot be said that the RPD conflated a no credible basis finding with a finding that the claim had not been established on a balance of probabilities. Had it done so, this would have been a reviewable error: see *Boztas v Canada (Citizenship and Immigration)*, 2016 FC 139 at paras 11-13; *Mahdi v Canada*

(Citizenship and Immigration), 2016 FC 218 at para 10; and *Adeshina v Canada (Citizenship and Immigration)*, 2022 FC 1559 at para 34.

[32] In summary, the RPD did not find that the claim has no credible basis simply because it concluded that the applicant is not a credible witness. It also examined the other evidence the applicant provided and concluded that it was insufficient to support the claim because none of it was deserving of any weight. The applicant has not established any basis for interfering with either of these conclusions. Since the RPD reasonably found that the essential requirements of a no credible basis finding were met, I am also satisfied that its ultimate finding that the claim has no credible basis is reasonable.

[33] That being said, I would also observe that nowhere in the decision does the RPD expressly advert to the established test for a no credible basis finding, nor does the RPD acknowledge that a high threshold must be met before this finding may be made. For the reasons I have given, I am satisfied that the RPD reasonably concluded that the applicant's claim had no credible basis. Nevertheless, for the sake of transparency and intelligibility, and having regard to the serious consequences of a no credible basis finding, it would have been better if the RPD had actually articulated the applicable test in the decision.

V. CONCLUSION

[34] For these reasons, the application for judicial review will be allowed in part. The RPD's finding that the claim is manifestly unfounded is set aside. The application will otherwise 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-2656-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed in part.
2. The RPD's finding that the claim is manifestly unfounded is set aside.
3. The application is otherwise dismissed.
4. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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