Federal Court  Cour fédérale

Date: 20231106

Docket: IMM-10804-22

Citation: 2023 FC 1474

Ottawa, Ontario, November 6, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

PATHMAKUMAR KAJENTHIRAN
(AKA KAJENTHIRAN PATHMAKUMAR)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] dated October 5, 2022 [Decision]. In the Decision, the RAD dismissed the Applicant's appeal from a decision of the Refugee Protection Division [RPD] of the IRB and upheld the RPD's decision that the Applicant is neither a

Convention refugee nor a person in need of protection under section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is allowed, because the RAD failed to discharge its burden of justification, explaining why its decision on the risk represented by the Applicant's residual profile diverged from other recent decisions of the RAD involving materially the same country condition evidence and residual profiles.

II. Background

[3] The Applicant is a citizen of Sri Lanka, who has claimed refugee protection in Canada based on fear of the Aava group, a criminal youth group that the Applicant alleges has ties with the Sri Lankan Army [SLA]. He alleges that, in December 2018 and April 2019, he and his brother were taken to an army camp, where they were beaten in an effort to convince them to join the Aava. The Applicant's father paid to have him and his brother released. After the second event, the Applicant attempted to file a police report, but the police refused. The next day the Aava came to his home, looking for him. He and his brother subsequently left Sri Lanka and eventually arrived in Canada and claimed protection.

[4] The RPD rejected the Applicant's claim, finding that he has a viable internal fight alternative [IFA] in Colombo. He appealed that decision to the RAD. In the Decision under review in this application, the RAD dismissed the appeal, concluding that the RPD was correct in finding that the Applicant was neither a Convention refugee nor a person in need of protection under the IRPA.

III. Decision under Review

[5] In relation to the first branch of the IFA test, whether there was a serious possibility of persecution in the proposed IFA, the RAD considered the Applicant's argument that the RPD had erred by considering only the means and motivation of the Aava to find him in Colombo and not that of the SLA. However, the RAD concluded that, while the Applicant was taken to an army camp and assaulted there, the evidence did not support a conclusion that the SLA had independently pursued the Applicant or had any interest in him.

[6] The RAD noted the evidence that it was the Aava who kidnapped the Applicant on both occasions. Also, while the Applicant asserted in his Basis of Claim form that he was beaten by army officers, he testified that it was the Aava who assaulted him. The RAD considered the Applicant's assertion that the SLA was directing the Aava. However, based on country condition evidence [CCE] of the police attempting to eliminate the Aava, and the Applicant's testimony as to what he suspected or guessed, the RAD concluded that the Applicant's assertion was speculation. Similarly, notwithstanding the visit by the Aava the day after the Applicant attempted to report them to the police, the RAD found that the evidence did not support a conclusion that the police were supporting the Aava.

[7] Based on those findings, the RAD concluded that the agent of persecution did not have the means or motivation to locate the Applicant in Colombo.

[8] Turning to the second branch of the IFA test, whether a move to the proposed IFA would be reasonable, the RAD considered applicable CCE, including evidence of language and employment challenges associated with internal relocation in Sri Lanka. However, taking into account the Applicant's education and language skills, it agreed with the RPD that he would be able to access housing, employment, education and medical care in Colombo. The RAD noted that the Tamil minority experiences discrimination in Sri Lanka but found that this discrimination did not amount to persecution and that the hardship the Applicant would experience upon relocation did not meet the threshold necessary for the relocation to be considered unreasonable.

[9] Finding that the Applicant therefore had a viable IFA, the RAD then considered the Applicant's submission that his residual profile as a Tamil male from the North of Sri Lankan, returning to Sri Lanka from Canada (a country with an active Tamil diaspora) as a failed asylum seeker and employing a temporary travel document in the absence of a passport, would place him at risk. The Applicant also argued that the RPD had ignored the fact that he was targeted by the SLA and that Sri Lankan authorities regard Aava members as being linked to the Liberation Tigers of Tamil Eelam [LTTE].

[10] The RAD referred to Federal Court jurisprudence to the effect that, for a Tamil without links to the LTTE, there was no more than a mere possibility of persecution upon returning to Sri Lanka, which was insufficient to support a refugee claim. The Applicant had testified that he had never been suspected of such a link. Based on CCE surrounding immigration processes upon

return to Sri Lanka, the RAD concluded that, in the absence of suspected LTTE links, any enhanced questioning he may face would not amount to persecution.

[11] The RAD therefore found that the Applicant did not have a residual risk profile that would make him a Convention refugee or a person in need of protection.

IV. Issues and Standard of Review

[12] The parties' arguments raise the following issues for consideration by the Court:

1. Did the RAD err in its IFA analysis?
2. Did the RAD err in its assessment of the Applicant's residual risk profile?

[13] The parties agree, and I concur, that these issues are reviewable on the standard of reasonableness.

V. Analysis

[14] My decision to allow this application for judicial review turns on the second issue raised by the Applicant, surrounding the RAD's assessment of his residual risk profile. With respect to the first issue, related to the RAD's IFA analysis, I need say only that I agree with the Respondent that the Applicant's arguments amount to asking the Court to re-weigh the evidence that was before the RAD, which is not the Court's role in judicial review.

[15] In relation to his residual profile, the Applicant argues that the RAD's analysis is unreasonable, because it failed to engage with his submissions on other recent decisions by the RAD, based on materially the same CCE, which found that a residual profile as a Tamil male from the North of Sri Lanka, returning to Sri Lanka from Canada as a failed refugee claimant, gave rise to a serious possibility of persecution. The Applicant invokes the so-called "justificatory burden" described as follows in *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 [*Brown*] at paragraph 134:

> 134. *Thanabalasingham* creates no special rule for ID reviews. The requirement to give reasons when departing from a prior decision is directed to the well-understood requirement, essential to the integrity of administrative and judicial decision making, that if there is a material change in circumstances or a re-evaluation of credibility, the ID is required to explain what has changed and why the previous decision is no longer pertinent. This reinforces the values of transparency, accountability and consistency. As was explained by the Supreme Court of Canada in *Vavilov*, the primary purpose of reasons is to demonstrate justification, transparency and intelligibility (at paragraph 81). To promote "general consistency", any administrative body that departs from its own past decisions typically "bears the justificatory burden of explaining that departure in its reasons" (at paragraphs 129–131). Moreover, reasons are the primary mechanism by which affected parties and reviewing courts are able to understand the basis for a decision (at paragraph 81; see also *Canada (Public Safety and Emergency Preparedness) v. Berisha*, 2012 FC 1100, [2014] 1 F.C.R. 574, at paragraph 52).

[16] In *Ramirez Cueto v Canada (Citizenship and Immigration)*, 2021 FC 954 [*Ramirez Cueto*], although not citing *Brown* or other precedent, Justice Heneghan applied this principle in a judicial review of an IFA decision by the RAD, explaining that, while each appeal before the RAD will turn on its facts, there will be occasions when the evidence in one appeal, and its treatment by the RAD, will be relevant to another case (at para 12).

[17] The Court in *Ramirez Cueto* referenced another RAD decision that had relied on a version of the National Documentation Package [NDP] for Mexico that was approximately a year older than the NDP relied upon in the RAD decision under review. While there were some differences in the documents contained in the two versions of the NDP, both RAD decisions had cited to common documents, and yet the decision under review had reached a conclusion on state protection different from that of the earlier RAD panel. Justice Heneghan found that the RAD's failure to address the similarities and differences between the NDPs in the two cases amounted to a reviewable error (at paras 13-17).

[18] In the case at hand, in which the RAD relied on the May 31, 2022 NDP for Sri Lanka, the Applicant referred the RAD to the following recent RAD decisions related to failed asylum-seekers returning to Sri Lanka:

1. Decision dated June 2, 2021, in RAD File TC0-10394, in which the RAD relied on the April 16, 2021 NDP for Sri Lanka;

2. Decision dated December 17, 2021, in RAD File TC1-11144, in which the RAD relied on the May 31, 2021 NDP for Sri Lanka; and

3. Decision dated January 10, 2022, in RAD File TC1-09339, in which the RAD relied on the May 31, 2021 NDP for Sri Lanka.

[19] The Applicant submits that the CCE in these different versions of the NDP for Sri Lanka in 2021 and 2022 is materially the same. The Respondent has not argued otherwise. The Applicant referred the RAD to the conclusions in RAD File TC0-10394 and RAD File TC1-

11144 that a Tamil male from the North or the East of Sri Lanka had a well-founded fear of persecution by Sri Lankan security forces simply by reason of being in that particular social group and by reason of returning to Sri Lanka as a failed asylum-seeker.

[20] The Applicant also relied on the conclusions in RAD File TC1-09339, which also allowed a *sur place* claim based on residual profile. The Applicant emphasized that, in addition to being a Tamil male and returning failed asylum-seeker, the RAD in that case took into account the fact that the claimant had family members residing outside Sri Lanka who had sought asylum. In the case at hand, the Applicant's brother was (at the time of the Applicant's submissions to the RAD) in the process of pursuing a refugee claim in Canada.

[21] The Respondent submits that the Applicant's arguments based on these past RAD decisions are misplaced. The Respondent refers the Court to *Sami-Ullah v Canada (Citizenship and Immigration)*, 2022 FC 1525 [*Sami-Ullah*], in which Justice Diner rejected similar arguments in the context of an IFA analysis. To begin, the Court noted that the RAD precedents had not been raised before the RAD and therefore could not form a basis for judicial review (at para 26). The Court also explained (at paras 30 to 31) that immigration cases, like all administrative decisions, are heavily fact dependent, and that *Qayyem v Canada (Citizenship and Immigration)*, 2020 FC 601, had recently confirmed (at para 20) that Canadian administrative law does not recognize inconsistency in a tribunal's decisions as a stand-alone ground of review.

[22] In finding that the RAD's decision was reasonable, *Sami-Ullah* noted (at para 35) that *Brown* referred to the "justificatory burden" in the context of prior immigration detention

decisions involving the same applicant, not in relation to consistency between applicants from the same country. Justice Diner adopted (at para 36) Justice Furlanetto's analysis (at para 23) in *Vanam v Canada (Citizenship and Immigration)*, 2022 FC 1457 [*Vanam*] in concluding that prior IFA decisions by the RAD were distinguishable and therefore not the type of decisions that impose a justificatory burden on the RAD to explain a departure from its previous decisions.

[23] The Respondent also argues that *Ramirez Cueto* is distinguishable from the case at hand, because in that case Justice Heneghan identified (at paras 15-16) particular documents from the relevant NDPs that were cited by the two panels of the RAD and resulted in different conclusions. I do not find that that argument to be a principled basis on which to conclude that *Ramirez Cueto* does not support the Applicant's submissions in the case at hand.

[24] Rather, while I accept the reasoning in the authorities described above upon which the Respondent relies, I find no doctrinal inconsistency with the analysis in *Ramirez Cueto*. Citing *Vavilov* (at para 94), *Sami-Ullah* identified (at para 32) the importance of a reviewing court considering the context of an administrative decision maker's reasons, including past decisions of the relevant administrative body. In its explanation of the need for an administrative decision to be justified in light of applicable legal and factual constraints, *Vavilov* elaborates as follows upon the role of past practices and past decisions as contextual considerations that inform the performance of reasonableness review (at paras 129-131):

> 129. Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions

does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

130. Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

131. Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public

> confidence in administrative decision makers and in the justice system as a whole.

[25] I would not necessarily regard the individual RAD decisions upon which the Applicant relies in the case at hand as "longstanding practices or established internal authority" (*Vavilov* at para 131). However, more generally the Supreme Court has identified the concern of both administrative decision-makers and reviewing courts with the general consistency of administrative decisions, as well the expectation of the public that "like cases will generally be treated alike" (*Vavilov* at para 129), as included among the constraints upon administrative decision-making.

[26] As noted in both *Ramirez Cueto* (at para 12) and *Sami-Ullah* (at para 30), each appeal before the RAD must turn on its own facts. Where the relevant facts involved in matters before the RAD are not materially the same, the concern with the general consistency of administrative decisions identified in *Vavilov* does not arise. In rejecting the applicants' justificatory burden argument in *Vanam*, Justice Furlanetto both distinguished the RAD precedents upon which the applicants relied (at para 24) and explained that the RAD itself had provided reasons that represented justification and distinguished the circumstances of that case from the prior decisions (at para 25). I do not necessarily read the latter analysis in *Vanam* as suggesting that the RAD expressly distinguished the precedents. Rather, the basis for its departure from those precedents was apparent from its reasons. As noted in *Brown* at paragraph 134 in the context of the justificatory burden, reasons are the primary mechanism by which affected parties and reviewing courts are able to understand the basis for a decision.

[27] In my view, these authorities all represent application of the overriding principle that an administrative decision must be transparent, intelligible and justified, in the context of the factual and legal constraints upon it (see *Vavilov* at para 15). If an administrative precedent is readily distinguishable on its facts, clearly no justificatory burden arises. In a matter involving facts that appear to be materially the same as in a past decision, it may nevertheless be apparent from the decision-maker's reasons why a different result was reached, even without expressly distinguishing the past decision. Moreover, the expectation that a precedent will be addressed, either expressly or otherwise, does not necessarily arise if the precedent has not been raised before the decision-maker (see *Sami-Ullah* at para 26). As *Vavilov* explains, the decision-maker's obligation is to meaningfully account for the central issues and concerns raised by the parties and their submissions (at para 127).

[28] Against that jurisprudential backdrop, I turn to the facts of the case at hand. In the Applicant's submissions on appeal to the RAD, he devoted considerable detail to the RAD precedents upon which he relied, explaining his argument that he had the same residual profile as had been found in those precedents, in an effort to support a finding of a serious possibility of persecution. This is not a case, as in *Sami-Ullah*¸ where the Applicant raised this argument as an afterthought on judicial review.

[29] The Applicant argued before the RAD, and again submits before the Court, that the CCE in the NDPs under consideration in the RAD precedents and in the case at hand is materially the same. As previously noted, the Respondent has not argued otherwise. As for whether the RAD precedents involved materially the same facts relevant to the individual claimants as in the case

at hand, in my view the analysis differs somewhat depending upon which precedent is considered.

[30] In RAD File TC1-09339, it is noteworthy that the claimant's residual profile that the RAD took into account in accepting his *sur place* claim included the fact that he had family ties with the LTTE. The Applicant emphasizes that, like him, that claimant also had family members residing outside of Sri Lanka who had sought asylum. However, in my view, the family ties with the LTTE in RAD File TC1-09339 is a sufficiently distinguishing feature of that decision that it cannot be said to have involved materially the same facts as the case at hand. If that were the only RAD precedent under consideration, I would not find a justificatory burden to arise.

[31] However, I find that the relevant facts of decisions in RAD File TC0-10394 and RAD File TC1-11144 are materially the same as in the present case. In RAD File TC0-10394, the RAD did not address the RPD's finding that the claimant's allegations as to events that occurred before he left Sri Lanka were not credible. Independent of that finding, the RAD allowed the appeal solely on the basis that the RPD had erred in rejecting the *sur place* claim. After reviewing the CCE, the RAD reasoned that the claimant may be perceived as having a link to the LTTE, based on his profile as a Tamil from the North of Sri Lanka who had made a refugee claim in Canada, a country with a large Tamil diaspora, and was returning to Sri Lanka without a passport. The RAD concluded that, based on that residual profile and the CCE, the claimant would face a serious possibility of persecution if he were to be returned to Sri Lanka.

[32] In RAD File TC1-11144, the claimant alleged that he had been assaulted and extorted by Sri Lanka Navy officers, but the RPD found he had a viable IFA in Batticaloa. In allowing his appeal and finding that he had a well-founded fear of persecution, the RAD did not engage with those events that had occurred in Sri Lanka. Rather, it relied on the analysis in RAD File TC0-10394 and focused solely upon the claimant's residual profile as a Tamil male from the Northeast of Sri Lanka, returning to Sri Lanka as a failed asylum seeker without a passport.

[33] In the case at hand, the RAD rejected the Applicant's claim based on a residual profile as a Tamil male from the North returning to Sri Lanka as a failed asylum-seeker. Notwithstanding that the facts personal to the claimants, relied upon by the RAD in conducting its residual risk profile analysis in the two precedents canvassed immediately above, were materially the same as the residual profile considered by the RAD in the case at hand, the Decision provides no analysis that assists the Court in understanding how the RAD arrived at a different conclusion than in those precedents. I note that the RAD refers to Federal Court jurisprudence as having stated that simply being a young Tamil from the North or East of Sri Lanka does not lead to the conclusion that the person is at risk of persecution. However, the RAD cites a Federal Court precedent from 2013 (*Velummayilum v Canada (Citizenship and Immigration)*, 2013 FC 742), which significantly predates the RAD precedents upon which the Applicant relies and therefore involved older CCE.

[34] I emphasize that I am not concluding that the RAD was obliged to arrive at the same conclusion as in the RAD precedents. Nor do I understand the Applicant to be asserting such an argument. Rather, as those precedents were central to the Applicant's appeal arguments and

involved materially the same facts, the RAD's error lies in failing to distinguish those precedents, either explicitly or otherwise intelligibly through its reasons, and thereby failing to meaningfully account for the central issues and concerns raised by the Applicant in his submissions (see *Vavilov* at para 127).

[35] Before concluding, I would observe parenthetically that it may be uncommon to find circumstances where the facts of a RAD precedent and a new appeal are sufficiently similar to invoke a justificatory burden. However, given the nature of a residual profile analysis, which is performed without recourse to many of the background facts that are unique to a particular claimant, there may be potential for such circumstances to present somewhat more readily in this sort of *sur place* analysis than in other areas of the RAD's work.

[36] Based on the reviewable error explained above, the Decision does not withstand reasonableness review, and this application for judicial review will be allowed. My Judgment will return the matter to a different panel of the RAD for redetermination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-10804-22

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and this matter is returned to different panel of the Refugee Appeal Division for redetermination.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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