Federal Court   Cour fédérale

Calgary, Alberta, October 8, 2024

PRESENT: Madam Justice Go

BETWEEN:

Sanjeewa Nimantha Gunathilaka
MAHANAYAKA MUDALIGE DON

Applicant

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I.   Overview

[1]   Sanjeewa Nimantha Gunathilaka Mahanayaka Mudalige Don [Applicant] is a Sri Lankan citizen. The Applicant alleges fear of persecution in Sri Lanka after he informed the police about two local drug dealers who were using his property to hide themselves and their drugs from the police. The Applicant claims that his information led the police to arrest the drug dealers and

seize large quantities of their drugs. The Applicant alleges that the drug dealers subsequently

kidnapped the Applicant, but he escaped captivity and eventually fled to Canada. The Applicant

further alleges that a then-sitting cabinet minister, N.L., in the Sri Lankan parliament and corrupt

police were involved in his kidnapping.

[2]   The Applicant brought a refugee claim, arguing that he has a nexus of political opinion to

the Convention as a member of a particular social group—specifically, a group that exposes

political corruption.

[3]   The Refugee Protection Division [RPD] refused the Applicant's refugee claim, finding

that the Applicant has no nexus with a Convention ground because his claim is not political but

rather stems from criminal behaviour, and that the Applicant has a viable Internal Flight

Alternative [IFA]. The Refugee Appeal Division [RAD] dismissed the Applicant's appeal and

confirmed the decision of the RPD [Decision].

[4]   The Applicant seeks judicial review of the Decision. For the reasons set out below, I

grant the application.

II.   Analysis

[5]   The Applicant challenges the reasonableness of the RAD's findings that the Applicant

has no nexus to a Convention ground and that the Applicant has a viable IFA.

[6]   When reviewing the merits of the Decision, the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[7]   I am persuaded that the RAD erred in two aspects of its analysis, each one of which alone may be insufficient to grant the application, but taken as a whole, undermine the reasonableness of the Decision.

A.   *The RAD erred in finding there was a lack of evidence to establish a link between N.L. and the drug dealers*

[8]   In finding that there was a lack of evidence to establish a link between N.L. and the agents of persecution, the drug dealers, the RAD failed to consider certain supporting letters from the Applicant's friends and family that corroborated the Applicant's account that N.L. was known within the community as being involved with the drug trade.

[9]   In rejecting the Applicant's claim that N.L. was involved in his kidnapping, the RAD examined an article pertaining to a raid conducted in 2011 of N.L.'s compound, the Applicant's evidence that one of his kidnappers told him they were waiting for the arrival of N.L., and the Applicant's brother-in-law's complaint to the police after the Applicant's escape. However, nowhere in the analysis on this issue did the RAD mention the supporting letters that the Applicant provided.

[10]   These include a letter from a friend who wrote about "a gang of thugs" who attacked the friend and abducted the Applicant. The friend stated in his letter that he found out later they were "[N.L.'s] henchmen" who belonged to the drug trafficking mob led by two of the named agents of persecution. Another letter was from the Applicant's brother-in-law who described "thugs working for Minister [N.L.] and drug kingpin … who abducted [the Applicant], had been searching for him everywhere, as we heard."

[11]   The question before me is not whether these statements were strong enough to establish a link between N.L. and the agents of persecution. Rather, the issue is whether the Applicant has made out a reviewable error on the basis that the RAD ignored corroborating evidence and whether that error was sufficient to overturn the Decision.

[12]   Having reviewed the Decision and the record, I find that the RAD did err. Neither the RPD nor the RAD was concerned about the Applicant's credibility. Both tribunals accepted the Applicant's allegations that he confronted the drug dealers, reported them to the police, and informed the police about the local drug dealers' connection to the larger drug trade. Both the RPD and RAD also accepted the Applicant's claim that he was kidnapped and that one of the kidnappers told him that they were waiting for N.L. to arrive and tell them what to do with him before he escaped.

[13]   The RAD also did not express any credibility concerns with respect to any of the corroborating evidence. The individuals who wrote the support letters claimed to possess local knowledge and stated that there was a link between N.L. and the drug dealers. While it was up to

the RAD to assess the weight, if any, to be assigned to these letters, it was unreasonable for the RAD to, on the one hand, be unsatisfied with the sufficiency of the evidence put forward, and on the other, fail to address documentary evidence that supported the Applicant's claim. The RAD's reasons for finding insufficient evidence to establish a link between N.L. and the agents of persecution was thus not justified, transparent, or intelligible: *Cerrato v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1574 at para 26.

B. *The RAD erred in finding that the drug dealers and drug kingpins lacked motivation to pursue the Applicant in the IFA*

[14] I find that the RAD erred in its treatment of the evidence when assessing the motivation of the agents of persecution to pursue the Applicant in the proposed IFA.

[15] As the RAD rightly pointed out, the two-pronged test for assessing an IFA was set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) [*Rasaratnam*]. With respect to the first prong, the RAD must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists: *Rasaratnam* at para 6. The RAD must consider both the motivation and means of the agents of persecution. In this case, the RAD found there was a lack of motivation for the agents of persecution to go after the Applicant and therefore did not need to consider the means of the drug dealers to do so.

[16] According to the Applicant, the two local drug traffickers, Darshan and Mohamad, who used the Applicant's property to hide drugs, worked for a well-known drug kingpin named

Ruban. The Applicant informed the police that Ruban and another man named Nipuna, who also worked under Ruban, likely coordinated drug distribution to street-level dealers such as Darshan and Mohamad. The Applicant testified before the RPD that he knew Nipuna's family because they were from his village, and the Applicant relayed to the police that he had heard rumours that Nipuna was often stationed in Dubai, from where he coordinated his business in Sri Lanka. The Applicant concluded by telling the police that Darshan and Mohamad lived very close to his property, that his wife and brother-in-law grew up with them, and that he did not have any further information to share.

[17] When addressing the motivation of drug kingpins, Nipuna and Ruban, to pursue the Applicant, the RAD found that neither were likely on a balance of probabilities to seek him out in the proposed IFA. The RPD had determined that the Applicant had not shown there was a need for him to become further involved in any future prosecutions. While the Applicant countered that the RPD had not taken into account Nipuna's and Ruban's desire that the Sri Lankan authorities not investigate or repatriate them, the RAD pointed out that the Applicant had no further information to provide to the police. The RAD thus concluded that the RPD did not err in its analysis of the materiality of the information the Applicant provided to the police.

[18] The RAD also examined the motivation of Darshan and Mohamad in pursuing the Applicant to the proposed IFA. The Applicant's record indicates that his brother-in-law had seen Darshan in prison and heard him utter threats against the Applicant. On appeal to the RAD, the Applicant also disclosed a letter from his wife, dated March 10, 2023, stating that Darshan had gone to her home in a drunken rage on February 21, 2023 while on bail and announced that he

would soon return to take revenge on the Applicant's family. The Applicant's wife wrote that she relocated to a relative's home near the proposed IFA after the threat. The RAD noted that months had passed since Darshan uttered his threat, and that there was no indication of Darshan having since returned to the home nor issued any further threats. Likewise, there was no evidence that Mohamad had made any attempt to pursue the Applicant even when he was free on bail. Additionally, the RAD noted that the Applicant was able to safely stay with his friend in another location for six weeks without being pursued. According to the RAD, the evidence did not support a finding that either Darshan or Mohamad would pursue him in an IFA.

[19]   Before the Court, the Applicant argues that the RAD's assessment of the facts in relation to his risk in the IFA were unreasonable and simplistic, and that the RAD had ignored relevant facts. The Applicant advances several arguments in this respect, not all of which I find persuasive. However, I agree with the Applicant that the RAD committed at least three reviewable errors when it analyzed the motivation of the drug dealers.

[20]   First, the RAD determined that the Applicant "has never remotely had any contact" with Nipuna nor Ruban. However, the Applicant testified before the RPD that he grew up in the same neighbourhood as Nipuna – as well as Darshan and Mohamad – and was not a stranger to Nipuna. This contradicts the RAD's finding that there was not even remote contact between the Applicant and Nipuna.

[21]   Second, in finding that the Applicant was able to safely stay at a friend's home and not be pursued by anyone, the RAD ignored the evidence that Darshan and Mohamad were in prison

during the six weeks the Applicant was in hiding. As such, the absence of attacks during this period was not indicative of a lack of motivation on the part of the drug dealers to seek out the Applicant, should he return to Sri Lanka.

[22]   Third, I find that the RAD unreasonably discounted the element of revenge as motivation on the part of the drug dealers. As noted above, in considering the motivation, the RAD focused its analysis on whether or not the Applicant might have further information to give to the police in addition to what he has already shared with them. While the RAD noted "reprisal" as one factor referred to in the Applicant's submissions, the RAD did not address this issue in its reasons, other than noting Darshan's uttered threat in prison and his stated threat during his visit to the Applicant's home. There was no further analysis in the Decision with regard to revenge as a motivation with respect to all four named agents of persecution.

[23]   The Respondent submits it was reasonable for the RAD to find that the evidence failed to establish there had been a sustained effort to pursue the Applicant or his family members after the initial kidnapping, noting that the RAD was concerned about forward-looking risk.

[24]   I agree that the focus of the IFA analysis' risk assessment is forward-looking. However, given the stakes involved, and the errors that the RAD made in assessing the motivation of the agents of persecution, I find these errors sufficiently tainted the RAD's IFA analysis and rendered it unreasonable.
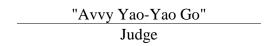
III.   <u>Conclusion</u>

[25]   The application for judicial review is allowed.

[26]   There is no question to certify.

JUDGMENT in IMM-7303-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

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"Avvy Yao-Yao Go"

Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7303-23

STYLE OF CAUSE: SANJEEWA NIMANTHA GUNATHILAKA
                                 MAHANAYAKA MUDALIGE DON v THE MINISTER
                                 OF CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

Barbara Jackman   FOR THE APPLICANT

Antonietta F. Raviele   FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman & Associates   FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada   FOR THE RESPONDENT
Toronto, Ontario