Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-5549-11

Citation: 2012 FC 543

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KULASINGAM, VIMALESWARY
KRISHNAPILLAI, KULASINGHAM

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 21 July 2011 (Decision), which refused the Applicants' application to be deemed Convention refugees or a persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are citizens of Sri Lanka and are currently living in Markham, Ontario. They are both sixty years old and have a daughter (Subangini) and grandchildren living in Canada. The Secondary Applicant's brother and sister also live in Canada.

[3] The Principal Applicant says that, when he lived in Trincomalee, Sri Lanka, the Sri Lankan army and police would often visit his home. During the conflict between the LTTE and the Sri Lankan Government, LTTE members would also sometimes visit his home and demand money. On two separate occasions, he says he gave them 10,000 Rupees – approximately $80.

[4] The Applicants' son, Pradeep, was kidnapped by unknown people in 2005 and has not been heard from since. After Pradeep was kidnapped, the Applicants sent their other son, Prasanna, to claim refugee status in the United Kingdom (UK). The record is unclear as to how authorities in the UK finally disposed of that claim. Subangini came to Canada in 2006 and claimed refugee status. The RPD rejected her claim; however, she was accepted as a refugee on 29 October 2010 during a PRRA application (see page 284 of the Certified Tribunal Record (CTR)).

[5] The Principal Applicant says the Sri Lankan police and army once stopped him on a road near Trincomalee. They took money from his wallet and searched his other baggage. He also says he was once detained by members of the Karuna Faction – a paramilitary group associated with the Sri Lankan army – on 26 November 2009, after the government defeated the LTTE in 2009. On this occasion, two men with pistols took him from his home, blindfolded him, and drove him to a house some distance away. The men interrogated him about his sons and beat him with a stick and their

bare hands. After holding him captive for two days, the men released him because the Secondary Applicant paid them a bribe.

[6] The Applicants decided that they should leave Sri Lanka and made arrangements through an agent to do so. They sold their home to pay their way and set off for Colombo, Sri Lanka, on 5 January 2010.

[7] When the Applicants were in Colombo, the police came to the place they were staying and questioned them. The Principal Applicant says the police asked him about his national identity card and told him to leave Colombo. The Applicants contacted their agent, who arranged visas for them to travel to the United States of America (USA). They flew to Qatar on 17 January 2010 and to the USA on 18 January 2010. The Applicants came to Canada and claimed refuge status on 1 February 2010.

[8] In her Personal Information Form (PIF), the Secondary Applicant adopted the Principal Applicant's narrative for her claim. The RPD joined the Applicants' claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-228 and heard the claims together on 14 July 2011. Only the Principal Applicant testified at the hearing. The RPD made its Decision on 21 July 2011 and notified the Applicants of the outcome on 26 July 2011.

DECISION UNDER REVIEW

[9] The RPD denied the Applicants' claims because it found they did not have a well-founded fear of persecution under section 96 of the Act. It also found that the Applicants had an internal

flight alternative (IFA) available to them in Colombo. Further, any risk the Applicants faced was a generalized one, which excluded them from protection under section 97 of the Act.

Credibility

[10] The RPD concluded that the Applicants did not have a well-founded fear of persecution because the Principal Applicant was not credible. Although he had described his capture in November 2009 in his PIF, the Principal Applicant had not mentioned that his captors were from the Karuna faction until the hearing. The RPD found this detail was an embellishment. The RPD also said that if he had been captured by paramilitaries working with the Sri Lankan security forces he would have been taken to a police station or army camp and not a house as he said in his PIF

[11] The RPD also found that the Principal Applicant was not wanted by Sri Lankan security forces. His captors were not members of the security forces and he was released two days after they abducted him and the Secondary Applicant paid them a bribe. The Applicants were also left alone after the police check at their hotel in Colombo; they were not arrested, which showed that the police were not interested in them. Further, the Applicants left Sri Lanka without incident. The RPD reasoned that if they were allowed to leave Sri Lanka freely, this showed they were not on any watch list, even if their agent had bribed the authorities at the airport, as they said he had.

[12] Since the Applicants claimed protection on the basis of the risk they faced from the Karuna faction, which was associated with Sri Lankan security forces, the fact that they were not wanted by the security forces meant they were not at risk on return to Sri Lanka. The RPD concluded the Applicants' fear of persecution was not well-founded on this basis.

Internal Flight Alternative

[13] In the alternative to its finding that their fear was not well-founded, the RPD found that the Applicants had an IFA available to them in Colombo.

[14] When the RPD raised the IFA issue at the hearing, the Principal Applicant said he could not live in Colombo because the Karuna faction would find him there.

[15] The RPD found that the Applicants could settle in Colombo because there is a large Tamil population there. The Applicants have relatives in Colombo and the Principal Applicant can speak Sinhalese – the majority language in Colombo – although he is not fluent. The Principal Applicant also owned and operated his own business in Trincomalee, which the RPD found he could also do in Colombo.

[16] The RPD also looked at whether the Applicants would be at risk in Colombo. It noted that the war between the LTTE and the Sri Lankan government is over and, according to a report from the Danish Immigration Service, the situation for Tamils in Sri Lanka has improved. It also acknowledged that some risk remained in Sri Lanka to young Tamil men and that 30% of the population in Colombo is Tamil, while 41% of the population is Sinhalese. The RPD concluded, however, that the Applicants' risk of persecution in Colombo is low because they are not young Tamil men and do not have a profile which would attract undue attention from the security forces.

[17] The RPD concluded that the Applicants have an IFA available in Colombo which meets both requirements established by the jurisprudence.

Generalized Risk

[18] The RPD also found that any risk the Applicants faced was generalized, which was fatal to any claim under section 97.

[19] The RPD noted that extortion by paramilitaries and Sri Lankan security forces is a problem in post-civil-war Sri Lanka. It also noted that extortion is on the rise there. The RPD found that the Applicants would be former residents returning from abroad and might be attractive targets for extortion on that basis. However, although some people might be targeted for their wealth, this does not remove them from a general risk of crime (see *Vickram v Canada (Minister of Citizenship and Immigration)* 2007 FC 457). While they might be perceived as wealthy, any risk the Applicants faced was generalized and so excluded them from protection under paragraph 97(1)(*b*) of the Act.

ISSUES

[20] The Applicants raise the following issues in this case:

1. Whether the RPD's credibility finding was reasonable;
2. Whether the RPD's finding they did not have a well-founded fear of persecution was reasonable;
3. Whether the RPD's finding they had an IFA available was reasonable;
4. Whether the RPD's finding they faced a generalized risk was reasonable.

STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) (QL) the Federal Court of Appeal held at paragraph 4 the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)* 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review on the first issue is reasonableness.

[23] The standard of review applicable to the RPD's finding that the Applicants' fear of persecution was not well-founded is reasonableness. Justice Sandra Simpson found that the standard of review on this issue was reasonableness at paragraph 7 of *Moreno v Canada (Minister of Citizenship and Immigration)* 2011 FC 841. Justice Leonard Mandamin made a similar finding in *Jean v Canada (Minister of Citizenship and Immigration)* 2010 FC 1014 at paragraph 9.

[24] In *Rosales v Canada (Minister of Citizenship and Immigration)* 2008 FC 257, Justice Frank Gibson held at paragraph 13 that the RPD's finding that in IFA was available is patent unreasonableness. More recently, Justice Luc Martineau held at paragraph 8 of *Martinez v Canada (Minister of Citizenship and Immigration)* 2012 FC 5 that the standard of review on an IFA finding is reasonableness (see also *Kumar v Canada (Minister of Citizenship and Immigration)* 2012 FC 30 at paragraph 16). The standard of review on the third issue is reasonableness.

[25] The reasonableness standard is also applicable to the RPD's finding that the Applicants faced a generalized risk in Sri Lanka. Justice David Near determined that reasonableness was the appropriate standard of review on this issue in *V.L.N. v Canada (Minister of Citizenship and Immigration)* 2011 FC 768, at paragraphs 15 and 16. As Justice André Scott found in *Vasquez v Canada (Minister of Citizenship and Immigration)* 2011 FC 477, a generalized risk finding involves questions of mixed fact and law to be evaluated on a standard of reasonableness (paragraphs 13 and 14). The standard of review on the fourth issue is reasonableness (see also *Innocent v Canada (Minister of Citizenship and Immigration)* 2009 FC 1019).

[26] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[27] The following provisions of the Act are applicable in this case:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
Person in Need of Protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENTS

The Applicants

[28] The Applicants say the RPD ignored evidence when it found they are not Convention refugees. The RPD did not consider how the disappearance of Subangini from Sri Lanka and her successful refugee claim means that they would be exposed to a risk of persecution. They point to

Srichandradas v Canada (Minister of Citizenship and Immigration) 2003 FC 829, at paragraph 4, where Justice Elizabeth Heneghan held that

> In my opinion, the Board committed a reviewable error in failing to consider the impact upon the Applicants, in Sri Lanka, of the finding that their daughter had been found to be a Convention refugee and would not accompany them back to Sri Lanka. The Board did not consider that this finding might expose the Applicants to persecutory treatment by the SLA and the Sri Lankan authorities on the basis of a suspicion that their daughter had been recruited by the LTTE. The Board did not apply the law which requires that a determination of Convention refugee status must be a forward-looking inquiry: see *Mileva v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 398 (C.A.). The Board's conclusion that the SLA would not suspect them of supporting the LTTE in the future is a reversible error, having regard to the fact that the Applicants would be returned to Sri Lanka without their daughter. That is a circumstance that could feed suspicion by the SLA that the daughter has joined the LTTE.

[29] When the RPD did not account for the risk the Applicants faced by association with Subangini, it committed the same error as occurred in *Srichandradas*.

[30] The Applicants also argue that the RPD's finding that the Principal Applicant was not credible was unreasonable. Although he added the detail about his captors being Karuna members at the hearing, he only learned this himself after he submitted PIF to the RPD. In his PIF, he wrote that his captors pushed him into a white van. He later learned from members of his community that Karuna members travel in white vans. Contrary to the RPD's conclusion, the Principal Applicant provided spontaneous and credible testimony, so the RPD's credibility finding is unreasonable.

Risk

[31] The RPD's conclusion on risk was unreasonable because it was based on an erroneous inference. The Applicants point to the Principal Applicant's testimony that he was targeted by Karuna members and that their agent paid a bribe at the airport. This testimony shows that the RPD's inference from their trouble-free exit through the Colombo airport was unreasonable.

IFA

[32] The Applicants also challenge the RPD's finding that they have an IFA. This finding is unreasonable because, at sixty years old, they are elderly and it will be difficult for them to relocate. The RPD based its IFA finding in part on the fact that the Principal Applicant's father was a police sergeant who spoke Sinhalese, but the Applicants say the Principal Applicant cannot speak Sinhalese very well. They also direct the Court's attention to the Principal Applicant's testimony that the Colombo police told them to leave Colombo.

[33] The Applicants also say that the documentary evidence before the RPD shows that they actually face a risk in Colombo. When it concluded that their risk was low, the RPD ignored a report from the Department of State in the USA which their counsel raised at the RPD hearing. The RPD's conclusion on IFA is unreasonable because the RPD ignored this evidence.

The Respondent

[34] The Respondent argues that the Decision should stand because it was based on reasonable credibility findings and a reasonable finding that the Applicants have an IFA available to them.

[35] Subangini's refugee claim was not relevant, so it was not an error for the RPD not to consider it. In *Rahmatizadeh v Canada (Minister of Employment and Immigration),* [1994] FCJ No 578 (QL) Justice Marc Nadon had this to say at paragraph 8:

> Before concluding, however, I would like to make the following comments. In paragraph 31 of his memorandum, the applicant asserts that the Refugee Division accepted his sister's refugee claim on April 9, 1992. The mere fact of proving that his sister had been found to be a refugee does not carry a lot of weight, since the members of the Division who made that decision made it on the basis of the facts in the record. Why did the applicant not call his sister and brother-in-law to testify to establish that he is of Kurdish nationality? The Division was not bound by a decision made by another panel since it may be that the other panel made an incorrect decision.

[36] The RPD was not obligated to consider Subangini's claim because each case must be determined on its own merits and the RPD is not bound by its own decisions (see *Bakary v Canada (Minister of Citizenship and Immigration)* 2006 FC 1111 at paragraph 10).

[37] It was reasonable for the RPD to conclude the Principal Applicant was not credible because he embellished his story. This Court has held that a failure to include a key fact in a PIF is an appropriate basis for an adverse credibility finding (see *Sahi v Canada (Minister of Citizenship and Immigration)* 2001 FCT 527 at paragraph 18 and *Huang v Canada (Minister of Citizenship and Immigration)* 2008 FC 1266 at paragraph 17).

[38] Although the Applicants challenge the RPD's finding that their fear was not well-founded, this finding was reasonable. The RPD based its conclusion on the following facts:

i. the Applicants were cleared after the police check at their hotel;

ii. the Principal Applicant was not taken to a police or army camp when he was abducted, though he said his abductors were associated with the Sri Lankan authorities;

iii. the Applicants had no trouble leaving Sri Lanka.

[39] The Applicants have not shown that the RPD could not have drawn the inferences it did, so the Decision should stand.

[40] The RPD properly applied the test for an IFA. In *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 2118 (FCA), the Federal Court of Appeal held that claimants must demonstrate a serious possibility of persecution in the proposed flight location. Claimants must also demonstrate that requiring them to seek refugee in the proposed location would be unreasonable in the circumstances. In the instant case, the Applicants did not demonstrate that they faced a serious possibility of persecution in Colombo. The RPD reasonably concluded that they were not at risk there and that it was reasonable for them to seek refuge in Colombo. The availability of an IFA is conclusive against a refugee claim, so the RPD's finding that the Applicants are not Convention refugees or persons in need of protection was reasonable. The Applicants are simply asking the Court to re-weigh the evidence.

ANALYSIS

[41] The Applicants raise a number of issues for review but, in my view, the IFA finding is determinative and does not contain a reviewable error.

[42] The Applicants say that the finding was based on the RPD's reasoning that the Principal Applicant's father was a sergeant in the police force who spoke Sinhalese. They say the Principal Applicant is elderly, his father is deceased, and he does not speak Sinhalese well.

[43] A reading of the Decision reveals that the RPD was well aware of the factors the Applicants have raised and took into account a wide range of relevant considerations, some of which the Applicants do not even challenge. When these factors are reviewed against the documentary evidence, I do not think I can say that the IFA finding falls outside the *Dunsmuir* range.

[44] Although the RPD mistakenly said the Applicants had relatives in Colombo (they did have acquaintances there who they occasionally stayed with, and who visited the Applicants) this is not material enough to warrant setting the Decision aside. Nor do I think that the proposition for which Danish Immigration Service report is cited is undermined in any material way by the later April 2011 US DOS report.

[45] In any event, the factors cited by the Applicants as to why Colombo is not a reasonable IFA are not in line with the governing jurisprudence. In *Ranganathan*, above, the Federal Court of Appeal had the following to say on point, at paragraphs 14 to 16:

> I agree with Rothstein J., as he then was, in *Kanagaratnam v. Canada (Minister of Employment and Immigration)* (1994) 28 Imm. L.R. (2d) 44 (F.C.T.D.), that the decision of our Court in Thirunavukkarasu does not exclude, as a relevant factor on the issue of the reasonableness of the IFA, the absence of relatives in or in the vicinity of the safe area. It makes it obvious though that more than the mere absence of relatives is needed in order to make an IFA unreasonable. Indeed, there is always some hardship, even undue hardship, involved when a person has to abandon the comfort of his home to leave in a different part of his country where he has to seek employment and start a new life away from relatives and friends. This is not, however, the kind of undue hardship that this Court was considering in Thirunavukkarasu.

> We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.
>
> There are at least two reasons why it is important not to lower that threshold. First, as this Court said in Thirunavukkarasu, the definition of refugee under the Convention "requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country". Put another way, what makes a person a refugee under the Convention is his fear of persecution by his home country in any part of that country. To expand and lower the standard for assessing reasonableness of the IFA is to fundamentally denature the definition of refugee: one becomes a refugee who has no fear of persecution and who would be better off in Canada physically, economically and emotionally than in a safe place in his own country.

[46] On the evidence which was before the RPD, it was reasonable for it to conclude that the situation they faced in Colombo did not jeopardize the Applicants' lives or safety. They have not shown me that the factors they cite amount to a risk such that the Decision must be returned for reconsideration.

[47] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	May 4, 2012

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