

Federal Court



Cour fédérale

Date: 20161019

Docket: IMM-929-16

Citation: 2016 FC 1160

Ottawa, Ontario, October 19, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

VINUSHAN VIJAYAKUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Vinushan Vijayakumar seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board. The RAD confirmed the determination of the Refugee Protection Division [RPD] that Mr. Vijayakumar is neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, I find that the RAD reasonably excluded the new evidence offered by Mr. Vijayakumar in support of his appeal pursuant to s 110(4) of the IRPA. The RAD's assessment of the remaining evidence was also reasonable. The application for judicial review is therefore dismissed.

II. Background

[1] Mr. Vijayakumar is an ethnic Tamil from northern Sri Lanka. He arrived in Canada on October 31, 2014 and made a refugee claim.

[2] According to Mr. Vijayakumar, his father was a prominent member of the Liberation Tigers of Tamil Eelam [LTTE]. His father was killed more than twenty years ago, when Mr. Vijayakumar was just one year old. Mr. Vijayakumar claimed that in 2009 he was abducted by five men, blindfolded, and beaten with a metal rod while he was questioned about his father. He was abducted a second time in 2010, questioned about his connections to the LTTE, and beaten with a stick. In 2014, he was held by airport security officials for a day and a half, asked about his father, and beaten. Mr. Vijayakumar alleged that he would face persecution as a Tamil with suspected links to the LTTE if he returned to Sri Lanka.

[3] The RPD conducted hearings into Mr. Vijayakumar's refugee claim on December 10, 2014 and September 22, 2015. It rejected the claim on November 5, 2015. The determinative issues were Mr. Vijayakumar's credibility and whether his profile as a Tamil whose father was active in the LTTE more than twenty years ago would expose him to persecution in Sri Lanka today.

[4] Mr. Vijayakumar appealed the RPD's decision to the RAD. The RAD dismissed his appeal on February 9, 2016.

III. Decision under Review

[5] Mr. Vijayakumar submitted new evidence in support of his appeal. The RAD concluded that this evidence did not meet the statutory requirements of 110(4) of the IRPA. While the RAD accepted that the documents were not available prior to the RPD's decision, it concluded that the information they contained could have been produced to the RPD with reasonable diligence. The RAD also found that the evidence was not material, in that it could not affect the outcome of the case. The RAD summarized its conclusion on this point as follows:

The primary issue here is not how his father died specifically, but that his father was working with or for the LTTE when he died. The RPD recognizes that "it is possible that his father had connections to the LTTE" and nowhere in the Decision does the RPD deny that the Appellant's father was connected to the LTTE. The letters submitted are "not new". These documents will not be allowed as new evidence.

[6] The RAD found only one error in the RPD's decision, namely its failure to acknowledge that Mr. Vijayakumar had been detained and questioned by the police when he returned to Sri Lanka from Vietnam in 2014. However, the RAD found that this was because Mr. Vijayakumar had been deported following his use of fraudulent documents to enter Vietnam. There was no evidence to suggest that he was stopped because of his family background. The RAD noted that Mr. Vijayakumar was subsequently released without conditions.

[7] The RAD found insufficient evidence to establish that Mr. Vijayakumar is currently of interest to the Sri Lankan authorities. The RAD concluded that "[a]s a Tamil, it is generally

thought by the Sinhalese majority that [Mr. Vijayakumar] would support the LTTE. This may give rise to discrimination in some areas of Sri Lanka, however, there is insufficient evidence to convince the RAD that this would give way to persecution.”

IV. Issues

[8] This application for judicial review raises the following issues:

- A. Did the RAD reasonably reject the new evidence submitted by Mr. Vijayakumar?
- B. Did the RAD reasonably conclude that Mr. Vijayakumar will not be persecuted if he returns to Sri Lanka?

V. Analysis

[9] Decisions of the RAD concerning the admission of new evidence under s 110(4) of the IRPA and its assessment of the evidentiary record involve questions of mixed fact and law, and are subject to review by this Court against the standard of reasonableness (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 23 and 29 [*Singh*]; *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Ngandu v Canada (Citizenship and Immigration)*, 2015 FC 423 at para 12). The Court will intervene only if the decision falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

- A. *Did the RAD reasonably reject the new evidence submitted by Mr. Vijayakumar?*

[10] The new evidence that Mr. Vijayakumar sought to adduce before the RAD consisted of affidavits and letters purporting to provide further details of the circumstances surrounding his

parents' deaths and subsequent events occurring in 2009, 2010 and 2014. All of these events preceded the RPD's decision. Mr. Vijayakumar says that the documents were relevant to the adverse credibility findings of the RPD, and he could not have produced them earlier because the RPD's rejection of his testimony was not foreseeable.

[11] The RAD disposed of this argument as follows:

In this case, even though the letters were written post-hearing, the information in them was available to the claimant at any time prior to the hearing had he requested it. It is not for the RAD to allow an Appellant to "patch the holes" in his RPD claim presentation by allowing into evidence at appeal, information or supportive documentation which could have been presented at the hearing. The onus is clearly on the Appellant and especially so if represented by counsel, to present his best possible case to the RPD. Such presentation would reasonably include any and all supportive evidence such as the affidavits now disclosed.

[12] In my view, the RAD's rejection of the new evidence offered by Mr. Vijayakumar is supported by the Federal Court of Appeal's decision in *Singh* (at para 34):

34 There is no doubt that the explicit conditions set out in subsection 110(4) have to be met. Accordingly, only the following evidence is admissible:

- Evidence that arose after the rejection of the claim;
- Evidence that was not reasonably available; or
- Evidence that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[13] Subsection 110(4) of the IRPA must be interpreted narrowly. Evidence that simply corroborates facts or contradicts the RPD's findings does not fall within the meaning of "new

evidence” for the purposes of s 110(4) of the IRPA (*Singh* at paras 35, 50, 51). In the words of the Federal Court of Appeal, “[t]he role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected” (*Singh* at para 54).

[14] The RAD also rejected the new documents submitted by Mr. Vijayakumar because they were not material to his claim. Given the Federal Court of Appeal’s insistence that s 110(4) of the IRPA be applied strictly, materiality is no longer a relevant threshold consideration (*Singh* at paras 47-49). While the RAD’s consideration of the materiality of the proposed new evidence was superfluous, this does not detract from the reasonableness of its conclusion that the documents did not meet the statutory requirements of s 110(4).

B. *Did the RAD reasonably conclude that Mr. Vijayakumar will not be persecuted if he returns to Sri Lanka?*

[15] Mr. Vijayakumar says that the RAD’s conclusion that he is not currently of interest to the Sri Lankan authorities was unreasonable. He has not pointed to any specific shortcoming in the RAD’s factual determinations, beyond taking issue with the adverse credibility findings. He maintains that the threshold for persecution is low: more than a mere possibility, established on the balance of probabilities (*Muthuthevar v Canada (Citizenship and Immigration)*, 2015 FC 1 at para 11; *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 8). He argues that the facts, as accepted by the RAD, meet this standard.

[16] In my view, the RAD’s consideration of the record was careful and cogent. I can find no reviewable error in the RAD’s assessment of the evidence offered by Mr. Vijayakumar in

support of his refugee claim, nor in its conclusion that the treatment he endured in Sri Lanka, while harsh, did not amount to state persecution. Mr. Vijayakumar is asking this Court to re-weigh the evidence and come to a different conclusion. That is not the role of the Court in an application for judicial review.

VI. Conclusion

[17] The RAD's decision is justifiable, transparent and intelligible, and falls within a range of possible, acceptable outcomes (*Dunsmuir* at para 47). The application for judicial review is therefore dismissed.

[18] Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-929-16

STYLE OF CAUSE: VINUSHAN VIJAYAKUMAR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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