Federal Court  Cour fédérale

Date: 20200409

Docket: IMM-1986-19

Citation: 2020 FC 509

Ottawa, Ontario, April 9, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

WAJIRA SHATHA JAYASINGHE ARACHCHIGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD], dated March 5, 2019 [Decision], which dismissed the Applicant's appeal of the decision of the Refugee Protection Division of the

Immigration and Refugee Board [RPD] denying the Applicant's refugee and person in need of protection claim under ss 96 and 97 of the *IRPA*.

II. BACKGROUND

[2] The Applicant is a citizen of Sri Lanka and is of Sinhalese ethnicity. His spouse and three children currently reside in Sri Lanka.

[3] The Applicant left Sri Lanka for the United States of America [USA] in July 2011 on a multiple entry visitor's visa. He remained in the USA until 2017 and then entered Canada and made a refugee and person in need of protection claim. The Applicant claims he fears persecution from the Sri Lankan government and certain persons who work for the government.

[4] The Applicant alleges that, in 2006, he was transferred from his government position at the Sri Lanka Ports Authority to a position in the Media Division of the Office of the Presidential Secretariat during Mahinda Rajapaksa's presidency. The Applicant says that he was under the direct supervision of Mr. Silva and Mr. Kularathne during his time in the Media Division.

[5] The Applicant says that he was severely beaten and threatened by presidential security agents on April 11, 2009, at the direction of Mr. Silva and Mr. Kularathne. He states that this was the result of two incidents.

[6] First, the Applicant notes that Mr. Silva took issue with the fact that the Applicant was asked directly by the President's private secretary in February 2009 to organize a photo exhibit

in Australia that would criticize the Liberation Tigers of Tamil Eelam [LTTE], as he had done previously in Europe. The Applicant says that Mr. Silva took exception to the fact that the Applicant was given control over the event, and that Mr. Kularathne consequently removed an Australian visa sticker from the Applicant's passport.

[7] Second, the Applicant states that Mr. Kularathne objected to the Applicant's meeting with Mr. Prageeth Eknaligoda (a journalist critical of the Sri Lankan government whom Mr. Kularathne labelled an LTTE terrorist) and with Mr. Ruwan Ferdinandez, another journalist critical of the Sri Lankan government.

[8] Following an alleged violent interrogation of the Applicant on April 11, 2009, in which he was accused of associating with the LTTE and other enemies of the government, the Applicant says he returned to his prior position at the Sri Lanka Ports Authority. However, he claims that Mr. Kularathne continued to threaten him with death should he complain to the police and pressured him to return to his position in the Media Division because the Applicant was aware of certain government fraudulent activities. The Applicant says that he was blackmailed by Mr. Kularathne who threatened to label him as a terrorist because of his association with Mr. Eknaligoda. He states that the police inexplicably arrested him without any investigation, though he was eventually released after hiring a lawyer.

[9] As a result of this treatment in Sri Lanka, the Applicant says that he fled to the USA in July 2011, following the presidential election in Sri Lanka in 2010. The Applicant says that he did not make an asylum claim in the USA because he could not afford to do so.

[10] The RPD heard the Applicant's claim on August 31, 2018, and rejected it that same day. In essence, the RPD found that there was less than a mere possibility that he would face persecution or serious harm due to the change in government in Sri Lanka because Mr. Eknaligoda had been cleared of any links to the LTTE, and because of the overall changes in Sri Lanka's political climate.

[11] On March 5, 2019, the RAD rejected the Applicant's appeal of the RPD's decision. No oral hearing was held, nor did the Applicant request one.

III. DECISION UNDER REVIEW

[12] The RAD dismissed the Applicant's appeal and confirmed the RPD's decision that the Applicant was neither a refugee nor a person in need of protection pursuant to ss 96 and 97 of the *IRPA*. The RAD agreed with the RPD's finding that there was no serious possibility that the Applicant would suffer persecution upon return to Sri Lanka. Nor were there grounds to believe that he would be tortured, subjected to cruel and unusual punishment, or killed.

[13] Specifically, the RAD found that: (1) there was insufficient evidence to demonstrate that the Applicant would suffer persecution or harm from Mr. Silva and Mr. Kularathne should he return to Sri Lanka; (2) the change in circumstances in Sri Lanka made it unlikely that the Applicant would be labelled an LTTE supporter and would, instead, allow the Applicant to work as a journalist without fear of persecution; (3) the Applicant would not face a serious risk of persecution in Sri Lanka as a failed refugee claimant, even though a higher level of screening might occur; (4) there was insufficient evidence to support the Applicant's claim that he would

be permanently deprived of his profession as a journalist; (5) the alleged incidents did not rise to the level of "compelling reasons" in light of the insufficient evidence submitted; and (6) a cumulative consideration of the alleged incidents did not rise to the level of persecution.

[14] First, the RAD found that there was less than a mere possibility that the Applicant would suffer persecution or harm from Mr. Silva and Mr. Kularathne. The RAD noted that the Applicant had failed to establish, on a balance of probabilities, that these persecutors remained employed in the Office of the President or that they continue to have an interest in the Applicant. Nor had he established that these individuals were linked to his unjustified arrest, or had attempted to harm his family members who remain in Sri Lanka. The RAD further noted that the Applicant had remained in Sri Lanka for approximately two years following the alleged incidents, and had continued to work for the government without suffering any further harm. He provided no evidence of his knowledge of fraudulent activities by his alleged persecutors but for the removal of his Australian visa sticker from his passport. Additionally, the RAD highlighted the fact that the persecutors could no longer accuse him of supporting the LTTE because of this association with Mr. Eknaligoda, as Mr. Eknaligoda had been cleared of having any links to the LTTE.

[15] Second, the RAD found that there had been a positive change in circumstances for the Applicant in Sri Lanka as the government under which the alleged incidents occurred was no longer in power, and the level of censorship of journalists has decreased since 2009. In addition, Mr. Eknaligoda has been exonerated. The RAD did not accept the argument that the Applicant would face a risk of persecution or harm because former president Mahinda Rajapaksa remained

in a political position in Sri Lanka since there was no evidence that he was a direct agent of persecution.

[16] The RAD also found on a balance of probabilities that the Applicant had not established that he was considered a supporter of the LTTE. The RAD noted that the Applicant had been asked to organize anti-LTTE exhibitions, and was never approached by the Sri Lankan army or police regarding potential links to the LTTE. In addition, he was able to renew his passport, and was able to leave Sri Lanka freely. Moreover, the RAD did not find the Applicant's explanation as to why he failed to claim asylum in the USA to be reasonable.

[17] Third, the RAD found that given the fact that he has lived abroad for a long period of time, the Applicant would likely be subjected to a higher level of screening at the airport upon return to Sri Lanka. However, it concluded that it is unlikely that this would amount to persecution. The RAD noted that the Applicant has a valid passport, was not considered an LTTE supporter, and there is no evidence to indicate that his name would appear on any immigration, intelligence, or criminal databases in Sri Lanka.

[18] Fourth, the RAD found that there was insufficient evidence to establish that the Applicant would be prevented from practising his profession as a journalist. In fact, the RAD noted that the documentary evidence shows that "independent media are active and express a wide variety of views" in Sri Lanka. In addition, the RAD concluded that, even if he were to face difficulties in finding work in his profession, this does not amount to persecution.

[19] Fifth, the RAD found that the alleged beating and threats suffered by the Applicant did not rise to such a level as to constitute a compelling reason for the Applicant to remain in Canada. The RAD noted that the Applicant did not establish, on a balance of probabilities, that there have been any repercussions for his mental or physical health as no medical evidence was submitted. Moreover, the RAD highlights the fact that the Applicant did not provide any evidence regarding his detention at the time of the arrest nor any evidence regarding the harm experienced.

[20] Sixth, the RAD noted that, even when these claims are considered cumulatively, the Applicant failed to show more than a mere possibility that he would experience persecution or harm in Sri Lanka. For these reasons, the RAD rejected the Applicant's appeal.

IV. ISSUES

[21] The issues raised in the present matter are:

1. Did the RAD violate the Applicant's right to procedural fairness?
2. Did the RAD apply the wrong legal test in assessing forward-looking risk?
3. Did the RAD err in its assessment of the risk of persecution or harm faced by the Applicant?

V. STANDARD OF REVIEW

[22] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application. Although it has changed the applicable standard to my review of whether the RAD erred in applying the test for assessing forward-looking risk, it has not changed my conclusion.

[23] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of: (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52); and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[24] Prior to the Supreme Court of Canada's decision in *Vavilov*, the Applicant did not explicitly make any submissions concerning the applicable standard of review in this case but, apart from the procedural fairness issues, applied the standard of reasonableness throughout its submission. Meanwhile, prior to the *Vavilov* decision, the Respondent submitted that the standard of reasonableness applied to all of the issues raised.

[25] On January 16, 2020, the parties were asked to make written submissions on the applicable standard of review in light of the *Vavilov* decision. In essence, neither party changed their submissions as to the applicable standards of review in this case but provided the Court with helpful submissions as to how a reasonableness review must be conducted following the *Vavilov* decision.

[26] But for the issue of procedural fairness, I agree with both parties that the standard of reasonableness should be applied to my review of all the issues at bar as there is nothing to rebut the presumption that the standard of reasonableness applies.

[27] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The

Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[28] With regard to whether the RAD applied the correct legal test when assessing forward-looking risk, courts in the past have often found that the standard of correctness applies to questions concerning whether a decision-maker applied the correct legal test. See, for example, *Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at para 22. Following the Supreme Court of Canada's decision in *Vavilov*, a decision-maker's application of a legal test does not fall into any of the listed exceptions to the presumption of reasonableness, baring a constitutional dimension to the legal question, or a generality or "central importance to the legal system as a whole." However, clear language in a governing statutory scheme and a significant body of jurisprudence establishing a certain applicable legal test will impose strict constraints on a decision-maker's discretion, and a departure from such would generally be considered unreasonable in the absence of explicit persuasive reasons for this departure. See *Vavilov*, at paras 105-114, 129-132, notably para 111:

> [111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious"

> system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[29] As for this Court's review of the RAD's assessment of the risk of persecution or harm faced by the Applicant, the application of the standard of reasonableness to this issue is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Iraqi v Canada (Citizenship and Immigration)*, 2019 FC 1049 at para 15.

[30] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "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). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal

to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[31] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

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 ;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
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	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

have a country of nationality, their country of former habitual residence, would subject them personally

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.

VII. ARGUMENTS

A. *Applicant*

[32] The Applicant argues that the RAD erred by: (1) breaching his right to procedural fairness in various ways without providing him an opportunity to respond; (2) assessing his future risk of persecution in Sri Lanka according to a balance of probabilities test as opposed to a mere possibility test; and (3) unreasonably assessing his risk of persecution and harm in Sri Lanka. For these reasons, the Applicant asks this Court to grant this application for judicial review.

(1) Breach of procedural fairness

[33] The Applicant submits that the RAD breached his right to procedural fairness by making new credibility findings regarding facts already accepted by the RPD without providing the Applicant with notice or an opportunity to respond.

[34] First, the Applicant argues that the RAD breached his right to procedural fairness in making a negative inference regarding his ability to obtain a passport and to leave Sri Lanka without incident. The Applicant states that the RPD did not make such a finding and implicitly covered this point.

[35] Second, the Applicant submits that the RAD breached his right to procedural fairness by making a negative inference regarding his failure to make an asylum claim in the USA. The RPD

accepted the facts in this case and grounded its decision in the change of circumstances. The Applicant states that courts have held that a breach of procedural fairness occurs when a new issue is raised without providing notice to an applicant. See *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65-76 [*Ching*].

[36] Third, the Applicant argues that the RAD breached his right to procedural fairness by finding that he submitted insufficient evidence to demonstrate a continued risk of persecution from Mr. Silva and Mr. Kularathne. The Applicant notes that the RPD did not make such a finding and, consequently, the RAD could not reassess this evidence, *Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at para 45.

(2) Application of the wrong legal test for assessing forward-looking risk

[37] The Applicant says that the RAD erred in law by using multiple standards to assess the Applicant's forward-looking risk of persecution. The RAD erred many times by assessing the risk of future persecution on a "balance of probabilities" rather than on a "mere possibility." The Applicant states that this Court found this to be an error in *Sivagnanasundarampillai v Canada (Citizenship and Immigration)*, 2018 FC 1109 at paras 12-14 [*Sivagnanasundarampillai*].

(3) Assessment of the Applicant's risk of persecution or harm

[38] The Applicant submits that the RAD unreasonably assessed the risk of persecution and harm he faces should he return to Sri Lanka. Specifically, the Applicant submits that the Decision is unreasonable because the RAD: (1) erroneously assessed his risk as a returning failed

refugee claimant; (2) failed to consider relevant evidence regarding the potential to label him an LTTE supporter; and (3) erroneously assessed his risk of persecution or harm from Mr. Silva and Mr. Kularathne.

[39] First, the Applicant argues that the RAD unreasonably found that he did not face a risk of persecution as a failed refugee claimant returning to Sri Lanka because "there is no evidence on the record that the Sri Lankan authorities would be aware that the [Applicant] had made a refugee claim in Canada" (para 45). The Applicant states that it is unreasonable to assume that a claimant can conceal the fact that they made a refugee claim and this Court has found that it is always an error to deny protection on the ground that a claimant can avoid persecution if they lie or provide a cover story. The Applicant cites *Donboli v Canada (Minister of Citizenship and Immigration)*, 2003 FC 883 at para 8 as well as *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349 at paras 15-17 [*Vilvarajah*].

[40] Second, the Applicant argues that the RAD failed to consider the fact that: (1) Mr. Eknaligoda's wife has also been accused of being an LTTE supporter; and (2) the suspects charged with the disappearance of Mr. Eknaligoda were all released without charges.

[41] Third, the Applicant argues that it was unreasonable for the RAD to conclude that he did not face a risk of harm or persecution from Mr. Silva and Mr. Kularathne. The Applicant says it is unreasonable to expect that his persecutors would engage in a futile search for the Applicant when he has been out of the country for several years.

B. *Respondent*

[42] The Respondent argues that the RAD: (1) did not raise any new issues or breach the Applicant's right to procedural fairness; (2) properly assessed whether the Applicant faced more than a mere possibility of risk of harm or persecution; and (3) reasonably assessed the evidence submitted concerning the Applicant's risk of harm or persecution in Sri Lanka. For these reasons, the Respondent submits that this judicial review should be dismissed.

(1) Breach of procedural fairness

[43] The Respondent submits that the RAD did not violate the Applicant's right to procedural fairness as it did not consider any new issues but, instead, reviewed the evidence raised by the Applicant afresh as it is obliged to do. The Respondent notes that the RAD and the RPD can come to a different conclusion when assessing the evidence and that this does not amount to a breach of the Applicant's right to procedural fairness. See *Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at para 30 and *Bakare v Canada (Citizenship and Immigration)*, 2017 FC 267 at paras 18-19.

[44] Specifically, the Respondent states that it was open to the RAD to consider the evidence concerning the Applicant's ability to obtain a passport and leave Sri Lanka without incident, as well as the evidence concerning the risk of harm or persecution from Mr. Silva and Mr. Kularathne. Moreover, the Respondent says that the RAD did not make a finding concerning the Applicant's failure to make a refugee claim in the USA.

(2) Application of the legal test for assessing forward-looking risk

[45] The Respondent submits that the RAD applied the correct legal test in this case and assessed whether the Applicant faced more than a mere possibility of a risk of persecution. The Respondent notes that the RAD did not assess the Applicant's risk of persecution according to the balance of probabilities, but rather applied that test to assess whether the Applicant had established the facts upon which his claims are grounded. The Respondent notes that this is consistent with this Court's decisions in *Pararajasingham v Canada (Citizenship and Immigration)*, 2012 FC 1416 at para 46 and *Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 at paras 24-25.

(3) Assessment of the Applicant's risk of persecution or harm

[46] The Respondent submits that the RAD's assessment of the Applicant's risk of persecution or harm was reasonable as the RAD: (1) assessed his risk of returning as a failed refugee claimant according to his particular circumstances and profile; (2) considered all relevant evidence in making its Decision; and (3) assessed the risk of harm or persecution from Mr. Silva and Mr. Kularathne according to the evidence submitted.

[47] First, the Respondent argues that the RAD considered the Applicant's particular circumstances and profile as a whole in finding that he did not face a risk of persecution or harm should he return to Sri Lanka as a failed refugee claimant. The RAD noted that the Applicant would be returning with his own passport, that his former departure from Sri Lanka was without issue, and that there was an absence of a reasonable perception of ties to the LTTE. There was

also a lack of evidence that the Applicant would appear on any immigration, intelligence or criminal database, and an absence of evidence that he had criticized the Sri Lankan government while outside the country. The Respondent also points out that the RAD did not state, imply or assume that the Applicant would be required to conceal the fact that he made a refugee claim, but simply stated that there is no evidence that the Sri Lanka government would be aware of this fact.

[48] Second, the Respondent notes that the RAD considered the evidence submitted as a whole and grounded its Decision on several factors. Although the Respondent notes that the RAD did not mention the fact that the suspects in Mr. Eknaligoda's disappearance had been released, the failure to explicitly list all of the evidence submitted is not a material error.

[49] Third, the Respondent holds that the RAD's overall determination concerning the risk posed by Mr. Silva and Mr. Kularathne was based on the evidence and was reasonably open to the RAD to make.

VIII. ANALYSIS

[50] In written submissions, the Applicant raised a plethora of issues for review. However, at the hearing of this matter in Toronto on December 3, 2019, the Applicant withdrew all issues except the following three: (A) the RAD's application of the legal test for assessing forward-looking risk of persecution; (B) the procedural fairness issues with the RAD's analysis of his failure to make a claim in the USA; and (C) the RAD's assessment of the Applicant's risk as a failed refugee claimant.

A. *Legal test for assessing forward-looking risk*

[51] The Applicant says that the RAD erred in law by assessing forward-looking risk according to the balance of probabilities. He says this is an error because the correct test is "more than a mere possibility."

[52] The Respondent says that the RAD correctly applied the balance of probabilities test to the facts upon which the Applicant relied, and the "more than a mere possibility" test when assessing forward-looking risk of persecution based upon those facts.

[53] Justice O'Reilly summarized the ground rules concerning the standard of proof in *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at paras 8-11:

> [8] The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context. Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a *risk* of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance," "more than a mere possibility" or "good grounds for believing" that they will face persecution.
>
> [9] The case law referred to above shows that where the Board has articulated the gist of the appropriate standard of proof (*i.e.* the combination of the civil standard with the concept of a "reasonable chance"), this Court has not intervened. On the other hand, where it appears that the Board has elevated the standard of proof, the Court has gone on to consider whether a new hearing is required. Further, if the Court cannot determine what standard of proof was applied, a new hearing may be necessary: *Begollari v. Canada*

> *(Minister of Citizenship and Immigration)*, 2004 FC 1340, [2004] F.C.J. 1613 (T.D.) (QL).
>
> [10] Where the Board imposes a burden of proof that is too high, there is a chance that an unsuccessful claimant might otherwise have succeeded. However, in some cases, an error would be purely academic. This would be the case in situations where the claimant's evidence is so weak that it could not possibly meet even the "reasonable chance" standard: *Brovina*, above.
>
> [11] Accordingly, the Court's role on judicial review in these circumstances is to determine whether the Board applied the appropriate standard of proof. If not, the Court must then decide whether the error requires a new hearing.
>
> [Emphasis in original.]

[54] In *Sivagnanasundarampillai*, at paras 12-13, Justice Diner added the following gloss for situations where the standard of proof applied is unclear:

> [12] The Applicant argues that the RPD applied an incorrect test, elevating the requirement such that he prove persecution, on a balance of probabilities, rather than on the correct standard of more than a mere possibility. The Applicant further alleges that the RPD also misstated the test when it held "the claimant is unlikely to face any additional scrutiny upon his return to Sri Lanka as a result of his activities while in Sri Lanka and subsequent to his departure from Sri Lanka" (Decision at para 22, emphasis added). In doing so, the Applicant submits that the entire section 96 refugee determination analysis was tainted by an error of law, because the proper test to be applied is whether there is a reasonable chance, or more than a mere possibility, the Applicant would be perceived as a supporter of the LTTE.
>
> [13] The Respondent replies that the RPD's assessment of the Applicant's section 96 claim, when considered as a whole, was reasonable, despite the awkward wording. In other places of the Decision, the Board properly articulated the test, and then applied the evidence to that test reasonably, i.e. with the standard of proof on a balance of probabilities, and assessed this evidence against the correct legal test of a reasonable chance, or more than a mere possibility, of prospective risk of persecution (*Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 [*Nageem*] at paras 24–25).

[55] When I review the examples in the Decision relied upon by the Applicant in this application, it is my view that the RAD does assess the Applicant's risk of forward-looking persecution according to the more than a mere possibility test.

[56] For example, in para 37 of the Decision, the RAD says:

> As noted earlier, the RAD has found that the Appellant has not credibly established that his alleged agents of persecution, Sudath Silva and Chaminda Kularathne, continued to work for the government or have any interest in harming him at the present time. Additionally, the RAD agrees with the RPD that the Appellant would not be considered a supporter of the LTTE because of his brief meeting with the journalist Prageeth Eknaligoda as this individual has now been exonerated. The RAD finds, on a balance probabilities, that this brief meeting would not be used against the Appellant as proof that he had an association with the LTTE given the particular circumstances.

[57] It seems to me that when the RAD says "would not be considered" and "would not be used against him," the RAD is saying, in effect, that the Applicant has not established, on a balance of probabilities, sufficient facts to support his allegations of forward-looking risk. In particular, the RAD is saying that the facts do not support his claim that he would be considered an LTTE supporter or that his meeting with Mr. Eknaligoda would be used against him as proof that he is an LTTE supporter. If there are no facts to support his claim that he would be considered an LTTE supporter, there is inevitably no possibility that he would be treated as an LTTE supporter on return or persecuted as such. The Applicant did not establish the facts upon which he relied to establish more than a mere possibility of persecution.

[58] In para 38 of the Decision, the RAD makes the following findings:

> The RAD finds that the Appellant's allegations that he was considered an LTTE supporter while in Sri Lanka have not been established on a balance of probabilities. The RAD further finds that should he return to Sri Lanka, he would not be considered to be an LTTE supporter by the authorities and he would not be investigated or detained for this reason given his personal circumstances. The RAD finds that there is not a serious possibility that the Appellant would be arrested and tortured upon return to Sri Lanka because of perceived links to the LTTE.

[59] Once again, when the RAD uses "would not be," it is saying that, on a balance of probabilities, the Applicant has not proved that, upon return, the authorities would regard him as an LTTE supporter, or that he would be investigated or detained for this reason. Whether the authorities would regard the Applicant as an LTTE supporter is a fact that needs to be established on a balance of probabilities before the RAD can determine whether there is more than a mere possibility that he will be persecuted for being an LTTE supporter.

[60] Paragraph 44 also makes it clear that the RAD is looking for facts in order to determine whether there is a serious possibility that the Applicant will be persecuted for being an LTTE supporter:

> The RAD notes that the Appellant has his own permanent Sri Lankan passport which was issued while he was out of the country, and that he was able to leave Sri Lanka without any problems. The RAD has already found that he has not established, on a balance of probabilities, that he had been or would be associated with the LTTE by Sri Lankan authorities. There is no evidence on the record to indicate that his name would appear on immigration, intelligence or criminal databases given that he was able to leave the country without any problems at the height of the time that he believed he was considered an LTTE supporter or associate. There is no evidence in the record that the Appellant has had any association with LTTE diaspora organizations while outside of Sri Lanka, or that he has written about or criticized the Sri Lankan government in any way while outside of the country. The RAD finds that while remaining outside of Sri Lanka for along

> period of time may subject the Appellant to higher screening at the airport in the form of questioning about his activities abroad, this in and of itself does not amount to persecution.

[61] The Applicant says that in para 49, when the RAD uses the "balance of probabilities" test, it should have instead used the "more than a mere possibility" test. Paragraph 49 of the Decision reads as follows:

> The RAD has reviewed the record and finds that there is insufficient information in the documentary evidence that the Appellant would be banned from practising his profession as a journalist throughout Sri Lanka. The RAD notes that he returned to his job in the Port Authority in 2009 and remained working there until 2011. There is no evidence in the record that he was fired or dismissed. from this job. The recent documentary evidence, as noted earlier, states that independent media are active and express a wide variety of views. The RAD has further considered the other findings in this decision regarding the agents of persecution and risk upon return and finds, on a balance of probabilities, that the Appellant would be able to work in the profession of his choice in Sri Lanka.

[62] Because the RAD found that the Applicant would be able to work in the profession of his choice, then by necessary implication, he has not established on a balance of probabilities that he would not be able to work as a journalist. If the Applicant had established on a balance of probabilities that he would have been hampered in some way from working as a journalist if he returned to Sri Lanka, then the RAD would have had to consider whether the obstacles he faced amounted to more than a mere possibility of persecution. However, the facts for considering a possibility of persecution on this ground were not established.

[63] When I read the Decision as a whole, it is my view that when the RAD uses the "balance of probabilities" test or refers in some other way to what the Applicant has not established, either

in the past or in the future, it is addressing whether there is a factual basis to support a possibility of persecution finding. In essence, it is saying that the Applicant has not established the facts upon which his claim relies. I see no error in this.

B. *Failure to claim in the USA not raised by the RPD*

[64] The Applicant says that, in considering his appeal from the RPD, the RAD raised his failure to claim asylum in the USA as an issue. He says that this issue was not raised or relied upon by the RPD and it was therefore procedurally unfair for the RAD to raise it without giving him an opportunity to respond.

[65] The Applicant reminds the Court of the general guidance provided by the Supreme Court of Canada in *R v Mian*, 2014 SCC 54 at para 41:

> The question then is how to strike the appropriate balance between these competing principles. Appellate courts should have the discretion to raise a new issue, but this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party. This test is sufficiently flexible while also providing for an appropriate level of restraint to address the tensions inherent in the role of an appellate court.

[66] It is well established that the role of the RAD is to hear appeals from the RPD and determine whether the RPD's decision is correct in law, in fact, or in mixed law and fact. In other words, the RAD is generally not required to show deference to the RPD's findings, including findings of fact; the RAD's standard of review is correctness. See *Canada (Citizenship*

and Immigration) v Huruglica, 2016 FCA 93 at paras 54, 58-59, and 78 [*Huruglica*]. Rather, after reviewing the RPD's decision, the RAD must conduct its own analysis of the record to determine if the RPD erred. See *Huruglica*, at para 103:

> I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[67] In dealing with an appeal, the RAD generally possesses the same powers as the RPD. However, there are also a few important distinctions between the powers of the RPD and the RAD. These similarities and differences are well canvassed by the Federal Court of Appeal in *Huruglica*:

> [56] When dealing with an appeal, the RAD has essentially the same powers as the RPD: see sections 162 and 171 of the *IRPA*. For example, the RAD has the same ability as the RPD to take "judicial notice of any facts that may be judicially noticed and of any other generally recognized facts, and information or opinion that is within its specialized knowledge": subsection 171(b) of the *IRPA*. Nevertheless, there are a few important distinctions between the RAD and the RPD. First, the RAD will rarely hold a hearing: subsection 110(6) of the *IRPA*. Although it may consider any new documentary evidence submitted by the Minister, it can only accept new evidence as defined in subsection 110(4) from a refugee claimant (See *Minister of Citizenship and Immigration v. Parminder Singh*, 2016 FCA 96. Moreover, 10% of its members, as well as its vice-president, must be lawyers or notaries: subsection 153(4) of the *IRPA*. When an appeal is heard by three

> members of the RAD, their decision has the same precedential value that an appellate court decision has for a trial court. Such a decision binds all RPD members, as well as any one-member panel of the RAD: subsection 171(c) of the *IRPA*.

[68] These distinctions do mean that, in certain circumstances, the RAD is not as well placed as the RPD to make certain findings and should therefore exercise restraint in substituting its own findings for that of the RPD's. This is notably the case regarding credibility findings or findings made in relation to oral evidence seeing as the RPD "enjoys a meaningful advantage over the RAD" due to the benefit of an oral hearing. When these issues arise, the RAD must "determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim" (*Huruglica*, at para 70). If the RAD determines that it cannot make a final decision, it "may conclude that it is a proper case to refer back to the RPD with specific directions in respect of the error identified in the credibility findings" (*Huruglica*, at para 73).

[69] In exercising its powers on appeal, the RAD does not conduct a "true *de novo* proceeding" (*Huruglica*, at para 79) but rather "carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Huruglica*, at para 103). In other words, when considering an appeal, the RAD does not start anew and ignore the RPD's decision and the record before it. Rather, as this Court found in *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 99, the RAD is "constrained by the record before it and its appellate function" and is "tethered to the RPD's decision."

[70] In accordance with the RAD's role to determine whether the RPD's decision is correct in law, in fact, or in mixed law and fact, this Court outlined the general principles concerning allegations of procedural fairness based on new issues raised by the RAD in *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 40 [*Tan*], following a detailed review of the pertinent jurisprudence:

> [40] What I take from the above is that, in the context of a RAD appeal, where neither party raises or where the RPD makes no determination on an issue, it is generally not open to the RAD to raise and make a determination on the issue, as this raises a new ground of appeal not identified or anticipated by the parties thereby potentially breaching the duty of procedural fairness by depriving the affected party of an opportunity to respond. This is particularly so in the context of credibility findings (*Ching* at paras 65-76; *Jianzhu* at para 12; *Ojarike* at paras 14- 23). However, with respect to findings of fact and mixed fact and law which raise no issue of credibility, the RAD is to carefully review the RPD's decision, applying the correctness standard, and then carry out its own analysis of the record to determine whether the RPD erred. If so, the RAD may substitute its own determination on the merits of the claim to provide a final determination (*Huruglica* FCA at para 103). That is, the RAD is to conduct a hybrid appeal. The RAD is not required to show deference to the RPD's findings of fact (*Huruglica* FCA at para 58). And, when addressing issues raised by the parties, the RAD is entitled to perform an independent assessment of the record before the RPD (*Sary* at para 29; *Haji* at paras 23 and 27; *Ibrahim* at para 26) and to refer to evidence that supports the findings or conclusions of the RPD (*Kwakwa* at para 30; *Sary* at para 31). In my view, the necessary corollary of this is that the RAD is also permitted to refer to evidence in the record before the RPD to explain why it believes the RPD erred with respect to an issue raised on appeal or why it does not agree with the RPD's findings of fact. Such reasons do not, in and of themselves, give rise to a new issue. The fact that the RAD views some of the evidence differently from the RPD is not a basis to challenge the RPD's decision on fairness grounds when no new issue has been raised (*Ibrahim* at para 30).

[71] In essence, so long as the RAD does not raise a new ground of appeal without providing the parties an opportunity to respond, the RAD can refer to evidence in the record to support its

findings on the existing grounds of appeal, regardless of whether the RPD explicitly addressed this evidence in its decision. This is also explored in great detail by Justice Kane in *Ching*.

[72] In *Tan*, this meant that it was not a breach of procedural fairness for the RAD to make new factual conclusions in support of its decision on the issue of state protection on the revocability of the applicant's military service exemption, on his eligibility for employment protection through government programs, and on entitlement to redress through civilian authorities. Despite the fact that these factual conclusions were not raised in the appeal before the RAD, were not assessed by the RPD, and the applicant was not given an opportunity to respond to these factual conclusions, the Court found that these conclusions were not new issues because the issue of state protection was a ground of appeal brought before the RAD.

[73] Similarly, in *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870, Justice Gleeson, applying *Tan*, found that the RAD did not breach the applicants' rights to procedural fairness by finding it was implausible that family planning authorities would be unaware that one of the applicants had become pregnant. The Court noted that, although the RAD came to a more definitive conclusion than the RPD on this issue, as the RPD simply mentioned the documentation and the absence of enforcement action while the RAD found that the documentation itself was not authentic, it nevertheless found that this was not a "new issue" falling outside the grounds of appeal. Instead, the Court found that the RAD properly engaged in an independent assessment of the evidence when addressing the applicant's position.

[74] Conversely, in *Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819 [*Isapourkhoramdehi*], Justice Strickland, applying *Tan*, found that the RAD did indeed breach the Applicant's right to procedural fairness by raising a new issue on appeal without providing the applicant with an opportunity to make submissions on this issue. The Court found the following:

> [17] In my view, in this matter the RAD did breach the duty of procedural fairness by raising new credibility issues not raised in the RPD's decision. Although at the hearing the RPD asked the Applicant why he had not been baptized in Canada, in its decision the RPD did not discuss the Applicant's failure to be baptized and it made no credibility or other finding concerning that issue. In its decision, the RAD excerpted the portion of the transcript of the RPD hearing wherein the RPD asked the Applicant why he had not been baptized in Canada and his answer. It stated that it had difficulty with the Applicant's lack of a baptismal certificate and, of more concern, with the reason the Applicant provided to the RPD as to why he had not been baptized. The RAD concluded that this credibility concern, as well as the Applicant's evidence as to his motivation for conversion, caused it to doubt the veracity of the Applicant's conversion to Christianity.
>
> [18] Given that the RPD did not make an adverse credibility finding based on the lack of a baptismal certificate or the explanation given for this, in my view, procedural fairness required that the Applicant be afforded an opportunity to provide submissions on the issue if the RAD sought, as it did, to make and rely on credibility findings concerning that evidence.
>
> [19] Regarding the Pastor's letter, the RPD did discuss this in its decision. It stated that while church attendance is an indicator of interest in a church, it did not find that mere attendance at a church or bible study meant that the Applicant was a genuine Christian or Christian convert, particularly when considered in the context of the numerous credibility issues which it had outlined in its decision. In my view, it is clear that the RPD did not make any credibility assessment based on this letter, but rather afforded the letter little weight and found that it did not overcome the existing credibility issues the RPD had already outlined. Accordingly, it was also procedurally unfair for the RAD to base a negative credibility finding on the content of the letter without giving notice to the Applicant and providing him with an opportunity to respond.

[75] Moreover, in *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 [*Xu*], Justice Norris found that the RAD breached the applicant's right to procedural fairness by raising the issue of state protection without providing the applicant with an opportunity to make submissions on this point. The Court found that, as state protection was not a material issue in the case before the RPD and its decision consequently did not make any determinations in relation to this issue, it could not be said that the issue of state protection reasonably stemmed from the existing grounds of appeal.

[76] Although the RAD's jurisdiction permits it to raise new issues on appeal given its role to review the RPD's decision on a standard of correctness, which requires it to conduct its own analysis of the record, the jurisprudence is clear that it must do so in a way that upholds procedural fairness. As stated by Justice Kane in *Ching*, "[i]f the RAD pursues the new issue, it seems clear that procedural fairness requires that the party or parties affected be given notice and an opportunity to make submissions" (para 71). This is confirmed in subsequent jurisprudence as well. See, for example: *Tan*, at paras 31-32 and 40; *Isapourkhoramdehi*, at para 24; *and Akram v Canada (Citizenship and Immigration)*, 2018 FC 785 at para 19.

[77] Of particular note is this Court's summary of the key concepts at play in *Xu*, where this Court found that the RAD breached the applicant's right to procedural fairness by not providing him with an opportunity to make submissions concerning the new alternative grounds raised by the RAD. The Court summarized the state of the law as follows at para 33:

> [33] If there is an error, the RAD can still confirm the decision of the RPD on another basis (*Huruglica* at para 78). Nevertheless, this power must be exercised in accordance with the principles of natural justice and procedural fairness. Thus, before confirming a

> decision of the RPD on a basis that cannot reasonably be said to stem from the issues as framed by the parties, the RAD must give the affected parties notice and an opportunity to make submissions (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65-76; *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at paras 20-23; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at paras 24-26; *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 40). As Justice Hughes rather colourfully put it, "[t]he point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions" (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10).

[78] Once a breach of procedural fairness is found, the general rule dictates that the Court must render the decision void and remit the matter back for reconsideration. However, an exception to this rule exists, which permits a reviewing court to disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless." See *Mobil Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] SCR 202 at 228, 115 Nfld & PEIR 334. In these cases, the Federal Court of Appeal has stated that the outcome must be "legally inevitable." See *Canada (Attorney General) v McBain*, 2017 FCA 204 at para 10.

[79] In the context of new issues raised by the RPD, Justice Mosley noted the following with regard to this exception in *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paras 39-42:

> [39] As a general rule, a breach of procedural fairness will render a decision void and the matter will be remitted for reconsideration. However, there is a limited exception to this rule. A reviewing court may disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless": *Mobil Oil Canada Ltd et al v Canada-Newfoundland*

> *Offshore Petroleum Board*, [1994] 1 SCR 202 at 228, [1994] SCJ No. 14 (QL) [*Mobil Oil*] citing W Wade, Administrative Law (6th ed. 1988) at 535; see also *Yassine v Canada (Minister of Employment and Immigration)*, (1994) 172 NR 308, 27 Imm LR (2d) 135 at para 9 (FCA) [*Yassine*]. In other words, the limited exception applies in instances where the outcome is legally inevitable: *Canada (AG) v McBain*, 2017 FCA 204 at para 10 [*McBain*].
>
> [40] This limited exception, first set out in *Mobil Oil*, above, has been applied by the Federal Court and the Federal Court of Appeal: see for example *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 117 [*Farwaha*]; *Ilaslan v Hospitality & Service Trades Union, Locale 261*, 2013 FCA 150 at para 28 [*Ilaslan*]; *Yassine*, above; *McBain*, above; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 203; *Dhaliwal v Canada (MCI)*, 2011 FC 201 at paras 25-26; *Singh v Canada (MCI)*, 2013 FC 807 at para 1.
>
> [41] In the circumstances, even if I had been satisfied that the time stamps constituted a "new issue" requiring that the Applicant be given an opportunity to respond, this is not a case in which I would have found it necessary to return the matter for reconsideration before a different RAD. The alleged breach was not of such a material nature that it would have justified quashing of the RAD's decision and remitting it for a third determination by a different officer: see for example *Farwaha*, above at para 117; *Ilaslan*, above at para 28.
>
> [42] It is apparent that the decision maker would have reached the same decision notwithstanding the time stamp differences and no purpose would be achieved by remitting the appeal for reconsideration. Although it may have been preferable for the RAD to have given the Applicant notice of the inconsistencies and to have provided him with an opportunity to offer an explanation of the time stamp differences, the result was inevitable given the RAD's other findings.

[80] Similarly, in *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300, the Court found that, regardless of its finding that no breach of procedural fairness occurred with regard to the issue raised, remitting the decision back to the RAD would be of no help to the applicant as

the issue would not have changed the outcome of the appeal. The Court stated that this is because the issue "was simply another negative inference drawn by the RPD regarding the applicant's credibility and confirmed by the RAD, which both panels found sufficient to respectively reject the applicant's claim for refugee protection and the appeal from this decision" (paras 16-17).

[81] With these basic principles in mind, the Applicant says that the RAD acted in a procedurally unfair way when dealing with his failure to claim asylum in the USA.

[82] The RAD addressed this matter as follows in the Decision:

> [36] The RAD has further considered that despite having been labelled an LTTE supporter and having been threatened with death on at least one occasion, the Appellant did not make a claim for asylum in the US where he resided for approximately seven years after leaving Sri Lanka in 2011. The RAD does not find his explanation that he could not afford a lawyer to be reasonable given that he resided in the US illegally after his first six months in that country and could have been returned to Sri Lanka at any time after that; that he has provided no evidence of any research or attempts made to acquire legal aid from the government or NGOs in the US to pay for legal expenses; that he could have submitted a claim for asylum without having the services of a lawyer as he initially did for his Canadian refugee claim; and because he has alleged that threats were made against him after he left Sri Lanka.

[83] The Applicant points out that the RPD did not raise this issue and instead based its decision on a change of circumstances in Sri Lanka. The Applicant was not given any notice that the RAD would consider this issue. Moreover, he says he had no reason to suspect that it would play a part in the appeal, thus explaining why he was unable to make submissions on point. He says that, at the very least, the RAD should have considered whether procedural fairness required allowing him to make submissions on point. He also says that this is an important material issue

that could have affected the RAD's final conclusion and that, unless the Court concludes that it would be futile to send this matter back for reconsideration based upon this one issue, he should be given the benefit of the doubt.

[84] It seems to me that in para 36 of the Decision, the RAD is saying that the Applicant had not established that there are sufficient objective reasons for him to fear returning to Sri Lanka and that his failure to claim in the USA suggests that his level of subjective fear is in accord with this conclusion.

[85] It is apparent from the wording of para 36 – "The RAD has further considered […]" – that this is an additional factor that supports the RAD's general conclusion that the Applicant is not at risk of persecution if he returns to Sri Lanka. In fact, para 36 is part of the RAD's consideration of whether he would be considered an LTTE supporter in Sri Lanka. It follows paras 34 and 35, which read as follows:

> [34] The RAD has considered the Appellant's allegations that he was believed to be associated with the LTTE for reasons other than his meeting with Prageeth Eknaligoda. Although the Appellant has alleged that he had received information from Tamil people for his successful photo exhibition in Europe, which caused him to be labelled as a terrorist supporter, the RAD notes that the purpose of this exhibit was to show the atrocities of the LTTE during the war, and that he was asked to organize another photo exhibition in Australia by the Sri Lankan government because of the success of the European photo exhibition. This request was made by the private secretary to the president and the RAD does not find it reasonable or plausible that the Appellant would be asked to organize another exhibit if he was considered to be a terrorist supporter.
>
> [35] The RAD has further considered that the Sri Lankan army and police authorities, including the Criminal Investigation Department (CID) and the Terrorism Investigation Department (TED) never approached the Appellant or accused him of having

> links to the LTTE, despite the fact that he remained in Sri Lanka for over two years after he had been accused of being a supporter of the LTTE. Furthermore, he did not have any problems leaving the country and he was able to renew his passport while he was in the US. The documentary evidence notes that citizens are not allowed to leave the country if they are charged with criminal or civil violations and that the airport maintains a list of persons of interest by law enforcement agencies that have violated Sri Lankan law and transfers nationals to law enforcement from the airport. Furthermore there is a "stop list" which includes names of individuals considered to be of interest.
>
> [Footnotes omitted.]

[86] Paragraph 36 is then followed by paras 37 to 40:

> [37] As noted earlier, the RAD has found that the Appellant has not credibly established that his alleged agents of persecution, Sudath Silva and Chaminda Kniarathne, continued to work for the government or have any interest in harming him at the present time. Additionally, the RAD agrees with the RPD that the Appellant would not be considered a supporter of the LTTE because of his brief meeting with the journalist Prageeth Eknaligoda as this individual has now been exonerated. The RAD finds, on a balance probabilities, that this brief meeting would not he used against the Appellant as proof that he had an association with the LTTE given the particular circumstances.
>
> [38] The RAD finds that the Appellant's allegations that he was considered an LTTE supporter while in Sri Lanka have not been established on a balance of probabilities. The RAD further finds that should he return to Sri Lanka, he would not be considered to be an LTTE supporter by the authorities and he would not be investigated or detained for this reason given his personal circumstances. The RAD finds that there is not a serious possibility that the Appellant would be arrested and tortured upon return to Sri Lanka because of perceived links to the LTTE.
>
> [39] The RAD has considered the Appellant's profile as a journalist and agrees with the RPD that the documentary evidence indicates that the situation for journalists has changed in recent years. Recent documentary evidence states that the constitution provides for freedom of expression, including for the press, and that the government generally respects those rights. It is stated that an independent press, an effective judiciary and a functioning

> democratic political system combine to promote freedom of expression, including for the press. It is noted that the independent media were active and expressed a wide variety of views. It is stated that journalists in the Tamil majority North reported harassment and intimidation; however, the RAD notes that there is no evidence on the record that the Appellant ever resided in or reported about the North of Sri Lanka. The censorship regime has been officially dismantled by the current president and previously inaccessible content on the Internet has become accessible, except for pornography. Authorities have renewed investigations into past crimes against journalists and have detained nearly a dozen suspects in the 2010 disappearance of Prageeth Eknaligoda.
>
> [40] The RAD has considered the documentary evidence and the Appellant's personal circumstances. The RAD finds that there is less than a mere possibility that the Appellant would be persecuted in Sri Lanka if he chose to work as a journalist in that country.
>
> [Footnotes omitted.]

[87] The Applicant provided his explanation as to why he did not claim asylum in the USA and this explanation was cited by the RAD, which then refers to that explanation in the context of its general consideration of the issue as to whether he would be considered an LTTE supporter. The Applicant was well aware that his failure to claim in the USA required an explanation, which is why he provided one.

[88] The Applicant is saying that, in considering his appeal, the RAD cannot rely upon parts of the record that the RPD did not rely upon and that the RAD was, for reasons of fairness, required to tell him that it was considering his failure to claim in the USA and thus had to allow him to respond and explain why he had failed to do so. The Applicant had, however, already provided that explanation and there is nothing before me to suggest that, if this matter were returned for reconsideration, the Applicant's explanation would differ in any way that would

impact the RAD's conclusion that he has not provided evidence to suggest he is at risk in Sri Lanka.

[89] In my view, this is one of those situations where, given the Applicant's failure to establish any facts that would place him at risk of persecution if he returned to Sri Lanka, it is apparent that the RAD would have reached the same conclusion even if it had not referred to his failure to claim in the USA, and that it would be pointless to return this matter for reconsideration on this ground because the outcome is legally inevitable.

[90] Finally, I do not think this was a credibility finding as asserted by the Applicant. The Applicant may well have not been able to afford a lawyer, but he had other avenues available to him, and the fact that he did not explore them says something about the degree of his subjective fear of returning to Sri Lanka, which is in keeping with the objective evidence supporting the finding that he does not face more than a mere possibility of persecution in Sri Lanka. In my view, when read in its full context, the RAD is simply saying that the evidence of subjective fear on the record is in keeping with the objective facts that the Applicant has not established that he faces any risk of persecution in Sri Lanka. Even if the Applicant were to establish that he was subjectively fearful to a significant degree this would not alter the findings on a lack of objective evidence.

C. *Risk as a failed refugee claimant*

[91] The Applicant says that the RAD erred in its assessment of the risk he faces as a failed refugee claimant. He says that the RAD unreasonably assumed that he would be able to conceal

his refugee claim from Sri Lankan authorities. Upon arrival in Sri Lanka, the Applicant says that he would obviously be asked what he had been doing abroad and he would have to reveal that he had made a failed refugee claim.

[92] The Applicant specifically cites and relies upon the words in para 45 of the Decision where the RAD notes that "there is no evidence on the record that the Sri Lankan authorities would be aware that the Appellant had made a refugee claim in Canada and had been refused."

[93] The RAD does not assume that the Applicant will be able to conceal his failed refugee claim. The Applicant is quoting these words out of context. The full context is as follows:

> [43] The RAD has considered the documentary evidence which states that returnees are processed by different agencies, including the Department of Immigration and Emigration, the State Intelligence Service, and the Criminal Investigation Department. It is noted that these agencies check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters. It is further noted that for returnees travelling on temporary travel documents, police undertake an investigation process to confirm identity, which often involves interviewing the returnee, contacting their home town police, their neighbours and family, and checking criminal and court records.
>
> [44] The RAD notes that the Appellant has his own permanent Sri Lankan passport which was issued while he was out of the country, and that he was able to leave Sri Lanka without any problems. The RAD has already found that he has not established, on a balance of probabilities, that he had been or would be associated with the LTTE by Sri Lankan authorities. There is no evidence on the record to indicate that his name would appear on immigration, intelligence or criminal databases given that he was able to leave the country without any problems at the height of the time that he believed he was considered an LTTE supporter or associate. There is no evidence in the record that the Appellant has had any association with LTTE diaspora organizations while outside of Sri Lanka, or that he has written about or criticized the Sri Lankan government in any way while outside of the country.

> The RAD finds that while remaining outside of Sri Lanka for along period of time may subject the. Appellant to higher screening at the airport in the form of questioning about his activities abroad, this in and of itself does not amount to persecution.
>
> [45] The documentary evidence indicates that arrests and detentions of those with alleged links to the LTTE continue, but that they have been reduced; and, according to the Executive Director of the Northern Provincial Council (NFC), arrests and detentions are not common unless for some reasonable suspicion of criminal activities. As noted earlier, the RAD has found that the Appellant would not be perceived as someone associated with the LTTE. There is no evidence on the record that he was ever been involved in any criminal activity. Given his particular circumstances, the RAD finds, as noted earlier, that although the Appellant may be subjected to a higher level of screening at the airport because he has lived abroad, there is not a serious possibility that this treatment would amount to persecution. The RAD notes that there is no evidence on the record that the Sri Lankan authorities would be aware that the Appellant had made a refugee claim in Canada and had been rejected.
>
> [46] The RAD finds that the Appellant may face some harassment upon return to Sri Lanka; however, the RAD finds that it would not be sufficiently serious to amount to a serious possibility of persecution.
>
> [47] The RAD finds that the Appellant would not face a serious possibility of persecution in Sri Lanka as a failed refugee claimant.
>
> [Footnotes omitted.]

[94] It seems to me that the RAD's principal point is that the Applicant "may face some harassment upon return to Sri Lanka; however, the RAD finds it would not be sufficiently serious to amount to a serious possibility of persecution."

[95] The RAD's concern here is how the Applicant will be screened upon arrival in Sri Lanka. Returnees are processed by different agencies. The Applicant has remained outside of Canada for a long time but he is Sinhalese and not Tamil, he has his own Sri Lankan passport, and he has

left the country without problems. His name is not likely to appear on immigration, intelligence, or criminal databases. There is also no evidence that he has any association with the LTTE diaspora organizations outside Sri Lanka, or that he has written about the Sri Lankan government. Another thing that will affect how the Applicant is processed is the fact that the Sri Lankan authorities do not have any record themselves that he is a failed refugee claimant. This does not mean that this fact will not emerge during the course of screening, or that the Applicant will be able to keep it a secret, or will even try to do so. However, given the Applicant's complete profile, there is no evidence that the screening process will result in persecution, though it could well mean some harassment. The Applicant presented no evidence that a failed refugee claimant with his particular profile would be screened in a way that would amount to persecution.

[96] The Applicant is attempting to isolate one factor – his potential status as a failed refugee claimant – to establish that he will be tortured and mistreated when he is screened upon his return to Sri Lanka. The RAD takes the position that screening is done by different agencies and the Applicant's general profile is likely to affect how, and by whom, he is screened upon return. Based upon the evidence before the RAD, I can see nothing unreasonable in its reasons or conclusions. There is no suggestion here that the Applicant should attempt to withhold or disguise any aspect of his profile upon return to Sri Lanka. However he is questioned, it may emerge that he is a failed refugee claimant, the main point is that there is no evidence he would be regarded as someone with LTTE associations. The fact that he is a failed refugee claimant means that Canada has found he has no LTTE associations.

[97] The Applicant relies upon *Vilvarajah* but disregards the Court's words in that case. The Court was clear that it "must not parse the decision – but rather should consider it as an organic whole – in the circumstances of this case […]." In the present case, the RAD does not parse the Applicant's profile; rather it is the Applicant who attempts to do that before me when he narrowly characterizes his profile as a "failed refugee claimant."

IX. CERTIFICATION

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

JUDGMENT IN IMM-1986-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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