Federal Court Cour fédérale

Date: 20200630

Docket: IMM-5454-19

Citation: 2020 FC 737

Toronto, Ontario, June 30, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

THIRUVALLUVAN KURUSAMY
VIDUSHINI THIRUVALLUVAN
SHEROAN THIRUVALLUVAN
MAATHESH THIRUVALLUVAN
ANOSHKA THIRUVALLUVAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The principal applicant [Applicant] is a citizen of Sri Lanka who claims he is at risk of persecution, or worse, should he return to his country. The tribunals that heard his refugee claim and appeal both found his account lacked credibility, and denied his claim. He then applied for

judicial review, but this Court dismissed his application at the leave stage. The Applicant then applied for a pre-removal risk assessment [PRRA]. A PRRA officer denied the application on the basis that the new evidence neither addressed the prior credibility concerns, nor demonstrated any new risks. The Applicant now asks the Court to overturn that PRRA refusal. After considering the record, reviewing the submissions, and listening to counsels' presentations, I find the decision to be reasonable. As a result, I am dismissing this application.

II. BACKGROUND

[2] The Applicant is a citizen of Sri Lanka who previously made a refugee claim in Switzerland in 1990. He sponsored his spouse, also from Sri Lanka, and they had three children who were all born in Switzerland. The entire family [the Applicants] had temporary status in Switzerland.

[3] The Applicants returned to Sri Lanka in 2014, stating that they believed the political situation had improved. The Applicant claims he supported the Sri Lanka Freedom Party (SLFP) after he returned, and in 2016, while visiting his sister in Canada, "a group of political opponents with the security forces" sought him out, causing his spouse and children to seek shelter in another home. According to the Applicant, the same people broke into and looted his home, asking the neighbours where his family was.

[4] After returning from Canada, the Applicant alleges that he was detained several times in Sri Lanka while trying to file police reports against his political opponents for auto theft, damage

to his car, and threats they would kidnap his children for ransom. The Applicant contends this was due to his ties to the SLFP.

[5] In July 2016, the Applicants sought refugee protection in Canada. The Refugee Protection Division [RPD] rejected the family's claim in March 2017. The Refugee Appeal Division [RAD] upheld the RPD decision on August 2nd, 2017. Both tribunals rejected the claim based on credibility concerns. The Applicants subsequently applied for a PRRA, and on July 29, 2019, a PRRA Officer [Officer] rejected the application [Decision].

III. DECISION UNDER REVIEW

[6] The Officer observed that the Applicant's claim of risk due to his political profile and ethnicity were the same bases pleaded before the tribunals. The Officer further found that there was insufficient new evidence to address their findings, and noted that the purpose of a PRRA is to assess new risks that arise after the refugee hearing, not those already assessed. The Officer acknowledged the evidence that conditions had deteriorated in Sri Lanka for Tamils with suspected ties to the Liberation Tigers of Tamil Eelam (LTTE) since the RPD decision, but that the new evidence did not indicate that the Applicant fit, or would be perceived to fit, the profile of a Tamil with suspected ties to the LTTE. The Officer also noted that the Applicant failed to address the various credibility findings made against him. Finally, the Officer found that the new documentary evidence did not suggest that failed refugee claimants from countries where there is greater criticism of Sri Lankan authorities (such as Canada) are at greater risk than failed refugee claimants from other countries.

IV. ISSUES AND ANALYSIS

[7] The Applicants raise two issues: whether the Officer (i) applied the correct legal test; and (ii) made a reasonable decision. The presumptive standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*]). This presumption has not been rebutted in this case, as none of the exceptions to this rule apply (*Vavilov* at para 17).

(i) The correct legal test

[8] PRRA officers must assess "the effect which new evidence may have had on the Board decision in question" (*Mikhno v Canada (Citizenship and Immigration)*, 2010 FC 385 at para 23 [*Mikhno*]). This stems from subsection 113(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, which restricts new evidence only to that "evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection".

[9] In this case, the Officer concluded the Decision with the following two paragraphs, clearly focusing on the lack of evidence tying the Applicant to the LTTE:

> Having considered the documentary evidence cumulatively, I acknowledge that persons suspected of having ties to the LTTE continue to be at risk of ill treatment from the authorities and other groups in Sri Lanka. However, having considered the applicant's noted risks cumulatively, as well as his profile or in this case the lack thereof and having reviewed the country information, I find that there is insufficient new objective evidence to indicate on a balance of probabilities that the applicant was or will be suspected as an LTTE supporter or be perceived as such. I further find that there is insufficient objective evidence to indicate that the

> applicant faces risk of persecution or risk from the Sri Lankan authorities by reason of his Tamil ethnicity and/or his perceived origins from the north of Sri Lanka. Additionally, the applicant has not rebutted any of the issues raised by the RPD.
>
> In light of the foregoing, I find that the applicant and by extension his spouse and children, face no more than a mere possibility of persecution as described in section 96 of the Immigration and Refugee Protection Act (IRPA) and I find that the applicants would not likely be at risk of torture, or likely to face a risk to life of cruel and unusual treatment or punishment pursuant to section 97 of the IRPA if returned to Sri Lanka.
>
> [Decision at p 7, emphasis added.]

[10] The Applicant argues that the Officer erred in analysing the threat in this manner, as he was not required to demonstrate he faced persecution on a "balance of probabilities". Rather, he maintains that he faced a reasonable chance of prospective persecution.

[11] I do not agree. The Officer did not state that the Applicant had to show a risk of persecution on a balance of probabilities. Rather, the Officer applied the balance of probabilities standard to the new evidence of risk – or lack thereof – proffered by the Applicant. It is worth looking at the two key two paragraphs that Applicant's counsel focused on, since in my view, they provide a complete response to the Applicant's allegation that the Officer applied the wrong legal test.

[12] In short, the Officer's conclusion on the Applicant's suspected ties to the LTTE is that while there is some evidence of a "new risk" arising in Sri Lanka after the RPD decision, that new risk will not, on a balance of probabilities, be faced by the Applicant. In other words, the Officer is making a factual finding regarding the evidence, not misapplying the refugee test,

which the Officer correctly states in the second of these two concluding paragraphs. Rather, in this first paragraph, the Officer is effectively stating that the Applicant has not demonstrated that his subjective fear is objectively well founded (*Ramanathy v Canada (Citizenship and Immigration)*, 2014 FC 511 at para 16 [*Ramanathy*]).

[13] The "mere possibility" aspect of the analysis only becomes relevant after an applicant has established a subjective and objectively well-founded fear on a balance of probabilities (*Ramanathy* at para 16). In *Ramanathy*, Justice Mosley invoked the earlier analyses of both the Federal Court of Appeal in *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA), as well as Justice O'Reilly, who wrote at paragraph 8 of *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4:

> 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.
>
> [Emphasis in original.]

[14] Here, as is evident from the Decision's two-paragraph conclusion – as well as all that precedes it – the Officer did not address whether a "mere possibility of persecution" had been established, because the Applicant failed to establish that there was an objective or subjective risk, given his profile. Rather, the Officer found that the threat did not apply to the Applicant in

light of the evidence and submissions presented. This is consistent with this Court's approach in *Nageem v Canada (Citizenship and Immigration*), 2012 FC 867 at paras 24-25, which was cited by both parties. There, the applicant had also argued the wrong legal test had been applied and Justice Rennie, then with this Court, disagreed:

> The standard of proof, or the evidentiary burden as it is sometimes referred to, in assessing the danger and risk described in paragraphs 96 and 97(1)(a) and (b) is proof on a balance of probabilities. This is the standard of proof to be applied by the Board in assessing the evidence before it. That evidence, once established on a balance of probabilities, is then assessed against the applicable legal tests for persecution under section 96 and torture under section 97.
>
> In so far as section 96 and a claim of persecution is concerned, the Board assessed the evidence against the correct standard, namely, whether it establishes a reasonable chance, or more than a mere possibility, that the applicant faces a prospective risk of persecution; *Florea v Canada (Minister of Citizenship and Immigration),* 2005 FC 1472 at para 24.

[15] Here, the Officer followed the law. S/he did not misarticulate or misapply the legal test.

(ii) Reasonability of the Decision

[16] At this judicial review hearing, counsel for the Applicants focused on a risk letter from Amnesty International dated November 7, 2017 [Letter] entitled "Sri Lanka: Forced Returns and Passengers from the Sun Sea and Ocean Lady" (signed by Gloria Nafziger, Refugee Coordinator, Amnesty International) that addressed, in part, returning asylum seekers. Counsel confirmed this Letter was the one piece of new evidence submitted by the Applicants' immigration consultant with the PRRA application, but argued that it went unaddressed in the RAD's analysis of whether there was a new risk.

[17] Once again, I cannot agree with the submission. In his PRRA application, the Applicant submitted that because he is Tamil, and would be returning as a failed refugee claimant to a centre of LTTE activity, he would be perceived to be an LTTE supporter, and would face persecution. The Officer acknowledged the evidence that conditions have worsened in Sri Lanka for Tamils with suspected ties to LTTE, but found that that did not apply to this Applicant's profile, also addressing the issue of danger to returning refugees, as follows:

> I have insufficient evidence to indicate that such guidelines [UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka] have been revised since the applicant's refugee hearing. I find insufficient new evidence to indicate that the applicant fits or could be perceived to fit the profiles of the aforementioned risk profiles. I find the documentary sources do not suggest that failed refugee claimants from countries such as Canada are at greater risk than failed refugee claimants from other countries where there has been less public criticism of the Sri Lankan authorities.
>
> [Decision at p 7, emphasis added.]

[18] Going back to the Letter, it focused on the risk of return to returning Tamil men "suspected of having supported the Liberation Tigers of Tamil Eelam (LTTE) and were passengers on the MV Sun Sea or Ocean Lady". The Letter went on to note that:

> Individuals removed from Canada and suspected of having ties to the LTTE may be detained, interrogated and arrested by the CID or SIS upon arrival at the airport with respect to their reasons for return to Sri Lanka, activities in Canada and possible links to the LTTE. Such a person is at risk as a person returned from abroad, who may be presumed to have access to financial resources and/or international connections which could be exploited for financial gain by Tamil paramilitary groups or state agents.
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> [Application Record at p 112, emphasis added.]

[19] The term “such a person” underlined above, clearly suggests that Ms. Nafziger, the author of the Letter, is referring to the group of people discussed in the previous sentence: those with suspected ties to the LTTE. The Applicants were not passengers on either ship. And neither tribunal (RPD or RAD), nor the Officer, found any evidence to suggest that the Applicants would be suspected of having supported the LTTE (again, see the two-paragraph conclusion of the Decision reproduced above in paragraph 9 of these Reasons). Furthermore, I note that nothing more recent than this 2017 Letter was submitted in the PRRA application to corroborate the Applicants’ claim regarding risk as failed refugee claimants, either by way of personalized evidence, or objective (country) documentation.

[20] Reasonable decisions are based on internally coherent chains of analysis that are “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). Here, the Officer was constrained by fundamental weaknesses in the PRRA application, including the lack of any compelling new evidence, accompanied by unpersuasive submissions, which included the immigration consultant’s misunderstanding of a PRRA as “appealing the decision made by the RAD”. As was held in *Mikhno*, at paragraph 23, “PRRA assessments are not appeals or reconsiderations of Board decisions. They are only an assessment of the effect which new evidence may have had on the Board decision in question”. In short, I find that the Officer reasonably found that the PRRA lacked sufficient new evidence.

[21] The onus is at all times on applicants to support their allegations with evidence (*Sufaj v Canada (Citizenship and Immigration)*, 2014 FC 373 at para 39). The PRRA application consisted of 19 dense pages of written submissions, along with country condition evidence that

pre-dated the tribunal hearings, which retread ground that had already been decided (regarding LTTE association). Only one very limited portion of the submissions addressed the issue of returning refugees raised in the Letter (see Letter extract above in paragraph 17 of these Reasons).

[22] In short, the issue of returning refugee claimants was a peripheral argument raised in the submissions. Given how little attention the Applicant gave to the issue, the Officer's brief analysis of it was reasonable, as was the focus on the crux of the evidence and submissions that the Applicants provided. The Officer was under no obligation to take measures to bolster insufficient evidence (*Borbon Marte v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 930 at para 40). While one might argue that the Officer could have spent more time in his reasons addressing the subject of returning refugees, in my view, the submission and accompanying Letter received attention commensurate with the references to them in the PRRA application.

[23] Even if I were to accept counsel's contention that the "returning refugee" issue merited more comment in the Decision, perfection is not the standard (*Vavilov* at para 91). As the Supreme Court's majority writes at paragraph 94 of *Vavilov*:

> The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the

> reasons is not, in fact, a failure of justification, intelligibility or transparency.

[24] The Officer responded to the submissions, and referred to the evidence contained in the PRRA application. The Decision met the definition of reasonableness, in that it was justified, intelligible, and transparent in relation to the facts and law. Its analysis responded to the immigration consultant's submissions: those submissions focused almost exclusively on the SLFP and LTTE risks, with a peripheral paragraph about returning refugees. The Officer was entirely justified in focusing on the key issues pleaded to him, and in addressing the risks associated with returning from Canada as a subsidiary point.

V. CONCLUSION

[25] Ultimately, the PRRA application contained significant weaknesses. The deficiency lay in the PRRA evidence and its submissions, not the Decision that flowed from it: the Applicants presented very limited new evidence to the Officer. The Officer was thus justified in noting the absence of a connection between the case presented and the Applicants' claim that they would be at risk. While Applicants' counsel valiantly attempted to convince the Court that the Decision contained errors in both the law and its application to the facts, I remain unconvinced that the Officer fell short. In my view, the Decision "is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at para 85). As a result, I am constrained in my ability to interfere. This application for judicial review is dismissed.

JUDGMENT in IMM-5454-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions for certification were argued and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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