Federal Court  Cour fédérale

Date: 20211004

Docket: IMM-4822-20

Citation: 2021 FC 1023

Ottawa, Ontario, October 4, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DHAMMIKA NISHANTHA JAYASINGHE HENKAWATTHE GEDARA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, which upheld the decision of the Refugee Protection Division [RPD]. The RPD determined the Applicant is neither a Convention refugee

nor a person in need of protection pursuant to section 96 and section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] [Decision].

II. Facts

[2] The Applicant is a 39-year-old citizen of Sri Lanka. He is Sinhalese by ethnicity and Buddhist by religion and belongs to both the majority ethnic group and religion. His wife and children live in Sri Lanka. He worked in his family's textile business before arriving in Canada.

[3] In his Basis of Claim [BOC] the Applicant alleges fear of persecution at the hands of politically-connected criminals, politicians, Buddhist extremists, and police in Sri Lanka.

[4] The Applicant alleged three separate incidents occurring between February 13, 2018 and March 8, 2018, which caused him to flee Sri Lanka.

[5] The first incident occurred on February 13, 2018 when he says a group of six politically connected gangsters entered his store and threatened him for money. The second incident occurred on February 17, 2018 when he says a group of Buddhist Extremists attacked his home during his wife's Christian prayer meeting, causing damage. The third incident he says occurred on March 8, 2018 when a group of Buddhist extremists entered his home while he was harbouring his Muslim friend (Abubaker), beat him and his friend, forced the two men to engage in homosexual activities of which they took pictures and filmed. The extremists then called police, who arrested the Applicant and his friend, and took them to the station where they continued to beat them.

[6] The Applicant fled Sri Lanka on June 22, 2018 and made a claim for refugee protection upon arriving in Canada. His claim was denied on June 28, 2019, the RPD finding "the determinative issues in this claim are state protection and credibility". The RAD upheld the RPD's decision to deny his refugee claim "on the grounds that the Appellant was not credible and failed to rebut state protection."

[7] I will deal with the Applicant's submissions to the RAD in terms of its credibility findings in the Analysis section of these Reasons. Essentially the Applicant submitted he was credible. The RAD having considered the matter of credibility extensively, and found otherwise.

[8] Subsequent to perfecting the appeal, the Applicant says six men went to his mother's home on August 26, 2019, vandalized her property and threatened her, demanding she hand over the Applicant. A journalist reported the incident in a local newspaper.

III. Decision under review

[9] The RAD dismissed the appeal. The RAD upheld the RPD's decision to deny the Applicant's claim for refugee protection. Its independent assessment of the record found the Applicant was "not credible", and that he failed to rebut state protection.

[10] Regarding the incident of February 13, 2018: the RPD did not make specific credibility findings related to this incident. However, the Applicant told the RAD his testimony and documentation were "highly credible and compelling", "overwhelmingly consistent" and "cogent". The RAD concluded otherwise, finding the Applicant failed to "provide clear and

convincing evidence of the state's inability of unwillingness to protect him", failed to "rebut the presumption of state protection" relating to this incident, and failed to "credibly establish his political profile, and that he was being persecuted and harmed due to being identified by governing politicians as an enemy."

[11] Regarding the incident of February 17, 2018: the RAD upheld the RPD's finding the Applicant failed to rebut the presumption of state protection in relation to this incident. His written submission to the RAD said his testimony and documentation were "highly credible and compelling", "overwhelmingly consistent" and "cogent". The RPD had found "serious credibility concerns" regarding the Applicant's description of the incident and lack of supporting documentation. The RAD found further credibility concerns arising from documents submitted.

A. *Incident of March 8, 2018*

[12] The Applicant's written submission to the RAD claimed his testimony and documentation were "highly credible and compelling", "overwhelmingly consistent" and "cogent". The RAD found the RPD did not err in impugning the Applicant's credibility. The RAD agreed the lack of corroborating documents from neighbours who witnessed 10 men entering his home impugned his credibility. The RAD further found the lack of corroboration from the Muslim friend strained his credibility.

[13] The primary piece of documentation filed to corroborate this event was a letter from a Mosque dated June 8, 2018, stating its appreciation for protection given by the Applicant to the Muslim friend. However, the letter did not provide any specific details about the friend and was

vague in terms of details provided relating to the incident. The RAD gave this letter no weight towards corroborating the events of March 8, 2018.

[14] The RAD assessed the evidence and also agreed with the RPD the following events were implausible:

- The Buddhist extremist called the police after they had just committed several criminal offences;
- Four police men dispersed a gang of weapon wielding Buddhist extremists by "simply asking them to leave";
- The police chose to overlook the obvious criminal offences committed by the Buddhist gang in exchange for arresting the Applicant on the mere suspicion he was gay.

[15] Having considered the totality of the evidence and given its credibility concerns, the RAD found the central allegations of the incident were not established with sufficient credible or trustworthy evidence to reach a positive determination under section 96 or 97(1) of the *IRPA.*

B. *New Evidence*

[16] The Applicant submitted the following as new evidence pursuant to *Refugee Appeal Division Rules*, SOR/2012-257, Rule 29: 1) affidavit of the Applicant dated October 28, 2019; 2) affidavit of the Applicant's mother dated September 27, 2019; 3) affidavit of the Applicant's neighbour dated October 7, 2019; 4) news article regarding the incident with his mother dated August 28, 2019; and 5) mailing envelope in which new evidence was received from Sri Lanka.

[17] The Applicant submitted the evidence was new, arose after the RPD rendered its decision, went to the core of his allegations, and refutes the RPD's finding the Applicant was not credible.

[18] The RAD accepted the Applicant's new evidence pursuant to section 110(4) of the *IRPA.*

[19] However, the RAD found the affidavit of the Applicant's mother lacking in credibility because her assertion the attackers were from the Bodu Bala Sena movement was speculative, no police report was available to corroborate the incident, and the Applicant made no mention of his mother receiving threats since his departure. The RAD also put little weight on the newspaper article because there was nothing before the Panel to establish its reliability and there was minimal information provided of how the incident came to be known to the newspaper. Overall, the RAD found the new evidence did not assist in establishing forward-looking risk or overcoming credibility issues.

C. *Request for an Oral Hearing*

[20] The Applicant requested an oral hearing. As the RAD accepted new evidence pursuant to section 110(4), they considered whether an oral hearing should be convened pursuant to section 110(6) of the *IRPA* but ultimately found a hearing could not be convened because the new evidence was neither central nor determinative to an issue on the appeal, and therefore did not meet the requirements of section 110(6).

D. *Sur Place Analysis*

[21] The RAD agreed with the RPD that the Applicant does not face a serious possibility of persecution because he would be returning to Sri Lanka as a failed asylum seeker. The RAD also found the RPD was correct to reject his *sur place* claim because there was no evidence to establish the Applicant was charged under the *Prevention of Terrorism Act.* The Applicant submitted a letter from his lawyer in Sri Lanka stating he had been arrested under the *Prevention of Terrorism Act* [Lawyer's Letter]; however, the RAD found the letter lacked credibility because it stated he sought police assistance after the second event, when the Applicant himself testified to not seeking police assistance. Therefore, there was insufficient evidence to establish the Applicant is on a watch list at the airport which may subject him to increased scrutiny.

IV. Issues

[22] The Applicant submits the issues are as follows:

A. Did the RAD fail to give the Applicant notice before raising new and determinative credibility issues not identified by the RPD?

B. Did the RAD make unreasonable credibility findings about the March 8, 2018 incident?

C. Did the RAD err by impinging the new evidence and failing to call a hearing?

D. Did the RAD err by finding that the Applicant failed to rebut the presumption of state protection?

E. Did the RAD conduct an unreasonable *sur place* analysis?

[23] In my respectful view, the issues are as follows:

A. Did the RAD breach procedural fairness?

B. Was the Decision reasonable?

V. Standard of Review

A. *Principle of Procedural Fairness*

[24] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I wish to note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I note the Federal Court of Appeal's recent decision which held judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[25] I also note from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[26] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[27] With regard to reasonableness, the appropriate standard of review is reasonableness; see *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35.

[28] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme

Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (Vavilov, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision 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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[29] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: Dunsmuir, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [Emphasis added]

[30] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that

> his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[31] Furthermore, *Vavilov* makes it clear this Court is not to reweigh or reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

VI. Analysis

A. *Did the RAD breach procedural fairness?*

(1) Failure to give notice before raising new credibility concerns

[32] The Applicant submits the RAD breached the duty of fairness by raising credibility concerns not identified by the RPD. In my view, there is no merit to this submission for two reasons. First, the jurisprudence establishes the RAD, without the need for notice, may consider and determine issues of credibility arising on the record if the issue of credibility was considered and determined by the RPD. Secondly, on the facts of this case, a comparison of his submissions

to the RAD against the RAD's credibility findings leads me to conclude the Applicant himself asked the RAD to consider many if not most of the RAD's now complained of credibility assessments. Having asked the RAD to assess his credibility, the Applicant may not come to this Court and claim he had no notice of what he had asked the RAD to do. With respect, that makes no sense at all.

[33] On the jurisprudence, the Applicant relies on *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 [Hughes J] at para 10:

> [10] The 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.

[34] The Applicant also relies on *Fu v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1074 [*Fu*] [Diner J] at para 14:

> [14] The RAD has a duty to allow parties to address pivotal new matters not raised by the RPD (*Ehondar v Canada (Citizenship and Immigration*), 2016 FC 1253 at paras 13-14). In *Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180, Justice Shore faulted the RAD for raising doubts about the genuineness of a police report, which were neither raised as an issue by the RPD, nor put to the applicant (at para 22). In another case, Justice Hughes found that where "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).
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> [Emphasis added]

[35] I note regarding *Fu*, that the RPD in this case did indeed raise credibility. In any event, and with respect, the preponderance of the jurisprudence holds the RAD is entitled to make

independent findings of credibility where credibility was at issue before the RPD, the RPD's findings are contested on appeal, where the credibility concerns from the RAD are linked to the Applicant's appeal submissions, and the RAD's findings arise from the evidentiary record. This is particularly so where an applicant asserts to the RAD that he is overall credible and makes broad assertions that his evidence was "highly credible and compelling", "overwhelmingly consistent" and "cogent". Such submissions made by this Applicant invited the RAD to consider the overall record – which the RAD must do in any event.

[36] In this connection I start with *R v Mian,* 2014 SCC 54 [Rothstein J] at para 30:

> [30] An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

[37] Further, in *Smith* v *Canada (Citizenship and Immigration),* 2019 FC 1472, I noted jurisprudence concluding the RAD may make independent findings of credibility if credibility was raised before the RPD at paras 31-32 (this point was also made in *Fu*):

> [31] In addition, as noted in *Nuriddinova v Canada (Citizenship and Immigration),* 2019 FC 1093, per Walker J at paras 47-48, the RAD would in any event have been entitled to make independent findings of credibility against an appellant where credibility was at issue before the RPD, the RPD's findings are contested on appeal and the RAD's additional findings arise from the evidentiary record:
>
> > [47] The RAD's role on appeal is to consider the record before the RPD and to review the RPD's decision against the issues raised by the appellant,

> respecting the basic principle of procedural fairness that a party must have an opportunity to respond to new issues that will have a bearing on a decision affecting them (*Tan* at para 32). While the RAD cannot raise a new issue without notice to the parties, it is entitled to make independent findings of credibility against an appellant where credibility was at issue before the RPD, the RPD's findings are contested on appeal and the RAD's additional findings arise from the evidentiary record. (*Adeoye* at paras 12-13, citing *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at paras 27-32). This principle was recognized in *Kwakwa*, cited by the Applicants, where Justice Gascon stated that a new question or issue is one which "constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from" (*Kwakwa* at para 24).
>
> [48] I agree with the Applicants that the issue of credibility is very broad and that the RAD cannot have *carte blanche* to identify any new credibility issue. However, the Applicants raised the issue of Ms. Nurridinova's testimony broadly, stating that it was "consistent, uncontradicted, plausible and corroborated". The RAD directly addressed this ground of appeal, highlighting inconsistencies between her BOC and testimony, and Mr. Nurridinov's testimony, that arose from questions posed by the RPD. As a result, I find that the RAD did not raise a new question in support of its decision and did not breach the Applicants' right to procedural fairness.
>
> [Emphasis added]

[32] In this connection it is noteworthy that the Applicant raised the matter of credibility in his submissions to the RAD, in which he also submitted that the RAD should agree that "we are then to presume that [the mother] was credible and her testimony was true."

[38] Thus, and with respect, I have concluded the RAD was entitled to make new credibility findings based on the record it reviewed, because the RPD based its finding on credibility in addition to state protection.

[39] Moreover, I have concluded the Applicant himself asked the RAD to make the credibility assessments now complained of. The Applicant did not need notice from the RAD before it considered credibility he raised.

[40] For example, regarding the February 13, 2018 incident, the RPD did not make specific credibility findings related to this incident. However, the Applicant asserted to the RAD that his testimony and documentation were “highly credible and compelling”, “overwhelmingly consistent” and “cogent”. The RAD acknowledged he made this request, and as requested, did indeed make further findings of credibility not made by the RPD. In the circumstances and dealing with this aspect of this application overall, in my view this did not constitute procedural unfairness.

[41] Regarding the February 17, 2018 incident, the RAD upheld the RPD’s finding the Applicant failed to rebut the presumption of state protection in relation to this incident. The RPD had serious credibility concerns regarding the Applicant’s description of the incident and lack of supporting documentation. The RAD acknowledged this and found further credibility concerns arising from documents submitted. The Applicant submits it was procedurally unfair for the RAD to raise these new issues without notice to the Applicant. However, having reviewed his

submissions to the RAD, I have concluded the Applicant asked the RAD to consider his credibility, and therefore had no need of notice.

[42] In my respectful view, the Applicant's contentions on various individual findings made by the RAD regarding the February 13 and 18, 2018 incidents are simply arguments on how the Applicant would have weighed the evidence in his favour. The RAD disagreed, and found the Applicant and his evidence were not credible or should be given reduced weight, with extensive reasons. This does not constitute breach of procedural fairness, but merely evidences disagreement with credibility and sufficiency of evidence findings by the RAD, made with the heartland of its jurisdiction per the Federal Court of Appeal's decision *Giron v Canada (Minister of Employment and Immigration),* [1992] FCJ No 481 (FCA) at para 1.

B. *Failure to call a hearing pursuant to section 110(6) of the IRPA*

[43] The Applicant submits the RAD acted in breach of fairness when it did not call a hearing pursuant to section 110(6) of the *IRPA*:

Hearing	**Audience**
110(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**110(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim	**c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas

[44] Subsection 110(3) provides:

Procedure	**Fonctionnement**
110(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.	**110(3)** Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

[45] The Applicant submits "the RAD was duty-bound to call a hearing" given the new evidence raised serious issues with the Applicant's credibility, which was central to the RAD's decision; see *Zhou v Canada (Citizenship and Immigration),*2015 FC 911 [O'Reilly] at para 11:

> [11] I believe the same should apply here. Where the conditions for holding an oral hearing are present, the RAD should generally be required to convene one. Obviously, the RAD retains a discretion on this question but that discretion must be exercised reasonably in the circumstances. In particular, the mere fact that a party has not requested a hearing will generally not be sufficient reason to justify a refusal to convene one when the circumstances appear to require it. While the RAD rules allow an appellant to request a hearing, IRPA does not actually impose a burden either to request, or to satisfy the RAD that the circumstances merit, an oral hearing (see *Refugee Appeal Division Rules*, SOR/2012-257, Rule 5(2)(d)(iii)). The onus rests with the RAD to consider and apply the statutory criteria reasonably.

[46] I note, unlike in *Zhou* where a hearing was not held because the applicant failed to request one, the Applicant in the case at bar asked for a hearing and the RAD gave reasons why the requirements to hold an oral hearing were not satisfied.

[47] I disagree with the Applicant's submissions. In my view, it was reasonable for the RAD not to hold a hearing under section 110(6) of the *IRPA.* I also see no procedural unfairness given the following jurisprudence:

a) In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, Justice de Montigny held "the basic rule is that the RAD 'must proceed without a hearing' […]" [para 51] and a hearing is only held where new evidence would "justify a reassessment of the overall credibility of the applicant and his or her narrative." [para 44] [*Singh*], and

b) In *Kreishan v Canada (Citizenship and Immigration),* 2019 FCA 223, Justice Rennie held the RAD's decision to hold a hearing under section 110(6) is discretionary. [para 43]

[48] In the case before me, the RAD gave reasons why the new evidence had problems itself and in relation to other evidence. It was reasonable for the RAD to find the new evidence provided

would not have altered the credibility findings nor "justify a reassessment of the overall credibility of the applicant" [*Singh*].

[49] In my respectful view, procedural fairness was not breached, nor was the decision not to hold an oral hearing unreasonable in the circumstances particularly given this constraining jurisprudence.

C. *Was the decision of the RAD unreasonable?*

(1) Credibility findings related to the March 8, 2018 incident

[50] Corroboration from neighbours: The RAD found the Applicant failed to provide written statements from his neighbours to corroborate this incident. The RAD found this to be suspicious because the Applicant alleged a crowd of neighbours had gathered in front of his house. The Applicant submits the RAD mischaracterized his testimony as he stated while his neighbours witnessed the February 17, 2018 incident, they did not witness the March 18, 2018 incident:

> **MEMBER:** So the last time Buddhist extremists visited your house the neighbours gathered in the front of your house. Did the neighbours gather this time?
>
> **CLAIMANT:** The last time they did not come in front of our house but they were looking from their gardens. But this time I didn't see anyone.

[51] I note the Respondent says the Applicant's testimony reveals the neighbours witnessed the prior incident from the front of their homes, but for the March 8, 2018 incident they witnessed the incident from their gardens. This submission is not accurate because the transcript demonstrates the Applicant testified: "last time […] they were looking from their gardens" and

"this time I didn't see anyone." The neighbour witnessed from their gardens for the February 17, 2018 incident and no one witnessed the March 8, 2018 incident.

[52] Therefore, I agree it was unreasonable for the RAD to expect corroboration from neighbours on this point.

[53] Corroboration from the Muslim friend: The RAD found lack of corroborating documents from the Applicant's Muslim friend strained the Applicant's credibility. The Applicant submits the evidence was that he lost touch after the arrest and never heard from him again, and that it was unreasonable for the RAD to assume the Applicant could have contacted him to obtain evidence, or that he would have been capable or willing to contact him after the trauma they both endured.

[54] In my view, this issue is one of weighing and assessing the evidence which this Court should not do according to *Vavilov* at para 125 cited above.

[55] Plausibility of Police Involvement: The RAD found it implausible that the Buddhist gang called police after they committed several offences, that police dispersed the armed extremists by "simply asking them to leave", and that police arrested the Applicant because they suspected he was gay. The Applicant submits police did not arrest him because they suspected he was gay, rather they arrested him because he was accused of homosexuality and because he had been caught "harbouring a Muslim Jihadist". According to the country documents, homosexual acts are illegal in Sri Lanka and may result in up to ten years in prison. The Applicant further cites to

a 2018 UK Home Office Report, which found LGBT individuals in Sri Lanka face assault and extortion by police officers, who use the laws to wrongfully detain sexual minorities.

[56] In my view, the RAD had plausibility concerns over the fact Buddhist extremists risked calling police while they themselves were engaged in crimes and objective reports of arrests in response to the violence against Muslims. I note there were objective reports of hundreds of arrests in response to the violence against Muslims, including arrest of a hardline Buddhist organization leader and yet these individuals faced no repercussions or arrests despite the serious crimes alleged.

[57] I note plausibility findings are to be made in the clearest of cases. See *Valtchev v Canada (Minister of Citizenship and Immigration),* 2001 FCT 776 at para 7. Here, this plausibility finding could have been decided either way, i.e., it fell within a range of reasonable outcomes. In my view on balance, the RAD's finding was open to it.

[58] Mosque Letter: The RAD found the mosque letter was too vague to be credible. The Applicant submits this was an error because the letter stated: "(i) the Applicant's family business was located on land owned by the mosque; (ii) in March 2018, the conflict between Sinhalese and Muslims in Kandy erupted and Muslims were attacked and their properties were destroyed by Buddhists; (iii) a group of Sinhalese extremists went to the Applicant's house, assaulted him and Abubaker, forced them to 'behave like homosexuals,' and accused the Applicant of betraying the nation and Buddhism; (iv) the Applicant went into hiding and fled Sri Lanka."

[59] In my view, this issue is also one of weighing and assessing the evidence which this Court should not do according to *Vavilov* at para 125 cited above.

(2) State protection

[60] In *Dawidowicz v Canada (Citizenship and Immigration),* 2019 FC 258 at para 10, and cases cited therein, the Court held the proper legal test for state protection is whether state protection is adequate at the operational level.

[61] Regarding the February 13, 2018 incident, the RAD found the Applicant failed to rebut state protection because he testified to reporting the incident to police, which resulted in one thug being arrested shortly thereafter. He was then assisted by a Superintendent who directed his complaint be investigated. Thus, state protection at the operational level demonstrated not only efforts made by the state, but actual results. The Applicant failed to follow up with his complaint and thus, had no way of knowing the extent of state protection available to him.

[62] Regarding the February 17, 2018 incident, the RAD found the Applicant failed to rebut state protection because he did not report this incident to authorities. The Applicant's reasoning was that he was unimpressed with the police investigation into the first incident. With respect, that is insufficient.

[63] In *Moya v Canada (Citizenship and Immigration),* 2016 FC 315 [Kane J] at para 73, held "to be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect". Here, the Applicant may have

been unimpressed with the police investigation into the first incident; however his reasoning is not adequate to rebut the presumption of state protection.

(3) *Sur place* analysis

[64] The Applicant submits the RAD erred in finding he does not face forward-looking risk as a failed asylum seeker. The Applicant submits the evidence reveals he is considered to be a criminal by the Sri Lankan authorities and that he has been charged under the *Prevention of Terrorism Act.* However, I note the only evidence the Applicant is charged is the Lawyer's Letter, which the RAD found lacked credibility for stating he sought police assistance after the second event, when the Applicant testified to not seeking police assistance. I am not persuaded this assessment was unreasonable, and note once again this is a matter of weighing and assessing evidence which this Court should not do according to *Vavilov* at para 125 cited above.

[65] The Respondent submits there was no police documentation before the RAD to assert the Applicant was ever charged with an offence, but this assertion is only supported by the Lawyer's Letter, which was reasonably assigned no weight.

[66] I am not persuaded this state protection analysis is unreasonable.

VII. Conclusion

[67] In my respectful view, the Applicants have not shown the decision of the Officer was unreasonable or that procedural fairness was breached. In my view, the Decision is transparent,

intelligible and justified based on the facts and law before the decision maker. Therefore, this application will be dismissed.

VIII. Certified Question

[68] While at the outset the Applicant said neither party proposes a question of general importance to certify, counsel for the Applicant later asked for and I allowed time to propose such a question after the hearing. He has now proposed:

> Where a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board that is based, in part, on specific adverse credibility findings, is appealed to the Refugee Appeal Division (RAD), is it a breach of procedural fairness for the RAD to make additional adverse credibility findings based on the Record of the RPD proceeding that were not made by the RPD in the first instance, without first giving the Appellant notice of its intention to possibly do so?

[69] I decline to certify this question.

[70] First, the preponderance of jurisprudence cited above at paragraph 47 decides the point in the negative, such that the matter has already been decided.

[71] Secondly, in this particular case, many if not most of the credibility assessments made by the RAD were in fact raised and or invited by the Applicant himself. No argument was made that notice should be given to the Applicant of credibility assessments the Applicant himself asked the RAD to make. Therefore, the answer to the question on the facts of this application did not arise and in any event an answer would not be dispositive of this case.

[72] In this connection, the Respondent submits and I agree:

> As noted by the Federal Court of Appeal, submissions made by applicant to the administrative decision-maker must be considered in comparison to the submissions he raised before the Federal Court. [*Canada (Attorney General) v Herrera-Morales*, 2017 FCA 163 at para 65.] The Applicant's proposed question is theoretical and in the nature of a reference not dispositive of his matter. [*Mudrak v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 at para 35; *Lunyamila v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46.]
>
> In light of the Applicant's submissions to the RAD, what would be a new issue on appeal requiring notification is also a matter settled [*Mudrak v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 at para 36; *Torre v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 48 at para 3; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 39.] by Supreme Court of Canada's jurisprudence of *Mian* [*R v Mian*, 2014 SCC 54 at para 30]:
>
> > An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

JUDGMENT in IMM-4822-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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