Federal Court  Cour fédérale

Date: 20220118

Docket: IMM-3690-20

Citation: 2022 FC 59

Ottawa, Ontario, January 18, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

SATTAR NAZMIL MOHAMED MUSTHAFFA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (the "RAD") of the Immigration and Refugee Board dated July 29, 2020. The RAD dismissed an appeal from a decision of the Refugee Protection Division ("RPD"), which concluded that the applicant was not a Convention refugee or person in need of protection under s. 96 and subs. 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] For the reasons that follow, the application is dismissed.

I. Facts and Events Leading to this Application

[3] The applicant is a Muslim citizen of Sri Lanka, whose family owns and controls industrial facilities and retail stores in Sri Lanka.

[4] The applicant experienced the Sri Lankan civil war from an early age, including forced relocations, bombings, extortions, threats and attacks against Muslims and mosques.

[5] In 2004, the applicant was involved in an incident involving members of a gang known as the “Karuna” group. While driving with his father, members of the gang forced the applicant to pull over to let their convoy pass. The gang made threats to his father. The incident ended in an altercation in which the applicant was hit with a gun. The gang took his vehicle’s licence number.

[6] Later in 2004, the applicant came to Canada on a 3-year study permit. He attended the University of Windsor and York University.

[7] During his studies in Canada, the applicant returned to Sri Lanka in 2007. While there, he witnessed a telephone call by members of the Karuna gang to his father, in which the caller extorted money from his father and threatened to kidnap or kill the applicant.

[8] His study permit was extended once, for one year. From 2009 to 2018 when he claimed protection under the *IRPA*, the applicant remained in Canada without legal status.

[9] The applicant testified that from 2004 onwards, he experienced depression. It peaked in the period 2009-2011. However, he did not seek medical help until 2018.

[10] The applicant claimed protection in Canada because he fears persecution from the Karuna gang.

[11] The RPD denied his claim. The RPD found that the determinative issue was “credibility including subjective fear”. The panel’s concerns about the applicant’s evidence were “multiple and reside in the fact that the [applicant’s] allegations and the evidence are clearly indicative of numerous implausibilities and a lack of subjective fear”.

[12] Overall, the RPD concluded that the applicant had “not established having a subjective fear of returning to Sri Lanka and his explanations, in order to justify a delay of over 13 years” in claiming protection since he arrived, were “not credible nor plausible”.

[13] The applicant appealed to the RAD. In his written memorandum, he submitted, first, that the RPD came to the wrong conclusion on his lack of subjective fear. He argued that the RPD engaged in speculation because it did not accept his allegations concerning his mental health and erroneously misinterpreted or ignored the contents of the supporting letters from his family.

[14] Second, the applicant argued that the RPD did not consider the “totality” of the evidence, by: (i) failing to consider the applicant’s own explanation for why he delayed in seeking protection and the expert evidence he filed to support his claim; and (ii) failing to understand that the family’s supporting letters showed he was at “personal risk” if he returned to Sri Lanka.

[15] In a section entitled “PERSONAL RISK”, the applicant’s submissions referred to evidence from his sister that it was mainly the male population who were targeted by the Karuna group, that male members of their family had been targeted and that due to the applicant’s mental distress he would be at more risk. The applicant’s memorandum referred to his brother-in-law’s statement that the Karuna group had often approached members of their family to inquire about the applicant. The memorandum further noted the applicant’s own testimony that discussed why he was more at risk if returned to Sri Lanka, as he is known to be wealthy, was physically assaulted in 2004 and the Karuna group asked his brother-in-law’s brother about him. He submitted that in his oral testimony and the documentary evidence, the “personal threat” to him was communicated to the RPD and the evidence was consistent. The applicant argued that the RPD erred by concluding that there was no evidence presented in support of his claim of personal risk.

[16] The applicant’s appeal memorandum also asked the RAD to consider all the evidence – the audio recording of the hearing, the supporting evidence from his family and the mental health professionals, and the objective evidence including documents corroborating the threat of the Karuna group – and substitute the RAD’s own conclusion declaring that the applicant was a person in need of protection under the *IRPA*.

II. The Decision under Review

[17] The RAD stated that the determinative issue on the appeal from the RPD was whether the applicant had “established from a forward-looking perspective that he faces a risk of persecution or of serious bodily harm”. The RAD stated that it would “review the credibility and subjective fear findings of the RPD that [were] relevant to analyzing this determinative factor”.

[18] The RAD stated that its role was to review the evidence and decide whether the RPD made the correct decision.

[19] With respect to the applicant's delay in claiming protection, and the reasons he advanced for that delay, the RAD found:

- The psychological reports submitted into evidence confirmed that the applicant exhibited symptoms consistent with post-traumatic stress and depression. However, the RAD found that those reports could not "attest to his ability or lack thereof to pursue refugee status prior to 2018, as the writers [of the reports] had no prior contact with him. In addition, one failed attempt to work with a fraudulent immigration consultant does not adequately explain the considerable delay to regularize his status or seek refugee status".
- In considering the applicant's subjective fear, the RAD accepted that he "may well have historical trauma in what he witnessed when growing up in Sri Lanka and fear relating to conversations he overheard between his father and alleged Karuna gang extorters in 2007".
- The delay in claiming refugee status undermined the applicant's subjective fear, but this factor in itself was not determinative of his credibility or of his claim for refugee status.

[20] The RAD then stated that a "successful refugee claim must incorporate both a subjective and objective basis to a [claimant's] fear of persecution or of serious bodily harm. Furthermore,

the refugee claimant must establish his fear of persecution or risk of serious bodily harm on a forward-looking basis."

[21] The RAD noted that the applicant feared members of the Karuna group whom he alleges may seek to harm or kill him. The RAD noted that the applicant had submitted country condition documents to the RPD, published in 2007, that discuss human rights violations attributed to the Karuna group. The RAD stated that it had reviewed the latest National Documentation Package for Sri Lanka and found no reference to the Karuna gang in the major reports of the US Department of State, Amnesty International and Human Rights Watch. The RAD found that "if the Karuna gang was still active as a significant perpetrator of human rights abuses in Sri Lanka, there would have been reports of their ongoing activities".

[22] The RAD recognized that the Karuna gang had "in the past" threatened his family members that he would be harmed or killed if their extortion demand was not met. However, the applicant had not "personally experienced any direct threat or attempt to abduct or kill him". The RAD confirmed that it had reviewed the support letters from his family members. The RAD found that they did not refer to any ongoing targeting of the applicant (although they did refer to the history of the civil war and human rights violations attributed to the Karuna gang). The RAD concluded that the applicant's fear of being harmed or killed by the Karuna gang was "speculative".

[23] The RAD concluded that the applicant had not established from a "forward-looking perspective" that he would face a serious possibility of persecution on a Convention ground or

that it was more likely than not that he would face a personalized risk to life, cruel or unusual treatment or punishment, or a risk of torture should he return to Sri Lanka.

[24] In this Court, the applicant challenged the RAD's decision on two grounds: (a) that he was deprived of procedural fairness; and (b) because the RAD's decision was substantively unreasonable owing to an erroneous finding of fact.

[25] The applicant did not allege any error in the RAD's description of its role on appeal, or in its statements that a successful claim for protection must incorporate both a subjective and objective basis to a claimant's fear of persecution or of serious bodily harm and that a claimant must establish a fear of persecution or risk of serious bodily harm on a forward-looking basis.

III. Analysis

A. *Procedural Fairness*

[26] The applicant submitted first that the RAD failed to observe his right to procedural fairness. According to the applicant, the RAD determined the appeal on the basis of lack of forward-looking risk, an issue not determined by the RPD and not raised on appeal. The applicant submitted that the RAD did not find that subjective fear was a determinative factor in the applicant's refugee claim. He submitted that the forward-looking risk was legally and factually distinct from credibility and subjective fear. On this view, the RAD breached procedural fairness because it did not advise him that it was considering a "new" issue – one not raised by him as the appellant – and did not provide an opportunity to make additional

submissions on that issue. At the hearing, the applicant confirmed that he did not claim that the RAD deprived him of a chance to adduce additional evidence.

[27] The Court's review of procedural fairness issues involves no deference to the decision maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual(s) affected: *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69, at paras 46-47; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49 and 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[28] Having carefully read and considered the RPD's decision, the applicant's memorandum on appeal to the RAD and the RAD's decision, I conclude that the applicant was not denied procedural fairness by the RAD. He was aware of the case to meet and had an opportunity to make submissions (and did so) on the forward-looking risks to him if he returned to Sri Lanka.

[29] Justice Norris set out the following principles in *Lopez Santos v Canada (Citizenship and Immigration)*, 2021 FC 1281:

> [45] The test for whether procedural fairness required notice and an opportunity to be heard is whether the RAD raised an issue that is new in the sense that it is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues raised on appeal: see *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65 to 76, adopting the test in *R v Mian*, 2014 SCC 54 at para 30; see also *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 40. The test applies equally to grounds relied on by the RAD and to the lines of reasoning it follows in disposing of an appeal: see *Kwakwa v*

> *Canada (Citizenship and Immigration)*, 2016 FC 600 at para 25. Thus, while it is open to the RAD to make findings that go beyond those made by the RPD, if they do not reasonably stem from the issues raised on appeal, procedural fairness requires that the appellant be given notice and an opportunity to be heard. Put another way, the RAD may not "make additional findings or analyses on issues unknown to the applicant" (Kwakwa para 24).
>
> [46] This Court has extended some latitude to the RAD to raise new issues relating to a claimant's credibility without further notice when the claimant's credibility is "at the heart of" the RPD's determination or the grounds of appeal advanced at the RAD: see *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 at para 13.

See also the recent reasons of Justice Pallotta in *Aghedo v Canada (Citizenship and Immigration)*, 2021 FC 450, at paras 15-18 and *Sadeghi v Canada (Citizenship and Immigration)*, 2021 FC 604, at paras 17 and 20.

[30] As noted by Justice Norris in *Lopez Santos*, the Supreme Court in *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689, stated that "new issues are legally and factually distinct from the grounds of appeal raised by the parties" that "cannot reasonably be said to stem from the issues as framed by the parties": *Mian*, at para 30. The Court also stated that "issues that are rooted in or are components of an existing issue" are also not "new issues". It gave the following example:

> Appellate courts may draw counsel's attention to issues that must be addressed in order to properly analyze the issues raised by the parties. For example, in a case involving a claim of self-defence, the parties may argue exclusively over whether the accused's belief that his life was in danger was reasonable, but it may be necessary for the court to first analyze the issue of whether the accused subjectively believed that he was at risk of death. This is not a "new issue", but a component of the overall analysis of the grounds as raised by the parties. However, where appropriate, the court may have to be prepared to grant even a brief adjournment to allow the parties to consider and canvass the issue.

[31] Applying the principles described in *Mian* and *Lopez Santos*, I conclude that the issues decided by the RAD were not new issues, but stemmed from the issues decided by the RPD and raised by the applicant in his appeal memorandum. In addition, the forward-looking nature of the risk allegedly faced by the applicant was an inherent or implicit component of the RPD's and the RAD's analyses, as well as the applicant's express position on the appeal in his written memorandum to the RAD. This is not a case in which the applicant did not know the case to meet on appeal.

[32] In my view, the issues analyzed by the RPD, by the applicant's in appeal submissions and by the RAD were closely intertwined. All three addressed the forward-looking nature of the risks claimed by the applicant. In addition, what the RPD and RAD respectively characterized as "determinative" was not so different as the applicant maintained. The RPD's decision turned on credibility, implausibility and the applicant's lack of subjective fear. It concluded that he had not established that he had a subjective fear of returning to Sri Lanka. On appeal, the applicant's memorandum of argument to the RAD raised the issue of "personal risk" to him if he returns to Sri Lanka and referred to the evidence that supported his claim. While he did not state expressly that he faced a "forward-looking risk", that is the argument he made. He also invited the RAD to look at all the evidence before the RPD, come to its own conclusion, and declare that he was a person in need of protection. The RAD's reasons stated at the outset that the determinative factor was whether he had established from a forward-looking perspective that he faces a risk of persecution or serious bodily harm, and that the RAD would review the RPD's credibility and subjective fear findings that were relevant to analyzing that determinative factor.

[33] The applicant relied on *He v Canada (Citizenship and Immigration)*, 2019 FC 1316. The applicant submitted that the RAD focused on different evidence than was central to the RPD's analysis, without giving him an opportunity to make submissions on the evidence. Specifically, the RAD considered documents from the NDP and letters from the applicant's family.

[34] In *He*, the reasons of the RPD and the RAD had considered two issues in "vastly different ways" that were essentially opposite: *He*, at para 23 (quotation), 24-33 and 42-48. Justice Elliott concluded that the RAD had introduced a determinative, entirely new and much more extensive analysis of certain supporting documents: at para 67. She noted the "extraordinary difference" between the RAD's analysis and the RPD's lack of analysis and found that the evidence reviewed by the RAD was not central to the RPD's decision or to the appeal: at paras 79-80. In the result, Mr He did not know the case to meet on appeal: at paras 16 and 80.

[35] The circumstances in the present case are quite different. Here, the RAD's reasoning was far more connected in substance to the RPD's reasoning. Both considered the explanations for his delay of many years to make a claim for protection, including the professional reports about his mental health. Both considered the evidence he claimed to support a subjective fear of persecution or serious bodily harm on return to Sri Lanka. Both considered whether he would be a "target" if he returned to Sri Lanka (as his appeal memorandum argued) and found he would not be.

[36] With respect to his subjective fear of the Karuna group, the RAD expressly concluded that the applicant's fear of being harmed or killed by the Karuna group was "speculative". The

RPD did not believe his claim of subjective fear on the evidence before it, considering his own experiences in Sri Lanka, his family's actions while still there, and the years of delay while the applicant was in Canada before he claimed protection (it was 9 years from the time the applicant stopped attending university until he filed his claim).

[37] With respect to whether the applicant was at risk on his return from the Karuna group, the RAD reviewed the major reports in the NDP and concluded that the Karuna group was not mentioned – in effect, it had no ongoing activities and therefore could not pose a risk to him. The RPD found that "[n]owhere can we find evidence of allegations of physical violence from the Karuna group in recent years, so long as they are paid extortion money" (as the applicant claimed his family did).

[38] I do not agree with the applicant's position that the RAD should have provided him with an opportunity to make submissions on documents central to its decision, because the applicant's own submissions raised those documents. The applicant's memorandum of argument to the RAD expressly relied upon the contents of the family members' letters to support two different parts of his submissions on appeal, including his "personal risk" if he returned to Sri Lanka. While the RPD did not expressly refer to the reports in the NDP, the applicant's appeal submissions invited the RAD to consider the objective evidence including the "significant number of objective documents corroborating the threat" of the Karuna group. The RAD noted that the applicant had submitted earlier reports to the RPD. The RAD properly considered more recent reports from three reputable sources (the US Department of State, Amnesty International and Human Rights Watch).

[39] Lastly, I also do not find the present case comparable to other decided cases in which this Court had concerns about procedural fairness. The RAD did not make a new or different credibility finding, or use different reasoning to reach one: see *Lopez Santos*, at paras 47-48; *Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063; *Emac Sonkoue v Canada (Citizenship and Immigration)*, 2018 FC 1173; *Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180; *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725. The RAD did not rest its decision on a different issue as in *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 (*sur place* claim) and in *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 (internal flight alternative). The issue in this case also did not concern a new analysis of key documents, as occurred in *He* and *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 (identity papers). Nor can the applicant claim that the forward-looking nature of the alleged risk was an issue unknown to him: see *Koffi*, at para 38; *Kwakwa*, at para 25; *Emac Sonkoue*, at para 18.

[40] For these reasons, the applicant's first overall submission cannot succeed. The RAD did not deprive him of procedural fairness.

B. ***Was the RAD's Decision Reasonable?***

[41] The applicant's second position was that the RAD's decision was unreasonable because it erroneously found as a fact that he had not "personally experienced any direct threat or attempt to abduct or kill him". The applicant contended that although he was not threatened in person, he was personally threatened because he was present when two incidents occurred in 2004 and 2007.

[42] On this issue, the standard of review is reasonableness, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15.

[43] A reasonable decision is one that is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194. A decision may be unreasonable if it is in some respect "untenable" in light of the relevant factual and legal constraints that bear on it, or if the decision maker fundamentally misapprehended or failed to account for the evidence before it: *Vavilov*, at paras 101 and 125.

[44] In this case, the applicant submitted that the RAD made an erroneous finding of fact on an issue which, in his submission, was critical to the outcome of his appeal. He submitted that it was a gross misapprehension of the evidence for the RAD to find that he had not personally experienced any "direct" threat to abduct or kill him. The applicant's Basis of Claim narrative described the events in 2004 when the Karuna gang pulled over the applicant and his father in their vehicle. The perpetrators threatened his father that the applicant would be kidnapped or shot, and that the whole family would be killed. In addition, the applicant also noted that, in 2007, he was listening on speaker phone and personally heard the extortion demands made to his father. The applicant's Basis of Claim narrative stated that the caller threatened to harm to kill him if the family did not pay.

[45] The applicant's written submissions acknowledged that these threats were not made directly to him, but that he was personally identified and threatened in each case.

[46] In my view, the RAD did not commit a reviewable error. The RAD's statement was as follows:

> While the [applicant] alleges that members of the Karuna gang have in the past threatened his family members that he would be harmed or killed if their extortion demand[s] were not met, he has not personally experienced any direct threat or attempt to abduct or kill him.

[47] Read in its entirety, this statement adequately reflects the two incidents described in the applicant's Basis of Claim narrative and his submissions on this application. It admittedly draws a nuance, given the presence of the applicant during both events. However, in my view, it was not an untenable description of the circumstances and did not go so far as to fundamentally misapprehend the evidence: *Vavilov*, at paras 106 and 125-126. I find no basis in *Vavilov* on which to interfere with the RAD's statement on this judicial review application.

[48] The applicant has therefore not demonstrated that the RAD's decision was unreasonable on the ground alleged.

IV. Conclusion

[49] Accordingly, the application must be dismissed. Neither party proposed a question for certification and none is stated.

JUDGMENT in IMM-3690-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified for appeal under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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