

Federal Court



Cour fédérale

Date: 20220506

Docket: IMM-3153-21

Citation: 2022 FC 673

Ottawa, Ontario, May 6, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THEVASUTHAN MANIKKARASA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] In this judicial review application, Mr. Manikkarasa, a citizen of Sri Lanka, challenges the decision of the Refugee Appeal Division (RAD) to dismiss the appeal from the decision of the Refugee Protection Division (RPD) which found that Mr. Manikkarasa (the Applicant) is neither a Convention refugee nor a person in need of protection, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA, or the Act]. Leave to launch the judicial review application was granted in accordance with section 72 of the IRPA.

I. Facts

[2] The Applicant arrived in Canada on July 9, 2019. What preceded his arrival is much less clear. In view of the conclusion reached by the Court, it is prudent to refer to the allegations in this case carefully. The Court has concluded that the matter ought to be sent back to a differently constituted panel of the RAD for a new determination.

[3] The Applicant alleged that he witnessed the kidnapping of his uncle on December 19, 2007. According to his basis of claim (BOC) dated July 27, 2019, the Applicant was helping his uncle in his shop when a number of persons (probably four persons plus a driver) took his uncle; the Applicant tried unsuccessfully to intervene and was rebuffed. In his BOC, the Applicant identified members of the Sri Lankan army as having kidnapped his uncle, but these individuals were not wearing uniforms. The Applicant identifies himself as a “Sri Lankan Tamil by race and nationality”. The abduction happened during the civil war in Sri Lanka (2006-2009, according to the BOC).

[4] There does not appear to have been developments of notice in the matter until April 30, 2018. While the Applicant was at an army camp in Sooriyapura for the delivery of goods, he claims he recognized an officer who had participated in the kidnapping of his uncle close to nine years earlier. There was a confrontation before the Applicant was expelled from the camp.

[5] On his way back home that day, the Applicant was intercepted by four uniformed army personnel. His vehicle was damaged and he was pulled inside the jungle where he was insulted

and intimidated at gunpoint. According to the Applicant, he was questioned as to why he was asking about his uncle; he was forcefully instructed not to say anything about the officer responsible for the kidnapping. He was advised that he would be under surveillance. He was released after the money he was carrying was stolen.

[6] The second development occurred, according to the BOC, on July 18, 2018, when the Applicant testifies in his BOC that he was taken by the army to the same camp, Sooriyapura, where he was asked about having revealed to anyone or the media about his uncle's kidnapping and the officer involved. The Applicant claims that he was assaulted and threatened before he was allowed to go.

[7] The third development allegedly took place on July 30, 2018. The Applicant was taken again to the same camp at Sooriyapura where he says "I was tortured with the accusation that I had told the media and the human rights about the officer who did kidnap my uncle" (BOC, pp. 2/3, CTR, p. 63). The Applicant declares in his BOC that he had told his aunt about his identification of an officer responsible for the kidnapping and his presence at the army camp. He goes on to state that his aunt had made the complaint to the relevant authorities.

[8] The Applicant said that he was detained, interrogated and tortured during four days. The Applicant's wife retained a lawyer who got him released after paying a bribe to an officer. That officer told the Applicant's lawyer that the army was planning to kill the Applicant. With the assistance of his counsel, the Applicant found shelter in a church in Trincomalee where he stayed from August 2018 to mid-December 2018.

[9] The Applicant left Sri Lanka on December 27, 2018. He arrived in the United States on February 9, 2019 where he was initially detained. He arrived in Canada on July 9, 2019. The Applicant reports that the Sri Lankan army went to his house looking for him while hiding at the church and after his departure from Sri Lanka.

[10] Two pieces of evidence need to be mentioned. One is the letter from the Sri Lankan lawyer who was instrumental in getting the Applicant released after his arrest by the military on July 30, 2018. In a three-paragraph letter dated December 25, 2019, the lawyer makes some assertions that can only be hearsay about the abduction of the Applicant's uncle and arrests to which his client was subjected before July 30, 2018. Counsel for the Applicant suggested that such evidence is corroborative. However, this evidence lacks independence as it merely repeats information counsel did not witness: the paragraph does not derive from a source extraneous from the testimony of the Applicant benefiting from corroboration.

[11] The second paragraph from the letter does not suffer from the same deficiency. It describes the lawyer's involvement in the release of the Applicant from detention starting on July 30, 2018. The lawyer testifies that he was instrumental in allowing his client to find refuge in a church after the lawyer was told by the army officer that "the army was planning to shoot my client" (letter from Attorney at law, T. Karikalan, CTR, pp. 165-166). Finally, the letter concludes with the opinion that the Applicant is at risk because of his high profile with the local authorities. Indeed, the Applicant's wife has been visited by "the Army intelligence" about her husband's whereabouts.

[12] The other piece of evidence consists of a letter (CTR, p. 167), dated December 27, 2019, from the parish priest who offered shelter to the Applicant for some three and a half months at the end of 2018. The parish priest attests that the Applicant took shelter fearing arrest from the Sri Lankan army.

II. Decision under review

[13] The RPD found that credibility was the determinative issue in this case. The serious possibility of persecution in Sri Lanka was not established in view of the testimony offered by the Applicant which is said to have been vague, general, presenting inconsistencies and suffering from plausibility issues about which the Applicant failed to offer satisfactory explanations. The RPD articulated its concerns.

[14] The only decision that is before the Court is that of the RAD that conducted its own review of the evidence presented before the RPD (no new evidence was submitted by the Applicant and there was not an oral hearing before the RAD). The RAD agreed with the RPD that credibility was the determinative issue in this case.

[15] Reading the short set of reasons given by the RAD, it appears that the analysis is limited to two issues:

- 1) the Applicant was evasive as to whether his aunt, the wife of the abducted uncle, complained to the authorities after her nephew, the Applicant, confronted an officer in April 2018;

- 2) the BOC and the Applicant's testimony allege that he was targeted because he confronted one of the uncle's abductor. The RAD finds that the incidents of 2018 have not been established.

[16] As for disclosure to the "authorities", as put by the RAD, the BOC states unequivocally that the disclosure to the "media and the human rights about the officer who did kidnap my uncle" was not by the Applicant but rather that "I did tell my aunt Mrs. Sivagurunathan about the officer who was responsible for my uncle's kidnapping and about his location (Sooriyapura army camp)" (BOC, pp. 2/3, CTR, p. 63). The RAD takes issue, finding that the Applicant's testimony before the RPD lacked credibility. I reproduce paragraph 11 from the RAD's reasons which consists in the articulation of the reasons on this issue:

[11] The Appellant first said in his BOC that his aunt spoke to a human rights organization. He then admitted that he did not know this for sure but only inferred that she did because he was interrogated about this while being detained. He further testified that he never spoke to his aunt after being released from custody, even after traveling to Canada. The Appellant appears to be unsure of what exactly led to his detention and, despite stating the reasons with certainty in his BOC, his testimony was evasive as to this crucial aspect of his claim. I agree with the RPD that this evasive and contradictory testimony impacts his credibility.

[17] The other issue is concerned with the events alleged to have taken place in 2018. The RAD seeks to find a contradiction between the Applicant's BOC and testimony, and the letter of the Applicant's lawyer in Sri Lanka who secured the Applicant's release from detention in early August 2018, and was instrumental finding shelter in a church.

[18] The RAD juxtaposes, at paragraph 6, the confrontation of April 30, 2018 of the Applicant and the alleged abductor, and the letter from the Sri Lankan lawyer reporting that the Applicant was held in custody on July 30, 2018. The letter provides details about the lawyer's involvement in the release of the Applicant and links up the Applicant with the parish priest who provided shelter after the Applicant's release. The RAD faults the letter "for revealing to the authorities including human rights (sic) about the abduction of his uncle", while it suggests that the real issue with the army was with respect to this confrontation of April 30, 2018. The RAD considers this to be a contradiction between the Applicant and his lawyer as to the reason he was detained. That, says the RAD, constitutes a "major credibility issue" (RAD decision, para 6).

[19] The RAD continues its explanation by stating that the lawyer should know the most about why the client was detained in the first place. The confrontation of April 30, 2018, which, according to the RAD, is the core reason triggering the problems with the authorities, is not mentioned in the lawyer's letter. The lawyer is said to have stated the wrong reason for the detention which "contradicts other important aspects of the evidence" (RAD decision, para 7). That "raises serious credibility concerns relating to the Appellant's core allegations of recognizing and confronting one of his uncle's abductors" (RAD decision, para 9).

[20] In effect, the RAD identifies a "contradiction" between the Applicant and his lawyer in Sri Lanka who acted on his behalf when he was arrested on July 30, 2018. That "contradiction" is the reason given by the RAD for finding that the incidents of 2018 are not even established (RAD decision, paras 12 to 16). While acknowledging the letter from the parish priest, it does not corroborate the incidents alleged in 2018 that led the Applicant to go into hiding before

fleeing Sri Lanka. That letter does not have the effect to outweigh the credibility concerns identified between the Sri Lankan lawyer and the Applicant.

[21] As a result, the RAD found that the incidents of 2018 have not been established and the reason for the departure is also missing. The 2007 abduction took place so long ago that “there is nothing in the record that suggests that he [the Applicant] would be targeted today because of what happened in 2007” (RAD decision, para 15).

III. Standard of review and Analysis

[22] The parties did not address in their written case the standard of review applicable in this matter. Nevertheless, the case was argued on the basis of reasonableness and there is no doubt that issues of credibility are addressed by a reviewing court on that basis.

[23] The standard of reasonableness brings with it the principle of judicial restraint and the reviewing court adopts an appropriate posture of respect. It remains however that the judicial review must entail a sensitive and respectful but robust evaluation of administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 12).

[24] Reviewing courts are instructed by the *Vavilov* Court to develop an understanding of the decision under review for the purpose of determining whether the decision bears the hallmarks of a reasonable decision: justification, intelligibility and transparency. The decision must be “justified in relation to the relevant factual and legal constraints that bear on the decision”

(*Vavilov*, above, at para 99). There is no doubt that the review process is now concerned not only with the outcome, but also with the decision-making process: reasons matter. They are the “primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts” (*Vavilov*, above, at para 81). In my view, the reasoning in this case is defective to the point of making the RAD decision unreasonable, because it lacks intelligibility and transparency.

[25] The shortcomings in the decision are sufficiently serious that it cannot be said that it exhibits the hallmarks of reasonableness. They are not superficial or peripheral. The shortcomings are central and significant, enough to render the decision unreasonable as opposed to some line-by-line treasure hunt. In my estimation, the case at bar constitutes an excellent example of what is described at paragraph 126 of *Vavilov*:

[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.

[My emphasis.]

[26] The Court examined carefully the transcript of the hearing before the RPD. It was rather chaotic, with the RPD member, the Applicant’s counsel and the interpreter all having speaking

parts during the hearing. As previously seen, the RAD found a contradiction between the Applicant's narrative and a letter written by his lawyer. That lawyer had assisted the Applicant only with respect to his detention starting on July 30, 2018. In the view of the RAD, a lawyer ought to have known the most about why the client was detained in the first place. There is no authority that is offered for such proposition and I am not aware of any. More importantly, it is less than clear what the "contradiction" is about.

[27] The lawyer's letter is faulted by the RAD to the point of constituting a "contradiction" with what the Applicant said. The letter only describes the lawyer's activities to secure the release of the Applicant from detention in late July, early August 2018. The letter is clear that the Applicant "was held in custody by the army personnel for revealing to the authorities including human rights about the abduction of his uncle Mr. Murugupillai earlier in December 2007". As a matter of fact, the Applicant's BOC does not assert that he was detained because he recognized and confronted his uncle's abductor on April 30, 2018. Rather, the Applicant confronted the alleged abductor on April 30, 2018, but he left the military camp after that. It is only on his way back home later that day, according to the BOC, that he was intercepted on the road in the jungle by uniformed army men, was intimidated and told not to reveal anything about the kidnapping army officer.

[28] The BOC and the Applicant's testimony before the RPD are consistent about being arrested twice in July 2018. Twice he was arrested said the Applicant because he was suspected of having spoken about the person he confronted on April 30, 2018. The Applicant was arrested on July 18, 2018, when he was questioned about having revealed to anyone or any media about

the kidnapping and the officer who allegedly took part in the kidnapping. The confrontation of April 30 did not produce detention at the military camp according to the BOC, but the Applicant was detained on July 18, 2018, because, he says, there appears to have been some disclosure relating to the alleged perpetrator of the kidnapping.

[29] The Applicant was also detained on July 30, 2018. This time, the BOC asserts that he was detained for four days, tortured and accused of having told the media and some human rights organization about the officer involved in his uncle's kidnapping and his location at the Sooriyapura camp. I have not found vacillation in the testimony before the RPD. The evidence, therefore, is that the detention events in July 2018, on the 18th and the 30th, were related to the disclosure of information about the alleged abduction; the confrontation of April 30, 2018, did not result in detention at the army camp. It is noteworthy that the RAD does not refer specifically to the arrest and detention that are alleged to have taken place on July 18, despite the reference to it in the BOC and being part of the hearing before the RPD. The reason for the arrest is given as being the disclosure relative to the connexion between the abduction and the military officer. The evidence seems to be to a different effect.

[30] There are two shortcomings in the RAD decision. One is that, contrary to the RAD finding, there is no discrepancy between the letter from the Sri Lankan lawyer and the evidence of the Applicant. The BOC is clear that the two incidents (July 18 and July 30, 2018) involving detention at the army camp were related to the disclosure of information about the alleged perpetrator of the uncle's kidnapping. That is perfectly in line with the letter coming from the Sri Lankan lawyer. It appears that the decision maker misapprehended the evidence before him.

Thus, there is no discrepancy between the two. Indeed, the lawyer is careful to write directly about what he was personally involved in, that is, his intervention concerning the detention starting on July 30, 2018. The other information in the letter is cast in terms of “I was made to know by my client”, which evidently constitutes hearsay.

[31] The second shortcoming is that the letter is impugned because it is said that a lawyer ought to know better about the reason for the detention in the first place. The letter is faulted for not disclosing anything about the April 30, 2018 confrontation. Not only it is left without explanation why the lawyer ought to have better known, but the RAD infers “serious credibility concerns” about the confrontation having occurred. It is in my view unintelligible how the lack of a mention of the confrontation in a letter attesting to a completely different incident can become a credibility issue on the part of the Applicant.

[32] These shortcomings are serious. In order to conclude that the incidents of 2018 (which must include the confrontation of April 2018) had not been established, the RAD concluded that the lawyer’s version, which spoke in terms of the Applicant being in custody for “revealing to the authorities including human rights about the abduction”, was different from the version given by the Applicant. That is not accurate.

[33] The letter from the parish priest, which corroborates that the Applicant took refuge in his church, is given little weight because it did “not outweigh the credibility concerns about the contradiction between what was said by the Applicant and the lawyer’s letter”. There was no

such contradiction and the weight given to that letter will have to be considered afresh in the redetermination of this matter.

[34] There may be reasons why the narrative concerning the three incidents of 2018 (April 30, July 18 and July 30) is inadequate. But the reasons given by the RAD fail because a decision must bear the hallmarks of reasonableness, that is justification, intelligibility and transparency (*Vavilov*, above, at para 99). The RAD had to show that the conclusion reached was based on the evidence before it. In *Vavilov*, at paragraph 15, the Supreme Court states that “[i]n conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified”. In fact, it looks like the RAD misapprehended the evidence or, at the very least, it failed to account for the important evidence before it. I have not found in the decision any explanation with regards to the clear statements about the reasons for detention on July 18 and July 30, 2018. In fact, what was said to be at the heart of the decision, the credibility of the Applicant, appears to have been based on a misapprehension of the evidence.

[35] The letter from the lawyer has to be reconsidered in view of the BOC and the Applicant’s testimony. The credibility concerns based on the alleged “contradiction” between the Applicant and his Sri Lankan lawyer must be reassessed. Furthermore, the RAD discounted the letter from a parish priest which would tend to corroborate that the Applicant took refuge in his church for more than 100 days. The RAD claims that the letter does not outweigh the credibility concerns. It would appear that a new panel of the RAD will obviously have to reconsider that assertion made in this case.

IV. Conclusion

[36] The Court noted during the course of the hearing that the Sri Lankan lawyer and parish priest repeatedly referred to the Applicant as “Mr. M. Thevasuthan”. The Applicant’s wife is also designated as “Mrs. Brammiya Thevasuthan”. Furthermore, the BOC gives the Applicant’s family name as “Manikkarasa”, but the family list in the form speaks of the Applicant’s son having as his family name “Thevasuthan”, while the Applicant’s sister bears the family name “Manikkarasa”. As for the Applicant’s parents, neither of them appears to have as a family name either “Manikkarasa” or “Thevasuthan”, although the father’s first name is listed as “Manikkarasa”. The parties may want to clarify the matter.

[37] The Court concludes that the judicial review application must be granted. In accordance with the guidance provided in *Vavilov* (paras 139 to 142), the matter is remitted to the Refugee Appeal Division for a different panel to reconsider the decision with the benefit of this Court’s reasons.

JUDGMENT in IMM-3153-21

THIS COURT'S JUDGMENT is:

- 1) The judicial review application is granted.
- 2) The matter is remitted to the Refugee Appeal Division for a different panel to reconsider the decision.
- 3) There is no serious question of general importance that ought to be certified.

"Yvan Roy"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3153-21

STYLE OF CAUSE: THEVASUTHAN MANIKKARASA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: APRIL 6, 2022

JUDGMENT AND REASONS: ROY J.

DATED: MAY 6, 2022

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