

Federal Court



Cour fédérale

Date: 20220721

Docket: IMM-6145-21

Citation: 2022 FC 1086

Ottawa, Ontario, July 21, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Teral Sanjeeewaka GAMALATHGE DON

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is citizen of Sri Lanka who fears persecution by a political opponent.

[2] Following his career as a chef, and as a cook on ships, the Applicant became politically active with the People's Liberation Front [JVP]. Because of his political activities, the Applicant was threatened by Nishantha Muthuhettigama [Nishantha], who was a member of the Sri Lanka

Freedom Party [SLFP] and a Member of Parliament. The Applicant also was attacked by those he says were Nishantha's thugs. After that incident in November 2014, the Applicant left Sri Lanka to work on a ship. He returned to Sri Lanka in May 2015 after a regime change following a presidential election. Nishantha continued as a Member of Parliament by realigning with the new President following the election. The Applicant received threatening calls after his return.

[3] Because of the attacks and threats, the Applicant eventually left Sri Lanka for the United States of America [USA] where he sought refugee protection. While there, he learned his wife was having an affair with Nishantha that started before the Applicant left for the USA. The Applicant informed Nishantha's wife about the affair, and he also informed his political colleagues of Nishantha's illicit liquor business.

[4] Consequently, Nishantha's thugs inquired after the Applicant's whereabouts with neighbours. Nishantha called the Applicant in the USA and threatened to kill him if he returns to Sri Lanka. In addition, Nishantha's thugs threatened the Applicant's mother on several occasions.

[5] Because of the Trump administration policies, the Applicant decided to seek refugee protection in Canada instead.

[6] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejected the Applicant's claims, for lack of credibility. The Refugee Appeal Division [RAD] of the IRB dismissed the appeal [Decision].

[7] The Applicant seeks judicial review of the Decision. I am not persuaded that the RAD engaged in a microscopic, over-zealous examination of the Applicant's evidence. For the more detailed reasons that follow, I therefore dismiss the Applicant's application.

II. Issues and Standard of Review

[8] The main issue for the Court's determination is the reasonableness of the Decision. In my view, none of the situations that could rebut this presumptive standard of review is present here: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], at paras 10, 17, 25.

[9] The Applicant asserts four subsidiary issues:

- (1) The RAD's error in concluding that the Applicant was not challenging the RPD's findings regarding certain core elements of his claim and in failing to conduct a fresh and full assessment;
- (2) The RAD's error in finding Applicant's return to Sri Lanka in May 2015 was inconsistent with well-founded fear of persecution;
- (3) The RAD's unreasonable findings regarding threatening calls and Applicant's involvement with JVP, because of inconsistencies in the evidence; and
- (4) The RAD's unreasonable rejection of corroborating evidence.

[10] My analysis deals with each of these issues in turn.

III. Analysis

[11] I start my analysis with the general observation that the Applicant's submissions regarding RAD's errors, in my view, encourage the Court to engage in a line-by-line treasure hunt for errors and to reweigh and reassess evidence that was before the RAD, neither of which is the role of the Court in a reasonableness review: *Vavilov*, above at paras 102, 125. Perfection is not the standard against which the Court is to review the Decision: *Vavilov*, above at para 91.

[12] Further, just because there were other conclusions the RAD could have drawn, in itself does not mean that the RAD's findings were unreasonable: *Zhou v Canada (Citizenship and Immigration)*, 2020 FC 676 at para 21, citing *Krishnapillai v Canada (Minister of Citizenship & Immigration)*, 2007 FC 563 at para 11.

[13] With these principles in mind, I turn to the subsidiary issues.

(1) The RAD conducted fresh and full assessment

[14] I am satisfied that that the RAD understood and performed its appellate role on the Applicant's appeal of the RPD decision.

[15] As the Federal Court of Appeal guides, "...the RAD is to review RPD decisions applying the correctness standard[; ...] after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether... the RPD erred [and, h]aving done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim": *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] at para 103. The RAD

also has the option of referring the matter back to the RPD for redetermination in limited circumstances: subsections 111(1) and 111(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]; *Alvarenga Torres v Canada (Citizenship and Immigration)*, 2021 FC 549 at paras 34-35.

[16] I do not disagree with the Applicant that the onus is on IRB to determine whether the Applicant meets the definition of a Convention refugee: *IRPA* s 96; *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 at 745. Although there thus is no onus on the Applicant to demonstrate that he meets this definition, nonetheless there is an initial burden on the Applicant to provide sufficient, credible evidence so that the administrative decision maker can make the necessary assessment.

[17] I am not persuaded by the Applicant's argument that RAD did not engage in its own full factual assessment because it was of the view that the Applicant did not challenge some of the RPD's key findings. Even if it was an error for the RAD to state that the Applicant was not challenging certain core findings of the RPD, the RAD nonetheless considered the issues, including for example, whether Nishantha and/or his thugs attacked the Applicant on November 1, 2014, and whether the Applicant faced threats and harm not only from Nishantha but also the Rajapaska and Sirisena governments, and their respective goons.

[18] The Applicant's Basis of Claim [BOC] narrative describes Nishantha as the Applicant's agent of persecution, with the Rajapaska government mentioned in passing. The Applicant testified at the RPD hearing, however, that his agents of persecution were Nishantha, Mahinda

and Gotabaya Rajapaska, Maithripala Sirisena, and their respective goons. I do not agree with the Applicant that the omission was peripheral.

[19] I agree with the Respondent that the RAD conducted an independent assessment of the Applicant's forward-facing risk as required, and that the RAD was entitled to defer to the RPD's credibility findings as the central issue: *Huruglica*, above at para 103; *Wahjudi v Canada (Ministry of Citizenship and Immigration)*, 2017 FC 279 [*Wahjudi*] at para 13; *Bishop v Canada (Citizenship and Immigration)*, 2022 FC 569 at para 21.

(2) No reviewable error regarding the RAD's assessment of Applicant's reavailment

[20] I am not convinced that the RAD committed a reviewable error in its assessment of the Applicant's return to Sri Lanka in 2015 following a regime change.

[21] In my view, the RAD's rationale for rejecting the Applicant's explanation, that the regime change meant no further problems for the Applicant in Sri Lanka, was not dependent on the error the Applicant says that the RPD made. Specifically, the Applicant submits that the RPD erred regarding Nishantha's political affiliation at the time of the regime change that caused the Applicant to return to Sri Lanka. I find, however, the RAD was under no misapprehension that Nishantha previously was affiliated with the Rajapaska regime and then with the Sirisena regime following the latter's success in the presidential election. Rather, it was the lack of evidence that the Applicant made any enquiries about Nishantha's political position prior to returning to Sri Lanka that the RAD found incompatible with the Applicant's alleged fear of persecution by such individual.

[22] I find that the RAD's reasoning on this issue "adds up": *Vavilov*, above at para 104.

- (3) No reviewable error regarding the RAD's assessment of threatening calls and Applicant's involvement with JVP

[23] Having read the transcript of the RPD hearing, I am not persuaded that that the RAD's assessment of the Applicant's evidence regarding the threatening phone calls, and of the letter from the secretary of the JVP regarding the Applicant's work for the organization [JVP letter], is unreasonable.

[24] The fact that the Applicant was answering questions put to him by the RPD member does not support, in my view, the contention that the RPD used its examination of the Applicant to find contradictions. The argument is circular but more importantly, it challenges the RPD's findings, rather than those of the RAD, with no explanation of how the RAD erred.

[25] I find the RAD's thorough consideration of the telephone calls, JVP letter, including the Applicant's inconsistent testimony, and resultant credibility findings justified, transparent and intelligible.

- (4) No reviewable error regarding the RAD's assessment of corroborating evidence

[26] I am satisfied that the RAD's assessment of the photographs, friend's affidavits, and news article was not unreasonable. Rather, I find that the Applicant disagrees with the RAD's weighing of them and requests the Court to reweigh them. As mentioned, this is not the role of

the Court in judicial review. The RAD's reasons permit the Court to understand the RAD's rationale which, in my view, is internally coherent: *Vavilov*, at para 85.

IV. Conclusion

[27] When viewed holistically as an organic whole, I find that the Decision is reasonable, in that it is justified, transparent and intelligible in relation to the applicable constellation of facts and law: *Vavilov*, above at para 103; *Wahjudi*, above at para 19. For the foregoing reasons, I thus dismiss the Applicant's judicial review application.

[28] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-6145-21

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review is dismissed.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6145-21

STYLE OF CAUSE: Teral Sanjeewaka GAMALATHGE DON v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

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APPEARANCES:

Barbara Jackman FOR THE APPLICANT

Kevin Doyle FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barbara Jackman/ Farah Saleem FOR THE APPLICANT
Jackman & Associates
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario