Federal Court  Cour fédérale

Date: 20221208

Docket: IMM-9612-21

Citation: 2022 FC 1694

Ottawa, Ontario, December 8, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

VALLUVAN MARIMUTHU
ANNAPOORANI VALLUVAN
NITHIYAN ANNAPOORANI VALLUVAN

Applicants

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], dated December 13, 2021, affirming a decision of the Refugee Protection Division [RPD], which found that the Applicants are neither Convention refugees nor persons in need of protection.

II. Facts

[2] The Applicants are three family members of Indian citizenship. As a broad overview, they allege a fear of persecution by the police Tamil Nadu, who accused the Principal Applicant [PA] of receiving funding from foreign terrorist groups and being affiliated with the Liberation Tigers of Tamil Eelam [LTTE]. The PA alleges there is a serious possibility he will be apprehended upon his return to India for violating his conditional release.

[3] The RAD found their evidence was found truthful. The following provides their more detailed narrative.

[4] The PA was detained in 2007 for four days by the Q Branch of the Tamil Nadu Police – a security police. Following this, the PA was asked by police to attend a prison to identify two LTTE suspects they thought he knew. The Applicant did not attend because his cousin advised him his uncle had received a similar request and had not returned. The PA travelled to England and remained there until 2013.

[5] At the time he left India, the civil war was continuing in Sri Lanka: it ended in 2009, although not without difficulties since then.

[6] He returned to India in 2013 when he believed that the situation was safe. He reopened his construction business. Due to financial difficulties, he partnered with a Sri Lankan businessman he met in England. Supposedly, “politically connected individuals” this

businessman opened a construction business called “Nathan Contractors”. In 2018, someone claiming to be from the PA’s company allegedly made a complaint about Nathan Contractors to the police. The PA was blamed for this complaint and threatened and assaulted as a result.

[7] In January 2018, the police arrested the Applicant, alleging his business was supported by foreign terrorist funds. Police again accused the PA of being affiliated with the LTTE as they had in 2007. The PA was then detained for three days and told his case would be handed over to the Q Branch of the Tamil Nadu Police. He was ordered to report to police weekly.

[8] Critically, during his 2018 arrest and detention, the Applicant was beaten with batons to tell the truth. The police asked him about his connection to an alleged member of the Tamil Tiger diaspora which operated in the UK. The Applicant refuted the allegation this individual was associated with the Tamil Tigers. As a result, the police increased their beatings.

[9] The police accused him of being a Tamil Tiger sympathizer.

[10] The police told him they were well aware of his past arrest in connection with the Tamil Tigers in 2007. The Applicant, while being beaten, could hear heavy ringing in his ears and eventually collapsed and lost consciousness. He woke up and later learned he was an isolation room, with a chain attached to his left leg. Prison guards abused him.

[11] He was detained until released three days later after paying a bribe. Police instructed him to report to the police station weekly. The PA and his family relocated elsewhere in India and went into hiding. He did not report to back to the police.

[12] However, the police searched for him at his home, checking also with family and neighbours while he was in hiding. The group then left India, arrived in Canada and made a claim for refugee protection.

[13] The determinative issues at RAD was whether an Internal Flight Alternative [IFA] was available.

III. Decision under review

[14] The RAD's decision focused on the two aspects the RPD considered determinative of this case in its reasons. These were issues with credibility, and the availability of a potential IFA.

A. *Credibility*

[15] The RAD found the RPD failed to make any concrete decisions on the consequences or outcomes of its credibility concerns. After considering the evidence, the RAD did not find sufficient credibility concerns to overcome the presumption of truth. Therefore I proceed on the basis his narrative is true.

B. *Internal flight alternative*

[16] The RAD agreed with the RPD the determinative issue is an IFA elsewhere in India. In making a determination on a viable IFA, the RAD applied the two-prong test set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA), namely that an IFA requires:

> (a) There is no serious possibility of the Appellants being persecuted or subjected, on a balance of probabilities, to a danger of torture or to a risk to their lives or of cruel and unusual treatment or punishment in the proposed IFA; and
>
> (b) Conditions in the IFA area are such that it would not be unreasonable, in all the circumstances, including those particular to them, for the Appellants to seek refuge there.

[17] Once proposed, the burden was on the Applicants to demonstrate the proposed IFA is either unsafe or unreasonable.

(1) No serious possibility of persecution or section 97 risk

[18] The RAD agreed with the RPD there was insufficient evidence of ongoing police interest in the PA such that there is a serious possibility of persecution for him in the IFA. It found no evidence to demonstrate a criminal case has been registered in the PA's name in 2018, or that warrants were issued. Given this, the RAD found it unlikely police would conduct a countrywide search to locate the PA in the IFA when no legal actions have been initiated. The RAD noted a lack of evidence of any pursuit or ongoing interest in the PA in the time (three years or so) he was away from India.

[19] Specifically, the RAD did not find the one experience cited by the Applicants as being sufficient to ground a finding the police are interested in the PA such that they would launch a countrywide search.

(a) *Means and ability to locate the Applicants unproven*

[20] In the RAD decision maker's view, it was not clear there is a serious possibility the Applicants could be located in the IFA for the reasons that follow.

(i) Location through police cooperation unproven

[21] The RAD noted even if the police were motivated to find the PA in the IFA, it would be difficult because of weak communications and information-sharing limitations between police agencies. Regardless of these limitations, the RAD was not convinced there was sufficient evidence the PA had been charged with any serious crime that would warrant inter-agency cooperation. Nor did the decision maker find sufficient evidence to agree that the national "Q Branch" was involved in the PA's case in 2018. Even if they did become involved however, the RAD found the PA's testimony only spoke to the localized nature of the Q Branch.

[22] Furthermore, the RAD rejected the idea that the whole of India is automatically unsafe for the Applicants because of the PA's interactions with police in Tamil Nadu, even if the Q Branch became involved. In the RAD's view, this assessment would require more evidence.

(ii) Location through police database unproven

[23] The Applicants argued they could be located through the Crime and Criminal Tracking Network and Systems [CCTNS]. The RAD did not find a serious possibility the Applicants could be located in the IFA on this basis. Specifically, the RAD noted the documentary evidence on the efficacy of the CCTNS is mixed, and the National Documentation Package notes many limitations of its use. Instead, the RAD noted the evidence suggests police stations in India very much work in informational "silos" as far as criminal tracking is concerned. Furthermore, the evidence suggests the system is still yet to become functional across the country.

(iii) Location through tenant verification unproven

[24] The RAD found the objective country documentation suggests there is no serious possibility that the police in the IFA could contact the police in Tamil Nadu. Specific evidence suggested that various systems of verifying individual locations are inadequate and not updated regularly. On this note, further sources suggest police forces are ill-equipped to personally go and check all new tenants. As such, verifications are "extremely limited."

(iv) Location through Aadhar identity cards not established

[25] The Applicants argued since Aadhar enrolment is mandatory, it could be used as a tool of surveillance. The RAD noted these identity cards, which act as unique identification for citizens and foreign nationals, wrought a somewhat mixed understanding and use in country documentation. Regardless, some documentation notes the police are not able to access this

information for investigations. The RAD did not find a serious possibility the Applicants could be located on this basis or that the police would break the law to access this information. Since the Applicants had not provided evidence to demonstrate that their data has been compromised or breached in any way, their concern was speculative.

(v) Discoverability through social media and the internet

[26] The RAD rejected the proposition the Applicants would be found because of their social media or internet use. The RAD noted that as per this Court's decision in *Adeyig Olusola v Canada (Citizenship and Immigration)*, 2021 FC 659 [*Olusola*], that placing a reasonable limitation on the use of social media is not unreasonable in a proposed IFA. As such, the RAD found the Applicant had not demonstrated how their careful use of social media would result in a risk of police finding them.

[27] Similarly, the RAD found the Applicants failed to provide sufficient evidence as to how police would have the means and ability to locate them in Mumbai through their payment of taxes. Neither did the RAD accept this argument as it referred to limited contact with relatives or through COVID-tracking databases.

(2) Reasonableness of the IFA

[28] The Applicants r similar arguments with regards to their use of social media, the internet, and contact with their family and friends. Similarly, the RAD found the Applicants had not

proven they would have to be cut-off from family and friends and could not use social media or the internet such as to avoid police detection.

IV. Issue

[29] The only issue is whether the RAD's decision is reasonable.

V. Standard of Review

[30] Both parties agree that the applicable standard of review in this case is reasonableness. I agree. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] the majority per Justice Rowe explains what is required for a reasonable decision, and 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*).
>
> [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).
>
> [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).
>
> [Emphasis added]

[31] 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]

[32] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [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.
>
> [Emphasis added]

[33] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

VI. Analysis

A. *No serious possibility of persecution in the IFA [Prong 1]*

(1) Motivation to locate the Applicant

[34] The Applicants submit it was unreasonable for the RAD to find police would be unlikely to search for them despite an attempt being made in 2018 once the Applicants had fled. In the Applicants' submission, it made sense that authorities did not return to look for them in their abandoned home. Given this, the Applicants suggest that reliance on the known attempt at searching for the Applicants does not imply that there was no serious possibility of further searches.

[35] Conversely, the Respondent submits the RAD reasonably found the Applicant did not have a sufficient profile to attract the continued interest of police. Specifically, the Respondent notes that the RAD found the Applicant did not provide sufficient evidence to show the Q Branch of the police was involved in his 2018 arrest. Similarly, the Applicant provided no evidence there was a pending criminal case in his name, or that a warrant or First Information Report [FIR] had been issued for him. Nor was there any evidence, the Respondent submits that the PA had been pursued by police in the three years since he left India.

[36] The Respondent also rejects the Applicants' argument that it was unreasonable for the RAD to conclude it was unlikely the police would search for him the IFA. In the Respondent's view, the Applicant's argument is simply a disagreement with the RAD's defensible finding.

Given there had been no legal action taken to initiate a case against the Applicants, there was no evidence of pursuit in Bangalore, and no evidence of pursuit in the three years since he had left India, the Respondent submits the RAD reasonably concluded there was insufficient evidence the police would now continue to search for the Applicant in the IFA.

[37] Moreover, the Respondent rejects the Applicants' assertion the RAD unreasonably found there was no evidence the Q branch became involved in his case in 2018. The Respondent notes the RAD never disputed the Applicant's assertion that he received that threat, rather there was no evidence the Q branch ever got involved. In the Respondent's view, this was supported by the fact that there was no indication the Q branch were involved in seeking the Applicant at his last known address, or after he fled to Bangalore.

[38] My difficulty with the Respondent's approach lies in the undisputed facts that the police not only questioned him in 2018 (as they had in 2007) but in 2018 held him for three days, beat him unconscious, chained him up and abused him. He was ordered to report back to police, but he did not.

[39] Instead he fled. This led the police to come looking for him at his home. The police questioned his neighbours and friends. In my view this is critically important context in which to consider police motivation. It shows not only motive in the future but that *in fact* and fairly recently, the police were motivated to look for him, and not just to look for him, but when they found him the police proceeded to arrest, detain and beat him unconscious, and then chain him up because he denied LTTE connections to himself and others.

[40] With respect, I am not satisfied these aspects of his arbitrary arrest, beating and extreme treatment were not reasonable factored into the RAD's assessment of motivation of the agents of persecution – in this case the state police. With respect this aspect of the assessment did not grapple with this central issue and in that respect is fundamentally flawed.

(a) *Uncertainty re-use of correct test*

[41] Furthermore, in making this central determination, the Applicants submit the RAD applied two different constraining law thresholds thereby committing an error. I agree here as well.

[42] The Respondent also agrees the RAD made one error in requiring the Applicants to establish their case on a balance of probabilities i.e., a likelihood, but notes in three other places the RAD used the correct test namely the much lower serious possibility test.

[43] As per *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*], the Applicant submits reviewable error is committed where one or more standards are used or it is unclear as to what standard was used by a decision maker, as occurred here. I agree. I am also of the view there is a lack of necessary clarity in this case. In *Alam*, Justice O'Reilly stated:

> [9] The case law referred to above shows that where the Board has articulated the gist of the appropriate standard of proof (i.e. the combination of the civil standard with the concept of a "reasonable chance"), this Court has not intervened. On the other hand, where it appears that the Board has elevated the standard of proof, the Court has gone on to consider whether a new hearing is required. Further, if the Court cannot determine what standard of proof was applied, a new hearing may be necessary: *Begollari v. Canada*

> *(Minister of Citizenship and Immigration)*, 2004 FC 1340, [2004] F.C.J. 1613 (T.D.) (QL).

[44] The Applicants note in *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA) was faced with a similar issue. In that case, Justice MacGuigan stated the following:

> Despite the terminology sanctioned by the House of Lords for interpreting the British legislation, we are nevertheless of the opinion that the phrase "substantial grounds for thinking" is too ambiguous to be accepted in a Canadian context. It seems to go beyond the "good grounds" of Pratte J.A. and even to suggest probability. The alternative phrase "serious possibility" would raise the same problem except for the fact that it clearly remains, as a possibility, short of a probability.
>
> In the case at bar, the Board relied, as one of its equivalent terms, on "substantial grounds". <u>In our view this introduced an element of ambiguity into its formulation. Indeed, two factors incline us to believe that it may have been misled by this phrase: its use of the verb "would" rather than "could" in its summation on this point; and its stringent conclusion on the facts. In any event, it is impossible to be satisfied that the Board applied the correct test to the facts.</u>
>
> [Emphasis added]

[45] While the Respondent submits a review of the RAD's reasons demonstrates the correct test was applied, I am not persuaded. It seems to me there is an ambiguity and with respect it is not safe to maintain this aspect of the Decision. I prefer to follow the Federal Court of Appeal in this respect because it is on point.

[46] I also conclude in this manner because the confusion regarding the correct test occurs in the RAD's consideration and analysis of motivation having regard to his arrest, arbitrary

detention, being beaten unconscious, chained and abused, followed by the police search for him at his home and their questioning his friends and neighbours. As noted this was a central issue in considering the existence of the IFA.

[47] I am also not satisfied the RAD reasonably concluded that by careful use of social media and the internet, the Applicants could avoid detection by Indian authorities because this is contrary to the uncontested US-DOS country condition evidence which establishes Indian authorities have the ability to patrol the internet and locate individuals such as the Applicants. In this connection the following is from US-DOS re Indian state and national police internet surveillance powers:

> Internet Freedom
>
> There were government restrictions on access to the internet, disruptions of access to the internet, censorship of online content, and reports the government occasionally monitored users of digital media, such as chat rooms and person-to-person communications. The law permits the government to block internet sites and content and criminalizes sending messages the government deems inflammatory or offensive. Both central and state governments have the power to issue directives for blocking, intercepting, monitoring, or decrypting computer information. The government continued to block telecommunications and internet connections in certain regions, often during periods of political unrest.
>
> In January the Supreme Court declared access to the internet a fundamental right guaranteed by the constitution. In 2015 the Supreme Court overturned some provisions of the information technology law that restricted content published on social media but upheld the government's authority to block online content "in the interest of sovereignty and integrity of India, defense of India, security of the State, and friendly relations with foreign states or public order" without court approval. In 2017 the Ministry of Communications announced measures allowing the government to shut telephone and internet services temporarily during a "public emergency" or for "public safety." According to the measures, an order for suspension could be made by a "competent authority" at either the federal or the state level.

> […]
>
> Government requests for user data from internet companies increased dramatically. According to Facebook's transparency report, the government made 49,382 data requests in 2019, a 32 percent increase from 2018. Google reported a 69 percent increase in government requests for user data in its *2019 Transparency Report*, receiving 19,438 disclosure requests. Twitter's *Transparency Report* indicated 1,263 account information requests from the government in 2019, a 63 percent increase from 2018.
>
> […]
>
> Press outlets frequently reported instances in which individuals and journalists were arrested or detained for online activity, although NGOs noted there was little information about the nature of the activity or if it involved criminal or legitimate speech. Police continued to arrest individuals under the Information Technology Act for legitimate online activity, despite a 2015 Supreme Court ruling striking down the statute as unconstitutional, and which experts claimed was an abuse of legal processes.
>
> The Central Monitoring System continued to allow governmental agencies to monitor electronic communications in real time without informing the subject or a judge. The monitoring system is a mass electronic surveillance data-mining program installed by the Center for Development of Telematics, a government-owned telecommunications technology development center. The National Intelligence Grid (NATGRID), expected to begin functioning at year's end, was proposed after the 11/26 terror attacks in Mumbai as a unified intelligence database to collect data and patterns of suspects from 21 organizations. NATGRID's database was designed to link 11 national agencies with approximately 14,000 police stations throughout the country.
>
> [Emphasis added]
>
> Item 2.1 (USDOS-2020), Record, pages 123-125

[48] While I appreciate and agree this Court in *Olusola* found reasonable limitations might be expected of those living in an IFA in terms of social media use on the facts of that case, I am not satisfied the same applies in this case. *Olusola* dealt with agents of persecution who were family

members, not state police forces as in the present case. *Olusola* is distinguishable on its facts. Cases involving location by non-state agents of persecution are of little if any relevance where the agent of persecution is the state itself as here.

[49] Moreover it seems to me the restrictions in *Olusola* cover common sense matters such as not giving out your name or address or posting pictures or other identifiers and the like on Facebook, Instagram, TikTok and other social media platforms.

[50] Also, and with respect, taking care on *social media* is very different from taking care on the *internet* generally particularly in the use of emails for example, from which it appears state and national governments have little difficulty finding an individual's address.

[51] With respect, these considerations are sufficient to warrant the grant of judicial review. While other issues have been raised, they need not be considered.

VII. Conclusion

[52] In my respectful view, the Applicants have established the RAD's decision was unreasonable. Therefore, the Application for judicial review will be granted.

VIII. Certified Question

[53] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-9612-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for redetermination by a differently constituted decision maker, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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