

Federal Court



Cour fédérale

Date: 20180328

Docket: IMM-3820-17

Citation: 2018 FC 349

Ottawa, Ontario, March 28, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JANESMATHAN VILVARAJAH

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Janesmathan Vilvarajah, challenges the May 31, 2017 rejection of his Pre-Removal Risk Assessment [PRRA]. For the reasons that follow, I am granting Mr. Vilvarajah's application.

I. Background

[2] Mr. Vilvarajah is a 27-year old Tamil male. He was born in the Eastern Province of Sri Lanka, where he remains a citizen. In or around the late 1990s, Mr. Vilvarajah's father was granted refugee status in Canada, following which he sponsored his wife and three sons. Mr. Vilvarajah arrived in Canada at the age of seven and has lived here, as a permanent resident, for over twenty years. He has never returned to Sri Lanka and is not proficient in Tamil.

[3] In 2013, Mr. Vilvarajah was convicted under section 342.1 of the *Criminal Code of Canada*, RSC, 1985, c C-46 for credit card fraud. He deposes that he was sentenced to twelve months, including six months house arrest, and 12 months of probation, which he completed. In this application, Mr. Vilvarajah deposes that he has taken full responsibility for his actions, and has worked hard toward rehabilitation. He is currently undertaking academic upgrading at Seneca College and plans to continue his studies there in its Programming Analyst program. He deposes that he has had no other criminal charge or conviction outside his credit card convictions in 2013.

[4] In 2016, Mr. Vilvarajah appeared before the Immigration Division of the Immigration and Refugee Board, where he conceded the allegations giving rise to his inadmissibility under sections 36(1)(a) and 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. A deportation order was then issued against him.

[5] In his PRRA application, Mr. Vilvarajah advanced a *sur place* risk claim arising from his status as a young, Eastern Province Tamil male, who would be returning to Sri Lanka alone after over two decades of living with a family of Convention refugees in a country with a large concentration of Sri Lankan Tamils. Mr. Vilvarajah also argued that his status as a failed asylum-seeker and his criminal history in Canada would elevate the suspicions of Sri Lankan authorities, should his PRRA be rejected.

[6] Specifically, Mr. Vilvarajah's counsel presented Mr. Vilvarajah's profile as having seven factors, which he set out as follows: (1) identity, (2) nationality, (3) ethnicity, (4) failed asylum-seeker, (5) sole returnee, (6) from Canada, where a large concentration of Sri Lankan Tamils reside, and (7) without a valid passport.

[7] Further, Mr. Vilvarajah's counsel began and ended his submissions by referencing Mr. Vilvarajah's criminal record, as an eighth point in his profile. He highlighted the unique quality of Mr. Vilvarajah's risk profile in the first and final paragraphs of those submissions, stating:

My client is a 27 year-old male Tamil citizen of Batticaloa, Sri Lanka and of no other country. He was landed in Canada on September 3, 1997 as part of the *Convention* refugee / Protected Person class. He has, therefore, resided in Canada for approximately 19-years. Due to issues related to IRPA A36(1)(a) and A37(1)(a), as conceded before the Immigration Division (ID) of the Immigration and Refugee Board (IRB) on July 14, 2016, my client was determined to be inadmissible to Canada on grounds of serious criminality. [sic]

[...]

My client's profile now includes the fact of his **criminality in Canada** and this can only serve to strengthen any potential concerns, suspicions, allegations by the Sri Lankans as to his

activities in Canada and what his potential, future activities may be in Sri Lanka - this critical fact ties in to his overall profile as an individual who will very likely be viewed, suspected, perceived to have LTTE-links. Please carefully consider this unique and critical component for this particular PRRA applicant.

[Emphasis in original]

[8] The senior immigration [Officer] officer who decided Mr. Vilvarajah's PRRA application, included as part of the rejection of his *sur place* risk submissions, the following rationale:

- I am of the opinion that it is speculation on the part of counsel and the applicant to conclude that Sri Lankan government authorities would be aware that the applicant's family members had been determined to be Convention refugees in Canada or that Sri Lankan government authorities would be aware that the applicant has a criminal record in Canada

- I am not satisfied that, on a balance of probabilities, Sri Lankan government authorities would be aware of the applicant's family members' Convention refugee status in Canada or his criminality in Canada unless the applicant himself told the Sri Lankan authorities, which, in my opinion, would be highly unlikely

[9] The Officer then addressed the country conditions evidence and concluded that "being a Tamil male and having lived in an area controlled by the LTTE (such as the applicant, who lived in an Eastern Province) is not enough, in itself, to expose an individual to risk upon his return to Sri Lanka".

II. Analysis

[10] The parties agree that the decision is to be assessed on a standard of reasonableness. To withstand scrutiny, the decision must be justified, transparent, and intelligible, and fall within the

range of possible, acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). I am of the view that the decision fails to meet that standard.

[11] As set out above, Mr. Vilvarajah's full risk profile was presented to the Officer. That profile can be likened to a coat of many colours — here, it had eight. However, as I will now explain, the Officer unreasonably cut out two of the eight colours that made up the fabric of Mr. Vilvarajah's coat, and re-sewed that coat into a different garment than the one presented. As a result, the Officer unreasonably viewed Mr. Vilvarajah in a different garment than the one he came dressed in.

[12] The Officer did not consider the evidence tending against the conclusion that Mr. Vilvarajah's fears as a returning failed asylum-seeker were speculative. This evidence included a 2015 affidavit from a former caseworker at Asylum Access Thailand, which detailed the persecution of several failed asylum-seekers upon return to Sri Lanka. Also before the Officer was evidence from "Freedom from Torture", a United Kingdom human rights organization, published in May 2016, that Sri Lankan Tamils returning to Sri Lanka from the United Kingdom experience torture and interrogation about activities of the Tamil diaspora:

We are also extremely concerned about our mounting evidence of Sri Lankan Tamils tortured after return from the UK. Many were interrogated about the activities of the Tamil diaspora in this country. The Home Office must urgently update its policy to recognise our evidence of ongoing torture and the particular risks faced by those returning from the UK with a real or perceived past connection to the LTTE, at whatever level and whether directly or through a family member or acquaintance.

[13] Further, although the Officer considered a publicly available country policy and information note published in March 2017 by the United Kingdom Home Office, the Officer failed to consider evidence in that report that Tamils returning to Sri Lanka (and particularly failed asylum-seekers who are deported and returnees from the Tamil diaspora) will be questioned and may be monitored, whether at the airport or afterward.

[14] Therefore, Mr. Vilvarajah provided reliable evidence to the Officer that individuals with his profile are screened and interrogated upon return to Sri Lanka. It was unreasonable for the Officer to dismiss Mr. Vilvarajah's fears as "speculative", without at minimum addressing this contradictory information, as I will explain, with reference to the relevant case law, below.

[15] Further, the Officer's comment that Mr. Vilvarajah's criminal history and his family's immigration status in Canada would remain unknown unless "the applicant himself told the Sri Lankan authorities", is tantamount to inviting him to commit fraud. It is an offence in Canada to make misrepresentations in immigration-related matters. One of the most common places, if not the most common place, where one is confronted by immigration questions, is after returning to a country upon primary or secondary inspection at a port of entry, such as an airport.

[16] It was therefore unreasonable for the Officer to suggest that Mr. Vilvarajah ought to withhold or disguise his profile if questioned by Sri Lankan authorities. Indeed, such a suggestion to withhold or misrepresent is dangerous, given some of the evidence referenced above, as it could increase any risk for a returning failed asylum-seeker — the very outcome that a PRRA application seeks to avoid.

[17] Moreover, the Officer's awareness that Mr. Vilvarajah would be uncomfortable making such a disclosure could indeed constitute an implicit acknowledgement of the risk Mr. Vilvarajah would face should government authorities learn of his profile.

[18] Turning to the most recent case law, in *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142 [*Jesuthasan*], Chief Justice Crampton set aside a PRRA decision rejecting the application of a young Tamil woman who claimed she would face risk in Sri Lanka as a failed asylum-seeker. Chief Justice Crampton held that the PRRA officer's treatment of the objective evidence of risk was unreasonable, because evidence tending against the officer's conclusions was ignored:

25 ...the Officer ignored more recent documents, written in 2015 and 2016, that reported upon persons of Tamil ethnicity being "detained, tortured and/or sexually abused" upon their return to Sri Lanka. The Officer's failure to meaningfully engage with that more recent information, which directly contradicted his conclusions, rendered unreasonable his assessment of the risks that Ms. Jesuthasan alleged she would face if required to return to that country (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, at para 17).

[19] Similarly, in another recent decision, *Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 [*Kailajanathan*], Justice McDonald set aside a PRRA decision that failed to fully consider the risks to the applicant as a returning Tamil failed asylum-seeker:

6 ...the Officer considered the evidence submitted by the Applicant, which included documentary evidence pertaining to the conditions in Sri Lanka. The Officer put significant weight on a UK Home Office Report [the Report], which outlined significant risks for Tamil returnees, and the Officer concluded from this report that being Tamil without significant connections to the LTTE would not render the Applicant worthy of international protection. The Officer also considered a number of reports on the significant human rights issues in Sri Lanka including information

that Tamils returning from abroad are still at a significant risk of arrest on suspicion of prior LTTE involvement. The Officer reiterated the RPD's findings that the Applicant did not have sufficient evidence to prove that he was wanted by any of the groups in Sri Lanka, or by the authorities regarding any past LTTE involvement.

[...]

18 The Applicant's claimed profile is a Tamil returning to Sri Lanka after a failed asylum claim. The Applicant points to the documentary evidence respecting the treatment of Tamil returnees generally, not just those with a connection to the LTTE.

19 The Officer was obligated to consider this evidence. Officers must consider all the risk factors put forward by the Applicant, cumulatively (*K.S. v Canada (Citizenship and Immigration)*, 2015 FC 999, at para 42). The Officer cannot view the evidence of such risks in isolation.

[...]

21 ...The Officer found that the Report was probative. However, the Officer failed to consider the full Report, which documents the significant risks for Tamil returnees. The Officer, while acknowledging these risks, did not assess those risks against the Applicant's profile, and instead solely relied upon the RPD's credibility findings.

[Emphasis added]

[20] In this case, the Officer rejected as "speculation", without dealing with contrary evidence, that Sri Lankan authorities would be aware of Mr. Vilvarajah's criminal and immigration history — unless the applicant himself told the Sri Lankan authorities, which, in the Officer's opinion, "would be highly unlikely". As in *Jesuthasan* and *Kailajanathan* — albeit in the particular circumstances of this case — I am satisfied that the Officer's findings here were also unreasonable.

[21] The problem was then further exacerbated because, as a consequence of those unreasonable findings, the Officer carved out two indelible parts of Mr. Vilvarajah's risk profile. While Mr. Vilvarajah has deposed that he is remorseful of his criminal past and has worked toward rehabilitation, he can erase neither those convictions, nor his immigration history in Canada. Based on this reality, Mr. Vilvarajah's counsel stressed that the eight profile factors in his submissions had to be considered as a package: i.e., the risk that Mr. Vilvarajah would face in Sri Lanka as a sole, young, Tamil, failed-refugee from the Eastern Province, returning from Canada, a country with a large Tamil diaspora, where he belonged to a family of refugees for more than two decades, in addition to a criminal record. The Officer unreasonably excised key parts of this profile and, as a result, failed to consider all aspects of Mr. Vilvarajah's risk profile together, in light of the full body of evidence provided in the PRRA.

[22] The Respondent, in response, encourages this Court to recall that judicial review is not a line-by-line treasure hunt for errors (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54), and that this Court should consider the Officer's decision as an organic whole, with deference to the Officer, who is, after all, the expert in risk analysis.

[23] I agree with the Respondent's observations: many leave and judicial review applications of PRRA decisions are rejected by this Court for those very principles. They, however, cut both ways. Just as in this judicial review I must not parse the decision — but rather should consider it as an organic whole — in the circumstances of this case, neither should the Officer have cut up

and resewn the profile presented. As a result, the Officer's conclusion was unreasonably based on a different garment than the one Mr. Vilvarajah came in.

[24] As my conclusions above are dispositive of Mr. Vilvarajah's application, I need not consider the other issues he raises.

III. Conclusion

[25] The decision will be set aside and remitted for redetermination by a different officer. No questions for certification were argued, and none arise.

JUDGMENT in IMM-3280-17

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed.
2. The PRRA decision is set aside, and the matter is remitted for redetermination by a different decision-maker.
3. No questions for certification were argued, and none arose.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3820-17

STYLE OF CAUSE: JANESMATHAN VILVARAJAH v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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DATE OF HEARING: MARCH 21, 2018

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