Federal Court  Cour fédérale

Date: 20230118

Docket: IMM-6952-21

Citation: 2023 FC 79

Ottawa, Ontario, January 18, 2023

PRESENT: Madam Justice Walker

BETWEEN:

SIVABALAN GNANASEKARAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Gnanasekaran, is a Tamil citizen of India. He sought refugee protection in Canada on the basis of his fear of the Indian authorities as a suspected supporter of the Liberation Tigers of Tamil Eelam (LTTE), this despite the fact that he is not associated with any political party.

[2] According to the Applicant, he made many Tamil friends from Sri Lanka and India during his studies in the United Kingdom. In August 2017, a relative of one of his Sri Lankan

Tamil friends stayed with him in India. Following the visit, the Applicant was first questioned at his home by police about his visitors' connections to the LTTE and was subsequently taken to the police station for further questioning. In June 2018, the Applicant assisted a Sri Lankan family to find a place to live in his hometown in India and they later visited him to thank him for his help.

[3] In April 2019, the Applicant came to Canada on a visitor visa. After the 2019 Easter Sunday bombing in Sri Lanka later that month, police officers visited the Applicant's home in India and took his wife in for questioning. She was ordered to hand the Applicant to the authorities when he returned. These events caused the Applicant to fear returning to India and he filed a claim for refugee protection in Canada in June 2019.

[4] The Applicant's refugee claim was heard by the Refugee Protection Division (RPD) on December 15, 2020. The RPD rejected the claim, concluding that the Applicant was not a credible witness and had not established, on a balance of probabilities, that the events as alleged had occurred. The RPD also found that the Applicant has an internal flight alternative (IFA) available to him in India.

[5] The RAD dismissed the Applicant's appeal in a decision dated September 15, 2021. The RAD admitted as new evidence a psychiatric report written by Dr. Clare Pain, consultant psychiatrist and associate professor, Department of Psychiatry, University of Toronto (the Report) diagnosing the Applicant with a traumatic brain injury (TBI) as a result of a motor vehicle accident in India (subs. 110(4) of the *Immigration and Refugee Protection Act*, SC 2001,

c. 27 (IRPA)). However, the RAD refused the Applicant's request for an oral hearing (subs. 110(6)) and confirmed the RPD's adverse credibility findings, concluding that the Applicant is neither a Convention refugee nor a person in need of protection.

[6] The Applicant now seeks judicial review of the RAD's decision.

I. Analysis

[7] The Applicant argues that the RAD's decision is unreasonable because the panel rejected his appeal without convening an oral hearing and without providing any reasons for its refusal to do so. The Applicant also contests the RAD's credibility analysis and conclusions largely on the basis of the Report.

[8] The determinative issue before the Court is whether the RAD's failure to explain its refusal to hold an oral hearing pursuant to subsection 110(6) of the IRPA renders its decision unreasonable (*Abdulai v Canada (Citizenship and Immigration)*, 2022 FC 173 at paras 21-22; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*)).

[9] The RAD's assessment of the Applicant's request for an oral hearing is as follows:

> [23] The [Applicant] requests that the RAD hold a hearing. Section 110(6) of the IRPA says the RAD may only hold a hearing if there is new evidence that (a) raises a serious issue with respect to the credibility of the [Applicant], (b) that is central to the RPD's decision, and (c) if accepted, would justify allowing or rejecting the refugee protection claim. Since the new evidence I accepted does not meet any of the 110(6) criteria, the hearing request is denied.

[10] The RAD's decision provides the Applicant no explanation for its peremptory conclusion. There is no analysis of the Report against the statutory criteria and the request for a hearing. The RAD simply lists the three legislative criteria and states that the new evidence "does not meet any of the 110(6) criteria". While the Respondent correctly notes that the decision to hold a hearing is discretionary, the onus is on the RAD to justify its exercise of, or refusal to exercise, this discretion (*Hundal v Canada (Minister of Citizenship and Immigration)*, 2021 FC 72 at para 24). Moreover, a reasonable decision is based on rational and logical reasoning. Merely repeating statutory language and stating a conclusion "will rarely assist a reviewing court in understanding the rationale underlying a decision" (*Vavilov* at para 102).

[11] In *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 (*Tchangoue*), Justice Roussel (as she then was) stated that the RAD erred "in failing to conduct a proper analysis of whether the criteria for holding an oral hearing set out in subsection 110(6) of the IRPA were met" (at para 18), even if the decision to hold a hearing is a discretionary power. Justice Aylen reached a similar conclusion in *Bukul v Canada (Citizenship and Immigration)*, 2022 FC 118 (*Bukul*). Mr. Bukul argued that his mental health issues had affected his ability to testify. The RAD admitted letters from a psychiatrist as new evidence but refused to convene a hearing, concluding that the letters provided insufficient detail about Mr. Bukul's mental health condition and how it had affected his testimony. Justice Aylen found that (*Bukul* at para 23):

> [23] … [T]he RAD committed a reviewable error in failing to conduct a proper analysis of whether the criteria for holding an oral hearing set out in subsection 110(6) of the *IRPA* were met and if so, whether it should exercise its discretion and grant an oral hearing. With the exception of the RAD's conclusory statement that the new evidence does not raise a serious issue with respect to the Applicant's credibility, the decision is silent on the application

> of the remaining criteria set out in subsection 110(6) of the IRPA and the exercise of discretion.

[12] The Respondent submits that the RAD considered the Report at length in the course of its decision and ultimately concluded that the Report did not overcome the credibility concerns of the RPD for a number of reasons. Therefore, a hearing would not be necessary.

[13] This argument is not persuasive. First, nowhere in the decision does the RAD give a reason for its refusal to hold a hearing. Second, the Respondent's argument conflates the requirement for the RAD to consider subsections 110(6)(a) to (c) and its ensuing analysis and conclusions regarding the new evidence. There is overlap, of course, as the subsection 110(6) criteria require an assessment of the content of the new evidence, but the two inquiries are distinct. If the new evidence raises a serious issue with respect to a claimant's credibility and is central to the RPD's decision (subs. 110(6)(a) and (b)), the RAD must assess whether the evidence would justify allowing or rejecting the refugee claim (subs. 110(6)(c)). The weight to be given to the new evidence should not be determinative in the RAD's decision to hold an oral hearing (*Tchangoue* at para 18).

[14] The Report diagnosed the Applicant with a TBI and summarized the cognitive deficiencies resulting from the TBI (which include memory and concentration issues, and difficulty communicating and organizing thoughts). These deficiencies raise concerns relevant to the Applicant's ability to testify coherently and credibly, an issue central to the RPD's decision (subs. (a) and (b)). It is at least arguable that the Report would influence the ultimate decision regarding the Applicant's claim (subs. (c)). However, the RAD set out no analysis of these

concerns against the statutory criteria and, therefore, no justification for its refusal to hold a hearing. Again, I agree with the Respondent that the decision as to whether or not to convene a hearing is discretionary. Indeed, the new RAD panel may continue to refuse a hearing after reconsideration of the Applicant's request. If so, the RAD's decision must include an explanation that justifies the refusal (*Vavilov* at para 85).

[15] Accordingly, I find that the RAD committed a significant error in its omission of reasons for its refusal to hold an oral hearing. This error in itself justifies the Court's intervention and I will allow the application.

[16] I will not examine the Applicant's arguments contesting the substantive reasonableness of the decision as the RAD's failure to justify its subsection 110(6) refusal is a fatal flaw. If, when the RAD reconsiders this matter, it decides to hold a hearing, the new panel's credibility analysis may change.

[17] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-6952-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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