

CANADA / JUDGMENT

TC1-19957

COURT

Refugee Appeal Division

DECIDED

29 April 2022

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RAD File / Dossier de la SAR : TC1-19957 TC1-19958 Private Proceeding / Huis clos Reasons and Decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXX XXXXXXXX XXXX XXXX XXXX XXXX XXXX Personnes en cause Date of decision 29 April 2022 Date de la décision Panel Ron Stratigopoulos Tribunal Counsel for the persons who are the subject of the appeal Max Berger Conseil des personnes en cause Designated representative N/A Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION OVERVIEW

- [1] XXXX XXXX XXXX XXXX (Principal Appellant/PA) and XXXX XXXX XXXX XXXX XXXX (Associate Appellant/AA) are citizens of Sri Lanka. They are appealing a decision of the Refugee Protection Division (RPD) dated November 2, 2021, rejecting their claim for refugee protection DECISION
- [2] I dismiss the appeal. The RPD was correct in finding that the Appellants are neither Convention refugees nor persons in need of protection. The determinative issue is credibility. The AA relies on the allegations of her father, the PA, and has not made any allegations other than those provided by her father.

BACKGROUND

- [3] The PA alleges that in XXXX 2014 three police officers came to his home and accused him of having connections to the Liberation Tigers of Tamil Eelam (LTTE) because he had sent medical supplies to the XXXX area. The PA alleges that he was beaten and told that the officers would return. The PA's father paid a bribe of XXXX XXXX XXXX rupees to one of the officers so that they would not return. The PA alleges that in XXXX 2015 the Sri Lanka Army (SLA) arrested him and took him to an army camp, where he was again accused of sending medical aid to the LTTE. The PA alleges he was beaten, punched, and kicked before being released. He required treatment and was kept overnight at the local hospital. Afraid to remain in Sri Lanka, the PA secured a visa to the USA and travelled there on XXXX XXXX, 2015. He remained in the USA until XXXX XXXX XXXX 2016, when he returned to Sri Lanka. The PA alleges that two days later the police officer he bribed in 2014 told his wife that he was going to be arrested again, so he went to live with his wife's parents and made plans to leave Sri Lanka again. The PA travelled to the USA again on XXXX XXXX XXXX 2016 and

remained there until he returned to Sri Lanka again on XXXX XXXX, 2018. The PA alleges that in XXXX 2016, while he was in the USA, the SLA took his wife and the AA for questioning about him. The SLA was abusive and made sexual comments towards his wife and daughter before releasing them. The PA alleges that in XXXX 2018, the SLA came to his home and took him to their office for more questions and accused him of supporting the LTTE and the Tamil diaspora in the USA. The PA alleges he was beaten before being released. The PA decided to flee Sri Lanka once again. The PA came to Canada on XXXX XXXX XXXX 2019 and his daughter on XXXX XXXX, 2019, they both made a claim for refugee protection based on their imputed support of the LTTE.

Procedural history

- [4] On March 8, 2022, I notified the Appellants that I would like submissions on the issues of the PA's re-availment to Sri Lanka and his failure to claim in the USA. The Appellants provided those submissions on March 23, 2022. New evidence
- [5] The Appellants have presented as new evidence a Tamil Guardian online news article, 'Sri Lankan police arrest 4 Tamil youth outside Prabhakaran's home,'¹ dated March 21, 2022.
- [6] The article outlines that four Tamil youth were arrested outside the destroyed home of LTTE leader XXXX XXXX ahead of his 64th birthday. I agree with the Appellants that the evidence meets the criteria under s. 110(4) of the Immigration and Refugee Protection Act (IRPA) in that it could not reasonably have been presented to the RPD as the article is presented in support of issues that were raised on appeal.
- [7] However, if the evidence meets the criteria of s. 110(4), I must decide if the evidence is new, credible, and relevant before I can accept it.² While I accept that the evidence is new and on its face appears to be credible, I do not find it to be relevant. The Appellants submit that it is relevant as it corroborates concerns about the PA's return to Sri Lanka and failure to claim in the USA. I do not agree. As noted above, the article chronicles the arrest of four Tamil youth ahead of the birthday of the LTTE leader. The evidence meets only part of the Raza test in that it is new, but I see no relevance to the issues on which I sought submissions. The article is rejected as new evidence.
- [8] As I have no new evidence, I cannot convene an oral hearing.

ANALYSIS

- [9] My role is to look at all the evidence and decide if the RPD made the correct decision.³
- [10] The Appellants argued, previous to the submissions that I requested, that the RPD erred in making nebulous credibility findings against them. They argued that the RPD finding regarding the PA leaving Sri Lanka on his own passport was an implausibility finding, that the RPD failed to mention important corroborative evidence, and that the RPD erred in not conducting a separate s.97 analysis. As I have determined re-availment to be the

determinative issue, I did not assess the above concerns unless they were in relation to the re-availment. Re-availment to Sri Lanka and delay in leaving are determinative

- [11] The record shows that the PA was visited by the police in XXXX 2014 under the suspicion of supplying the LTTE with medical supplies. In XXXX 2015 he was arrested, detained and beaten by Sri Lankan intelligence officers. The PA required medical treatment. At this point the fears of the PA became crystalized. He stated in his Basis of Claim (BOC) form that as a result, 'I was afraid to remain in Sri Lanka.'⁴ The PA testified that because of his arrest in XXXX 2015 he feared living in Sri Lanka and he wanted to live outside of Sri Lanka forever.⁵
- [12] The PA secured a visitor visa for the USA and travelled there on XXXX XXXX, 2015. While he was in the USA, the PA stated that the Sri Lankan intelligence officers came to his home looking for him. He remained in the USA until XXXX XXXX, 2016 when he returned to Sri Lanka. The PA states in his BOC form that he thought it would be safe to return to Sri Lanka since it had been several months since the authorities had come to his home.⁶
- [13] The PA states that just two days after his return to Sri Lanka, he learned that the police were going to arrest him again for further questioning. The PA decided that he would flee Sri Lanka once more. His visa to the USA was still valid so he returned to the USA on XXXX XXXX, 2016.
- [14] The PA states that in XXXX 2016, the Sri Lankan intelligence officers came to his home and arrested his wife and the AA. They were questioned about the PA's whereabouts and his activities. The PA states in his BOC form that he felt that if he returned to Sri Lanka at this time, he would be putting his family in more danger. However, after not hearing from the Sri Lankan authorities for some months, the PA decided to return to Sri Lanka once more on XXXX XXXX XXXX 2018.⁷
- [15] The PA submits that he returned to Sri Lanka after one year in XXXX 2016 because his family had been left alone and his whereabouts had not been inquired about by the authorities in the preceding twelve months. This is not correct. The PA states in his BOC form that while he was in the USA, the Sri Lankan intelligence officers came to his home looking for him, asking his wife where he went and when he would be back.⁸
- [16] I am not persuaded by submissions of the Appellants. The PA fled Sri Lanka fearing for his safety; he no longer wanted to live there. While he was in the USA, the Sri Lankan authorities visited his home looking for him. Despite this, the PA returned to Sri Lanka voluntarily. His return to Sri Lanka in 2016 after having fled for his life demonstrates a lack of subjective fear and undermines the credibility of his allegations.
- [17] Further impugning the credibility of his allegations is his second return to Sri Lanka. Clearly his assumption that it would be safe to return to Sri Lanka in XXXX 2016 was wrong. The PA fled the country once again in XXXX 2016. A few months later the authorities detained his wife and eldest daughter. Again, the PA submits that he thought it would be now safe to return. I do not agree with the Appellants' submission that the PA's fears from 2015 and 2016

did not persist during his re-availment in 2018. The PA was first assaulted in XXXX 2014 and again in 2015, causing him to flee. Upon returning in 2016, he learned that the authorities were still looking for him, so he fled again. Even after his second visit to the USA, his wife and daughter were detained.

- [18] I also do not accept the submission that it was only after his alleged persecution in XXXX 2018 that the PA realized that his attempts to live safely in Sri Lanka were futile as he would never be left alone by the authorities. The PA came to this realization much earlier; he testified that he realized he could not live in Sri Lanka anymore after he was arrested in XXXX 2015.
- [19] I have considered that the final incident of persecution occurred in XXXX 2018, after the PA had re-availed himself to Sri Lanka on two occasions. During that incident, the PA was once again questioned about his connections to the LTTE, slapped, hit, and punched. This is similar to the incidents he endured in XXXX 2014 and XXXX 2015. Also, the authorities had continued to come looking for him at his home and had also detained his wife and daughter. The PA had already fled Sri Lanka twice after his fears were crystalized in 2015, that the final incident occurred after his re-availments does not dissuade me from finding that the PA's behaviour of returning to Sri Lanka is inconsistent with someone who faces a likely risk to his life and impugns his credibility regarding his allegations.
- [20] I also note the PA's significant delay in leaving Sri Lanka after his second return there. The Federal Court has stated that the time it takes an applicant to leave his or her country of origin can be taken into account in determining whether that person had a subjective fear of persecution.⁹ The Appellants have submitted that after the last incident of persecution in XXXX 2018, the PA quickly left the country, as he then realized that his attempts to live safely in Sri Lanka were futile. I disagree that he quickly left. The Appellants did not leave Sri Lanka until XXXX XXXX XXXX 2019, some seven months after the last incident. Unlike his first return, when the PA claimed he went to stay with his wife's parents for three months, the PA was not in hiding. Despite still being in possession of a valid visa for the USA which would allow him to immediately leave after the XXXX 2018 incident the PA did not do so. Instead, he waited until XXXX 2019 to apply for a Canadian visa and only when it was issued did he leave Sri Lanka. I find that the delay in leaving Sri Lanka is also a factor that undermines the PA's subjective fear and the credibility of his allegations. Failure to Claim Asylum in the USA Undermines Subjective Fear
- [21] The PA first arrived in the USA on XXXX XXXX, 2015 and remained there until XXXX XXXX, 2016. The PA testified that he did not make a claim in the USA because he took advice from a monk and other temple worshippers that it would be very difficult for someone to apply for refugee status in the USA, and even if he were successful it would drag on for a long time.¹⁰ I note that the PA had status in the USA until XXXX XXXX XXXX 2015.¹¹ The PA testified that he was living in fear of being caught and deported.

- [22] The Appellants submit that the PA always yearned to be reunited with his family in Sri Lanka and that is why he did not claim asylum in the USA while staying there from XXXX 2015 to XXXX 2016. I do not agree. As mentioned above, the PA testified that he wanted to reside outside of Sri Lanka on a permanent basis. If the PA were truly fearful for his safety and could not return to Sri Lanka, one would expect that he would have sought protection in the USA, despite it being a difficult and lengthy process. The PA stayed in the USA a significant period of time and was out of status much of his time there; he had placed himself at risk of violating immigration laws and possible deportation.
- [23] Regarding his second stay in the USA, the PA provided in his BOC form that he returned there for his safety.¹² Despite the fear for his safety in Sri Lanka, the PA again failed to make an asylum claim in the USA even though he was there for almost two years. The PA states that his failure to claim this time was because it would be even more difficult to win an asylum claim with Donald Trump as President.¹³ I do not find this a credible explanation. The PA had fled Sri Lanka for a second time because he believed that his safety was at risk. He was now safe and yet again did not seek protection. That it would now be harder to win his claim is not a valid reason to not seek protection in the USA, when he again potentially faced arrest and removal to where his life was at risk. The PA has not justifiably explained his failure to claim asylum in the USA as he has submitted. While I agree that failure to claim in the USA is not a determinative issue, I find that this is a factor that undermines the PA's subjective fear and the credibility of his allegations.
- [24] Overall, I find that the PA's re-avilment to Sri Lanka on two occasions and his delay in leaving Sri Lanka after his XXXX 2018 incident are indicative of a lack of subjective fear and are determinative. His failure to claim in the USA despite remaining there twice for significant periods of time, while not determinative, is also indicative of a lack of subjective fear and undermines the credibility of the PA's allegations. I find that, on a balance of probabilities, the Appellants have not credibly established the allegations they have made, and I do not believe their underlying narrative. The appellants have no residual profile, and a separate s.97 assessment is not necessary
- [25] The Appellants are both Sinhalese. They are not of Tamil ethnicity. I have determined that their allegations of being persecuted for their imputed political opinion as LTTE supporters are not credible. As a result, the Appellants do not have a residual profile that would place them at risk returning to Sri Lanka as failed refugee claimants.
- [26] The Appellants also argue that the lack of a s. 97 analysis is a ground for review. They rely on the proposition that those with suspected LTTE connections, even the Sinhalese, are subject to detention and torture. Again, I have determined that the Appellants have not credibly established that they are being persecuted for their perceived LTTE support.
- [27] The courts have held that a separate s. 97 analysis does not always need to be done. The court has stated in Chukwunyere that "There is no obligation for the [Refugee Appeal Division] RAD to conduct a further section 97 analysis where the allegations in support of

the section 97 claim were the same as those under section 96," and also held that "the RAD and the RPD are not obligated to undertake a section 97 analysis when faced with a case where the claimant lacks credibility."¹⁴ Here, the Appellants have not presented any evidence of a risk or danger other than the one in relation to their imputed support of the LTTE and their s.96 claim. A separate analysis under s. 97 is not required.

CONCLUSION

[28] I dismiss the appeal and confirm the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection. (signed) Ron Stratigopoulos
Ron Stratigopoulos 29 April 2022 Date 1 Exhibit P-3, Response to Member's Direction, pages 4-7. 2 Canada (Citizenship and Immigration) v. Singh, 2016 FCA 96; Raza v. Canada (Citizenship and Immigration), 2007 FCA 385. 3 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; Rozas del Solar v. Canada (Citizenship and Immigration), 2018 FC 1145. 4 Exhibit RPD-1, RPD Record, Exhibit 2.1, page 16, paragraph 12. 5 RPD Hearing Transcript, page 7, lines 17-18. 6 Exhibit RPD-1, RPD Record, Exhibit 2.1, page 17, paragraph 13. 7 Exhibit RPD-1, RPD Record, Exhibit 2.1, page 17, paragraph 18. 8 Exhibit RPD-1, RPD Record, Exhibit 2.1, page 17, paragraph 13. 9 Rahim v. Canada (Minister of Citizenship and Immigration), 2005 FC 18 (CanLII), 2005 FC 18 at para 11. 10 RPD Hearing Transcript, page 7, lines 24-26. 11 Exhibit RPD-1, RPD Record, Exhibit 1, page 56. 12 Exhibit RPD-1, RPD Record, Exhibit 2.1, page 17, paragraph 15. 13 Exhibit RPD-1, RPD Record, Exhibit 2.1, page 17, paragraph 17. 14 Chukwunyere v. Canada (Citizenship and Immigration), 2021 FC 210.

RAD File / Dossier de la SAR : TC1-19957 TC1-19958 RAD.25.02 (August 20, 2021) Disponible en français
2 Immigration and Refugee Board of Canada Refugee Appeal Division Commission de l'immigration et du statut de réfugié du Canada Section d'appel des réfugiés RAD.25.02 (August 20, 2021) Disponible en français

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