

Federal Court



Cour fédérale

**Date: 20150714**

**Docket: IMM-6383-14**

**Citation: 2015 FC 849**

**Ottawa, Ontario, July 14, 2015**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**PAVITHRAN PAUL JOSEPH SELVARASU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of the August 8, 2014 decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, in which it was determined that the applicant is not a Convention refugee, nor a person in need of protection, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The RPD concluded that the determinative issues were identity and credibility. The applicant is

arguing that the RPD's assessment of the evidence going to his identity, its assessment of his credibility, and its assessment of his residual profile were all unreasonable.

[2] For the reasons set out below, the application for judicial review is allowed and the matter is referred to the RPD for re-determination by a different panel member.

### I. Background

[3] The applicant is a citizen of Sri Lanka of Tamil ethnicity. He is from the city of Batticaloa, but moved to Jaffna to study English at a private language school in order to pass his English exams. He claims that on November 24, 2012, military officials attended at the building where he was studying and checked identification documents of all those present. There were no problems during this encounter. However, on November 27, 2012, which was Liberation Tigers of Tamil Eelam (LTTE) Hero's Day, there was a riot at Jaffna University and the applicant was arrested because he was an out-of-province student. He was taken into custody, was severely beaten and was released the next day. Following advice from his father, and given that he had done nothing wrong, he returned to his studies.

[4] The applicant claims that on January 21, 2013, he was arrested by the military once again when returning from school in the evening. He claims to have been tortured for four days at a military camp. He made an agreement with his detainers to release him on January 25, 2013 to meet with his uncle, under the condition that he would return into custody the same evening. He was once again detained, this time for ten months, and was forced to work on developing for the

military a software program into which he was subsequently required to input data about Tamil families.

[5] The applicant was released on December 12, 2013 so that he could see his family. He was told that he would have to return on December 29, 2013. Instead, his father made arrangements for him to leave Sri Lanka for Canada. He left Sri Lanka on December 26, 2013 and had a four-day layover in France before arriving in the United States. He stayed at Vive La Casa, a shelter for refugee claimants in Buffalo, until he crossed the border into Canada on February 25, 2014, where he claimed refugee status.

## II. RPD Decision

[6] The RPD found that the applicant was not a Convention refugee, nor a person in need of protection. The determinative issues were identity and credibility.

[7] The RPD began by addressing a lack of credibility in the applicant's evidence as to his identity. The applicant had not produced a Sri Lankan passport to show he was a national of that country, and the RPD found there was a lack of credibility in his account of the existence of a Sri Lankan passport, which he testified he had been forced to surrender to his agent in France. The applicant provided inconsistent statements regarding the issuance of a passport: at the first sitting of the hearing, he indicated that his passport was obtained through proper channels, and at the second sitting of the hearing, he indicated that it was obtained through a bribe. His explanation was that he did not know about the bribe before speaking to his father after the first sitting. The panel did not believe this explanation, concluding that it was not credible that he would not have

been informed, or have taken steps to inform himself, as to how his passport had been obtained. The panel also indicated that it was not plausible that a letter from his father, sent to provide explanations with respect to his identity documents, would not also have mentioned recent developments regarding the military visiting his family home and looking for him, which were part of the applicant's claim.

[8] The RPD also noted that the applicant had not produced an original National Identity Card (NIC) and found that there was a lack of credible evidence as to its existence. The applicant produced a certified true copy of his NIC, but the RPD did not find this to be a reliable document. The applicant testified at the first sitting of the hearing that a lawyer in Sri Lanka certified the copy after the applicant had left Sri Lanka with the original. He then changed his evidence at the second hearing after consulting with his father and confirmed that the copy had been certified using the original NIC before the applicant left Sri Lanka. The RPD did not accept this explanation.

[9] The RPD also found to be unreliable a Certificate from the Register of Births produced by the applicant, because the date of issue was in 2012 and the applicant was not able to explain why the certificate had been issued on this date.

[10] Overall, the RPD found that the applicant was tailoring his account as the need arose through the hearing.

[11] The RPD also held that the findings of identity by the US authorities and at the Canadian Port of Entry did not assist in establishing the applicant's identity and that the applicant's ability to speak Tamil and English was not sufficient to demonstrate his identity.

[12] The RPD then addressed the lack of credibility in the applicant's explanation as to why he feared persecution. It first stated that there was no identity established with which the account for fearing persecution could be associated. The RPD then concluded that there were material unresolved credibility issues in his account as to why he feared persecution.

[13] The RPD noted that a letter the applicant provided from his bishop contradicted his testimony regarding the period of time for which he was detained. The RPD did not accept the applicant's explanation for the contradiction. There were also material omissions in the account the applicant provided to the US officials in his credible fear interview, given that the applicant did not disclose that he had been detained for 10 months in 2013. The applicant stated that it was on the advice of his lawyer that he did not disclose this information, but he provided no evidence from his lawyer to support this explanation, which the RPD did not accept. The RPD also found that the applicant's account of having had a tracking chip embedded by the military and subsequently removed was not credible. The applicant stated that he had it removed in a particular town, but the letter from the clinic stated a different (albeit bordering) town. The RPD once again did not accept his explanation for the inconsistency.

[14] The RPD also placed little weight on medical reports adduced by the applicant. The first report was lacking an opinion that the applicant's scars were consistent with the trauma he

described. The RPD found that the second report, from the applicant's psychiatrist, did not allay the RPD's concerns respecting the credibility issues and that the report was providing an opinion on the legal issue that the RPD was tasked with deciding.

[15] On this basis, the RPD concluded that the applicant had not established that there was a reasonable chance that he would be persecuted were he to return to Sri Lanka or that he would face a risk that would subject him personally to a danger, believed on substantial grounds to exist, of torture or to a risk to his life or to a risk of cruel and unusual treatment or punishment. The RPD referred to the applicable country condition documentation and held that the applicant had failed to establish identity to which any of the risk profiles identified therein would apply. Finally, the RPD found that there was no applicable residual risk profile of the sort raised by the applicant, related to being a young Tamil male from the Eastern province who had previously worked for an NGO and who would become a returning failed asylum seeker from Canada.

### III. Applicant's Submissions

[16] The applicant first submits that the RPD erred in assessing his identity, by ignoring or arbitrarily rejecting all the evidence relevant to establishing identity. While s. 106 of the IRPA and s. 11 of the *Refugee Protection Division Rules*, SOR/2012-256 (RPD Rules) make it mandatory for the RPD to consider the identity of the claimant, there was ample evidence on the identity of the applicant in this case. Additionally, the US authorities and the Canadian authorities found he had established his identity.

[17] The applicant then submits that the RPD erred in assessing the applicant's credibility by allowing the identity findings to colour the credibility determination, by engaging in an overly microscopic assessment, by relying on discrepancies which were not material and by refusing to consider reasonable explanations and proof to resolve inconsistencies. The RPD explicitly found that the lack of a passport was a negative credibility factor, an inference which the applicant argues this Court has found to be unreasonable (*Nishanthan v Canada (MCI)*, [1999] FCJ No 1673, at para 28), and that it was not credible that the agent would have taken his passport. The RPD also drew a negative inference from the applicant's explanation on how the passport was obtained. The applicant clearly stated at the first hearing that he did not have any information on this, and that the only information he had was from his father. He then provided the correct information from his father at the second sitting. The applicant also argues that the RPD rejected his explanation by making improper implausibility findings.

[18] The applicant also argues that the RPD's conclusions regarding the NIC were unreasonable. The applicant provided a certified true copy and provided explanations for why he did not have his original NIC or documentation establishing that the US authorities had seized it. The RPD was not entitled to draw negative inferences from its absence.

[19] The applicant's position is that the RPD's conclusion regarding the birth certificate was unreasonable, because the applicant gave an explanation for the issuance date of 2012, and because the year it was issued was immaterial.

[20] The applicant argues that the RPD also erred in rejecting the medical report from the clinic where he had the chip removed simply because he made an error in the name of the town and identified the bordering town. It was also unreasonable for the RPD to reject the father's letter because of information it did not contain instead of focusing on the information it did contain. The RPD did not properly consider the conclusions on identity by the Canadian and American authorities, it failed to consider the totality of the relevant evidence regarding identity, and it made fatal errors in its findings on credibility and identity which affected the rest of the decision on the risk the applicant would face in Sri Lanka.

[21] Finally, the applicant submits that the RPD erred in assessing the applicant's residual profile and should have considered the evidence which demonstrated that someone with the applicant's profile (a failed asylum seeker or a person with past work for an NGO) was at risk in Sri Lanka.

#### IV. **Respondent's Submissions**

[22] The respondent first submits that the applicant did not prove his identity, as is required in sections 106 and 100(4) of the IRPA and Rule 7 of the RPD Rules. The applicant must establish his identity on a balance of probabilities, and in this case the applicant failed to meet this onus. The respondent argues that the RPD considered all the evidence and provided reasons for rejecting it.

[23] First, the account of how the applicant secured his passport was not credible. His testimony changed from the first to the second sitting of the hearing. It was also not credible that



the applicant would not have informed himself of how the passport was obtained before leaving the country or when he arrived in the US or Canada. The explanation that the applicant was a young man still largely dependent on his father, especially in the culture he was raised, is not a valid explanation and no evidence on this was adduced. Additionally, whatever led the US and Canadian authorities to accept the applicant's identity was not binding on the RPD.

[24] Second, the RPD properly rejected the certified copy of the applicant's NIC as not being reliable proof of identity. The applicant had no evidence that the NIC was with the US authorities, and his testimony was contradictory on how the copy he provided came to be certified.

[25] Third, the birth certificate was not satisfactory proof of identity given that it was issued in 2012 and the applicant did not provide a satisfactory explanation for this date of issuance.

[26] The respondent further submits that the RPD's general credibility findings are reasonable. Although it is true that the applicant provided explanations, these were thoroughly considered by the RPD and rejected. The fact that the applicant provided more evidence at the second sitting went to the point that the applicant was tailoring his account as the hearing proceeded. The RPD considered the explanation for the inconsistency with the US documents, which the RPD acting reasonably did not accept. The RPD explained why it rejected the father's letter, because of the absence of crucial information, and concluded that the applicant was tailoring his account to the issues raised by the RPD. The RPD reasonably rejected the first medical report because of the inconsistency in the applicant's testimony and the evidence. The RPD did not err in considering

the inconsistency in the dates between the applicant's testimony and the bishop's letter and in rejecting the explanation given by the applicant. Finally, the RPD was entitled to reject the other two medical reports as unsatisfactory support for the credibility of the applicant's allegations.

[27] The respondent lastly submits that there was no reviewable error in the assessment and conclusion on the applicant's profile. The RPD's conclusion followed its findings on credibility and identity. The Panel reasonably concluded that there was no evidence that the applicant would fall within the applicable risk profiles identified by the United Nations High Commissioner for Refugees (UNHCR) and that the mere fact of being a Tamil male from the north or east of Sri Lanka is not sufficient.

#### V. Issues

[28] The applicant submits that this matter raises the following issues:

1. What is the appropriate standard of review?
2. Did the RPD err in assessing the applicant's identity?
3. Did the RPD err in assessing the applicant's credibility?
4. Did the RPD err in assessing the applicant's residual profile?

#### VI. Analysis

##### A. *What is the appropriate standard of review?*

[29] The issues in this case are questions of fact and mixed law and fact and thus the standard of reasonableness applies (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 50). Questions

regarding findings of identity are reviewable on the standard of reasonableness (*Zheng v Canada (MCI)*, 2008 FC 877, at para 13; *Bagire v Canada (MCI)*, 2013 FC 816, at para 18), as are questions of credibility (*Aguebor v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 732 (Fed CA), at para 4; *Lumaj v Canada (MCI)*, 2012 FC 763, at para 25) and findings regarding the applicant's residual profile (*M (J) v Canada (MCI)*, 2015 FC 598, at paras 63, 67).

*B. Did the RPD err in assessing the applicant's identity?*

[30] The Court's conclusion is that the RPD's findings regarding the applicant's passport are unreasonable. It was unreasonable for the RPD to draw an adverse credibility inference from the inconsistency in the applicant's testimony, given that it is clear from the transcript of the hearing that the applicant did not know at the time of the first sitting how his passport had been obtained and explained that his father had obtained it for him. At this point in the hearing, he was giving information to the best of his knowledge. The applicant testified that his father had told him it was a genuine passport obtained through proper channels and, when then asked by the RPD member whether his father or anyone else had paid a bribe to obtain the passport, the applicant answered in the negative. At the second sitting, the applicant clarified that he had since spoken with his father and that the passport had in fact been obtained through a bribe. This is not inconsistent with the applicant's evidence at the first sitting of the hearing, given that he had clearly indicated he had not known how the passport was obtained and was relying on what his father had told him.

[31] The Court also finds to be unreasonable the RPD's conclusion that the applicant had not credibly addressed the change in his evidence on this point between the first and second sittings.

The RPD stated that it was not credible the applicant would not have previously known that his passport was obtained through a bribe and, given that identity is a central issue for the applicant to demonstrate, that he would not have taken steps to inform himself, once safely in Canada, about the circumstances in which his passport was obtained.

[32] I agree with the applicant's characterization of these statements as implausibility findings. In so finding, the RPD was speculating about what the applicant should have done or what would have been the reasonable course of action. Implausibility findings should only be made in the clearest of cases, where the facts as presented are outside the realm of what could reasonably be expected or where the documentary evidence demonstrates that that the events could not have happened in the manner asserted by the claimant (*Valtchev v Canada (MCI)*, 2001 FCT 776 at para 7). In the present case, there was no evidence that the applicant's explanation was not the truth, and such explanation cannot be characterized as outside the realm of reasonableness. Therefore, with respect, the RPD's conclusion on this point was itself unreasonable.

[33] The other component of the RPD's decision related to identity, that I find to be unreasonable, is its finding on the applicant's evidence surrounding the certificate from the register of births. This evidence does not contain inconsistencies of the sort that gave the RPD concerns in relation to his passport and NIC. It was unreasonable for the RPD to reject this certificate simply because the date of issue of the copy he produced was 2012 and his explanation of the reason a copy was required in 2012 was somewhat tentative. I agree with the

applicant's submissions that the fact he could not recall for certain the reasons why a copy of an official document was obtained does not mean the RPD can ignore it.

[34] I appreciate, as noted by the RPD, that the certificate does not bear a photograph of the claimant as would a passport and national identity card. However, in combination with my conclusion on the evidence surrounding the applicant's passport, I find the RPD's decision, that the applicant has not established his identity with credible and trustworthy evidence, to be an unreasonable finding.

[35] However, the respondent argues that, even if the Court were to reach this conclusion on the identity issue, this is not a sufficient basis to return this matter to the RPD, because identity is not entangled with the other issues of credibility and risk profile. I will address this argument below.

*C. Did the RPD err in assessing the applicant's credibility?*

[36] The applicant argues that the RPD's identity findings coloured its credibility determinations. The respondent's position is that the RPD's findings on credibility are very specific and, independent of the identity findings, leave no doubt that the RPD did not believe the applicant's account for fearing persecution.

[37] Because of my conclusions below with respect to the applicant's risk profile, with the result that the RPD's decision must be remitted for re-determination, it is not necessary to decide the credibility issues argued by the parties.

D. *Did the RPD err in assessing the applicant's residual profile?*

[38] The RPD referred in its decision to the specific risk profile that had been raised by his counsel, that the applicant was at risk based on his personal experiences at the hands of the Sri Lankan government but also based on his profile as a young Tamil male from the Eastern Province, who previously worked for an NGO, and who would become a returning failed asylum seeker from Canada. The RPD's conclusion was that, the claimant not having established his identity with credible and trustworthy evidence, there was no identity to which any of the risk profiles raised by the relevant country condition documentation, or a risk profile unique to him, could attach. The RPD also concluded that, not having established with credible and trustworthy evidence his account of detentions, torture and computer work for the military, there was no risk profile that could support a positive determination.

[39] Because the RPD's conclusion on this issue was at least partially based on its finding that the applicant had not established his identity, I find that the outcome of the risk profile analysis may have been different had it not been for the RPD's error in its treatment of the identity issue.

[40] I have considered the arguments and authorities raised by the respondent to the effect that, without more, the mere fact of being a male from the north or east of Sri Lanka does not warrant the grant of refugee protection. For example, in the most recent of those cases, *Kulanayagam v Canada (MCI)*, 2015 FC 101 at paras 41- 43, Justice Locke referred to such authorities and held that, as country condition documents are insufficient on their own to

establish a personalized risk, it was reasonable for the immigration officer performing the pre-removal risk assessment in that case to find that, because the applicant had not established an affiliation with the LTTE, his profile did not bring him within the group of failed asylum seekers that would attract the attention of authorities upon their return. As such, the officer had properly assessed the risk to the applicant as a returning asylum seeker from Canada.

[41] The challenge for the respondent in this case in relying on this authority is the express link drawn by the RPD between its identity finding and its conclusion on risk profile. While the RPD noted that it had kept in mind the risk profile raised by the applicant's counsel (including being a failed asylum seeker from Canada), its conclusion was that the applicant had not demonstrated identity to which the any of the risk profiles raised by the UNHCR, or any risk profile unique to the applicant, could attach. As such, as a result of the RPD's error in its treatment of the identity issue, the residual risk profile raised by the applicant has not received the required assessment, which represents a reviewable error (see *Navaratnam v Canada (MCI)*, 2015 FC 244 at para 11).

[42] I also note that this Court has recently held that the risk profile of a failed refugee claimant returning to Sri Lanka requires assessment regardless of the assessment of the applicant's credibility. In *Suntharalingam v Canada (MCI)*, 2014 FC 987, the RPD found that, because it did not believe the applicant was targeted by the authorities for a perceived association with the LTTE, there was no need for it to consider whether he was at risk in relation to the objective documentary evidence. However, Justice Brown held as follows at para 49:

In my respectful view, the RPD's credibility concerns cannot determine the issue of whether there is a serious possibility of

persecution of the claimant in his capacity as a failed refugee claimant returnee. The applicant's status in this regard is determined objectively by the fact that he is a failed refugee applicant by virtue of having his claim rejected by the RPD. It has nothing to do with credibility.

[43] In conclusion, the Court's decision is that the RPD's decision must be set aside and remitted to a different panel of the RPD for re-determination.

[44] No question has been submitted to the Court for consideration for certification for appeal.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the matter is referred to the RPD for re-determination by a different panel member. No question is certified for appeal.

“Richard F. Southcott”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6383-14

**STYLE OF CAUSE:** PAVITHRAN PAUL JOSEPH SELVARASU v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

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