

Federal Court



Cour fédérale

**Date: 20181211**

**Docket: IMM-1251-18**

**Citation: 2018 FC 1238**

**Ottawa, Ontario, December 11, 2018**

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

**BETWEEN:**

**JEYAJEEVAN JEYAREDSAGATHAS**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Jeyajeevan Jeyaredsagathas seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD found that he is neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, the decision of the RPD was both procedurally unfair and unreasonable. The application for judicial review is therefore allowed.

## II. Background

[3] Mr. Jeyaredsagathas is a citizen of Sri Lanka and an ethnic Tamil. In May 2009, when the Sri Lankan civil war was nearing its end, he was living in Colombo. He says that he was often harassed by the authorities at security checkpoints due to his ethnicity.

[4] According to Mr. Jeyaredsagathas, in March 2009, he was kidnapped and held captive. He was interrogated and mistreated. He obtained his release by bribing one of his captors. He says he then received threatening phone calls with demands for money because he has family in Canada. He also claims he was visited by two people who identified themselves as plainclothes police officers. They asked Mr. Jeyaredsagathas whether a certain Tamil person was living with him. When Mr. Jeyaredsagathas said no, the plainclothes officers ransacked his house.

[5] Fearing for his safety, Mr. Jeyaredsagathas moved in with a friend and made plans to leave Sri Lanka. He worked at a travel agency, and a customer suggested a way of getting to Canada. This customer put Mr. Jeyaredsagathas in touch with a human smuggler agent.

[6] Following the agent's instructions, Mr. Jeyaredsagathas travelled to Thailand in June 2009. From there he went to Indonesia. He submitted a refugee claim to the United Nations High Commission for Refugees [UNHCR], but later abandoned it.

[7] On August 8, 2009, Mr. Jeyaredsagathas boarded the MV *Ocean Lady*, a ship bound for Canada that carried many Tamil Sri Lankans. The MV *Ocean Lady* arrived off the coast of British Columbia in October 2009. Mr. Jeyaredsagathas was detained and questioned by the Canada Border Services Agency [CBSA].

[8] Mr. Jeyaredsagathas made a refugee claim in Canada. The RPD rejected his claim and he applied for judicial review. His application was granted and the matter was remitted to the RPD for reconsideration.

[9] The RPD reclassified Mr. Jeyaredsagathas' claim as a "Legacy Claim" and kept it in abeyance for approximately five years. On November 16, 2017, the RPD held a second hearing into Mr. Jeyaredsagathas' refugee claim.

### III. Decision under Review

[10] The Minister of Public Safety and Emergency Preparedness intervened in the hearing and provided documentary evidence, but did not make written or oral submissions. The RPD rejected Mr. Jeyaredsagathas' claim on January 16, 2018. The RPD found that circumstances in Sri Lanka had improved for Tamils, and Mr. Jeyaredsagathas did not have a well-founded fear of persecution.

[11] The RPD acknowledged that the evidence concerning the treatment of Tamils in Sri Lanka is mixed, citing the National Documentation Package [NDP] for Sri Lanka dated March

31, 2017. The RPD preferred a report of the UNHCR titled *Sri Lankan Refugee Returnees in 2014* [UNHCR Report] over other documents in the NDP which state that Tamils continue to face a significant risk of persecution in Sri Lanka.

[12] The UNHCR Report was published in November 2015. It found that 100% of Tamils who returned to Sri Lanka were motivated by the increase in peace and stability, 95% felt secure, and 90% were satisfied with their current residence. The RPD noted that the UNHCR was working with the Sri Lankan government to facilitate the return of Tamil refugees and has an elaborate and effective formal reintegration strategy for returnees.

[13] The RPD concluded that there had been a material change in circumstances in Sri Lanka following the end of the civil war and the first hearing into Mr. Jeyaredsagathas' refugee claim. The RPD found that the change is durable, effective and substantial, and conditions continue to improve.

[14] The RPD also examined Mr. Jeyaredsagathas' *sur place* claim. Mr. Jeyaredsagathas asserted that he would face additional scrutiny from Sri Lankan authorities as a failed refugee claimant without a passport who had travelled to Canada aboard the *MV Ocean Lady*.

[15] The *MV Ocean Lady* and the *MV Sun Sea* were two ships that carried hundreds of Tamil Sri Lankans to Canada in October 2009 and August 2010 respectively. Their journeys attracted considerable media attention. Many media reports in Canada and abroad alleged that the vessels were associated with the Liberation Tigers of Tamil Elam [LTTE], the ethnic Tamil rebel group

that was defeated in the civil war. Mr. Jeyaredsagathas claimed that Sri Lankan authorities would perceive him as having connections to the LTTE or able to provide information about the LTTE, and this would increase his risk of persecution.

[16] The RPD found that Mr. Jeyaredsagathas had “failed to establish how the Sri Lankan government would know that he arrived in Canada aboard the *Ocean Lady*.” The RPD also preferred the evidence provided by the CBSA regarding the treatment of passengers on the MV *Sun Sea* and MV *Ocean Lady* who had returned to Sri Lanka.

[17] The evidence provided by the CBSA included transcripts of interviews of three Tamils who came to Canada aboard the MV *Sun Sea* and returned to Sri Lanka after their refugee claims were rejected. All three appeared to be faring well in Sri Lanka, although each had experienced periods of detention since their arrivals. The evidence also included an interview with a liaison officer with the Canadian High Commission in Colombo, who praised the Sri Lankan authorities’ efforts to reintegrate Tamil returnees.

[18] Mr. Jeyaredsagathas relied on two reports of Amnesty International [Amnesty] and other articles which maintained that failed refugee claimants who came to Canada aboard the MV *Ocean Lady* or MV *Sun Sea* are likely to face persecution on their return to Sri Lanka.

[19] The RPD preferred the CBSA evidence over the Amnesty reports. The RPD held that the CBSA evidence was based on first-hand witness accounts, while the Amnesty reports were derived from third and fourth-hand information. The RPD also found that the Amnesty reports

did not establish a direct link between travel on the MV *Ocean Lady* and persecution, and “the information contained in the Amnesty International reports is presented for the purpose of advocacy and is not neutral.”

#### IV. Issues

[20] This application for judicial review raises the following issues:

- A. Was the RPD’s decision procedurally fair?
- B. Was the RPD’s decision reasonable?

#### V. Analysis

[21] Questions of procedural fairness are subject to review by this Court against the standard of correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34). The RPD’s factual findings are subject to review against the standard of reasonableness (*Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 21).

- A. *Was the RPD’s decision procedurally fair?*

[22] At the commencement of the hearing before the RPD, the RPD entered a box of documents as “Exhibit 1”. According to the RPD, Exhibit 1 consisted of documents that were before the RPD during the first hearing into Mr. Jeyaredsagathas’ refugee claim in October 2012.

Neither Mr. Jeyaredsagathas nor his counsel received notice that the RPD would admit the record of the first RPD hearing into evidence. Mr. Jeyaredsagathas requested an adjournment, but this was refused. Mr. Jeyaredsagathas says this amounts to a breach of procedural fairness.

[23] The request for an adjournment and its refusal are not mentioned in the RPD's decision. However, the transcript indicates that the RPD provided four reasons verbally: (a) Mr. Jeyaredsagathas signed a confirmation of readiness form in September 2017; (b) Mr. Jeyaredsagathas was represented by experienced counsel who had also represented him in his application for judicial review of the first RPD decision, and should therefore be familiar with the record of the first hearing; (c) Mr. Jeyaredsagathas should have raised any objection to the inclusion of evidence before he signed the confirmation of readiness form; and (d) it would be in Mr. Jeyaredsagathas' best interests to proceed with the hearing rather than delay the determination of his refugee claim any longer.

[24] The RPD also stated that there was a "new policy" whereby the record of a previous hearing would automatically be entered into evidence when a matter was remitted for reconsideration. Counsel for the Minister of Citizenship and Immigration [Minister] concedes that this statement was incorrect, and there was (and is) no new policy to this effect.

[25] Mr. Jeyaredsagathas relies on Rule 33 of the *Refugee Protection Division Rules*, SOR/2012-256, s 33 [RPD Rules], which states that "[s]ubject to subrule (2), if the [RPD] wants to use a document in a hearing, the [RPD] must provide a copy of the document to each party." It

is unclear what use the RPD made of the documents in reaching its conclusions, although Exhibit 1 is referenced in one footnote in its written reasons.

[26] The Minister says that the RPD's findings regarding the material change in circumstances facing Tamils who return to Sri Lanka today were necessarily based on evidence that arose after the first hearing, and this evidence was disclosed to Mr. Jeyaredsagathas. Any defects in the procedure adopted by the RPD did not affect the fairness of the hearing. Mr. Jeyaredsagathas could have submitted an objection to the consideration of certain evidence after the hearing, but he did not do so.

[27] The RPD did not comply with Rule 33 of the RPD Rules, which requires that all documents to be used in a hearing be disclosed to refugee claimants in advance. The RPD compounded its error by invoking a change in policy that did not exist. I am satisfied that this amounted to a breach of procedural fairness.

[28] A court may withhold relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). A breach of procedural fairness may be overlooked only if it is beyond doubt that it had no material effect on the decision (*Nagulesan v Canada (Citizenship and Immigration)*, 2004 FC 1382 at para 17).

[29] In this case, the breach of procedural fairness was not purely technical. Exhibit 1 is referenced in the RPD's decision. It is unclear what impact, if any, Exhibit 1 had on the RPD's



conclusion that Mr. Jeyaredsagathas was not a Convention refugee or person in need of protection. The matter must therefore be remitted to the RPD for redetermination.

B. *Was the RPD's decision reasonable?*

[30] Mr. Jeyaredsagathas asserts that Tamils who are suspected of being affiliated with the LTTE continue to be at risk in post-civil war Sri Lanka (*UNHCR Guidelines for Asylum-Seekers from Sri Lanka*, December 2012, NDP, Item 1.5). Passengers aboard the MV *Ocean Lady* and MV *Sun Sea* were widely reported to have LTTE connections. Mr. Jeyaredsagathas relies on two Amnesty reports: *Amnesty International Concerns with respect to forced returns to Sri Lanka for passengers of the Ocean Lady and MV Sun Sea* (June 2012) and *RE: Forced Return to Passengers on MV Sun Sea and Ocean Lady* (October 2017).

[31] The RPD acknowledged the Amnesty reports in its decision, but expressed a preference for the UNHCR Report and the evidence provided by the CBSA. The Minister says that preferring one source of evidence over another is a matter of weight, and it is not the role of this Court to reweigh the evidence (*Koppalapillai v Canada (Citizenship and Immigration)*, 2018 FC 235 at para 15).

[32] In rejecting Mr. Jeyaredsagathas' *sur place* claim, the RPD observed that Mr. Jeyaredsagathas had "failed to establish how the Sri Lankan government would know that he arrived in Canada aboard the *Ocean Lady*." Justice Alan Diner said the following about a similar

line of reasoning in *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349

[*Vilvarajah*] at paragraph 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.

[33] The RPD gave little weight to the Amnesty reports, holding that the information they contained was "presented for the purpose of advocacy and is not neutral." In my view, this was not a sufficient basis on which to reject the Amnesty reports. It was incumbent on the RPD to engage with the substance of the reports, rather than dismiss them based on a general and unsupported finding of bias.

[34] The UNHCR Report was primarily concerned with the experiences of Tamils whose return to Sri Lanka was either facilitated or monitored by the UNHCR. These are not the circumstances under which Mr. Jeyaredsagathas will return to Sri Lanka. It was unreasonable for the RPD to assume that Sri Lankan authorities will not learn of his travel aboard the MV *Ocean Lady*. As a returning failed refugee claimant without a passport, Mr. Jeyaredsagathas is certain to be questioned by the authorities, including about how he came to Canada. As Justice Diner found in *Vilvarajah*, it was unreasonable for the RPD to expect Mr. Jeyaredsagathas to misrepresent his past to immigration officials in Sri Lanka.

VI. Conclusion

[35] The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RPD for reconsideration. Neither party proposed that a question be certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RPD for reconsideration.

"Simon Fothergill"

---

Judge

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

**DOCKET:** IMM-1251-18

**STYLE OF CAUSE:** JEYAJEEVAN JEYAREDSAGATHAS v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 22, 2018

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** DECEMBER 11, 2018

**APPEARANCES:**

Robert Blanshay FOR THE APPLICANT

Nicholas Dodokin FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Blanshay Law LLP FOR THE APPLICANT  
Barristers and Solicitors  
Toronto, Ontario

The Attorney General of Canada FOR THE RESPONDENT  
Ottawa, Ontario