

Federal Court



Cour fédérale

**Date: 20141126**

**Docket: IMM-4617-13**

**Citation: 2014 FC 1138**

**Ottawa, Ontario, November 26, 2014**

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

**BETWEEN:**

**RAVEENDRAN GOPALARASA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] Raveendran Gopalarasa, the Applicant, is a citizen of Sri Lanka applying for judicial review [JR] of a decision of the Refugee Protection Division [RPD, Board] of the Immigration and Refugee Board of Canada rendered June 3, 2013 which determined he is not a Convention refugee or a person in need of protection according to the criteria specified in sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The application was

commenced pursuant to section 72(1) of *IRPA*. The application is allowed for the following reasons.

II. **Facts**

[2] The Applicant is a citizen of Sri Lanka from Jaffna in the Northern Province of Sri Lanka, claiming refugee protection. He is a 35 year old Tamil male carpenter. In brief, there are two aspects to the risk of persecution claimed, emanating from two separate sources.

[3] First, the Applicant fears the Sri Lankan Army (Army). He claims that he had some problems with the Army in the 1990s, and that they came looking for him at his home in June 1997. They told his mother to advise him to report to the army camp the next day. Instead, he fled to Vavuniya and remained there.

[4] Second, the Applicant fears the Eelam People's Democratic Party (EPDP), a Tamil paramilitary group. He claims that in April 2010, the EPDP kidnapped him in Vavuniya and demanded a substantial sum of money. In November 2011, the EPDP located his new residence and attended there to inquire about him. At that time, the EPDP representatives advised the house owners that they were no longer interested in the money, but wanted his life.

[5] The Applicant subsequently fled the country. He applied for asylum in the United States and remained there for almost two months, then proceeded to Canada and made a refugee claim here.

III. **Decision Under Review**

[6] The Board found that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of *IRPA*.

[7] The Board found that the Applicant's fear of the Army was not well-founded for various reasons, including the following:

- The Applicant was issued a Sri Lankan passport and was allowed to proceed through airport security without any issue, suggesting that there was no warrant for his arrest;
- The encounter when the Army came to look for him took place in 1997, more than 15 years ago, and before the war ended in May 2009;
- Former LTTE members are being released by the government;
- The Applicant's family lives in Jaffna, undisturbed;
- There is no evidence that the Applicant was involved with the LTTE in the past, or in anti-Sri Lankan government activity while in Canada, or that the Sri Lankan government considers him a security threat;
- The Applicant abandoned his asylum claim in the U.S. to come to Canada;

- His profile does not match any of the at-risk groups identified by the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 2012 [2012 UNHCR Guidelines];
- Returning Tamils are subjected to the same screening process, regardless of whether they are returning voluntarily or as failed refugee claimants; and
- The claimant did not provide corroborative documentary evidence to support the contention that he was being sought or would be arrested by Sri Lankan security forces if returned.

[8] With respect to the Applicant's claimed fear of the EPDP, the Board found that any risk faced by the Applicant was a generalized one, in that the threat was faced generally by others in the country who are perceived to be wealthy or who have enough money to be targeted for extortion. As such an individual, he was not a person in need of protection under subsection 97(1). The Board Member noted that victims of crime, corruption, or vendettas generally fail to establish a section 96 nexus.

#### IV. **Issues**

[9] The Applicant raises five issues in this Application, arguing that the Board erred by:

- A. applying the incorrect legal test for refugee status;
- B. erring in its treatment of generalized risk;

- C. assessing the Applicant's subjective fear based on his failure to await his refugee claim in the U.S.;
- D. ignoring crucial evidence; and
- E. improperly assessing the Applicant's credibility.

V. **Relevant Provisions**

[10] The relevant provisions of sections 96 and 97 of *IRPA* are attached as Annex A.

VI. **Submissions of the Parties**

A. *Wrong legal test*

[11] The Applicant contends that the Board applied an incorrect legal test for refugee status, namely a "balance of probabilities" rather than a "serious possibility" of persecution test.

[12] The Respondent, on the other hand, asserts that the Decision, taken as a whole, applies the correct standard of proof. The Board applied the civil standard of "balance of probabilities" to measure the evidence supporting the factual contentions, and the "serious possibility" of persecution standard to measure the risk. Although the Board might have chosen an unfortunate use of words to describe the test, it ultimately applied the correct test in its conclusion, and arrived at the correct result.

B. *Assessment of generalized risk*

[13] With respect to the Board's analysis of the Applicant's fear of persecution by the EPDP, the Applicant states that it erred by failing to analyse this aspect of the claim under section 96. The Applicant submits that the Board failed to consider the persecutory consequences of having failed to accede to extortion demands by the EPDP, which would be viewed by the EPDP as indicating opposition to their political agenda. As such, there is a clear nexus to perceived political opinion, which was not addressed by the Board.

[14] The Respondent submits that the Board reasonably noted that victims of crime, corruption or vendettas generally fail to establish a link to one of the Convention grounds. Furthermore, when making a claim on a Convention ground, membership in a group must be the primary cause of the persecution. The fact that the Applicant was a Tamil was not the primary cause of the persecution, and the EPDP was not interested in targeting the Applicant for political reasons. The Respondent concludes that the Board's section 97 finding was reasonable, since being targeted for wealth is a generalized risk. Similarly, where a claimant does not comply with a demand, reprisals do not personalize the risk (*Wilson v Canada (Citizenship and Immigration)*, 2013 FC 103 at para 7; *Baires Sanchez v MCI*, 2011 FC 993 at para 27).

C. *Assessment of subjective fear*

[15] The Applicant submits that the Board erred in drawing a negative inference from the Applicant's abandonment of his claim for protection in the U.S., since the case law states that the presence of a relative in Canada is sufficient reason not to seek protection in other countries.

[16] The Respondent submits that, in assessing whether the Applicant's fear was well-founded, it was open to the Board to take into account that the Applicant abandoned his asylum claim in the U.S.

D. *Ignored evidence that directly contradicted conclusions*

[17] The Applicant argues that the Board failed to address contradictory evidence in the documentary record, including evidence from the same document upon which it placed primary reliance with respect to risk factors (the 2012 UNHCR Guidelines). Further, the Applicant submits that the Board erred by ignoring other relevant evidence that directly contradicts the conclusions it reached regarding the danger faced by Tamil males from Northern Sri Lanka and the screening process for returning Tamils.

[18] The Respondent submits that the Board, albeit briefly, did note that the situation in Sri Lanka presented challenges, referring to four cases of detained returnees. In any event, the Board is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown, and the Board is not required to refer to contradicting evidence where that evidence is found in the general country condition documentation.

E. *Improperly assessing the Applicant's credibility*

[19] The Applicant further submits that the Board erred in its assessment of the Applicant's credibility. In its assessment of well-founded fear, the Board stated that credibility was an issue, and made the following problematic credibility findings, which:

- took too simplistic an approach by drawing negative inferences from the Applicant's ability to apply for a passport and get through airport security;
- defined the category of "similarly situated persons" too narrowly, by taking into consideration that the Applicant's family in Jaffna was undisturbed;
- failed to explain why it required corroborative documentation for the suggestion that the Applicant was being sought or would be arrested by the Sri Lankan authorities; and
- erred in drawing a negative inference from the Applicant's abandonment of his claim for protection in the U.S.

In any event, the Applicant contends that one is left uncertain as to exactly which factors led to the credibility finding of the Board.

[20] The Respondent submits that the Board's comment that there were "serious doubts to the claimant's story" went to the heart of whether the Applicant's claim was well-founded. The Respondent submits that it was open to the Board Member to take various factors into account in



determining whether the Applicant's fear was well-founded, including that: there were no reprisals since his encounter with the Army 15 years ago; he was able to obtain a passport and leave the country without problems; his family had not suffered reprisals; he abandoned his U.S. asylum claim; and he had not been politically involved since coming to Canada.

[21] The Respondent contends that the Board did not rely on any of these factors going to the well-foundedness of the claim exclusively, but rather assessed them cumulatively, unlike in *Rayappu v MCI*, FC Docket IMM-8712-11 dated October 24, 2012 and *B027 v MCI*, 2013 FC 485, cases which the Applicant relies on. Therefore, the Respondent contended that even if one of these findings was problematic, the overall decision was nonetheless reasonable.

## VII. Standard of Review

[22] There are two different standards in this case. Issues 1-3 raise questions of law and as such should be reviewed on a standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 44.

[23] Issues 4-5 should be reviewed on a reasonableness standard, which affords a greater degree of deference to the decision-maker: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51. When applying the reasonableness standard of review, the Court may intervene only if it is satisfied that the reasons of the tribunal are not "justified, transparent or intelligible" and that the result does not fall "within the range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir* at para 47).

VIII. Analysis

[24] It is my conclusion that the Board erred in each of the five issues raised in this JR.

A. *Wrong legal test*

[25] The Board Member stated as follows in three different places in the decision:

(i) ...the panel does not believe, on a balance of probabilities, that the claimant is a wanted person by the security forces of Sri Lanka.

(ii) ...the panel finds, on a balance of probabilities, that the claimant would not face a serious risk of harm from the government security forces upon return to Sri Lanka.

(iii) ...the panel does not believe that he will be arrested, or harmed by government forces if he were to return to Sri Lanka today, on a balance of probabilities.

[Emphasis added]

(Decision, Applicant's Record [AR], p 12, paras 13, 15, 23)

[26] These statements apply the wrong test. The Board should have applied the balance of probabilities standard with respect to evaluation of the evidence to determine the facts, but the ultimate test to determine the section 96 claim involves a lower standard of "serious possibility".

In doing so, the Board erred in law.

[27] The Board cannot set out a multiplicity of tests – in this case, three misstatements of the test as above – and then cure those errors by stating the test once correctly (*Sekeramayi v MCI*, 2008 FC 845 at para 17; *Paramsothy v MCI*, 2012 FC 1000 at para 32).

B. *Assessment of Generalized Risk: Failure to consider section 96 persecution*

[28] The Board found that the EPDP extortion was a generalized risk. However, extortion is not what the Applicant stated he feared. Rather, the Applicant was clear that he feared the persecutory risk of failing to comply with extortion. The Applicant stated to the Board, “They also told him that we do not need his money any longer but we need his life. Whatever we need we will kill him” (Hearing transcript, AR, p 578) and his counsel noted in submissions to the Board:

...the evidence does suggest that the green light has been given to these groups to extort Tamil businessmen, not Sinhalese businessmen. That this extortion is still based on race and ethnicity, perceived political opinion which brings you right into the Convention refugee definition. It’s not a generalized risk.

(Hearing transcript, AR, p 600)

[29] The Board member erred in considering the fear only under section 97, and deeming it a generalized risk, instead of considering the Applicant’s nexus to Convention grounds (i.e., perceived political opinion based on refusal to comply with the demands of the EPDP).

[30] This fear of the Applicant was articulated not only at the hearing, but also previously, in written statements of the Applicant. For instance, in his March 2012 Personal Information Form (PIF), the Applicant stated, “These gunmen told the house owners that they did not want the money anymore but my life now.... I fear that if I return to Sri Lanka I will have problems with the EPDP as I did not pay them the money demanded” (PIF Narrative, AR, p 29, paras 5-6).

[31] Despite the Board Member's finding in this matter that the risk by the EPDP was a generalized one, the RPD should have conducted a section 96 analysis, as there was evidence that the Applicant's risk in this regard was based on ethnicity or perceived political opinion. Unlike in *Pararasasingam v MCI*, 2013 FC 805, where the Board was found to have reasonably analyzed nexus in regard to a Tamil from Sri Lanka who claimed he had been subjected to threats and extortion from the EPDP, the Board in this case did not conduct an analysis of whether the Applicant had established a nexus to a Convention ground. A finding that a risk is generalized does not prohibit a finding of persecution on the basis of one of the Convention grounds: See *Dezameau v MCI*, 2010 FC 559 at paras 23, 31; *Josile v MCI*, 2011 FC 39 at para 11.

### C. *Assessment of Subjective Fear*

[32] The Board found that the Applicant did not have a subjective fear of persecution because he could have claimed refugee status elsewhere, noting that he has a sister in Norway, and remained in the U.S. for two months. It stated that the delay to claim refugee status points to a lack of subjective fear of persecution.

[33] The jurisprudence, however, is clear that attempting to reunite with family is a valid reason for a refugee claimant not to seek protection in the first country in which they arrive en-route to Canada: See *Ay v MCI*, 2010 FC 671 at paras 39-40; *Paramananthan v MCI*, FC Docket IMM-6206-09 dated November 16, 2010; *Rivera Mejia v MCI*, 2011 FC 1265 at para 9.

[34] In this case, the Board drew a negative inference from the Applicant's abandonment of his claim in the U.S. The Board noted that the Applicant was detained in the U.S. However, what the Board failed to note is that the Applicant could not leave the U.S. because of this detention, and that as soon as he was released, he left the U.S., making his way to Canada, which was his intention from the start of his journey in Sri Lanka. Indeed, the Applicant had a brother in Canada. The Applicant's oral testimony emphasized that he never intended to seek asylum status in the U.S. (see Certified Tribunal Record [CTR], pp 582-588), where he states in summation to detailed examination and cross-examination on the subject:

COUNSEL: I want to know on that issue, sir, when you were leaving Sri Lanka what was your intention, like where were you intending to go? Did you have any plans?

CLAIMANT: It's a plan to come to Canada

COUNSEL: Okay. And is there any reason why you were planning to come to Canada?

CLAIMANT: There were two reasons. One agent told me, advised me that you can go to Canada. Number two my brother was here.

COUNSEL: Okay. So had you not been arrested by the authorities in the United States would you have made a refugee claim down there?

CLAIMANT: No, I wouldn't have.

[CTR, p 588]

[35] It appears that the claimant's testimony was overlooked by the Board when it found that the Applicant "abandoned the opportunity for asylum in the U.S.", and that someone who is truly fearful would "claim refugee status at the first opportunity". In my view, the Board erred in law by failing to consider, in its assessment of subjective fear, that the Applicant's reason for abandoning his opportunity for asylum in the U.S. was that he had a brother in Canada.

Moreover, the Board should have considered the reason for the time the Applicant spent in the U.S., as well as the Applicant's intention to claim status in Canada from the outset.

[36] The next two items are reviewable on a reasonableness standard, as discussed above, and will be reviewed briefly, since, having determined that the Board erred on Issues 1-3, these final issues are not necessary to decide the case. However, they should nonetheless be heeded in the reconsideration of this matter.

D. *Ignoring evidence that directly contradicted conclusions*

[37] In reaching its conclusion that the Applicant's fear of the Army was not well-founded, the Board found that the Applicant's profile was not one of the at-risk profiles in the 2012 UNHCR Guidelines (CTR, pp 134-175).

[38] However, in the very next section of the Decision, dealing with risk by being a returnee to Sri Lanka, the Board Member failed to cite other evidence in the same 2012 UNHCR Guidelines of detention, ill-treatment, and torture of former Sri-Lankan (particularly Tamil) asylum-seekers after they were forcibly returned to Sri Lanka (CTR, p 141).

[39] The case law is clear that the Board does not need to deal with every piece of documentary evidence – far from it: See *Cepeda-Gutierrez v MCI*, [1998] FCJ No 1425 at para 16; *Florea v Canada (MEI)*, [1993] FCJ No 598 at para 1 (CA). However, what is also clear from the jurisprudence is that contradictory evidence should not be overlooked. This has to be particularly so with respect to a key document relied upon by the Board to reach its

conclusion that the claimant will not be persecuted in his country of origin. To leave out references from the same document used to arrive at the opposite conclusion is to take a proposition out of context and show only half the picture.

E. *Assessment of credibility*

[40] The Board member states that “there are serious doubts to the claimants story”, but it is not clear what these doubts are. The Applicant suggests that there are four particular issues that the Board Member may be referring to, and refutes all of these (the fact that (i) the Applicant was able to obtain a passport and get through airport security, (ii) the Applicant’s family members were similarly situated but never persecuted, (iii) the Applicant did not produce corroborating evidence for much of his claim, and (iv) the Applicant did not await his asylum claim in the U.S.). However, it is not known whether these were indeed the particular elements that gave the Board member doubts with respect to credibility. The case law states that credibility findings against the applicant must be clearly set out: See *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (FCA); *Cooper v MCI*, 2012 FC 118 at para 5. In reading this decision, it is unclear which findings of the Board in its analysis of well-founded fear refer to an objective basis for fear, and which refer to credibility.

IX. **Conclusion**

[41] Given that five issues were raised, and all five had problematic elements, including errors of law that must be reviewed on a correctness standard, this application for judicial review is allowed and will be sent back for reconsideration by a differently constituted panel.

[42] No questions were proposed for certification, and none arose.



**JUDGMENT**

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

"Alan Diner"

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Judge

## ANNEX A

*Immigration and Refugee Protection Act (SC 2001, c 27) Sections 96 and 97*

*Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27) Articles 96 et 97*

### **Convention refugee**

### **Définition de « réfugié »**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

### **Person in need of protection**

### **Personne à protéger**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

### **Person in need of protection**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

### **Personne à protéger**

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

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

**DOCKET:** IMM-4617-13

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**DATED:** NOVEMBER 26, 2014

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