

Federal Court



Cour fédérale

**Date: 20150522**

**Docket: IMM-2110-14**

**Citation: 2015 FC 665**

**Ottawa, Ontario, May 22, 2015**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**BETWEEN:**

**KARTHIK MARIO RAVICHANDRAN  
VINODH MARINO RAVICHANDRAN  
DIVIYA MARIZA RAVICHANDRAN**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of a visa officer at the High Commission of Canada in New Delhi, India in which the officer refused the applicants' applications for permanent residence in Canada as members of the Convention refugees abroad

class and the country of asylum class pursuant to sections 11 and 96 of the Act and sections 139 and 145-147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

I. Facts

[2] The applicants are three siblings who are Sri Lankan citizens of Tamil ethnicity.

[3] They allege that their family was targeted for persecution by the Sri Lankan authorities in February 2007 after their father refused to issue a travel ticket to a relative of the leader of the Karuna paramilitary group. As a result, he was abducted by police and tortured. After a family friend secured his release by paying a substantial sum he was warned by friends to get out of the house. He left, taking his younger son with him.

[4] A few days later, when the two remaining siblings and their mother were home, the police and Karuna group raided their house, held them at gunpoint, and demanded to know the location of their father. At one point, they started to drag the female applicant into a room, at which time her mother intervened and was shoved. Her older brother then intervened, and was assaulted and taken outside to a police truck, where he was beaten. He was taken to the police station and further beaten. The next day, his mother paid to secure his release, but was instructed that she would need to pay a further sum within one month of his release. The two applicants and their mother went into hiding and then fled to India separately in the following three months.

[5] The officer interviewed each of the three applicants individually on March 12, 2014. She found their accounts to be very similar and confronted them with this, to which one of them

explained that this was likely due to the fact that they had refreshed their memories with a narrative prior to the interview.

## II. The Impugned Decision

[6] The officer found that the applicants had failed to provide sufficient evidence of a well-founded fear of persecution should they return to Sri Lanka.

[7] Her principal reason for this finding was that she found the applicants' testimony not to be credible. First, the testimony they provided was extremely similar, suggesting that it was scripted. Second, they had provided inconsistent information regarding their travel histories.

[8] She found, in the alternative, that even if some of the information provided by the applicants was true, she did not accept that the government was still looking for them due to the refusal of their father, with whom they no longer had contact, to issue a ticket seven years earlier.

## III. Issues

- A. Are the officer's affidavits admissible?
- B. Did the officer err in finding the applicants were not credible?
- C. Did the officer err in finding that even if some of the evidence provided by the applicants was credible, they had not established a well-founded fear of persecution?

IV. Standard of Review

[9] Whether or not an applicant falls within the Convention refugees abroad class is a question of mixed fact and law and is reviewable on a standard of reasonableness (*Bakhtiari v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1229 at para 22).

V. Legislative Scheme

[10] The Convention refugees abroad class is governed by sections 144 and 145 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. A foreign national will be a member of this class if he or she has been determined by an officer, outside Canada, to be a Convention refugee as defined by section 96 of the Act.

[11] The relevant provisions of the Act and Regulations are included in the Annex to this Judgment and Reasons.

VI. Analysis

A. *Are the officer's affidavits admissible?*

[12] The applicants submit that the affidavits sworn by the officer, dated June 24, 2014 and March 27, 2015, should be disregarded by the Court on the basis that they are an attempt to supplement the officer's reasons (*Barboza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1420 at para 26).

[13] While the officer's affidavits legitimately speak to her practices with respect to note-taking in interviews and responds to allegations made by the applicants that certain things were said in the interview that were not recorded in her notes, I have compared her affidavits to the reasons provided in the decision letter and Global Case Management System [GCMS] notes, and am satisfied that her affidavits provide additional reasons to support the decision.

[14] As the respondent is not entitled to submit affidavit evidence on judicial review to supplement the reasons in the decision under review, I disregard the supplemental reasons provided in the officer's affidavits.

B. *Did the officer err in finding the applicants not credible?*

[15] The applicants argue that the officer erred by basing her negative credibility finding on similarities in their evidence and on inconsistencies between their respective testimonies in respect of where they travelled seventeen (17) years earlier when they were young children. I deal with each of these grounds in turn below.

(1) Credibility finding based on similarity of evidence

[16] The applicants submit that it was an error for the officer to find that the evidence they provided at the interview was too similar and therefore not credible, since consistency is the hallmark of credibility, particularly in the refugee law context. They argue that the officer unreasonably failed to accept their explanation that they had re-read their narratives prior to the interview to refresh their memories. She also failed to consider that many of the incidents they

described had in fact happened to their father and been recounted to them by their parents, thereby explaining the similarities in the way they talked about them.

[17] The respondent, on the other hand, submits that unwarranted similarities in testimony can serve to undermine credibility, and that the officer reasonably found that the applicants' testimony was not credible because all of their testimony appeared to be rehearsed and scripted.

[18] I agree with the respondent that unwarranted similarities in testimony may serve to undermine an applicant's credibility. For example, courts have found that it is not unreasonable to draw a negative inference as to credibility from unwarranted similarities between a refugee claimant's narrative and the narratives of other unrelated claimants (*Liu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 695 at para 39; *Shi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1088 at paras 1, 19). Outside of the immigration context, the Ontario Superior Court of Justice drew a negative inference from the use of the same wording in the affidavits of two defense witnesses (*Simpson v Global Warranty Management Corp*, 2014 ONSC 724 at para 52). In another non-immigration case, *R v BL*, [1998] OJ No 2522, Justice Hill of the Ontario Court of Justice noted at para 107:

It is generally recognized that some differences or discrepancies in a witness' testimony, in particular when compared to prior statements of that witness out of court, may well be indicative of a truthful witness -- one who has not provided a scripted and rehearsed account, but rather one which suffers only from certain human frailties, for example, the product of a dulled memory, confusion from the stress of being a witness or other cause too insufficient to significantly affect the witness' credibility and reliability.

[19] However, while decision-makers may rely on their common sense in drawing negative credibility inferences from unwarranted and striking similarities between the testimony of applicants, it is equally true that they must use their common sense to determine whether, in the circumstances of the case, there is a valid reason for the similarity. If there is, it would not be appropriate to find that the similarity casts doubt on the applicant's credibility (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2006 FC 550 at paras 25-28, [*Zhang*]).

[20] Just as was found by Justice Russell in the circumstances of *Zhang*, I do not believe that in the circumstances of this case common sense dictates that, simply because the three applicants gave strikingly similar evidence, it was more likely than not that their evidence was not true. There was evidence before the officer that the applicants had refreshed their memories of these seven year-old events before the interview using a narrative. It is also significant that many of the events the applicants were recounting did not happen to all of them personally. The younger brother was not present for any of the events in the story, except for seeing the trauma his dad experienced after his detention. In addition to that, the sister was present only for the raid of their house. In addition to those events, the older brother was only present for his detention. All of the other background and events were told to the applicants by their parents, so very little of their testimony was first-hand information. These circumstances provided a strong explanation as to why the applicants might have used similar wording in telling their stories.

[21] While it was open to the officer to disbelieve the applicants' explanations, the explanations they provided appeared reasonable on their face and the officer had an obligation to

address them in her reasons and to explain why she did not find them convincing. Instead, she ignored them.

[22] Accordingly, I find that it was unreasonable for the officer to find the applicants not credible on the basis of the similarities between their accounts.

(2) Credibility finding based on inconsistencies with respect to travel when young

[23] The only inconsistency noted by the officer was with respect to the applicants' travel histories when they were young. While the two brothers did not state that they had visited China, Japan and Thailand as children when asked about their travel histories, the female applicant testified that she had been to these places with her brothers:

Have you ever been to any other country? Since birth till now? Yes  
Where? Hong Kong, Japan, Thailand. When did you go to Hong  
Kong? As a child; don't remember. How long? I was a baby.  
Japan? 2 or 3 years old. Thailand? Same thing. Small kid. Who all  
went to Hong Kong, Japan, and Thailand? My mother, two  
brothers, and I.

[24] When her brothers were confronted with this discrepancy, the older brother testified that he had been young at the time and didn't realize that the officer was asking about travels he took when he was young. The younger brother testified that he didn't know where he had been and that they didn't always travel together, which his older brother confirmed. The officer responded that they were not telling the truth because their younger sister had testified to having travelled with both of them to these countries.



[25] Despite the applicants' explanations, the officer concluded on the basis of these inconsistencies that the applicants had not all been entirely truthful during the interview. In doing so, she failed to acknowledge that the female applicant was testifying about events that occurred when she was a baby and a toddler, and that the boys were still fairly young children at the time as well. She also failed to recognize that these inconsistencies were on a peripheral and immaterial matter.

[26] As such, I conclude that the officer unreasonably relied on the inconsistencies in this peripheral matter to support her finding that the evidence provided by the applicants was not credible.

C. *Did the officer err in finding that even if some of the evidence provided by the applicants had been credible, they had not established a well-founded fear?*

[27] The officer made an alternative finding that the applicants' claims would fail even if some of the information they had provided were accepted as true:

However, even if some of the information is true, I find it hard to believe that after seven years the government is still looking for your mother and the three of you because your father refused to issue a ticket to someone who was related to a Karuna member. As I said, the incident happened seven years ago. An incident of this nature doesn't seem to suggest that the government would be keeping a log with your information. The war in Sri Lanka has ended. You have not provided me any information that would suggest that you would be suspected of having any ties to the LTTE, which is what the government in Sri Lanka would be interested in. Unless there is something else that happened that you have not told me about, I am not satisfied that you have provided sufficient evidence for a well-founded fear of persecution should you return to Sri Lanka or why you continue to be personally and seriously affected by conflict or human rights violations. [...]

Many Sri Lankan Tamils have been returning to Sri Lanka since the war ended.

[28] The applicants contend that the officer provided no basis for her conclusion that the incidents they described do not suggest that the Sri Lankan government would be after them, and that the officer failed to provide reasons with respect to whether they met the eligibility criteria. They argue that she failed to assess whether the incidents they described amounted to persecution based on their connection to their father, and instead assessed only whether they had demonstrated that they would be suspected of having ties with the LTTE.

[29] The respondent, on the other hand, submits that the officer clearly assessed and expressed why the applicants did not meet the eligibility criteria, and that the threshold for adequacy of reasons is fairly low in respect of decisions by administrative officers when compared to decisions of an administrative tribunal after an adjudicative hearing (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-11; *Shali v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1108 at para 31).

[30] I agree with the respondent that the fundamental question in assessing the adequacy of reasons is whether they show that the tribunal grappled with the substance of the matter (*Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at para 88, [*Ghirmatsion*]) and whether they are sufficiently clear, precise and intelligible to allow an applicant to know why her application failed and to be able to decide whether to apply for judicial review (*Ogunfowora v Canada (Minister of Citizenship and Immigration)*, 2007 FC 471

at para 58, [*Ogunfowora*]). However, I do not agree with the respondent that the reasons here met this standard.

[31] In my view, the officer's reasons suggest that in reaching her alternative conclusion, she did not grapple with the substance of the applicants' claims.

[32] First, she stated that she was assessing whether the applicants would meet the Convention refugee definition if she accepted that "some of the information is true", but did not specify which evidence she accepted as true for the purposes of this hypothetical analysis.

[33] Furthermore, she relied on the fact that the applicants did not have ties with their father anymore to support her conclusion that the Sri Lankan authorities would no longer be looking for them, but failed to consider the practical question of whether the Sri Lankan authorities would still perceive or believe that they were still associated with him. The same government officials that would put the family at risk were still in power.

[34] In conclusion, the officer's alternative reasons, even when read in the context of the record, were not sufficiently clear, precise and intelligible to allow the applicants to know why their applications would have failed even if their testimony had been accepted, and to show that the officer grappled with the evidence to determine whether they met the Convention refugee definition (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-18; *D'Errico v Canada (Minister of Human Resources and Skills Development)*, 2014 FCA 95 at paras 12-14.

[35] For these reasons, this application for judicial review is allowed and this matter is to be remitted to a different officer for re-determination. There is no question for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is allowed and the matter is to be remitted to a different officer for re-determination.
2. There is no question for certification.

"Danièle Tremblay-Lamer"

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Judge

## ANNEX

### Relevant Statutory Provisions

#### *Immigration and Refugee Protection Act, SC 2001, c 27*

**11.** (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

**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,

(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

(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

**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

**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) 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) 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.

country.

*Immigration and Refugee Protection Regulations, SOR 2002-227*

**139.** (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

[...]

(e) the foreign national is a member of one of the classes prescribed by this Division;

**144.** The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

**145.** A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

**145.** A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

**139.** (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :

[...]

e) il fait partie d'une catégorie établie dans la présente section;

**144.** La catégorie des réfugiés au sens de la Convention outre-frontières est une catégorie réglementaire de personnes qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.

**145.** Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

**145.** Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

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

**DOCKET:** IMM-2110-14

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**APPEARANCES:**

Adrienne Smith FOR THE APPLICANTS

Nicole Rahaman FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Adrienne Smith FOR THE APPLICANTS  
Jordan Battista LLP  
Barristers and Solicitors  
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Toronto, Ontario