

Federal Court



Cour fédérale

**Date: 20150911**

**Docket: IMM-6498-14**

**Citation: 2015 FC 999**

**Ottawa, Ontario, September 11, 2015**

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

**BETWEEN:**

**K.S.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**PUBLIC JUDGMENT AND REASONS**

**(Identical to Confidential Judgment and Reasons issued August 21, 2015,  
as the Applicant requested no redactions)**

[1] This is an application under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the decision of a member of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada that the Applicant was neither a Convention refugee nor a person in need of protection within the meaning of sections 96 or 97 of IRPA. The Applicant is a young, male Tamil citizen of Sri Lanka who arrived in Canada on August 13, 2010, with a group of Tamil migrants aboard the vessel *MV Sun Sea*. He claimed

refugee protection on the basis that he feared he would face persecution, torture and cruel and unusual punishment from the Sri Lankan government and paramilitary groups if he returned to Sri Lanka. He submits that the RPD erred in its determination that he would not face such a risk.

[2] For the reasons below related to the Applicant's *sur place* claim, the application for judicial review is allowed.

I. Background

[3] This proceeding is subject to a Confidentiality Order dated October 16, 2014, applicable to any information that could serve to disclose the identity of the Applicant or any of his family or associates, including their names, ages, or places of birth. At the hearing of this application, I requested counsel's submissions on the extension of the Confidentiality Order to the hearing and my resulting decision. In written submissions following the hearing, the Applicant requested that the Confidentiality Order be so extended relying on the arguments originally made in support of the motion for the Confidentiality Order, and the Respondent took no position on this issue.

[4] I consider it appropriate to extend the Confidentiality Order as requested by the Applicant. I believe that these Reasons refer only to background facts that are necessary for purposes of the analysis herein related to the Applicant's *sur place* claim and will not disclose information of the sort that is the subject of the Confidentiality Order. However, out of an abundance of caution, I am releasing this Confidential Judgment and Reasons and will afford the Applicant two weeks to propose any redactions to the Public Judgment and Reasons that will follow and the Respondent one week to provide any comments on any proposed redactions.

[5] The Applicant was born in the Northern Province of Sri Lanka. He recounted in his Personal Information Form [PIF] that, during his childhood, he and his family were displaced many times due to the conflict between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam [LTTE]. Like many others, the LTTE attempted to recruit him during his youth. They detained him when he refused but subsequently released him.

[6] While he was a student, the Applicant sustained an injury to his leg that required surgery and resulted in significant residual scarring.

[7] The Applicant stated in his PIF that his brother had repeatedly been captured, escaped and been recaptured by the LTTE.

[8] In 2010 the Applicant left Sri Lanka, travelled to Thailand and boarded the *MV Sun Sea*, which arrived in Canada on August 13, 2010. The Applicant made a claim for refugee protection in Canada after his arrival.

## II. RPD Decision

[9] In a decision dated August 11, 2014, the RPD dismissed the Applicant's claim for refugee protection [the Decision].

[10] The RPD determined that the Applicant was neither a Convention refugee nor a person in need of protection, focusing on the Applicant's overall credibility, the Applicant's risk profile

and the issue of whether the Applicant was a refugee *sur place* because of his travel on the *MV Sun Sea*.

[11] First, the RPD reviewed the Applicant's narrative as presented in his original and amended PIFs and found the Applicant had not been a credible witness throughout the hearing. The RPD drew negative inferences in regards to several areas of the Applicant's testimony, including inconsistencies surrounding the times the Applicant's brother was in the custody of the LTTE.

[12] Next, the RPD addressed the Applicant's risk profile, noting the conclusion by the United Nations High Commissioner for Refugees [UNHCR] in its Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka [UNHCR Guidelines] that, given the cessation of hostilities, Tamils from the North are no longer presumptively eligible for refugee protection and that all asylum-seekers should be considered on their individual merits.

[13] The RPD concluded that the Applicant was not at risk based on the risk profiles identified in the UNHCR Guidelines. While it found the evidence, in particular as to the dates, relating to the Applicant's brother's capture and work for the LTTE was not credible, the RPD did note that the documentation indicated that the Applicant's brother had been detained by Sri Lankan authorities and subsequently released from a rehabilitation center after the war. However, the RPD considered that, in spite of the familial connection with the LTTE, there was no probative evidence that the Applicant was wanted by Sri Lankan authorities. He was able to travel through checkpoints and depart Sri Lanka, and it was reasonable to expect that if the authorities

perceived him to be an LTTE supporter, they would have treated him differently. It was reasonable to expect the Applicant would not have been able to pass through security checkpoints, issued a passport and allowed to leave if the authorities believed he was a person described in the risk profiles.

[14] Before issuance of the RPD's decision, further disclosure was made concerning the status of two Sri Lankans who arrived in Canada aboard the *MV Sun Sea* and were subsequently returned to Sri Lanka. Both the Applicant and the Respondent made submissions regarding this evidence. Despite the evidence concerning the treatment of these two other individuals by Sri Lankan authorities, the RPD found it did not have the information to indicate why they were treated that way and was unable to determine whether the Applicant was similarly situated.

[15] The RPD concluded that there was no objective basis for the Applicant's subjective fear.

[16] Next, the RPD considered whether being a failed asylum claimant would put the Applicant at risk if he returned to Sri Lanka. The RPD observed that the international delegation, including Canada Border Services Agency [CBSA] and authorities from other countries, which participated in a fact-finding trip to Sri Lanka in 2011, noted that a "key theme" with interviewees was that they "said they no longer had fears for their personal safety". The RPD found this report trustworthy, reliable and relevant. Moreover, the RPD noted that, after the signing of an Assisted Voluntary Returns Agreement with the International Organization for Migration to facilitate the return of Sri Lankans from Africa, Canadian officials reported that sixty-six returnees were interviewed at the airport and released without difficulty.

[17] Other sources confirmed that Tamils are subjected to the same screening process for all persons, regardless of whether they are returning voluntarily or as failed refugee claimants. While there have been cases of detention upon arrival, these involved outstanding criminal charges and were not related to asylum claims or ethnicity. Although some reports found that Tamils who have an actual or perceived link to the LTTE are at heightened risk of detention and torture, there is insufficient evidence to conclude the Applicant had any ties to the LTTE or a history of having opposed the government.

[18] Again noting the post-hearing disclosure concerning the two individuals returned to Sri Lanka, the RPD found that the additional data provided by the Respondent negated the Applicant's submissions and concluded that the Applicant was not similarly-situated, observing that one of the cases involved previous criminality.

[19] The conclusion of the RPD was that there was insufficient evidence that the Applicant would be detained after screening if returned to Sri Lanka. As he was not perceived by the Sri Lankan government to be linked to the LTTE, he did not have grounds to fear persecution as a failed asylum seeker if he were to return.

[20] The RPD then considered whether, as a passenger on the *MV Sun Sea*, the Applicant would be suspected of involvement in the LTTE and was therefore a refugee *sur place*. It found there was insufficient evidence that the government of Sri Lanka suspects individuals to have links to the LTTE by virtue of being smuggled to Canada aboard the *MV Sun Sea*. There was insufficient credible evidence to suggest that the Sri Lankan government has any reason to

believe the Applicant is a member or supporter of the LTTE, other than his presence on the *MV Sun Sea*.

[21] The RPD's analysis was that, although the arrival of the *MV Sun Sea* was of significant interest to authorities in both Sri Lanka and Canada, it was logical to conclude that Canadian officials have deemed the Applicant to have no affiliation to the LTTE. Likewise, while Sri Lankan officials may know or suspect the Applicant was aboard the *MV Sun Sea*, they would also have logically concluded that Canadian officials concluded he did not have LTTE ties. Otherwise it is unlikely he would have been released. The Applicant could produce documentation from his refugee proceedings to show he has been found not to have any affiliation with the LTTE. Thus, the RPD concluded that, on a balance of probabilities, the Sri Lankan government would not perceive the Applicant to be a member or supporter of the LTTE simply on the basis of his travel on the *MV Sun Sea*, given his history in Sri Lanka before coming to Canada.

[22] The RPD also considered the Applicant's claim under s. 97 of IRPA and, for the same reasons underlying its analysis under s. 96, found the Applicant would not face a risk to his life, a risk of cruel and unusual treatment or punishment, or a danger of torture if returned to Sri Lanka.

### III. Issues

[23] In my view, the issues raised in this matter can be stated as follows:

- A. What is the applicable standard of review?

B. Did the RPD make reviewable errors, rendering its decision unreasonable?

IV. Submissions of the Parties

[24] Because my decision turns on the RPD's analysis of the Applicant's *sur place* claim, and it is accordingly unnecessary for me to consider the other grounds of review raised by the Applicant, the following summary of the parties' submissions relates only to those submissions directly or indirectly relevant to that analysis.

A. *Applicant's Submissions*

[25] The Applicant argues that the RPD erred in dismissing the *sur place* claim, which was based on the fact that the Applicant was a passenger on the *MV Sun Sea*, would be returning from a perceived centre of LTTE fundraising, had been detained and interrogated by CBSA regarding LTTE links, and would be returning on a temporary travel document. The RPD erred in failing to consider any of these factors, and instead determined the claim based on the Applicant's profile at the time he left Sri Lanka (*Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 836 at para 22). In a recent decision involving a Tamil male who came to Canada aboard the *MV Sun Sea*, this Court found that the Board erred in looking only at whether the applicant "had already been linked to the LTTE based on travelling on the *Sun Sea*, as opposed to whether he would be linked with the LTTE upon return" (*B407 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1085, at para 39 [B407]).



[26] The Applicant also relies on the decision of Justice Russell in *YS v Canada (Minister of Citizenship and Immigration)*, 2014 FC 324, holding at paragraphs 65-69 that the fact an Applicant has been cleared of any suspicion of LTTE connections in the past does not deal with the *sur place* claim, although it has some relevance to that claim, and that the RPD was obliged to consider a forward-looking *sur place* claim based upon a perceived LTTE connection as a result of his arriving in Canada on the *MV Sun Sea*. Similarly, Justice Strickland found in *B381 v Canada (Minister of Citizenship and Immigration)*, 2014 FC 608, at paragraph 51 [B381], that it is not the Applicant's past that would lead to suspicion of links to the LTTE but his travel on the *MV Sun Sea*, this being the very nature of the *sur place* claim. The Applicant argues that the RPD made the same error in relying solely on its findings regarding the Applicant's past, without considering whether the connection with the ship would put the Applicant at risk.

[27] According to the Applicant, the RPD also ignored or dismissed critical evidence supporting the *sur place* claim. The RPD failed to refer to two reports cited by the Applicant: a report from Amnesty International dated June 12, 2012 regarding the risks to passengers on the *MV Sun Sea* and *MV Ocean Lady*, concluding that the passengers faced a risk of persecution due to their perceived links to the LTTE; and a report by Freedom from Torture dated September 13, 2012 called "Sri Lankan Tamils tortured on return from the UK" (*B381*, at paras 44-53, 56-57).

[28] Further, the Applicant argues that the RPD discounted evidence regarding the two individuals returned to Sri Lanka (identified as B005 and B016) and made unclear and inconsistent findings. The finding that there was insufficient information regarding the "two Sri Lankan individuals" to indicate why these claimants were treated as they were by Sri Lankan

authorities and make a decision that the Applicant was in similar circumstances is unintelligible, as the RPD later stated, with reference to post-hearing disclosure, that it preferred the Minister's position on the documents. The Applicant argues it is not clear that the RPD was aware that the post-hearing disclosure referred to the same two individuals and only to a narrow point as to whether one of these individuals was still detained.

[29] The Applicant submits that the evidence indicated that the two *MV Sun Sea* returnees had been mistreated on arrival in Sri Lanka, despite the fact that one of them was specifically exonerated of LTTE involvement before his departure. It demonstrates that B016 was detained and tortured on arrival, was questioned regarding the names of everyone who was on the ship, and under torture gave all the names of passengers and crew he was aware of, saying they were linked to the LTTE. This confirms the Sri Lankan government was highly interested in the passengers on these boats. Whether or not B016 is similarly situated to the Applicant, this evidence was highly relevant and could not be dismissed by the RPD as it was. The RPD's failure to consider this evidence and assess it in intelligible, justifiable and transparent terms renders the *sur place* analysis unreasonable.

[30] Finally, the Applicant argues that the RPD erred in failing to consider important elements of risk advanced by the Applicant (*Zoja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1079, at paras 18-20; *Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1015 at paras 15-16). The submission is that the RPD did not consider the additional risk factors advanced by the Applicant, including: being a returnee from a perceived centre of LTTE fundraising and activity; the existence of visible scarring; the

Applicant's name being a name common among LTTE officials; and his fear of being targeted by the Eelam People's Democratic Party and paramilitaries.

B. *Respondent's Submissions*

[31] The Respondent submits that the Applicant has not demonstrated a reviewable error. Rather, he is disputing the sufficiency of the reasons and attempting to reweigh the evidence.

[32] The Respondent's position is that the Applicant failed to establish he is a refugee *sur place*. This Court has found in a number of cases that one is not a refugee *sur place* by virtue of being a Tamil male from Sri Lanka, including from the North, who travelled to Canada aboard a human smuggling ship (*PM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77, [PM] at para 16; *Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334 at paras 2, 3, 10, 16-18, 23-24; *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151 at para 28; *Canada (Minister of Citizenship and Immigration) v B323*, 2013 FC 190; *B223 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 511 at paras 1, 4, 6, 8, 10; *Canada (Minister of Citizenship and Immigration) v A011*, 2013 FC 580 at para 40; *Ganeshan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 841, at paras 1, 24, 31-35; *Sivanathan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 184 at paras 2, 10, 12; *Thevarasa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 234 at para 3, 10, 32, 33; *Yathavarjan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 146, [Yathavarjan], at paras 5, 7, 9, 46, 54, 56).

[33] The Respondent also notes that this Court has upheld decisions which found Tamil males arriving aboard the *Sun Sea* or *Ocean Lady* not at risk as perceived LTTE supporters based on a lack of credibility, the UNHCR Guidelines and evidence that Sri Lankan authorities do not view all passengers who arrived aboard these vessels as LTTE supporters (*SA v Canada (Minister of Citizenship and Immigration)*, 2014 FC 146 at paras 52-55; *Yathavarajan* at paras 53-54; *B231 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1218 at paras 60, 64, 69).

[34] The Respondent submits that the RPD reasonably found there was insufficient evidence that the Sri Lankan government suspects individuals to have links to the LTTE by virtue of having been smuggled to Canada aboard a ship owned and operated by the LTTE. The RPD noted that the Sri Lankan government had no reason to believe the Applicant was an LTTE member or supporter and questioned why the Applicant would be arrested, detained, or tortured given that he had little or no profile with the authorities. Contrary to the Applicant's argument, the RPD did consider whether the Applicant would be at risk because he was detained and interrogated by CBSA but found the Sri Lankan authorities would conclude that the Canadian authorities would have investigated whether the Applicant had LTTE ties before releasing him. The RPD also stated the Applicant could provide a copy of the RPD's reasons finding he did not have any association with the LTTE. The onus was on the Applicant to demonstrate it would be probable that he would be at risk because he was detained and questioned by Canadian authorities, but the Applicant cited no authority or documentation to support this or to show he would be at risk, especially as his brother was released by the army shortly after his departure and resides with their parents in Sri Lanka and there is no evidence his brother has been mistreated.

[35] The Respondent also argues that the Applicant's reliance on *B407* is misplaced as in that case, the analysis of the *sur place* claim was rendered in one sentence. Here, the RPD provided comprehensive reasons for why the Applicant would not be at risk if he returned to Sri Lanka. While the RPD acknowledged that there is evidence the Sri Lankan authorities employ torture, the Applicant failed to demonstrate he faces more than a mere possibility of risk. The RPD considered the post-hearing disclosure regarding B005 and B016 but found the Applicant was not similarly situated. While the RPD recognized that mistreatment was possible, it found that the risk was not beyond a mere possibility. This finding was open to the RPD on the record (*SK v Canada (Minister of Citizenship and Immigration)*, 2013 FC 78 at paras 21, 22, 25; *PM*, at paras 11, 12-14, 17). The RPD may rely on some pieces of evidence over others where the evidence is conflicting (*Kaur v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ No 190 at para 22).

[36] The RPD considered the Applicant's entire profile in context, but determined that the Applicant did not fit the profile at risk. All of the elements are tied to whether the Applicant would be viewed as an LTTE supporter, which the RPD determined he was not. He was released after being questioned by Sri Lankan authorities, and was allowed to leave on a valid passport. Read in light of the record, the Decision sets out the basis for the refusal based on a thorough assessment of the evidence.

V. Analysis

A. *What is the applicable standard of review?*

[37] The parties agree that the standard of review applicable to all issues is reasonableness, which is concerned with the existence of “justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48).

B. *Did the RPD make reviewable errors, rendering its decision unreasonable?*

[38] Although the RPD is owed a significant degree of deference in its assessment of the evidence and its findings as to the risk of persecution the Applicant would face if returned to Sri Lanka, I am satisfied that it made reviewable errors in its assessment of such risk in its analysis of the Applicant’s *sur place* claim.

[39] The Applicant relies heavily on authorities such as *B407* to the effect that the RPD errs in considering a claim of this nature if it considers only past links to the LTTE as opposed to whether the claimant would be linked to the LTTE upon return to Sri Lanka as a result of travelling on the *MV Sun Sea*. I do not believe the RPD erred in this particular respect, as it specifically posed in its Decision the question whether the Sri Lankan authorities would now perceive the Applicant to have LTTE links simply by virtue of his having travelled on the ship.

[40] However, it is my conclusion that the RPD erred in another respect, by failing to address the Applicant's circumstances cumulatively and by failing to consider relevant evidence.

[41] It is well-established that a claimant who is found to lack credibility (as was the Applicant in the case at hand) may still have a well-founded fear of persecution, which may be assessed based on the objective evidence regarding country conditions and the claimant's risk profile (*Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at para 18; *Maimba v Canada (Minister of Citizenship and Immigration)*, 2008 FC 226 at para 22). The Respondent confirmed at the hearing of this application that it does not take issue with the proposition that the Applicant's credibility is not determinative of the outcome of his claim.

[42] In conducting its analysis, the RPD must assess the cumulative impact of all the bases of concern put forward by the Applicant (*Boroumand v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1219 at para 63, *Yener v Canada (Minister of Citizenship and Immigration)*, 2008 FC 372 at para 57). In *LS v Canada (Minister of Citizenship and Immigration)*, 2014 FC 330, at paras 14-15, the Court confirmed that, if the RPD's reasons indicate that it failed to assess cumulatively the relevant risk factors and, instead, examined each risk element in isolation, the decision may be set aside.

[43] In this case, the RPD considered the risk profiles identified in the UNHCR Guidelines, but found that none of them applied directly to the Applicant. The RPD noted the evidence indicating that the Applicant's brother had been detained by the authorities in Sri Lanka and later released from a rehabilitation centre, but concluded that "in spite of this familial connection with

the LTTE, no probative evidence was adduced to suggest the claimant was wanted by the authorities in Sri Lanka” as he was able to travel through checkpoints to Colombo and leave Sri Lanka without difficulty and testified that he had never supported or worked for the LTTE himself.

[44] As the Applicant points out, the fact that a claimant was able to leave on his own passport is not determinative of the risk he may face upon return and reflects an overly simplistic approach, particularly given the information from the Research Directorate of the Immigration and Refugee Board of Canada that there is no concrete evidence that the airport alert system used by Sri Lankan authorities contains information on every individual who has been detained by the police or army. This Court has held that the fact that a claimant was released from detention or was able to travel on his or her own passport is not determinative of the risk he or she may face upon return (*B027 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 485, [B027] at para 8-9; *Canada (Minister of Citizenship and Immigration) v Fernando*, 2012 FC 706 at para 13; *Abdul v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 260 at para 23).

[45] Regardless, it is significant that the RPD did not reject the documentation indicating that the Applicant’s brother had been detained by the Sri Lankan army and held in a rehabilitation camp and referred to the Applicant having a “familial connection” to the LTTE, which the UNHCR Guidelines identify as a risk factor. This is consistent with evidence before the RPD which indicated that, after the war, many Tamils who were suspected of being LTTE members were detained at rehabilitation camps run by the army. Counsel for both parties also confirmed at



the hearing of this application that it is undisputed that the Applicant's brother is a member of the LTTE.

[46] It was open to the RPD to find that the Applicant was not at risk based on this connection as, despite the familial connection to the LTTE, no probative evidence had been adduced to suggest that the Applicant was wanted by the authorities in Sri Lanka. However, the RPD failed to consider how this connection, viewed together with the other factors, including the Applicant's status as a Tamil male from the North with visible scarring and his travel to Canada aboard the *MV Sun Sea*, would collectively contribute to the risk that he would be perceived as an LTTE supporter and face persecution if he were to return to Sri Lanka.

[47] The RPD had before it evidence that those suspected of LTTE connections are at a higher risk of being detained at the airport and facing torture. The RPD appears to have accepted this evidence, noting that the reports indicated that "those at particular risk of torture are Tamils who have an actual or perceived association with the LTTE or have a history of having opposed the government". The RPD found that there was insufficient evidence to conclude that the Applicant had any ties to the LTTE or a history of having opposed the government. But it stated that "the issue of his having travelled on the *MV Sun Sea* will be examined separately under the heading of *sur place*".

[48] In its subsequent analysis of the *sur place* claim, the RPD did not refer to or consider the effect of the Applicant's familial connection with the LTTE. In my view, this connection distinguishes this case from those referred to by the Respondent in which the Court has upheld

RPD decisions dismissing the claims of other *MV Sun Sea* passengers, who have not been found to have any actual or perceived connection to the LTTE. The failure to mention this significant factor anywhere in its analysis of the *sur place* claim suggests that the RPD failed to consider it in the context of the *sur place* claim. This suggests the RPD made its decision without regard for the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* [1998] FCJ No 1425 at para 17).

[49] In my view, the reasons indicate that the RPD considered the risk factors in isolation. In analyzing his *sur place* claim, it considered whether the Applicant would be perceived to have links to the LTTE by virtue of his having travelled aboard the *MV Sun Sea*. The RPD found that there was no indication that the Applicant has been involved in or supportive of any pro-LTTE organizations while in Canada. But the RPD failed to consider how the various factors established on the evidence, including his familial connection with the LTTE, together might have resulted in more than a mere possibility of persecution. This is comparable to the decision in *B027*, where Justice Harrington concluded, at paragraph 11, that the member did not analyze the circumstances cumulatively and that, given factors including *B027*'s ethnicity, the nature of his injury, the fact that he worked in the northern controlled part of Sri Lanka, that he and his wife were passengers on the *MV Sun Sea*, it may well be that they would face a serious risk of persecution if returned to Sri Lanka.

[50] The Respondent's counsel submitted in oral argument that the fact the Applicant's brother is an LTTE member actually makes the Applicant's claim less compelling. The Respondent's argument is that, as the Applicant's brother currently resides with their parents in

Sri Lanka and there is no evidence he has been mistreated, it would not be logical that the Applicant, whose only connection to the LTTE is through his brother, would be mistreated when the brother has not been.

[51] While there may be logic to that argument, it is inconsistent with the evidence in the UNHCR Guidelines that previous (real or perceived) links to the LTTE that go beyond prior residency in an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for protection. These links may include family connections to others who are associated with the LTTE. The RPD appears to have accepted the probative value of the UNHCR Guidelines. Further, the RPD did not, in the reasons given for its Decision, engage in an analysis akin to the argument advanced by the Respondent in this respect.

[52] The RPD also failed to refer to the two reports cited by the Applicant: a report from Amnesty International dated June 12, 2012 regarding the risks to passengers on the *MV Sun Sea* and *MV Ocean Lady*, concluding that the passengers faced a risk of persecution due to their perceived links to the LTTE; and, a report by Freedom from Torture dated September 13, 2012 called “Sri Lankan Tamils tortured on return from the UK”. This Court has found that the RPD has erred in failing to refer to and discuss the findings of this particular Amnesty International report. In the recent decision in *Thanabalasingam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 397, in relation to this report, Justice Fothergill held as follows at paragraph 17:

[17] Both Justice Russell in *Y.S.* and Justice Strickland in *B381 v Canada (Minister of Citizenship and Immigration)*, 2014 FC 608 [B381] emphasized the AI Report in assessing the *sur place* claims of asylum-seekers who travelled on the *MV Sun Sea*. In *B381*,

Justice Strickland found that the failure of the Board to explain why it discounted the AI Report rendered its decision unreasonable (at para 58). Similarly in this case, the Board's failure to explain why it discounted the AI Report and other contradictory evidence renders its decision unreasonable.

[53] On this point, the Respondent argues that the Decision does refer to the RPD having considered reports and counsel's submissions that suggest that returnees are at a heightened risk of being detained at the airport and at risk of torture should the returnees have connections to the LTTE. The RPD cites another Amnesty International report (not the report that is the subject of the Applicant's argument) as finding that those at particular risk are Tamils who have an actual or perceived association with the LTTE or have a history of having opposed the government. The RPD then proceeds to find that there is insufficient evidence that the Applicant has such ties or such a history, concluding by stating that the issue of his having travelled on the *MV Sun Sea* will be examined separately under the heading of *sur place*.

[54] It is accordingly apparent, from the particular evidence to which the RPD refers and its reference to a separate and subsequent examination of the issue of the Applicant having travelled on the *MV Sun Sea*, that the RPD was not considering, as part of its analysis in the portion of the Decision to which the Respondent refers, the evidence from Amnesty International to the effect that passengers on the *MV Sun Sea* face a risk of persecution due to their perceived links to the LTTE.

[55] In my view, as a result of the RPD's failure to consider this documentary evidence, combined with its failure to consider cumulatively the risk factors faced by the Applicant in

analysing the Applicant's *sur place* claim, the Decision is not defensible and is not within the range of acceptable outcomes.

VI. Conclusion

[56] For the reasons given above, the application for judicial review is allowed and the matter is remitted to a different panel of the RPD for reconsideration.

[57] No question of general importance has been submitted to the Court for consideration for certification.

**JUDGMENT**

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

1. The application for judicial review is allowed and the matter is referred to the RPD for redetermination by a different panel member;
2. No question is certified for appeal;
3. The record of the hearing of the application and the Confidential Judgment and Reasons shall be treated as confidential and available only to the parties and the Court; and
4. The Applicant shall be afforded two weeks from the date of the Confidential Judgment and Reasons to serve and file submissions on any proposed redactions in the Public Judgment and Reasons that will subsequently be issued by the Court, and the Respondent shall be afforded one week from service of any proposed redactions to serve and file any submissions thereon. Such submissions shall be treated as confidential and available only to the parties and the Court.

"Richard F. Southcott"

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Judge

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

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