

Federal Court



Cour fédérale

**Date: 20160107**

**Docket: IMM-7505-14**

**Citation: 2016 FC 16**

**Ottawa, Ontario, January 7, 2016**

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

**BETWEEN:**

**SELVARANY ARIPRASATHAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Selvarany Aripasatham is a citizen of Sri Lanka. She sought refugee protection in Canada based upon her ethnicity as a Tamil, her perceived political opinion as a supporter of the Liberation Tigers of Tamil Eelam [LTTE], and her membership in a particular social group, namely widowed Tamil women. She has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the

Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD determined that she is neither a Convention refugee under s 96 of the IRPA, nor a person in need of protection as defined by s 97 of the IRPA.

[2] For the reasons that follow, I have concluded that the RPD failed to properly apply the Immigration and Refugee Board Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution [the Gender Guidelines] to Mrs. Ariprasatham's circumstances. The RPD's determination that Mrs. Ariprasatham's claim had no nexus to a Convention ground listed in s 2(1) of the IRPA was unreasonable, as was its determination that she was excluded from refugee protection pursuant to s 108(e) of the IRPA. The application for judicial review is therefore allowed.

## II. Background

[3] Mrs. Ariprasatham is 64 years old. She formerly resided in the Jaffna district of Northern Sri Lanka. Her claim for refugee protection was based on the following allegations.

[4] On May 4, 2009, two unidentified men killed Mrs. Ariprasatham's husband because he was perceived to be a supporter of the LTTE. Following this incident, Mrs. Ariprasatham's two daughters fled Sri Lanka and Mrs. Ariprasatham began to openly criticize the government.

[5] In May 2011, members of the army and the Eelam People's Democratic Party [EPDP] arrested Mrs. Ariprasatham and held her at the Point Pedro Camp for three days. They assaulted her and warned her not to criticize the government.

[6] In September 2012, members of the army and the EPDP returned to her home and demanded that she pay them 30 lakhs. When she refused, they kidnapped her, said that they knew she had two daughters living abroad, and threatened her with “consequences” if she did not pay.

[7] On October 22, 2012, Mrs. Aripasatham fled Sri Lanka. On the same day, she arrived in Canada via the United Kingdom. She claimed refugee protection on November 14, 2012.

[8] In a decision dated October 17, 2014, the RPD rejected Mrs. Aripasatham’s claim.

### III. The RPD’s Decision

[9] The RPD found that the determinative issue was Mrs. Aripasatham’s credibility. The RPD did not believe that Mrs. Aripasatham had been kidnapped or beaten by the army and the EPDP as she alleged. The RPD drew negative inferences from inconsistencies between factual assertions in Mrs. Aripasatham’s Personal Information Form [PIF] and her testimony. It found that the information contained in a letter submitted to corroborate her claim was inconsistent with her PIF narrative. The RPD also considered Mrs. Aripasatham’s delay in claiming refugee protection and the availability of state protection in Sri Lanka.

[10] The RPD held that Mrs. Aripasatham’s claim was fundamentally based on her fear of extortion by the EPDP in Sri Lanka. It concluded that “victims of crime, corruption or vendettas generally fail to establish a link between their fear of persecution and one of the Convention grounds in the definition of Convention refugee” pursuant to the United Nations *Convention*

*Relating to the Status of Refugees*, Can TS 1969 No 6 [Convention]. According to the RPD, the documentary evidence suggested that post-war extortions are a result of paramilitary groups seeking to generate wealth, and are not politically-motivated. The RPD therefore found that Mrs. Aripasatham was unable to link her fear of crime to a Convention ground, and that her fear of extortion was a generalized risk that did not merit protection under s 97(1)(b)(ii) of the IRPA.

[11] Finally, the RPD considered the documentary evidence regarding changing country conditions in Sri Lanka. It found that the situation had improved for returning Tamils, but that suspected LTTE supporters continue to face certain risks. The RPD concluded that Mrs. Aripasatham would not be identified as someone with links to the LTTE, and she could therefore “return to Sri Lanka without the fear of persecution or death.”

#### IV. Issues

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

- A. Did the RPD fail to properly apply the Gender Guidelines to Mrs. Aripasatham’s circumstances?
- B. Was the RPD’s determination that Mrs. Aripasatham’s claim had no nexus to a Convention ground reasonable?
- C. Was the RPD’s determination that Mrs. Aripasatham was excluded from Refugee protection pursuant to s 108(e) of the IRPA reasonable?

V. Analysis

[13] The RPD's findings of credibility and its treatment of the evidence are subject to review by this Court against the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9). This Court owes deference to the RPD with respect to matters of credibility and its evidentiary findings (*Kurkhulishvili v Canada (Minister of Citizenship and Immigration)*, 2015 FC 7 at para 4).

A. *Did the RPD fail to properly apply the Gender Guidelines to Mrs. Aripasatham's circumstances?*

[14] Where consideration of the Gender Guidelines forms part of a credibility assessment, the Guidelines "become subsumed in the standard of review of reasonableness as applied to credibility findings" (*Evans v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444 at para 8, citing *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106 at para 13).

[15] I agree with Mrs. Aripasatham that the RPD failed to properly apply the Gender Guidelines to her circumstances. The Guidelines do not have the force of law and are not binding. Nevertheless, the RPD's failure to apply them in appropriate cases may constitute a reviewable error (*Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 at paras 18-20).

[16] The Gender Guidelines provide in Part 2:

Women who fear persecution solely for reasons pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, and siblings, or other family members. Such cases of “persecution of kin” typically involve violence or other forms of harassment against women, who are not themselves accused of any antagonistic views or political convictions, in order to pressure them into revealing information about the whereabouts or the political activities of their family members. Women may also have political opinions imputed to them based on the activities of members of their family.

According to Part 3 of the Guidelines, Canadian jurisprudence recognizes that claims grounded in familial affiliation, where kinship is the risk factor, may come within the ambit of the “membership in a particular social group” under s 96 of the IRPA, and that women may fear persecution solely by reason of their gender.

[17] In this case, Mrs. Aripasatham’s vulnerability as an older Tamil widow, whose husband was suspected of supporting the LTTE, was a central aspect of her refugee claim. Although the RPD did not believe that Mrs. Aripasatham had been kidnapped, assaulted, or threatened with extortion, the RPD accepted her testimony regarding the murder of her husband due to his perceived support of the LTTE. The RPD described the death certificate of Mrs. Aripasatham’s husband as credible and reliable.

[18] Nor did the RPD question Mrs. Aripasatham’s identity as a Tamil. The RPD referred to the United Nations High Commissioner for Refugees Guidelines [UNHCR Guidelines], which confirm that women and children “with certain profiles” are in need of ongoing protection. But the RPD did not assess whether Mrs. Aripasatham’s profile as a Tamil widow exposed her to risk.

[19] Counsel for the Minister of Citizenship and Immigration had little to say in defence of the RPD's analysis, merely observing that one "can't bleed a stone."

[20] In the circumstances of this case, the RPD's failure to assess Mrs. Aripasatham's claim in relation to the Gender Guidelines, particularly given her counsel's specific reference to them during the hearing, constitutes a reviewable error.

B. *Was the RPD's determination that Mrs. Aripasatham's claim had no nexus to a Convention ground reasonable?*

[21] A refugee claimant's fear of persecution must have a nexus to one of the five grounds listed in s 2(1) of the IRPA: race, religion, nationality, membership in a particular social group, or political opinion (*Ward v Canada (Minister of Citizenship and Immigration)*, [1993] 2 SCR 689, [1993] SCJ No 74 at para 60). Mrs. Aripasatham argues that the RPD unreasonably found that she was a victim of crime and not persecution. She says that her fear was not solely due to criminal conduct, but also because she was perceived to be a supporter of the LTTE, and because she was vulnerable as an older Tamil widow.

[22] The RPD noted that, according to the UNHCR Guidelines, Tamils from the North of Sri Lanka are no longer presumptively eligible for refugee protection and all asylum-seekers should be considered on their individual merits. Individuals with certain profiles require a particularly careful examination of the possible risks they face. The RPD acknowledged that women and children with certain profiles continue to be at risk, but found that Mrs. Aripasatham would not,

on a balance of probabilities, be identified as an LTTE member or supporter. The RPD provided no explanation for this critical finding.

[23] In my view, it was unreasonable for the RPD to conclude that Mrs. Ariprasatham's fear of extortion rendered her ineligible for protection under the IRPA without considering whether her connection with her late husband might cause her to be perceived as a supporter of the LTTE. Moreover, while the RPD acknowledged the risk faced by women and children "with certain profiles", it failed to assess whether Mrs. Ariprasatham might fit within one of the profiles identified in the UNHCR Guidelines, such as "former female LTTE cadres and war widows". Nor did the RPD consider whether Mrs. Ariprasatham's advanced age and status as a widow might bring her within the definition of "particular social group".

[24] Given that the RPD accepted Mrs. Ariprasatham's testimony that her husband was murdered due to his perceived support of the LTTE, it was obliged to assess whether she was at risk of persecution in Sri Lanka based on her profile as a suspected LTTE supporter through her association with her husband, regardless of whether or not she was found to be a credible witness. In my view, the RPD committed a reviewable error by confining its analysis to Mrs. Ariprasatham's fear of criminal conduct. Its finding that her claim had no nexus to a Convention ground was unreasonable.



C. *Was the RPD's determination that Mrs. Aripasatham was excluded from Refugee protection pursuant to s 108(e) of the IRPA reasonable?*

[25] Pursuant to s 108(e) of the IRPA, a claim for refugee protection will be rejected if the reasons for which the person sought refugee protection have ceased to exist. The RPD found that the situation in Sri Lanka has improved significantly since the end of hostilities in 2009, and returning Tamils are not presumptively entitled to group-based protection.

[26] The RPD remarked that its finding that Mrs. Aripasatham “would not be identified as an LTTE member or supporter is significant to the issue of changing political conditions in Sri Lanka.” The RPD then noted that the situation has improved for many Tamils, but not for those suspected of having links to the LTTE. I have found that the RPD's conclusion that Mrs. Aripasatham would not be identified as an LTTE supporter was unreasonable, and its finding of exclusion pursuant to s 108(e) of the IRPA is similarly unreasonable.

## VI. Conclusion

[27] For the foregoing reasons, the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RPD for re-determination.

**JUDGMENT**

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

1. The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RPD for re-determination;
2. No question is certified for appeal.

“Simon Fothergill”

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Judge

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

**DOCKET:** IMM-7505-14

**STYLE OF CAUSE:** SELVARANY ARIPRASATHAM v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 26, 2015

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