

Federal Court



Cour fédérale

**Date: 20170227**

**Docket: IMM-2073-16**

**Citation: 2017 FC 241**

**Ottawa, Ontario, February 27, 2017**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**PIRATHEEP JEYAKUMAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Mr. Piratheep Jeyakumar [the Applicant], challenges the Refugee Appeal Division [RAD]’s April 25, 2016 decision [the “Decision” or “Reasons”]. The RAD confirmed the Refugee Protection Division [RPD]’s decision, finding that the Applicant was neither a Convention refugee nor a person in need of protection as understood under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

## II. Background

[2] The Applicant, a young adult male and Sri Lankan citizen of Tamil ethnicity, arrived in Canada on June 24, 2015, at which time he claimed refugee status on identity, nationality, race, ethnicity, political opinion and specific social group membership grounds. The Applicant is from the town of Vavuniya.

[3] On July 7, 2015, the Applicant submitted a first Basis of Claim [BOC 1], which stated that both he and his family feared the Sri Lankan Armed Forces as well as the following paramilitary groups: the Sri Lanka Freedom Party [SLFP], Eelam People's Revolutionary Liberation Front, Eelam National Democratic Liberation Front, and People's Liberation Organisation of Tamil Eelam [PLOTE]. Specifically, the Applicant alleged that: (i) he and his family were threatened, harassed and tortured; (ii) demands for money were made against him and his father at gunpoint; and (iii) he was abducted and eventually released. The Applicant completed his BOC 1 without an interpreter or translator, and without the benefit of legal counsel.

[4] On August 3, 2015, the Applicant submitted a second Basis of Claim [BOC 2], which was completed with the assistance of legal counsel and an interpreter or translator. The Applicant alleges that the authorities, including the army, believe him to be associated with the Liberation Tigers of Tamil Eelam [LTTE] in large part because, Sugirthan's Amirthalingam [Sugirthan]'s father is the brother of the Applicant's grandmother, a journalist, had clandestinely supported LTTE in the past and written articles denouncing human rights abuses perpetrated by the State

and paramilitary groups. For these reasons, the Applicant states that he was arrested and detained by the army and the PLOTE in early 2013, during which time he was beaten.

[5] The Applicant alleges that both he and his family were subject to intimidation, threats and violence during the course of 2014 and 2015 by the army and paramilitary groups. He subsequently fled to Canada.

[6] With the assistance of counsel, the Applicant filed a refugee application before the RPD. On January 13, 2016, the RPD rendered a negative decision, based on poor credibility and insufficiency of evidence. The Applicant appealed to the RAD.

[7] The RAD began by addressing three preliminary issues. First, it defined its role as an appellate body and stated that it was to review the RPD decision on a standard of correctness, while differing with the RPD on matters of credibility. Second, it accepted two new pieces of documentary evidence per subsection 110(4) of the Act, but rejected a letter from the Applicant's father on the basis that it related to events that transpired before the publication of the RPD's decision. Third, the RAD refused to grant the Applicant an oral hearing per subsection 110(6) of the Act.

[8] The RAD then reviewed the RPD's decision and, ultimately confirming the RPD's ruling, opined the Applicant was not credible and that the objective evidence was insufficient to substantiate his claims. Upon reviewing the Applicant's BOC 1, BOC 2, point of entry examination [POE], and testimony before the RPD, the RAD found that the Applicant made

conflicting and inconsistent statements regarding the state agents that abducted him for ransom and threatened his family. The Applicant argued that these inconsistencies were due to the fact that he was unassisted by an interpreter/translator upon his arrival to Canada, namely when completing his BOC 1. The RAD dismissed this argument and found that the Applicant had sufficient language abilities in English.

[9] The RAD found the Applicant not credible with respect to conflicting evidence regarding his passport. The RAD noted that when asked by the RPD if the Applicant had a passport, he stated that he did not, when in fact he did. The Applicant argued that he misunderstood the question and believed the RPD was asking whether he had a passport on his person now, as opposed to whether he simply owned a passport. The RAD rejected this argument and drew a negative credibility finding. Moreover, the Applicant stated that he renewed his passport in April 2014. The RAD found that, given the Applicant's alleged arrest and detention in 2013 by the army and PLOTE, it was unlikely that the Sri Lankan state would have issued him a new passport.

[10] The RAD then reviewed corroborating documentary evidence submitted by the Applicant, including evidence regarding Sugirthan's work as a journalist. The RAD found the evidence was simply insufficient to outweigh its credibility findings, noted above. The RAD further found that there was insufficient evidence that paramilitary groups would consider the Applicant associated with the LTTE based on his connection to Sugirthan.

[11] Finally, the RAD considered whether the RPD erred in its assessment of the Applicant's risk of persecution as a Tamil from the North. The RAD found that there was no evidence to suggest that the Sri Lankan authorities viewed the Applicant as a LTTE sympathiser. The RAD also considered whether the Applicant would be subject to greater screening and abuse upon returning to Sri Lanka as a failed asylum-seeker. After reviewing the evidence and the 2012 UNHCR Guidelines, the RAD found that while he may face greater scrutiny upon return to Sri Lanka for using a false passport when leaving, he would not attract persecutory attention as a failed asylum-seeker.

[12] For these reasons, the RAD confirmed the RPD's decision per paragraph 111(1)(a) of the Act.

### III. Issues

[13] The issues presented by the Applicant are whether the RAD:

- A. Failed to conduct an independent analysis, likening its decision to that of a judicial review as opposed to a hybrid-appeal;
- B. Erred by rejecting the letter from the Applicant's father;
- C. Erred by raising the issue of the Applicant's overall credibility, misinterpreting the new documentary evidence, but failing to convoke an oral hearing.

IV. Standard of Review

[14] Based on the Federal Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], this Court is to review the RAD's findings on a standard of reasonableness.

V. Analysis

[15] I find the RAD did not err in its application of the test in *Huruglica*, above, and therefore the Applicant's first issue must fail. However, I will grant this application as the RAD erred on other aspects of the decision for the reasons as follows.

[16] The Applicant argued that the RAD unreasonably rejected a letter from his father dated February 12, 2016. The letter describes the family's problems from Christmas 2015 onwards and most importantly states that "on the fifth" two armed Tamil boys scolded the father, made threats against the Applicant, and damaged family property. The letter does not specify whether it referred to events that occurred on February or January fifth – it simply notes "the fifth". The Applicant disclosed no additional evidence from the father clarifying the date of the incident. The RAD held that the issues discussed in the letter predated the January 13, 2016 RPD decision and therefore failed to meet the statutory requirements under subsection 110(4) of the Act.

[17] The Applicant asserts that it was unreasonable for the RAD to assume that the events referred to in the letter occurred before the RPD decision in January, as opposed to February, fifth.

[18] The Respondent, in turn, defends the RAD's finding, arguing that upon a plain reading of the letter, it was reasonable for the RAD to assume that the father was referring to events that presumably occurred on January fifth. The father explains in the letter that the family faced no problems for two weeks after Christmas, but later states that on the fifth, he encountered a problem with the armed Tamil boys. I agree with the Respondent it is possible that the events being spoken about could have taken place on January fifth without having more evidence filed.

[19] Under subsection 110(4) of the Act and pursuant to the Federal Court's decision in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at paragraph 34, the RAD must accept new evidence that a) arose after the rejection of the claim; b) was not reasonably available; or c) was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[20] However, I find the RAD's rejection of the evidence unreasonable for different reasons. The Court of Appeal in *Singh*, above, stated that while subsection 110(4) must be strictly adhered to in that the RAD must accept the evidence if the admissibility criteria are met, the RAD nevertheless "has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case" (*Singh* at para 64). Indeed, in the case at bar, the RAD accepted new evidence – a press report – dated January 6, 2016 (clearly before the January 13, RPD decision) because in its view, "the Appellant could not reasonably have been expected to obtain and submit the document before January 13, 2016 and therefore the document is admitted as new evidence." This decision was clearly open to the RAD.

[21] What is unreasonable is why the RAD afforded such flexibility to one piece of evidence (the press report dated January sixth) without doing so for the father's letter discussing the January fifth encounter with the armed individuals. If indeed the event referred to by the father did occur on January fifth, as the Respondent argues, it is unclear how the RAD reasonably expected the letter to be written, and subsequently obtained, submitted and considered before January 13, 2016. If the event occurred in February then the different treatment of the two pieces of evidence is even more unacceptable.

[22] Compounding the RAD's issue is its confusion around the date the letter was submitted in relation to the RPD decision. At paragraph 23 of its decision it states that "the letter was requested by the Appellant, and the date indicates that it arose one day before the RPD's decision." This is factually incorrect. As already noted, the RPD decision was made on January 13 and the letter submitted on February 12, a full month later as opposed to the day before. The RPD hearing dates were November 18, 2015 and December 29, 2015, well before the incidents would have occurred and only days before the decision was rendered (if we're assuming an incident date of January 5). It is unreasonable to expect a letter written and submitted to the RAD from the Applicant's Sri Lankan father in less than 8 days.

[23] The Respondent argues that even if the RAD had accepted the evidence, its decision would not have changed because the letter is vague and does not address the RAD's credibility findings. However, the RAD did not reject the evidence on the basis of vagueness, materiality or credibility. It solely rejected it based on subsection 110(4) factors.



[24] In my view, it was unreasonable for the RAD to accept the January 6 press report on the basis that the Applicant could not have reasonably submitted it to the RPD by January 13, while on the other hand rejecting the letter on the basis that it made reference to an event that occurred on January fifth, one day before the press report's publication – and doing so without providing any further reasons. There is no mention of *Raza v Canada (Citizenship and Immigration)* (2007), 2007 FCA 385 (CanLII), factors being used by the RAD. If there was any confusion about whether the evidence should be admitted you would expect the RAD to look at the requirements in *Raza*, above, as suggested by the FCA in *Singh* at paragraph 49.

[25] In the circumstances, it was unreasonable for the RAD to reject the letter under subsection 110(4) of the Act; that error alone merits reconsideration by a different decision-maker (*Ogundipe v Canada (Minister of Citizenship and Immigration)*, 2016 FC 771 at para 29). The reasons lacked justification and transparency so as to fall outside the range of acceptable, possible outcomes: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47.

[26] For the reasons above, I will not deal with the other issues as presented and will send this matter back to be re-determined by a differently constituted board.

[27] The Applicant presented an opposed certified question: “Does the RAD owe any degree of deference to the RPD’s finding on credibility? Is so, what degree of deference?” As the application is granted, I will not grant the certified question (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168).

**JUDGMENT**

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

1. The Application is granted, the decision is quashed and the matter is sent back to the RAD to be re-determined by a different board;
2. No question is certified.

"Glennys L. McVeigh"

Judge

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

**DOCKET:** IMM-2073-16

**STYLE OF CAUSE:** PIRATHEEP JEYAKUMAR v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 17, 2016

**JUDGMENT AND REASONS:** MCVEIGH J.

**DATED:** FEBRUARY 27, 2017

**APPEARANCES:**

Mr. Robert Isreal Blanshay FOR THE APPLICANT

Mr. Lucan Gregory FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Robert Israel Blanshay FOR THE APPLICANT  
Professional Corporation  
Barristers & Solicitors  
Toronto, Ontario

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