

Federal Court



Cour fédérale

**Date: 20170224**

**Docket: IMM-2175-16**

**Citation: 2017 FC 236**

**Ottawa, Ontario, February 24, 2017**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**JATHURSAN PARAMANANTHALINGAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] The Applicant, Jathursan Paramananthalingam, challenges a Refugee Protection Division [RPD] decision dated May 3, 2016, which denied him refugee status in Canada. The RPD determined the Applicant was neither a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. For the reasons that follow, I am granting this application.

II. Background

[2] The Applicant is a citizen of the Democratic Socialist Republic of Sri Lanka [Sri Lanka]. He is a Tamil male from Mulliyawalai, in the North of Sri Lanka. Mulliyawalai was previously controlled by the Liberation Tigers of Tamil Eelam [LTTE]. The Applicant's father participated in a local LTTE committee which observed and reported on the local population.

[3] In April 2009, the Applicant's father was detained as a suspected LTTE supporter while the rest of the family was held in a detention camp. The Applicant was beaten by authorities when he denied involvement with the LTTE. The family was released in October 2010, except for the father who rejoined the family in April 2011. In May 2011, the Applicant's uncle visited from the United Kingdom.

[4] The Applicant alleges that three incidents occurred in 2013: 1) in February, the army arrested him, questioned him about his father's activities and his uncle's visit, and released him; 2) in May, the army arrested him, beat him and questioned him about his family's LTTE support; and 3) in July, the Karuna Group abducted him. The Karuna Group is a paramilitary group opposed to the LTTE. After he promised to join the group if they permitted him to complete his General Certificate of Education Advanced Level examination [A/L examination], they released him.

[5] The Applicant attempted to complete his A/L examination in August 2013, but was unsuccessful. He went into hiding from both the Karuna Group and Sri Lankan authorities in Jaffna in September 2013. He successfully re-wrote the A/L examination in August 2014.

[6] In December 2014, the Applicant's friend was arrested for leading a student demonstration. The Applicant then travelled to Colombo, where he remained in hiding. He left Sri Lanka on March 5, 2015, with the assistance of a smuggler. He travelled to Canada through the United States, claiming refugee protection at a land port-of-entry in December 2015 under an exception to the Safe Third-Country Agreement.

[7] The RPD conducted an extensive review of the Applicant's refugee claim and found he was not a Convention refugee under either sections 96 or 97 of the Act. The RPD spent considerable time assessing his identity, concluding that he was a citizen and Tamil male from the Northern region of Sri Lanka. The RPD also made a number of negative credibility findings. It did not find credible the Applicant's allegations of being abducted in 2013. It found incompatible his claim of safety at a local university with his claim of persecution, drawing a further negative credibility finding.

[8] The RPD concluded that the Applicant did not have a well-founded fear of persecution as a young Tamil male or as a failed asylum seeker given his low profile. Since he did not meet the lower standard of proof under section 96 – more than a mere possibility – the RPD concluded that the Applicant was incapable of meeting the higher standard of proof under section 97 –

balance of probability – as a person in need of protection. His refugee claim was rejected. A stay of proceeding was granted on August 24, 2016.

### III. Issue

[9] The determinative issue in this decision is whether on these facts a separate section 97(1) determination was necessary.

### IV. Standard of Review

[10] Whether the board should have conducted a separate section 97 analysis has been held to attract a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Al Ismaili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 84 at paras 19 & 61).

[11] The Applicant submits that the RPD was required to conduct a separate analysis of both paragraphs 97(1)(a) and (b) due to his fear of the authorities and the documentary evidence of systemic torture by the Sri Lankan military. He argues that even if he is found not credible under section 96, his risk may still ground a successful section 97 claim.

[12] The Respondent agreed at the hearing that the section 97 reasons are limited, but that the test was correctly articulated and applied. The Respondent defends the RPD's finding that there was insufficient evidence to establish that the Applicant's profile put him at risk. Given the RPD's negative credibility finding and its consideration of the general risk to individuals with

similar profiles, the Respondent submits that the RPD did not have to conduct a separate section 97 analysis.

[13] According to Mr. Justice Rothstein in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 [*Li*], the standard of proof for paragraph 97(1) claims is on a balance of probabilities. With regards to the legal test under 97(1)(a) he stated that “[i]t is immediately apparent that the words used to describe the standard of proof – balance of probabilities – are equivalent to the words used to describe the legal test to be met in order to be entitled to protection under paragraph 97(1)(a) – more likely than not” (*Li*, above, at para 29). He went on to reflect that Parliament did not choose to use the same words as in section 96 but chose to “...mirror the words in Article 3 of the Convention Against Torture” (*Li*, at para 32). He concludes with his determination that the RPD may be asked to “consider both whether an individual is a Convention refugee and whether that individual is in need of protection. Some of the evidence may apply to both determinations”.

[14] However, there are differences between section 96 and paragraph 97(1)(a) (*Li*, at para 33). Mr. Justice Rothstein cites some of the differences such as the fact that a section 96 claim has subjective and objective elements yet a claim under paragraph 97(1)(a) has no subjective component. In conclusion he says that the standard of proof for danger of torture is more likely than not and is the same standard for risk to life or cruel and unusual treatment.

[15] On our facts, the RPD defeats the purpose of the Act and of section 97 by assuming the test under section 97 cannot be met if a claim fails under section 96. The RPD sums up its entire

analysis under section 97 at paragraph 64 of its decision stating: “As there is no further evidence that the Claimant would satisfy the risks delineated pursuant to ss. 97(1) of IRPA, which requires a higher standard of risk than s.96 of IRPA, the Panel further finds that the Claimant is not a person in need of protection.”

[16] The purpose of section 97 is to capture those legitimate refugee claimants who may not meet the stringent standards of a well-founded fear of persecution. Despite the lower evidentiary threshold under section 96, proving both objective and subjective fear of persecution is very difficult. Section 97 acts as a safety valve which Parliament created to protect those persons who, even if found lacking credibility, face a personalized risk of harm. It bears repeating here that well-founded fear of persecution and a personalized risk of harm require different analysis.

[17] The RPD on these facts unreasonably assumes that if the test under section 96 cannot be met, then neither can the test under section 97. According to the RPD, this is due to the higher evidentiary standard under section 97 (balance of probability) than section 96 (serious possibility). What the RPD fails to grasp is that under section 96, the applicant must prove a serious possibility of a well-founded fear of persecution, as opposed to a personalized risk of harm on a balance of probabilities under section 97. To conflate one test with the other is a reviewable error which makes this decision unreasonable.

[18] The officer should have commented, even briefly, on whether the Applicant faced a personalized risk upon returning to Sri Lanka. Having none of this information, this Court is left

guessing at why the Applicant does not meet the test under section 97. As a result, this decision does not meet the *Dunsmuir*, above, standard of reasonableness.

[19] A separate section 97 analysis does not always need to be done. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paragraph 3, held that:

....where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[20] The Applicant pointed to the record where independent documentary evidence was presented to the RPD. The RPD discusses some of this documentary evidence at paragraph 58 of the decision:

...an Asian Human Rights Commission report, cited in the UNHCR Guidelines, states that torture is “endemic in Sri Lanka and is practised at every police station and detention centre.” Further, military and other security authorities subjected “detainees in the north and east to interrogation, frequently including torture.” The detainees were apparently civilians who were suspected of LTTE connections.

[21] The above makes clear that paragraph 97(1)(b) was at issue. Whereas the Applicant’s father, his uncle and his own connections to the LTTE may not be enough for persecution under section 96, it may expose him to a personalized risk relevant to section 97.

[22] The Respondent concedes that the RPD found the father was an LTTE vigilante, but argues that the RPD adequately considered general risk in its section 96 analysis. Given the documentary evidence, the Applicant's profile, and his father's arrest for his role with the LTTE, the RPD should have considered paragraph 97(1)(b) separately. The Applicant may not be successful under section 97, but it should have been considered on these facts.

[23] The board failed to properly assess the Applicant's personalized risk as required by section 97. The board's incorrect application of the test and lack of attention to section 97 renders the decision unreasonable.

[24] Given my reasons above and the fact the RPD was thorough and reasonable in their section 96 analysis, identity analysis, and credibility analysis, I will not address the Applicant's other arguments.

[25] A certified question was presented by the Applicant as follows:

If a claim is rejected under s.96(1) Immigration and Refugee Protection Act by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, is it necessary for the Division to analyze the claim under s.97(1)(a) and / or s.97(1)(b)?

Is the burden of proof under s.96(1) Immigration and Refugee Protection Act lower than the burden of proof under s. s.97(1)(a) and / or s.97(1)(b) by the Refugee Protection Division of the Immigration and Refugee Board?

[26] The Respondent opposes the certified question as the Federal Court of Appeal has already answered these certified questions.



[27] Since I am sending this application back for redetermination, I will not grant the certified questions.

**JUDGMENT**

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

1. The application is granted and sent back to be re-determined by a different decision maker;
2. No question is certified.

"Glennys L. McVeigh"

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Judge

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

**DOCKET:** IMM-2175-16

**STYLE OF CAUSE:** JATHURSAN PARAMANANTHALINGAM v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 16, 2016

**JUDGMENT AND REASONS:** MCVEIGH J.

**DATED:** FEBRUARY 24, 2017

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