

Federal Court



Cour fédérale

Date: 20181105

Docket: IMM-1418-18

Citation: 2018 FC 1109

Toronto, Ontario, November 5, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JENAGAN SIVAGNANASUNDARAMPILLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of the decision of the Refugee Protection Division [RPD], dated March 8, 2018 [Decision], which determined that the Applicant was not a

Convention refugee or a person in need of protection. For the reasons that follow, this application is allowed.

II. Background

[2] The Applicant was born in Jaffna, Sri Lanka in 1992. His family was displaced to Colombo in 1995, where he resided until he left the country in July 2011. The Applicant fears persecution from Sri Lankan government forces, on the basis of his family's perceived connection with the Liberation Tigers of the Tamil Eelam [LTTE].

[3] In 2007, the Applicant and his father travelled to Vanni, an LTTE stronghold, to visit family. Subsequently, in May 2009 the Applicant's uncle and his family were stopped by the Sri Lankan Army [Army], and his cousin was questioned and accused of being a member of the LTTE. During the interrogation, his cousin allegedly revealed that the Applicant and his family had visited Vanni in 2007, which led the Army to suspect that they were LTTE supporters. The Applicant claims that his cousin was taken by the Army and that she has never been seen or heard of again.

[4] On June 23, 2011, the Army and police searched the Applicant's home and he was once again questioned regarding his trip to Vanni, and about his cousin. The Applicant claims that the same night, members of the Army dressed in civilian clothes returned to his home and took him away in a van to a house. The Applicant was allegedly kept there for four days, during which he

was slapped and questioned about his connection to the LTTE. The Applicant was released after his mother paid 5 lakhs.

[5] After his release, the Applicant alleges to have been followed by someone in a white van. Fearing that the authorities continued to suspect him of being an LTTE supporter, the Applicant's parents arranged for him to leave Sri Lanka, which he fled in July 2011, arriving in Canada in November 2011.

III. Decision Under Review

[6] The RPD found the Applicant's testimony was detailed and generally consistent with the narrative in his Personal Information Form [PIF]. The RPD found the Applicant to be credible. It went on to consider whether he fit into one of the risk profiles as per the 2012 United Nations High Commissioner for Refugees *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* [UNHCR Guidelines] – a person suspected of certain links with the LTTE. The RPD noted that some of the documentary evidence indicates that those suspected of LTTE links face a possibility of arrest or torture by security forces. It further noted that more recent reports reflect improvements in the country and the reduction of arrests and detentions.

[7] The RPD observed that the Applicant had spent most of his life in Colombo – away from the LTTE-controlled areas. With respect to the events of June 23, 2011, the RPD found that it was not clear that it was members of the Army that took him away in a van. The RPD noted that

this could have been an extortion attempt. Therefore, the RPD found that the Applicant was never arrested by the police or Army.

[8] The RPD concluded that he is not, on a balance of probabilities, a person who would be perceived to be linked to any pro-LTTE factions by the Sri Lankan government, and does not have good grounds to fear persecution as a failed asylum-seeker. Further, it found that there is no evidence to suggest that since he fled Sri Lanka, the Sri Lankan government has had any reason to believe that he is a member or supporter of the LTTE.

IV. Issues and Standard of Review

[9] There are two issues: (1) whether the RPD used the correct legal test and (2) whether the RPD's 'risk profile' findings were reasonable. As agreed by the parties, the Decision is to be assessed on a reasonableness standard, meaning that it must be justified, transparent, and intelligible, and fall within the range of possible, acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[10] I note that the jurisprudence has developed a clear test for section 96 refugee determination: the standard of correctness applies to the RPD's identification of that test (*Conka v Canada (Citizenship and Immigration)*, 2018 FC 532 at para 11).

V. Analysis

[11] At the hearing, the Applicant led with two reasons for which he feels the Decision is fatally flawed, and I am persuaded by both.

A. *Did the RPD use the correct legal test?*

[12] The Applicant argues that the RPD applied an incorrect test, elevating the requirement such that he prove persecution, on a balance of probabilities, rather than on the correct standard of more than a mere possibility. The Applicant further alleges that the RPD also misstated the test when it held “the claimant is unlikely to face any additional scrutiny upon his return to Sri Lanka as a result of his activities while in Sri Lanka and subsequent to his departure from Sri Lanka” (Decision at para 22, emphasis added). In doing so, the Applicant submits that the entire section 96 refugee determination analysis was tainted by an error of law, because the proper test to be applied is whether there is a reasonable chance, or more than a mere possibility, the Applicant would be perceived as a supporter of the LTTE.

[13] The Respondent replies that the RPD’s assessment of the Applicant’s section 96 claim, when considered as a whole, was reasonable, despite the awkward wording. In other places of the Decision, the Board properly articulated the test, and then applied the evidence to that test reasonably, i.e. with the standard of proof on a balance of probabilities, and assessed this evidence against the correct legal test of a reasonable chance, or more than a mere possibility, of prospective risk of persecution (*Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 [*Nageem*] at paras 24–25).

[14] I am persuaded by the Applicant's position, in that while the RPD correctly identified that the burden of proof to evaluate evidence supporting a claim is on a balance of probabilities, it was unclear whether the RPD assessed the evidence against the correct legal standard of a reasonable chance or more than a mere possibility of prospective risk of persecution. In making this error, the Board's assessment cannot withstand judicial review (*Nageem* at paras 24–25).

B. *Were the RPD's 'risk profile' findings reasonable?*

[15] The Applicant argues that the RPD erred in its consideration of the UNHCR Guidelines by failing to consider that the Applicant falls within the risk profile of having family links to the LTTE.

[16] The Respondent asserts that the RPD's treatment of evidence concerning the UNHCR Guidelines was reasonable: the RPD identified potential risk profiles, and having family links to the LTTE was properly not one of them.

[17] I disagree with the Respondent. Persons with family links or who are dependent on or otherwise closely related to persons with LTTE profiles are included, and as a result, the RPD overlooked this risk profile.

[18] The Applicant, with whom the Board made no adverse credibility findings, provided uncontradicted evidence regarding the disappearance of his cousin, and provided certain third-hand accounts of why she was suspected of having LTTE ties. While the role of this Court is not

to assess whether the Applicant actually has a strong family link to the LTTE through his cousin, that is indeed the role of the RPD and it was unreasonable to remain silent on the issue.

VI. Conclusion

[19] The RPD's Decision will be set aside and returned for reconsideration, due to articulating the wrong legal test, and failing to consider a key component of the Applicant's risk profile. The application for judicial review is thus granted. No questions for certification were proposed and I agree none arise.

JUDGMENT in IMM-1418-18

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted.
2. The RDP's March 8, 2018 Decision is set aside, and the matter remitted for redetermination by a different board.
3. No questions for certification were argued, and none arose.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1418-18

STYLE OF CAUSE: JENAGAN SIVAGNANASUNDARAMPILLAI v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 23, 2018

JUDGMENT AND REASONS: DINER J.

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