

Federal Court



Cour fédérale

Date: 20190122

Docket: IMM-2608-18

Citation: 2019 FC 87

Ottawa, Ontario, January 22, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

YOKITHAN JEYAKUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of a Pre-Removal Risk Assessment Officer [Officer] dated April 16, 2018 [Decision], which refused the Applicant's Pre-Removal Risk Assessment [PRRA] application.

II. BACKGROUND

[2] The Applicant, Yokithan Jeyakumar, is a citizen of Sri Lanka. He is a 24-year-old Tamil male who was born and raised in the Northern Jaffna District of Sri Lanka. This region was formerly a stronghold of the Liberation Tigers of Tamil Eelam [LTTE].

[3] The Applicant claims to have been assaulted in 2014 and 2015 due to his Tamil ethnicity and perceived political opinion. The armed men who assaulted him inquired about a man known as “Shanthan.” The Applicant believes that Shanthan is associated with the LTTE.

[4] The Applicant left Sri Lanka with the assistance of a smuggler. After transiting through Qatar, Argentina, Bolivia, Ecuador, Panama, Costa Rica, Guatemala, and Mexico, the Applicant arrived in the United States where he was detained by US immigration authorities. He received assistance from his aunt and uncle who live in Toronto which enabled him to travel to New York and then to a Canadian port of entry.

[5] The Applicant arrived at the Canadian port of entry and, unaware of the *Safe Third Country Agreement*, stated his intention to file a claim for refugee protection. An immigration officer deemed the Applicant ineligible to file a refugee claim and issued a 1-year exclusion order against him.

[6] On October 12, 2017, the Applicant entered Canada illegally through Québec. He was apprehended and detained in Montréal. Subsequently, the Applicant initiated a PRRA application.

III. DECISION UNDER REVIEW

[7] The Officer rejected the Applicant's PRRA application and determined that he would not face more than a mere possibility of persecution or be subject to a risk of torture, a risk of persecution, or face a risk to life or risk of cruel and unusual treatment or punishment if he were to be returned to Sri Lanka.

[8] The Officer examined a letter written by the Applicant's father which described how unidentified people assaulted the Applicant on numerous occasions in 2014 and 2015. The Officer also noted a letter from the president of a women's organization which stated that unidentified persons regularly searched for the Applicant at his family's home. The Officer also noted the medical evidence which showed that the Applicant was treated at a hospital in Sri Lanka.

[9] The Officer then examined the objective evidence about the conditions of Tamils in Sri Lanka. The Officer noted the Applicant's submissions that failed Tamil refugee claimants are vulnerable to detention, physical violence, sexual assault, mistreatment, and torture.

[10] The Officer considered at length the UK Home Office Country Information and Guidance on Tamil Separatism [UK Home Office Report] of 2017. The UK Home Office Report refers to

the decision of a 2013 UK tribunal which the Officer cited. The UK tribunal decision states that not all Tamils are at risk upon return to Sri Lanka. Rather, it says the government of Sri Lanka is primarily concerned with Tamil activists who promote Tamil separatism. Individuals who are detained face a real risk of mistreatment. The Officer concluded that the tribunal identified four categories of people most at risk of persecution. These categories are Tamil separatists, journalists and activists who have criticized the Sri Lankan government, individuals who have witnessed or testified about Sri Lankan war crimes, and individuals who face court orders or arrest warrants.

[11] The UK Home Office Report also referred to the 2015 election of a new Sri Lankan government and associated improvements. The Officer concluded that these improvements included the weakening of executive power, the re-establishment of independent commissions, the legalization of some diaspora organizations, and the release of detainees. Furthermore, many returnees with past involvement with the LTTE are now able to return safely. The focus of the Sri Lankan government is on individuals who have a remaining desire to foster Tamil separatism as well as former members who played a significant role in the separatist conflict.

[12] The Officer acknowledged reports by the US Department of State, Human Rights Watch, and Amnesty International which show that Tamils who are suspected of having links with the LTTE continue to face government surveillance, arbitrary detention, and harassment. Also, some police forces continue to engage in torture, abductions, and sexual abuse of those suspected of being associated with the LTTE.

[13] The Officer discussed a 2015 United States Department of State report which states that Tamil returnees who are suspected of having former links to the LTTE continue to be detained upon arrival at Sri Lankan airports. This report also states that merely being of Tamil ethnicity or having past ties to the LTTE is not sufficient to ground a claim for refugee protection.

[14] The Officer then went on to consider the Applicant's personal characteristics and recognized that the Applicant was beaten by unknown individuals in 2014 and 2015. The Officer noted, however, that there was insufficient evidence to determine that the Applicant was sought by the Sri Lankan government for perceived ties to the LTTE. The Officer found insufficient evidence that the Applicant had been sought after by the authorities, or had been subject to a court order or arrest warrant.

[15] The Officer then considered the Applicant's argument that he would be at risk due to his Tamil ethnicity, gender, and age. The Officer noted the documentary evidence that being a young, Tamil male is insufficient on its own to ground a claim for international protection. Further, the Officer noted that the Applicant does not fit the profile of those most at risk of government persecution in Sri Lanka. Specifically, the Applicant did not demonstrate that he was an active proponent of Tamil separatism, a fugitive, or a known critic of the Sri Lankan government. Finally, the Officer found insufficient evidence that the Applicant had expressed anti-government views or supported the LTTE while in Canada. For this reason, the Officer found that the Applicant would not likely attract the attention of the government upon return to Sri Lanka.

[16] The Officer concluded that the Applicant would not face more than a mere possibility of persecution based on his profile as a Tamil and failed asylum seeker. Additionally, the Officer determined that the Applicant is not likely to face a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment. The Officer refused the Applicant's PRRA application.

IV. ISSUES

[17] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Was the Officer's Decision reasonable?

V. STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[19] A standard of reasonableness applies to a PRRA officer's findings of fact, determinations based on mixed fact and law, and consideration of evidence (*Selduz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 361 at paras 9-10).

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[21] The following statutory provisions of the Act are relevant to this application for judicial review:

Enforceable removal order

48 (1) A removal order is enforceable if it has come into force and is not stayed.

Effect

(2) If a removal order is enforceable, the foreign

Mesure de renvoi

48 (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

Conséquence

(2) L'étranger visé par la mesure de renvoi

national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.
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...

...

Application for protection

Demande de protection

112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112 (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

VII. ARGUMENT

A. *Applicant*

[22] The Applicant says that his *sur place* profile places him at a unique risk if he is returned to Sri Lanka. He emphasizes that his identity, nationality, Tamil ethnicity, failure to secure refugee protection, status as a sole returnee, his travel to Canada, and lack of a Sri Lankan passport all form part of his *sur place* profile. The Applicant argues that the Officer failed to conduct a cumulative assessment of this profile. The Applicant also says that the Officer erred by assessing allegations of past persecution as part of his new profile. Past events in Sri Lanka are not necessarily related to the Applicant's present profile.

[23] The Applicant says that he provided significant objective evidence to substantiate his claim that he faces a significant risk upon return to Sri Lanka. He says that security forces will quickly realize that he is a failed refugee claimant. Additionally, the Applicant says that he has heard many accounts of Tamil individuals being detained and tortured due to perceived LTTE connections. The perception that the Applicant has links with the LTTE will not be alleviated by the fact that he did not engage in anti-government activities in Canada.

[24] The Applicant says that the Officer failed to engage with several material pieces of evidence. Specifically, the letter from the Applicant's father, the letter from the president of the women's organization, and the medical documentation were mentioned, but not analyzed.

[25] The Applicant says that it was unreasonable for the Officer to conclude that there was insufficient evidence to demonstrate that the Applicant was sought by Sri Lankan authorities for perceived connections to the LTTE. The evidence demonstrates that the Applicant was attacked because of his ethnicity and perceived links to the LTTE.

[26] The Applicant further says that the documentary evidence confirms that he is at risk of persecution due to his ethnicity and perceived political opinion. Rather than relying on recent and relevant information, the Officer relied extensively on a 2013 UK tribunal decision. This selective use of documentary evidence was unreasonable. The Officer unreasonably disregarded the evidence submitted by the Applicant.

[27] The Applicant says that the Officer is owed little deference with respect to the finding that the election of a new Sri Lankan government has brought with it positive developments. This finding was not made based on more recent and reliable evidence. Furthermore, positive developments such as verbal commitments do not necessarily translate into actual protections for individuals such as the Applicant.

[28] The Applicant says that the Officer failed to examine his profile cumulatively. Instead, the Officer considered individual aspects of the Applicant's profile separately. By examining the elements of the Applicant's profile such as his ethnicity and status as a failed asylum seeker on an individual basis, the Officer rendered an unreasonable decision.

B. *Respondent*

[29] The Respondent says that the Applicant does not fit the profile of a person who would be at risk if returned to Sri Lanka. This Decision was reasonably open to the Officer to make.

[30] The Respondent disagrees with the contention that the Officer unreasonably selected documentary evidence to rely on. It was reasonable for the Officer to rely upon the UK Home Office Report which is well-respected, objective, and reliable. Numerous Federal Court decisions have upheld the findings of officers who have relied on this UK Home Office document. The Officer did consider the documentary evidence submitted by the Applicant. It was open to the Officer to prefer certain pieces of evidence over others. It was not an error for the Officer to refer

to the 2013 UK tribunal decision because it was not the decision, but the UK Home Office document, that was primarily relied upon.

VIII. ANALYSIS

[31] This application involves the vexed and perennial issue of whether a young, male Tamil will face s 96 persecution, or s 97 risk if he is returned to Sri Lanka.

[32] As is usual in such cases, the Officer assessed the Applicant's alleged experiences and profile against personal and documentary evidence. His conclusion was that the Applicant had not persuaded him that he would personally face more than a mere possibility of persecution based upon his profile as a failed Tamil asylum seeker. Nor was the Officer satisfied that the Applicant is likely to face a danger of torture, or a risk to life, or a risk of cruel and usual treatment or punishment if he is returned to Sri Lanka.

[33] The Applicant says that the Officer's conclusions are unreasonable for reasons that have been placed before this Court in numerous applications. The vast jurisprudence has yielded no consistent or easy answers. It all depends on the specifics of each case and each PRRA officer's or Refugee Protection Division's handling of the available evidence.

A. *Wrong Profile*

[34] The Applicant says that the Officer assessed persecution and risk using an "incorrect overall profile of the applicant" and "at times carving away certain key aspects of his profile."

The Applicant also says that the Officer failed “to consider the applicant’s current, cumulative *sur place* profile against the objective documentary evidence.”

[35] The Applicant describes his profile as follows:

23. The PRRA submissions focused wisely (given the most recent, credible information) on the applicant’s **current, unique *sur place* profile** as a young Tamil male, potential failed asylum-seeker, having sojourned in Canada, amongst a large Sri Lankan Tamil diaspora community with LTTE sympathizers, members and supporters.

...

27. The applicant’s PRRA submissions focused, specifically, on this current and changed *sur place* profile and not merely the fact of his “profile as a young Tamil male from the Northeast region of Sri Lanka. The precise profile was described as:

- (1) **Identity;**
- (2) **Nationality;**
- (3) **Ethnicity [Northern Jaffna District Tamil the former ‘heartland of the Liberation Tigers of Tamil Eelam[’] (LTTE)];**
- (4) **Failed asylum-seeker;**
- (5) **Sole returnee [No monitors];**
- (6) **From Canada, a centre of LTTE activity with a large concentration of Sri Lankan “diaspora” Tamils;**
- (7) **Without an internally-issued valid Sri Lankan Passport.**

[Emphasis in original, references omitted.]

[36] In written submissions, the Applicant explains the profile problem in the Decision as follows:

46. Strewn throughout the reasons are critical findings which exemplify the Officer conflating the applicant's overall "profile." At pages 6 and 10 of the Reasons the Officer carves away critical factors related to the applicant's profile, preferring unreasonably to portray him simply as being of "Tamil ethnicity" and a "young Tamil male from the Northeast region of Sri Lanka."

47. While the Officer touches on other profile factors, independently within the Reasons - Tamil returnees, residing in Canada amongst a large Sri Lankan Tamil diaspora, etc... - the reasons as a whole reflect the Officer neglecting to consider all profile factors *cumulatively*.

...

66. The PRRA Officer assesses this credible evidence against the *wrong profile* of the applicant, finding at page 10 that "being of Tamil ethnicity" would not in itself warrant international protection."

...

68. The applicant's PRRA was *not* based purely upon his *Tamil ethnicity*. It was based upon the cumulative factors of his nationality, ethnicity, presence in Canada, being a failed asylum-seeker, poised for return on his own.

...

71. Further down, the Officer then finds, separately, that the applicant will not be exposed to persecution as a "failed asylum-seeker." The finding reflects the Officer's act of separating the applicant's profile, whereas all factors in support of the profile had to be taken together *cumulatively*.

[Emphasis in original, references omitted.]

[37] The Officer's reasoning on profile is as follows:

With respect to the applicant's particular circumstances, the submissions show that he was beaten by unidentified armed persons in August 2014 and throughout 2015 prior to leaving for Canada. Still, there is insufficient objective evidence before me to show that he was sought by government authorities for perceived or actual links to the LTTE. As noted earlier, the objective evidence shows that former LTTE members most at risk are those

persons who are, or are perceived to be, a threat because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism with 'significant role' meaning those in the LTTE's former leadership (combat or civilian) and/or former members who were suspected to have committed terrorist or serious criminal acts during the conflict, or to have provided weapons or explosives. There is little if any evidence to show that the applicant was sought by authorities for falling under the above profile. Indeed, there is little if any evidence to show that official government authorities have inquired about the applicant in an official capacity. For example, there is little evidence to show that he has been subject to an arrest warrant or court order for his activities. Counsel notes that he was and would be targeted because of his profile as young, Tamil male from the North-East region; however the current objective evidence shows that simply being a Tamil male would not warrant international protection. As noted, current objective evidence shows individuals most at risk are those that fall under the profile of having a real or perceived connection to the LTTE, those who have been or continue to be active in promoting Tamil separation, those who have been critical of the Sri Lankan government such as journalists and human rights defenders, and those wanted for having committed a crime in Sri Lanka before departing including those having left illegally. I am not persuaded that the Applicant has provided sufficient evidence to demonstrate that he falls within these risk factors or that the Sri Lankan authorities would have any significant interest in targeting the Applicant.

Moreover, there is little other evidence to indicate that the applicant would be viewed as an LTTE supporter or sympathizer and would attract the heightened attention of authorities upon a return to Sri Lanka based on a sur place claim. In this respect I note that there is little evidence to demonstrate that he engaged any activities in Canada that would draw the attention of authorities in Sri Lanka. I note that there is little if any evidence to show that he has expressed anti-state views, associated with anyone who has expressed anti-state views or offered any assistance to support the revival of the LTTE. Accordingly, it is unlikely that the applicant would attract the attention of Sri Lankan authorities.

Accordingly, I am not persuaded that the applicant would personally face more than a mere possibility of persecution based on his profile as a failed Tamil asylum seeker. In addition, I am not satisfied that he is likely to face a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment.

[38] I agree with the Applicant that some of this is wide of the mark. For example, the Applicant never alleged that he would be targeted “because of his profile as young, Tamil male from the North-East region...” and does not dispute that “the current objective evidence shows that simply being a Tamil male would not warrant international protection.” More to the point, however, is what the Officer says about the Applicant’s *sur place* claim.

[39] In section 4 of the Decision, the Officer quotes the Applicant’s description of his own profile:

“My client’s PRRA remains grounded upon the IRPA A96 Convention grounds of identity, race (or ethnicity), imputed or perceived political opinion (as potentially having links and/or support and/or membership in the former Liberation Tigers of Tamil Eelam), and membership in a particular social group.”

[40] In my view, the Decision becomes unreasonable at the point where the Officer only briefly addresses the *sur place* claim. For purposes of that claim, the Applicant’s profile is as set out in para 27 of his written submissions which I quote again for convenience:

- (1) **Identity;**
- (2) **Nationality;**
- (3) **Ethnicity [Northern Jaffna District Tamil the former ‘heartland of the Liberation Tigers of Tamil Eelam[?] (LTTE)];**
- (4) **Failed asylum-seeker;**
- (5) **Sole returnee [No monitors];**
- (6) **From Canada, a centre of LTTE activity with a large concentration of Sri Lankan “diaspora” Tamils;**
- (7) **Without an internally-issued valid Sri Lankan Passport.**

[Emphasis in original.]

[41] The Officer's answer to this is that the Applicant has not shown he is at risk because:

- (a) There is little evidence that he would be viewed as an LTTE supporter or sympathizer and would attract the heightened attention of the authorities upon return to Sri Lanka;
- (b) There is little evidence to demonstrate that he engaged in any activities in Canada that would draw the attention of the authorities in Sri Lanka;
- (c) There is little, if any, evidence to show that he has expressed anti-state views, associated with anyone who has expressed anti-state views, or offered any assistance to support the revival of the LTTE.

[42] As the evidence I refer to later shows, the Applicant will likely attract the attention of the authorities as soon as he arrives at the airport in Sri Lanka because he left Sri Lanka illegally without an internally-issued valid Sri Lankan passport. In order to deport the Applicant to Sri Lanka, he will need some kind of travel document from the Sri Lankan authorities, so they will know how and when he will be arriving.

[43] The same evidence also shows that he will likely be screened and questioned upon arrival and it will be revealed that he is a failed asylum seeker from Canada where there is a large diaspora of Sri Lankan Tamils, and the authorities will want to find out what kind of risk he poses. I think the Officer assumes that all will be well because the Applicant will be able to reveal that he is not, and never has been, an LTTE supporter and has not engaged in any activities that the objective evidence suggests will cause the state authorities to deal harshly with him.

[44] So my own feeling is that the Officer doesn't necessarily overlook the Applicant's full profile for purposes of the *sur place* claim. He just assumes that the Applicant will come to no harm because, once the truth is known about him, the Sri Lankan authorities will have no interest in harming him. He also assumes that the interviewing techniques of the authorities will not harm the Applicant in a way that will amount to s 96 persecution or s 97 risk. The real issue before me, then, is whether, the evidence that was before the Officer reasonably supports these assumptions.

B. *Selective Analysis of Documentary Evidence*

[45] The Applicant also complains that the Officer's assessment of the documentary evidence is highly selective.

[46] In written submissions, the Applicant elaborates upon this assertion as follows:

29. The PRRA Reasons reveal the Officer's heavy reliance on a UK Home Office Country Policy and Information Note[,] Sri Lanka: Tamil separatism, dated June 2017.

30. However, within this very document are sections 7, 8, 9 and 12 which contain recent, relevant information regarding the applicant and his unique profile, and the ongoing credible reports of the use of torture, ill-treatment and sexual assault by State agents against such persons fitting this unique profile.

31. The Officer, however, preferred (inexplicably) to rely primarily on Section "2" of this UK Report, primarily, and a **2013** UK Upper Tribunal Decision, *GJ + Others*.

32. This Tribunal decision was roughly 5-years outdated as of the date of the PRRA decision in April 2018, and contained the *findings* of 1 UK decision-maker on a refugee claim, the full particulars of which are unknown.

33. It is critical for such decision-makers- -on applications involving fundamental human rights and risk - to actively seek out

at least some sort of evidence which is indeed both contradictory to their core findings *and* supportive of the alleged risk.

...

56. Further, there was ample documentary evidence before the Officer (other remaining portions of the UK Home Office June 2017 Report) which well corroborated such acts of persecution meted out to persons fitting the very profile of the applicant due to ethnicity and perceived political opinion.

57. At pages 7 and 8 of the Reasons the Officer relies heavily on 1 portion of 1 UK Home Officer [*sic*] Report. This portion of a June 2017 Report, in fact, relies on a UK Upper Tribunal decision, “OJ and Others”, issued in **2013**, roughly 5-years prior to the PRRA determination in April 2018[.]

58. Within his PRRA submissions the applicant disclosed a plethora of **recent**, reliable and credible objective evidence tailoured [*sic*] specifically to his circumstances and those of persons similarly-situated to him.

59. For reasons unknown, the PRRA Officer relies significantly on the decision of a foreign Tribunal related to 1 past refugee claim in 2013. The Officer fails unreasonably to explain why other recent, reliable evidence, supportive of the current risk to the applicant, is disregarded. This is a *highly-selective* analysis of the objective evidence adduced.

[Emphasis in original, references omitted.]

[47] First of all, was there any evidence before the Officer that someone in the Applicant’s position and with the Applicant’s profile could face s 96 persecution or s 97 risk if returned to Sri Lanka? My review of the record suggests that there was a significant body of such evidence.

[48] For example, there is a *Guardian* report for July 14, 2017 that says, *inter alia*:

The use of torture by Sri Lankan security services has become routine, a UN special rapporteur has concluded following a visit to the country.

[49] An Immigration and Refugee Board of Canada Response to Information Request for 11 February 2015 reported, *inter alia*, that:

Sources report that individuals returning from abroad are particularly subject to screening (Assistant Professor 20 Jan. 2015; Council of NGOs 14 Jan. 2015). According to some sources, authorities have used former LTTE cadres and informants to identify individuals with links to the LTTE (Anthropologist 8 Jan. 2015; Adjunct Professor 12 Jan. 2015), although this has “lessened” or has at least become “not as obvious” as in the past, (*ibid.*).

According to a May 2012 report by Tamils Against Genocide (TAG), a US-based “international non-profit, non-governmental human rights organization devoted to advocacy, research and litigation against genocide and its accompanying human rights violations” (TAG n.d.),

failed asylum seekers are more likely to be readily associated with the LTTE either by virtue of the fact that they sought asylum or because of a presumption of involvement in Tamil diaspora activities which are viewed by the Sri Lankan government as being supportive of the LTTE. (*ibid.*, May 2012, para. 1.3.3)

[50] A more recent *Guardian* report for November 2017, says, *inter alia*, that,

Piers Pigor, a South African human rights investigator who has interviewed torture survivors for the past 40 years said, “[...]The levels of sexual abuse being perpetuated in Sri Lanka by authorities are the most egregious and perverted that I’ve ever seen.”

[51] This is combined with advice from Ann Hannah, head of International Advocacy of Freedom from Torture that, in some cases, people who had been refused asylum in the UK had been returned to Sri Lanka, where they were abducted and tortured again.

[52] A *Washington Post* article for November 16, 2017 reads, in part, as follows:

Last week, the Associated Press published an explosive report documenting more than 50 Tamil men’s allegations that Sri Lanka’s security forces sexually assaulted and tortured them. Their accounts of gang rape, sexual humiliation, and penetration with barbed wire are supported by medical records and psychiatric evaluations. The details are stomach-turning. The news broke at an inconvenient time for Sri Lanka, which is up for its Universal Periodic Review at the U.N. Human Rights Council this week. The government delegation’s assurances of a “zero tolerance policy” on torture sat awkwardly alongside reports of abuses so shocking that one career human rights investigator described them as “the most egregious and perverted that I’ve ever seen.”

But it’s not just the brutality of the assaults that stands out; it’s their routine nature. Because, unsettlingly, these allegations are not anomalous. In 2016, the British organization Freedom from Torture reported that 71 percent of its predominantly male Tamil clients said they had been raped or endured other sexual torture. Given the stigma that conservative Tamil culture attaches to rape, male victims have a strong incentive to remain silent about such crimes. The actual incidence is likely to be even higher than the reported rate.

...

Much of the sexual violence described above was likely committed opportunistically, by individuals or small groups taking advantage of a permissive environment. But the violations reported in the AP article sound alarmingly routine.

In a human rights report that provides more detail, survivors describe conversations between interrogators about applying the “normal treatment.” Some recall the presence of members of both the police and the military as well as senior officers. Most tellingly, individuals detained at different locations describe strikingly similar torture chambers, suggesting that these assaults are not just routine but standardized.

To date, the military perpetrators of only one post-war rape and two wartime incidents have been convicted. And Sri Lanka has failed entirely to punish any of its peacekeeping troops for their crimes in Haiti.

[Emphasis in original.]

[53] These reports of routine torture have to be considered in conjunction with evidence in the June 2017, UK Home Office Report heavily relied upon by the Officer as to how returned asylum seekers are dealt with upon arrival in Sri Lanka:

8.2.4 The same report added however, that:

‘The Special Rapporteur notes with concern, however, that neither the Penal Code nor the Code of Criminal Procedure Act specifies that an arrest warrant must be authorized by a judge, giving the police extraordinary powers of arrest and increasing the risk of arbitrary detention and of torture and ill-treatment. Moreover, the Special Rapporteur received credible testimonies that suspects are often first detained for interrogation at official or unofficial places of detention without being registered during the initial hours or days and not brought before a judge, especially detainees under the Prevention of Terrorism Act who are held incommunicado. This facilitates the perpetration of torture and other ill-treatment and can in itself constitute such treatment.’

...

12.2.1 .The People for Equality and Relief in Lanka (PEARL), a non-profit organisation led by human rights activists concerned about the situation in Sri Lanka, recorded in its report, *Withering Hopes: Historic window of opportunity for reconciliation will close if Sri Lanka fails to act on accountability and militarization*, April 2016:

‘Tamils returning from abroad, particularly those returning from working in the Middle East and deported from other places, continue to be questioned and sometimes detained on arrival. At least 19 Tamils returning from abroad were arrested in 2015. In January 2016, a Tamil journalist returning from Australia was arrested and detained. Tamils deported from countries such as Turkey and Australia have also been arrested upon arrival. There is at least one reported case of abduction and murder of a Tamil who returned from Saudi Arabia in 2015.’

...

12.2.5 The Guardian further added: ‘Typically, asylum seekers who are returned to Sri Lanka are held in police custody or Negombo prison. They face a magistrate’s court and are usually fined for the offence of illegally leaving the country. Some spend weeks, or even months in jail, and the fines can be up to 100,000 rupees (\$A930).’

...

12.2.7 The DFAT Report on Sri Lanka, dated 24 January 2017, observed:

‘Most Sri Lankan returnees, including those from Australia, are questioned (usually at the airport) upon return and, where an illegal departure from Sri Lanka is suspected, they can be charged under the I&E [Immigrants and Emigrants Act 1949] Act. DFAT understands that in most cases, these individuals have been arrested by the police at Colombo’s Bandaranaike international Airport. As part of this process, most returnees will have their fingerprints taken and be photographed. At the earliest available opportunity after investigations are completed, the individual would be transported by police to the closest Magistrate’s Court, after which custody and responsibility for the individual shifts to the courts or prison services. The Magistrate then makes a determination as to the next steps for each individual.’

...

12.2.10 The Immigration and Refugee Board of Canada reported in February 2015 that: ‘Sources report that individuals returning from abroad are particularly subject to screening.’ A July 2015 International Truth & Justice Project (ITJP) Sri Lanka report on Sri Lanka’s Survivors of Torture and Sexual Violence 2009-2015 stated that: ‘A security force insider testified since the presidential election in 2015 that military intelligence officials from Joseph Camp were actively looking for any Tamils returning home from abroad in order to interrogate them. The witness stated that the intention was to abduct, detain and torture them.’

...

12.2.12 The International Crisis Group noted in an August 2015 report that: ‘Tamils returning from abroad continue to be arrested under the PTA [Prevention of Terrorism Act] on suspicion of old LTTE involvement. According to some reports, after police detention, many are sent to the military-run rehabilitation program. Tamil politicians and activists allege that secret detention centres established by the old government continue, though officials deny this.’

[References omitted.]

[54] Based upon this kind of evidence – and there is more in the materials that were before the Officer – I don’t think the Officer could just assume, as he appears to have done in the Decision, that the Applicant will not face s 96 persecution or s 97 risk if he is returned to Sri Lanka just because he has had no involvement with the LTTE and does not have some of the other profiles specifically referred in the Decision.

[55] It is, of course, for the Officer to assess and weigh the evidence and I cannot interfere even if I would have reached a different conclusion. But the Court has consistently held that it is a reviewable error not to address evidence that is in conflict with an officer or the Refugee Protection Division’s own conclusions.

[56] For example, in the recent case of *Jesuthasan v Canada (Citizenship and Immigration)*, 2018 FC 142, Chief Justice Crampton provided the following guidance on point:

[25] In so doing, the Officer ignored more recent documents, written in 2015 and 2016, that reported upon persons of Tamil ethnicity being “detained, tortured and/or sexually abused” upon their return to Sri Lanka. The Officer’s failure to meaningfully engage with that more recent information, which directly contradicted his conclusions, rendered unreasonable his assessment of the risks that Ms. Jesuthasan alleged she would face if required

to return to that country (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, at para 17).

[57] Justice McDonald's words in *Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 are equally applicable here:

[18] The Applicant's claimed profile is a Tamil returning to Sri Lanka after a failed asylum claim. The Applicant points to the documentary evidence respecting the treatment of Tamil returnees generally, not just those with a connection to the LTTE.

[19] The Officer was obligated to consider this evidence. Officers must consider all the risk factors put forward by the Applicant, cumulatively (*K.S. v Canada (Citizenship and Immigration)*, 2015 FC 999, at para 42). The Officer cannot view the evidence of such risks in isolation.

[20] Such an error was considered in the RPD context in *Suntharalingam v Canada (Citizenship and Immigration)*, 2014 FC 987 at paras 47-50. There, the Court rejected an RPD decision which reasoned that because an applicant was not targeted by the authorities for LTTE involvement, there was no need to consider whether the applicant was at risk based on the evidence. The Court noted:

[47] In addition, the RPD appears to be saying that because it did not believe the applicant was targeted by the authorities for a perceived association to the LTTE, there is no need for it to consider whether he is at risk in relation to the objective documentary evidence.

[...]

[49] In my respectful view, the RPD's credibility concerns cannot determine the issue of whether there is a serious possibility of persecution of the claimant in his capacity as a failed refugee claimant returnee. The applicant's status in this regard is determined objectively by the fact that he is a failed refugee applicant by virtue of having his claim rejected by the RPD. It has nothing to do with credibility.

[50] On review of the record before the RPD there was evidence that failed refugee claimants returning to Sri Lanka have been both detained and tortured (*Freedom from Torture Report* at 7; UNHCR Guidelines at 8; *Risk of failed asylum seekers of Tamil ethnicity upon return to Sri Lanka*,). The RPD did not refer to this issue not to any specific documents in this regard. Nor does it address the specific concern of a returning failed refugee claimant. In my respectful view, the RPD had a duty to consider whether there is a serious possibility of persecution of the applicant as a failed refugee returnee.

[21] This case is analogous and presents the same error. The Officer found that the Report was probative. However, the Officer failed to consider the full Report, which documents the significant risks for Tamil returnees. The Officer, while acknowledging these risks, did not assess those risks against the Applicant's profile, and instead solely relied upon the RPD's credibility findings.

[22] The Officer cannot simply rely on these findings without a full consideration of the evidence. This error indicates a failure of the Officer to consider the cumulative profile of the Applicant, specifically regarding the Applicant's status as a Tamil returnee, separate and apart from any other risk profiles.

[58] Justice Diner made a similar point in *Thevarajah v Canada (Citizenship and Immigration)*, 2018 FC 458:

[11] Finally, the RPD did not meaningfully address the risk Mr. Thevarajah would face in Sri Lanka as a failed refugee claimant, which was a key aspect of his profile that did not depend on his credibility (*Shanmugarajah v Canada (Minister of Citizenship and Immigration)*, 2014 FC 987 at para 49 [*Shanmugarajah*]). Rather, the RPD focused on a 2012 United Nations High Commissioner for Refugees document, which suggested that a serious possibility of persecution for young Tamil males only arose if they or a close relation had been actively and formally involved in the LTTE. As Justice Brown found in *Shanmugarajah*, the RPD has a duty to consider whether there is a serious possibility of persecution of the applicant specifically as a failed refugee returnee (see also, by analogy, *Vilvarajah v Canada*

(Citizenship and Immigration), 2018 FC 349). The RPD failed to do so in this case.

IX. CONCLUSIONS

[59] The Applicant has raised several other issues, but there is no need to address them. Based on the above, this matter must be returned for reconsideration by a different officer.

[60] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-2608-18

THIS COURT'S JUDGMENT is that

1. The application is granted. The Decision is quashed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2608-18

STYLE OF CAUSE: YOKITHAN JEYAKUMAR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION ET AL

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 10, 2019

JUDGMENT AND REASONS: RUSSELL J.

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