

Federal Court



Cour fédérale

**Date: 20220208**

**Docket: IMM-2507-20**

**Citation: 2022 FC 163**

**Ottawa, Ontario, February 8, 2022**

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

**BETWEEN:**

**MAHESWARALINGAM SUBRAMANIAM  
MERYLUCIA MAHESWARALINGAM**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] This is an application for judicial review of a March 12, 2021 Refugee Appeal Division [RAD] decision that the Applicants do not have a well-founded fear of persecution and therefore, are not Convention refugees or persons in need of protection.

[2] The application for judicial review is allowed.

## II. Background

[3] The Applicants, an elderly married couple, are citizens of Sri Lanka. During the Sri Lankan civil war, which ended in 2009, the Applicants lived in a territory controlled by the Liberation Tigers of Tamil Eelam [LTTE]. The Principal Applicant [PA] states he was not a member of the LTTE but was “forced to participate in LTTE activities and cooperate with the LTTE.”

[4] The Applicants state that they are fearful of returning to Sri Lanka because they are Tamils from the North; will be returning as failed refugees; and have a son-in-law that has pro-LTTE ties. The son-in-law previously worked as a journalist for a Tamil newspaper and for a pro-LTTE radio station. He states that he plans to report on the human rights abuses occurring in Sri Lanka while in the United Kingdom [UK], where he currently has protected person status. Prior to living in the UK, the son-in-law and the Applicants’ daughter occasionally stayed with the Applicants in their home in Sri Lanka.

[5] Between 2010 and 2012, Sri Lankan authorities questioned the Applicants and their son-in-law. Between 2014 and 2017, after their son-in-law’s departure, both Applicants were questioned two or three more times about their son-in-law’s whereabouts.

[6] They travelled to Canada on January 24, 2017. On November 5, 2017, while the Applicants were in Canada, the Eel am People's Democratic Party [EPDP] and the army visited

the Applicants' home. This visit occurred in the month of Martyrdom, when it is common for authorities to search for Tamils that were present during the war. The authorities asked the PA's brother, who was caring for their property, where the Applicants and their son-in-law were. He told them that they were in the Canada and the UK. The Applicants subsequently filed a refugee claim in December 2017.

### III. The RPD Decision

[7] The RPD, in rejecting the Applicants' claim, found that the PA was not credible and there was no persuasive evidence to substantiate the claim that the army or intelligence unit had any interest in the Applicants.

[8] With respect to credibility, the RPD drew a number of negative inferences because:

- The PA failed to mention in his Basis of Claim [BOC] form that the November 5, 2017 visit from authorities was routine due to Martyrs Day;
- The Applicants failed to produce articles written by their son-in-law, which could be obtained rather easily;
- The media cards belonging to the son-in-law did not appear authentic;
- The PA's fear of extortion (because his children lived abroad since at least 2014) was not raised in his BOC form; and
- The Applicants entered Canada in January 2017 but did not file their refugee application until December 2017.

[9] In light of these negative inferences, the RPD found that there was insufficient evidence to corroborate the Applicants' fears. The RPD also found that the Applicants had no trouble obtaining visas to come to Canada, they exited Sri Lanka on their own passports and visas, and they had no difficulty receiving an email from the PA's brother.

[10] Further, in looking to a United Nations Human Rights Commission report [UNHRC Report] about Sri Lanka's country conditions, the RPD found that conditions were improving and that UNHRC safeguards were being put in place for Tamil returnees.

#### IV. The RAD Decision

[11] The RAD rejected the Applicants' appeal, finding that the Applicants did not have a well-founded fear of persecution. The Applicants had argued that the RPD erred in its assessment of the Applicants' credibility and well-founded fear of persecution. The RAD assumed that the Applicants' account concerning the son-in-law's work as a journalist was credible.

[12] First, the RAD considered the questioning that occurred while the Applicants were still in Sri Lanka. The RAD noted that the PA's testimony about these events was vague and inconsistent but assumed that these events occurred. It noted that the PA was never abused, tortured, or harmed. In 2010 and 2012, the PA was questioned only about his son-in-law and his own connections to the LTTE and then he was let go. Between 2014 and 2017, the questions exclusively focused on the whereabouts of the son-in-law and then the authorities left.

[13] Next, the RAD considered the authorities' visit to the Applicants' home on November 5, 2017. When viewed in light of past questioning and the nature and pattern of previous visits, the letter from the PA's brother did not establish a serious possibility or risk of persecution to the Applicants. The letter only established that the authorities asked about the Applicants' whereabouts and that it occurred on Martyrs' Day, when it is routine for authorities to visit Tamils.

[14] The RAD then considered the Applicants' residual profiles. The RAD found that the RPD erred in considering the UNHRC Report, as it was specific to Tamil returnees from India. The RAD reclassified the Applicants' profile as "Tamils from the North who would be returning as failed refugees and who have a connection to a son in law working in the media."

[15] The RAD considered each aspect of the Applicants' profiles, beginning with their potential status as failed refugees. The RAD noted that failed refugees most likely to face abuse are "persons with past, perceived or real associations to the LTTE; persons critical of the government; significant political or military involvement against the government; and actively involved in prohibited Tamil Diaspora groups/organizations and functions." The RAD found that the Applicants did not fit into any of these profiles and were not at risk as failed refugees.

[16] According to the RAD, the following facts indicate that the Applicants are not suspected of having genuine LTTE ties:

- They were never members of the LTTE, only forced to cooperate;

- After being questioned in 2010 and 2012 about his own ties to the LTTE, the PA was never detained for a particular period of time, harmed, tortured, made to pay a fine, or given reporting conditions;
- The topic of questioning after 2012 was about his son-in-law, not the PA personally; and
- By the Applicants' own admission, they would not be included on the 'watch list' or the 'stop list'.

[17] The RAD then considered the Applicants' profiles as Tamils from the North. The RAD acknowledged that there is still a military presence in the North and Tamils are sometimes arbitrarily arrested. However, those who are primarily targeted include young and middle-aged Tamil men and those actively or previously engaged in activities threatening to the state.

[18] While the RAD accepted that the Applicants' son-in-law was a member of the media, the evidence did not establish that he had pro-LTTE ties. The RAD did note, however, that even if the son-in-law did have LTTE ties, the Applicants' history with the authorities did not indicate that they themselves were persons of interest.

[19] Finally, the RAD considered the Applicants' fear of extortion and found that this fear is speculative because the Applicants' children have lived outside of Sri Lanka for years prior to 2017 and the authorities had never demanded money.

V. Issues and Standard of Review

[20] The issues are:

1. Did the RAD breach the Applicants' rights to procedural fairness by not addressing the credibility arguments raised on appeal; and
2. Was the RAD's decision reasonable?

[21] Questions of procedural fairness are reviewable on the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 39).

[22] The merits of the Decision are reviewable on the standard of reasonableness because none of the exceptions identified in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*] arise in this matter. A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification and whether the decision "is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86). In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87).

VI. Parties' Positions

A. *Did the RAD Breach the Applicants' Rights to Procedural Fairness?*

(1) Applicants' Position

[23] At the RAD, the Applicants made submissions pertaining to the RPD's adverse credibility findings. The Applicant submits that the RAD erroneously failed to consider these arguments and instead "assume[d] without deciding the allegations regarding the son-in-law's work and the Appellants' exit from Sri Lanka are true." The Applicants argue that findings of credibility speak to whether the Applicants have a subjective fear of persecution and ultimately, whether a well-founded fear of persecution has been established. Failure to consider the Applicants' arguments about credibility renders the RAD's reasons deficient and thus, breaches the Applicants' rights to procedural fairness.

(2) Respondent's Position

[24] The Respondent argues that the Applicants' submissions about credibility and procedural fairness are misplaced. For the purpose of its analysis, the RAD did accept the Applicants' factual allegations. The RAD nonetheless found that the Applicants failed to establish a well-founded fear of persecution. The RAD did not breach the Applicants' rights to procedural fairness by finding that credibility was not a determinative issue.

B. *Was the RAD's Decision Reasonable?*

(1) Applicants' Position



(a) *Questioning in Sri Lanka*

[25] It was unreasonable for the RAD to conclude that the questioning by Sri Lankan authorities was not persecutory just because “no harm” came to the Applicants. The Applicants submit that the pattern of questioning and visits from the authorities amounts to “discrimination and harassment directed against [the Applicants] based on their ethnicity and perceived political opinion.” Interrogations alone may amount to persecution in certain circumstances and a decision may be unreasonable where there is no analysis for why interrogations only amount to harassment and not persecution.

(b) *November 5, 2017 Incident*

[26] The November 5, 2017 visit was routine, however that does not mean that a “policy of interrogation” is not persecutory (*Singh v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 238 at para 11 [*Singh*]; *Aire v Canada (Minister of Citizenship and Immigration)*, 2004 FC 41 at para 10). Similarly, it was unreasonable for the RAD to conclude that the visit was normal just because it happened annually.

[27] In addition, the RAD erred in its assessment and treatment of the letter from the PA’s brother pertaining to this visit. First, the RAD should have considered the overall situation of Tamils in the North when deciding what weight to assign the letter. Furthermore, the letter should not have been discounted because it was sent by a family member. The RAD should have provided reasons for discounting the letter.

(c) *Forward Looking Fear Based on Residual Profile*

[28] The Applicants submit that the RAD should have considered the cumulative profile of the Applicants which establish their perceived ties to the LTTE:

- Their children received refugee status in other countries;
- They had previously been targeted by the authorities;
- Their son-in-law was a journalist for pro-LTTE media;
- They are part of the Tamil diaspora abroad; and
- If unsuccessful in their refugee application, they will return to Sri Lanka as failed refugees.

[29] Furthermore, it was an error to compare the Applicants' profiles to others (i.e., those with LTTE links and those who are engaged in pro-LTTE activities outside Sri Lanka). The RAD unreasonably concluded that the Applicants are at a relatively reduced risk and therefore do not meet the criteria for refugee status. It was also unreasonable for the RAD to conclude that the Applicants were not persons of interest because they were never physically harmed and were able to travel out of the country on their own passports.

[30] With respect to the son-in-law, the Applicants submit that the RAD accepted their allegations that he worked in the media and for a pro-LTTE radio station. The RAD erred by not assessing how these facts affected the Applicants' risk of persecution and, if it was going to reject this evidence, it did not explain its reasons for doing so.

[31] The Applicants also submit that the RAD erred in assuming that the Applicants are at a reduced risk because the situation in Sri Lanka is generally improving. The RAD should have considered recent documentary evidence, demonstrating that the situation has actually deteriorated. The RAD selectively chose evidence to make it appear as though the situation is improving.

(2) Respondent's Position

(a) *Questioning in Sri Lanka*

[32] The RAD reasonably concluded that the interrogations in Sri Lanka did not give rise to a well-founded fear. The RAD accepted the Applicants' forward-looking subjective fear following the November 2017 visit. The RAD then considered the Applicants' residual profiles to assess the objective basis for this forward-looking fear.

[33] Contrary to the Applicants' submissions, the RAD accepted that the son-in-law previously worked for a Tamil newspaper, pro-LTTE radio station, and that he obtained protected person status in the UK. Likewise, the RAD accepted that the Applicants were questioned multiple times in Sri Lanka. The RAD reasonably concluded, however, that these interrogations were not persecutory in nature. To support this conclusion, the RAD noted the following: Sri Lankan authorities did not harm, threaten, or fine the Applicants during questioning; the Applicants' admitted that they were not fearful until the November 5, 2017 visit; the Applicants did not seek refugee protection until December 2017; the Applicants were not on a government stop or watch list; and the Applicants were able to travel out of the country on their

own passports. Accordingly, it was reasonable to conclude that since the son-in-law's departure from Sri Lanka in 2014, while the authorities occasionally asked questions, the PA "was not perceived to be someone with a true connection to [the LTTE] particularly given the passage of time without further personal incidents unrelated to his son-in-law."

(b) *November 5, 2017 Incident*

[34] It was reasonable for the RAD to find that the November 5, 2017 visit and the letter from the PA's brother did not establish a well-founded fear of prosecution. The Applicants did not mention prior Martyrs' Day searches in their BOC or before testifying because such searches are routine. Yet, the Applicants say that this routine search precipitated their refugee claim.

[35] The Respondent also submits that the RAD appropriately considered this visit alongside other visits from the authorities. In doing so, it was reasonable to look to the Applicants' "particular circumstances, including lack of past persecution" (*El Assadi Kamal v Canada (MCI)*, 2018 FC 543 at para 11). When considered cumulatively, these instances of past questioning, even if they could be considered discriminatory, did not rise to the level of persecution (*Ifeanyi v Canada (Minister of Citizenship and Immigration)*, 2018 FC 419 at para 20; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689).

(c) *Forward Looking Fear Based on Residual Profile*

[36] To assess the objective basis for a forward-looking fear, the RAD adequately considered the Applicants' profile as failed refugees and as relatives to a son-in-law with LTTE ties that

worked in the media. In assessing the documentary evidence, the RAD concluded that the Applicants did not fit the profile of failed refugees that faced more than a mere possibility of persecution upon return. This conclusion was reasonable because the RAD identified what those at-risk profiles were (i.e., young Tamil men, those with perceived ties to the LTTE, etc.) and why, in its opinion, the Applicants did not fit into those categories.

## VII. Analysis

### A. *Did the RAD Breach the Applicants' Rights to Procedural Fairness?*

[37] The Applicants submit that the RAD's reasons are deficient and breach their rights to procedural fairness because the RAD did not address the Applicants' submissions about the RPD's adverse credibility findings. The Applicants have not provided an authority to support this position. The Applicants cite cases for the proposition that the RAD has a responsibility to conduct a *de novo* hearing and adequately grapple with the evidence before it (*Jeyakumar v Canada (Citizenship and Immigration)*, 2018 FC 124 at paras 22-27; *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 218 at paras 67-70; *Jeyaseelan v Canada (Citizenship and Immigration)*, 2017 FC 278 at paras 19, 21). Such arguments go to the merits of the decision, not procedural fairness.

[38] The RAD found that it did not have to assess the Applicants' credibility to dispose of their refugee claims. Instead, the RAD assumed that the Applicants' factual allegations were true:

... for the purposes of analyzing well-founded fear, I assume without deciding the allegations regarding the son-in-law's work

and the Appellants' exit from Sri Lanka are true. As such, I find that it is unnecessary to address the other arguments in the memorandum that relate to credibility as they are not determinative of the appeal and do not change the decision.

[Emphasis added.]

[39] Had the RAD considered and accepted all of the Applicants' arguments about credibility, the outcome would not have changed for the Applicants. In other words, the Applicants did not stand to gain anything if the RAD considered the Applicants' submissions about the RPD's adverse credibility findings.

[40] I find that this argument is without merit. There was no breach of procedural fairness.

B. *Was the RAD's Decision Reasonable?*

(1) Questioning in Sri Lanka

[41] The RAD considered the questioning that took place before the November 5, 2017 incident to assess if the Applicants have an objective basis for their subjective fear. For the reasons already described at paragraph 33, above, the RAD found that these instances of questioning did not give rise to a well-founded fear.

[42] The Applicants' take issue with the RAD's emphasis on the fact that Sri Lankan authorities did not harm the Applicants during interrogations. The Applicants submit that cumulative harassment or discrimination on its own can amount to persecution in certain

circumstances (*Horvath v Canada (Citizenship and Immigration)*, 2014 FC 313 at para 24 [*Horvath*]).

[43] In my view, it was not incumbent on the RAD to explain why harassment did not reach the level of persecution when, unlike *Horvath*, harassment and discrimination were not alleged. It is only being raised now, before this Court. Indeed, as noted by the Respondent, the Applicants submitted that “there was no serious issue” before the November 5, 2017 visit. At the RAD, the Applicants merely asserted that they feared persecution because the authorities were looking for them in Sri Lanka on November 5, 2017. Likewise, this was also the story before the RPD.

[44] The Applicants never raised concerns that the questioning prior to the November 5, 2017 visit amounted to harassment or discrimination. The Applicants may not make new arguments on judicial review that were not before the RAD (*Khan v Canada (Citizenship and Immigration)*, 2016 FC 855 at para 30 citing *Zakka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1434 at para 13). Therefore, the Applicants’ arguments on this point must fail.

(2) November 5, 2017 Incident

[45] The RAD’s finding that the November 5, 2017 visit was insufficient to establish a serious possibility of persecution or a risk of harm to the Applicants is reasonable.

[46] Contrary to the Applicants’ submissions, the PA’s brother’s letter was not discounted because a family member sent it. Rather, the RAD found that the letter only established that authorities inquired about the Applicant’s whereabouts. The RAD found that, given the pattern

of visits in the past and their own interactions with the authorities, the letter does not establish that the Applicants are wanted. The RAD rejected the argument that the November 5, 2017 visit was persecutory because the PA's testimony indicated that the visit was routine. The RAD wrote:

Similarly, the letter from his elder brother in evidence indicates that army intelligence officials and EPDP members went to the house in search of them on November 5, 2017 and inquired about the Appellants, their daughter and son-in-law. In testimony, the principal Appellant revealed that this was Martyrs day and such questioning is routine as on this day "they do the lighting of the candle and lamps and during the month they used to go in search of everyone." Hence, it does not appear to be abnormal in and of itself to ask after individuals who have typically been in the country during that timeframe in the past.

[Emphasis added.]

[47] The Applicant submits that just because an annual "policy of interrogation" is routine does not mean that it is not persecutory. I agree with this principle but not with its application in the present circumstances. The Applicants cite cases where the routine policies at issue are those of "torture, brutality, and intimidation" (*Singh* at para 10). There is no evidence of such treatment of the Applicants in the present matter. There is nothing in the record about Martyrs' Day searches in the past, notwithstanding that such visits are apparently routine.

(3) Forward Looking Fear Based on Residual Profile

[48] I do find that the RAD's analysis of the Applicants' residual profile was unreasonable.

[49] The RAD framed the Applicants' residual profile as: "Tamils from the North who would be returning as failed refugees and who have a connection to a son in law working in the media."



I find that the RAD erred because it assessed the aspects of this profile in isolation from one another.

[50] In *KS v Canada (Minister of Citizenship and Immigration)*, 2015 FC 999 [KS], this Court explained this fatal error at paragraph 42:

In conducting its analysis, the RPD must assess the cumulative impact of all the bases of concern put forward by the Applicant (*Boroumand v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1219 (F.C.) at para 63, *Yener v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 372 (F.C.) at para 57). In *S. (L.) v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 330 (F.C.), at paras 14-15, the Court confirmed that, if the RPD's reasons indicate that it failed to assess cumulatively the relevant risk factors and, instead, examined each risk element in isolation, the decision may be set aside.

[Emphasis added.]

[51] In this case, the RAD first assessed the Applicants' profile as failed refugees. It acknowledged that failed refugees returning to Sri Lanka can face torture and abuse, but concluded that the failed refugees most likely to face abuse are those who: travelled out of the country illegally; have "past, perceived or real associations to the LTTE"; are "critical of the government"; have "significant political or military involvement against the government"; or are "actively involved in prohibited Tamil Diaspora groups/organizations and functions." The RAD concluded that the Applicants do not fit within these sub-categories and thus, were not likely to face persecution as failed refugees.

[52] The PA's testimony before the RPD was that his son-in-law worked as a journalist with a Tamil newspaper and as a reporter for LTTE affiliated radio station. The RAD member stated, "I

assume without deciding the allegations regarding the son-in-law's work and the Applicants' exit from Sri Lanka are true." Later, the RAD member seems to back-track on this finding, stating that there is no evidence that the son-in-law has links to the LTTE:

The evidence before me only confirms that the Appellants' son in law is a member of the media, but not that he has any links to the LTTE. Even if he did have the links that they propose, I find that the son in law had been out of country since 2014, the Appellants were not in the UK where he is and given their history with the authorities who have questioned them and done nothing further, this illustrates that they themselves are not persons of interest.

[Emphasis added.]

[53] If the RAD accepted that the son-in-law worked for a Tamil newspaper and as a reporter for LTTE affiliated radio station, the RAD was required to consider this familial connection cumulatively with other aspects of the Applicants' profile, including their profile as failed refugees. The Applicants may not have a well-founded fear of persecution as failed refugees alone. However, the Applicants may face a greater risk of being perceived as LTTE supporters if one considers that they are failed refugees *and* have a son-in-law with protected person status, LTTE ties, a job in the media, and plans to report on human rights abuses occurring in Sri Lanka. If the RAD was not convinced of these factual allegations, then it had a duty to explain why.

[54] The RAD failed to consider how various elements of the Applicants' profiles – which the RAD assumed to be true – may result in more than a mere possibility of persecution (*KS* at para 49). I agree with the Applicants that this is a case of a profile being “cut up and resewn” and is therefore, unreasonable (*Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349 paras 21-23).

VIII. Conclusion

[55] The application for judicial review is allowed.

[56] There is no question of general importance for certification and none arises from the circumstances of this matter.

**JUDGMENT in IMM-2507-20**

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

1. The application for judicial review is allowed. The matter is remitted to a different member of the RAD for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

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Judge

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

**DOCKET:** IMM-2507-20  
**STYLE OF CAUSE:** MAHESWARALINGAM SUBRAMANIAM,  
MERYLUCIA MAHESWARALINGAM v THE  
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**PLACE OF HEARING:** BY VIDEOCONFERENCE  
**DATE OF HEARING:** AUGUST 31, 2021  
**JUDGMENT AND REASONS:** FAVEL J.  
**DATED:** FEBRUARY 8, 2022

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