

Federal Court



Cour fédérale

**Date: 20130502**

**Docket: IMM-4847-12**

**Citation: 2013 FC 456**

**Ottawa, Ontario, May 2, 2013**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**KEERAN THARMAKULASINGAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant seeks judicial review of a decision dated April 26, 2012, rendered by Stephen J. Gallagher (the “Officer”) of the Immigration and Refugee Board (IRB or the “Board”), Refugee Protection Division (RPD), finding that the Applicant is not a Convention refugee or a person in need of protection.

[2] The Applicant alleges that the Officer’s decision was unreasonable and that he has erred in a number of respects. In addition, the Applicant argued in his memorandum that the Officer’s

decision raises a reasonable apprehension of bias in light of the Officer's prior publications on a subject addressed in his reasons. At the hearing, however, counsel abandoned this ground in light of a recent decision of my colleague Justice Noël, dismissing a similar argument in relation to the same Board member: see *Francis v Canada (Citizenship and Immigration)*, 2012 FC 1141 [*Francis*].

[3] Having carefully reviewed the record and considered the submissions made by both parties, I find that the Officer's decision is reasonable, despite certain weaknesses in the Officer's reasoning and findings. This application for judicial review must therefore be dismissed for the reasons set out below.

### **Facts**

[4] The Applicant, born December 22, 1988, is a citizen of Sri Lanka who claimed refugee status upon arrival in Canada on June 13, 2012. His claim was refused in a decision rendered April 26, 2012. The Applicant grew up in the Jaffna region of northern Sri Lanka and his father sells used cars, runs a grocery store, and owns a small farm. His claim is based primarily on three events occurring between December 2009 and June 2011.

[5] In late 2009, the Applicant alleges that he was targeted by members of the Pillaiyan Group, who, having seen him driving a number of different vehicles as a result of his father's business, believed him to be rich. The men kidnapped the Applicant and, after 15 days, his father paid a ransom of 8 lakhs to secure his release.

[6] In April 2010, the Applicant was stopped by three masked men wearing army uniforms, who he believes may also have been members of the Pillaiyan Group. When they demanded that he give them the van he was driving, he asked to see their identification. They beat him and stole the van, which was discovered four days later, burned out in an open field. The Applicant indicates in his Personal Information Form (PIF) that the men continued to call and harass him for money and vehicles.

[7] Finally, in June 2010, the Applicant attended a meeting of the Eelam People's Democratic Party (EPDP) in a library. He spoke out at the meeting and, three days later, was approached by a van containing armed individuals who tried to grab him. He escaped them, but they followed him to his house where they threatened to kill him unless they were given money, which the Applicant's father did. During his refugee hearing, the Applicant alleged for the first time that the person who he insulted at the EPDP meeting was Douglas Devananda, the leader of the EPDP.

[8] The Applicant left Sri Lanka in July 2010 but was arrested in Thailand and claims to have returned to Sri Lanka in January 2011. With the assistance of an agent, he left the country once again on February 9, 2011, travelling through a number of countries before being arrested in the United States, having crossed the Mexican border on or about April 16, 2011. He was detained from April 27, 2011 to May 23, 2011, at which time he was released on a \$15,000 bond, paid by a sister living in Canada. He arrived in Canada on June 13, 2011, and was accepted in spite of the Safe Third Country Agreement (STCA) due to his sister's presence in Canada.

[9] A solemn declaration from the Applicant's father alleges that armed men have continued to ask after his son, that his grocery store was burned down by arsonists, and that he has been threatened a number of times since his son's departure. He states that he was ultimately forced to move to Jaffna with his wife and two daughters.

### **Decision under review**

[10] Based on a lengthy set of reasons, the Officer concluded that he did not believe the allegations of the Applicant, on a balance of probability. In support of this negative credibility finding, the Officer identifies a number of problems with the Applicant's submissions and testimony, including the following:

- i) The Applicant previously misled officials on the advice of his agent and "Tamil people in Buffalo" by denying that he had previously travelled to Thailand;
- ii) Evidence suggests that the Pillaiyan Group, identified by the Applicant as an agent of persecution, is only active in the east of Sri Lanka (not the north, as alleged by the Applicant) and the Applicant claims to be targeted on the basis of political opinion but "was unaware that 'Pillaiyan' (Sivanesathurai Chandrakanthan) is the Chief Minister of the Eastern Province";
- iii) The Applicant lacks knowledge about politics and the Officer disagrees with his claims regarding recent elections, finding either that he was not in the Jaffna area at the relevant time or was not politically active or aware;
- iv) The Officer does not believe that Mr. Devananda was present at the library meeting of the EPDP, as the Applicant would have undoubtedly mentioned this fact prior to his hearing; and

- v) The Officer does not believe the Applicant's allegations regarding the theft of the van, due to inconsistencies in the Applicant's own testimony and with the letter provided by his father.

[11] The Officer indicates that, even if he were to believe the Applicant's claims, he would conclude that there was only a mere possibility that he would face persecution in Sri Lanka as a "young Tamil male from the [N]orth", as he has never been associated with the Liberation Tigers of Tamil Eelam (LTTE), the government has released thousands of actual LTTE cadres since the end of the war, and it is difficult to imagine that the Applicant would be of any interest to government authorities. The Officer cites Guidelines released by the United Nations High Commissioner for Refugees (UNHCR) in 2010, which suggest that broader protection is no longer needed on the basis of risk of indiscriminate harm. He considers evidence that conditions may now have deteriorated, but finds that there is no reason to conclude that the UNHCR Guidelines are no longer valid.

[12] With respect to the Applicant's transit through the United States, the Officer concludes that his failure to make a claim there demonstrates a lack of subjective fear, particularly in light of data suggesting higher acceptance rates in the United States in 2010. The Officer finds, on a balance of probability, that the Applicant, who was detained for a lengthy period of time and had the benefit of counsel, knew he was safe in the United States but chose to come to Canada to "reunite with family members and secure access to the greater range of reception condition benefits which characterize the Canadian compared to the United States refugee system", thereby "knowingly increasing the likelihood of being returned to Sri Lanka" and "giving up assured safety for the potential of being returned to Sri Lanka" (Decision, at paras 20 and 22).

[13] The Officer finds that the alleged risk of extortion at the hands of the Pillaiyan Group and the EPDP does not constitute persecution as these groups have evolved into criminal organizations and are no longer “arms of the Sri Lankan authorities in its security efforts in the [N]orth” (Decision, para 23). He goes on, however, to support this claim with evidence finding that “there were persistent reports of close, ground-level ties between paramilitaries and government security forces”, but that the paramilitaries are now taking on “increasingly criminal characteristics” (2010 United States DOS Report, Decision, para 25).

[14] If the Officer were to accept the Applicant’s allegations as true, apart from the alleged confrontation with Mr. Devananda, then he states that he would characterize any risk as a generalized risk that would not evoke Canada’s protection responsibility.

[15] If all of the Applicant’s claims were believed, the Officer states that he would nevertheless find an internal flight alternative (IFA) in Colombo, given the Applicant’s previous travels there, his education, and the large population of Tamils in that city. The Officer refused the Applicant’s argument that his information would be shared with the EPDP in Jaffna were he to register in Colombo, arguing that their willingness to accept a bribe in exchange for his release suggests it would not be worth their trouble and that the Applicant has not established that “the police, SLA or any paramilitary group is looking for him, in the sense of having a warrant out for his arrest” (Decision, para 30).

[16] Finally, the Officer notes without further explanation that, on a balance of probabilities, the Applicant does not face a risk under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “Act”).

### **Issues**

[17] As previously mentioned, counsel for the Applicant did not pursue her bias argument, given that this Court rejected the same argument in *Francis*, above. As a result, this case raises the following three issues:

- a) Did the Board err in concluding that the Applicant was not credible in his allegations?
- b) Was the Officer’s decision unreasonable in light of his assessment of current country conditions or incorrect in respect of his failure to assess risk as a returnee?
- c) Did the Officer err in his assessment of the availability of an IFA in Colombo?

### **Analysis**

[18] The standard of review applicable to the Officer’s findings of credibility is one of reasonableness. As is now well established, reasonableness is concerned with justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

[19] The same is true of the Officer’s assessment of risk based on the current country conditions in Sri Lanka, as it involves findings regarding questions of fact: *Selvalingam v Canada (MCI)*, 2012

FC 251 at para 20 [*Selvalingam*]. The Applicant submits that the Officer's failure to assess his submissions regarding risk in Sri Lanka as a returnee from abroad is a question of natural justice, compromising the Applicant's right to a hearing. I do not agree. The Officer's determination of the risk that the Applicant would incur if removed to Sri Lanka must be assessed as a whole; if his failure to deal with an argument vitiates his finding to such an extent that it becomes unreasonable, his decision must be quashed on that ground.

[20] Finally, the existence of an IFA is a question of fact and, therefore, also subject to a standard of reasonableness: *Selvalingam*, above, at para 20.

a) Did the Board err in concluding that the Applicant was not credible in his allegations?

[21] As summarized above, the Officer bases his negative credibility findings on the following points:

- i) The Applicant previously misled immigration officials;
- ii) The Applicant lacks political knowledge, despite basing his claim on his political opinions;
- iii) The Officer found that the Applicant's allegations are inconsistent with the timeline of recent elections in Sri Lanka;
- iv) The Applicant's claim regarding a personal encounter with the leader of the EPDP is not credible;
- v) There were inconsistencies in the Applicant's claims regarding the incidents surrounding the theft of his van that undermine the credibility of that event.



[22] The burden is on the Applicant to establish the facts of his claim and, as alleged by the Respondent, the Officer may reject the Applicant's uncontradicted evidence where it is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence: *Gharkhani v Canada (MCI)*, 2004 FC 965 at para 12. The Officer's disbelief regarding the Applicant's personal encounter with the leader of the EPDP was not unreasonable, particularly in light of the fact that this allegation was not raised prior to the hearing and that the Applicant had admitted to previously misleading officials. Similarly, the Applicant's allegation that the Pillaiyan Group stole his van in April 2010 was contradicted by the letter from his father submitted in evidence, which indicated that army officers had stolen it. It is to be noted that the Applicant did not challenge any of the above-mentioned findings of the Officer in his written or oral submissions.

[23] That being said, some of the Officer's findings, while not outside the realm of possible and acceptable outcomes, are more dubious and debatable, especially in light of the Officer's failure to provide reasons sufficient to permit this Court to review the bases for his conclusions. For example, the Officer questions the Applicant's allegations regarding the existence of an EPDP meeting and his political awareness based on perceived "time-line problems" and an assumption that a political party would not hold a meeting to garner support for an election a year in advance; yet he relies entirely on two screen shots from Sri Lanka's Department of Elections in support of his own interpretation of events. While the Officer argued that local elections took place in July 2011, a fact not contradicted by the limited evidence in the record, he physically underlined a link in the record to "results of local authorities elections" dated March 17, 2011, raising questions as to his interpretation of the timeline that are not answered in his reasons.

[24] The Officer provides no evidence in support of his conclusion that the Applicant's area is represented by the Tamil National Alliance and not the EPDP (as alleged by the Applicant) as a result of the 2010 election, yet relies on this statement to challenge the Applicant's political awareness. No evidence is provided to allay the hypothetical concern that the EPDP may have won in the Applicant's riding, while not prevailing at a regional or national level.

[25] Equally problematic is the Officer's argument that the Applicant was unaware that 'Pillaiyan' (Sivanesathurai Chandrakanthan) is the Chief Minister of the Eastern Province. Although the Applicant didn't volunteer this information when given the opportunity, the Applicant was only specifically asked to indicate the occupation of the leader of the EPDP and not of the Pillaiyan Group.

[26] Finally, the Officer's finding that the Applicant was "knowingly increasing the likelihood of being returned to Sri Lanka in order to reunite with family members and secure access to the greater range of reception condition benefits which characterize the Canadian compared to the United States refugee system" was problematic. The Applicant is justified in asserting that the Officer had no evidence of his motivations and that it was unreasonable to assume, despite being represented by counsel in the United States, that the Applicant or his counsel would be aware of the comparative acceptance rates between the two countries. Furthermore, it was unreasonable for the Officer to rely on statistics regarding claims made in 2010, which as submitted by counsel for the Applicant are subject to varying interpretations, as evidence that the Applicant was giving up "assured safety" in relation to a 2011 claim. It was particularly unreasonable in light of the constantly evolving situation

in Sri Lanka that could change drastically from year to year and the fundamental fact that every case must be determined on its own merits.

[27] While these findings are speculative and largely unfounded, I do not think that they rise to the level required to substantiate an allegation of bias. As stated by Justice Noël in *Francis*, above at para 37:

It is not because a person has expressed prior views through academic work on a subject matter that such a person should be disqualified as a decision-maker. To the contrary, having had such experience may be a valuable asset and may help in making such persons better decision-makers ...

I acknowledge that Mr. Gallagher's previous writings highlighting the disparity between Canada's offerings or reception conditions and those of other developed nations, as well as his critique of the STCA with the United States, come closer to his actual comments in the case at bar. Yet, this is not enough to impugn his impartiality, and counsel for the Applicant has in any event withdrawn this argument.

[28] All things considered, and after carefully reviewing the record and the parties' arguments, I am of the view that the Officer's negative credibility finding does not fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. While some of the Officer's conclusions amount to no more than speculation and are not supported by intelligible or carefully crafted reasons, they are not sufficient to undermine his overall assessment of the Applicant's credibility.

b) Was the Officer's decision unreasonable in light of his assessment of current country conditions or incorrect in respect of his failure to assess risk as a returnee?

[29] Regardless of the reasonableness of the Officer's credibility findings regarding the specific events alleged by the Applicant, the Officer was still required to consider whether the Applicant would be at risk under section 96 of the Act as a young Tamil male from the North or under section 97 due to a risk of extortion at the hands of the Pillaiyan Group or the EPDP.

[30] The Applicant submits that the Officer erred in his assessment of the current country conditions in Sri Lanka, arguing that the evidence shows the conditions have worsened recently. He submits that in focusing on the evolving criminal aspects of the paramilitaries' activities, the Officer failed to consider that it is Tamils who are targeted and not the Sinhalese.

[31] The Applicant did not argue before the Tribunal that he would be at risk of persecution by government authorities because of any perceived association with the LTTE. He did, however, produce considerable evidence going to persecution suffered by young Tamil males in northern Sri Lanka, including two more recent documents not before the Officer that are provided as further evidence that while persecution is generally committed on the pretext of sympathy or connections with the LTTE, young males are in fact at risk on the basis of their Tamil ethnicity or their emanation from northern Sri Lanka.

[32] This assertion is contradicted by the conclusion of the UNHCR in the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (5 July 2010). While the UNHCR specifies that the situation in Sri Lanka is still evolving and that "a

claim should not automatically be considered as without merit because it does not fall within any of the profiles identified [within]”, the Applicant has failed to establish that the Guidelines’ conclusions are directly contradicted by other, more recent evidence.

[33] Counsel for the Applicant also submits that she made specific arguments regarding risk the Applicant would face as a returnee in Sri Lanka and points the Court to a report entitled *Freedom from Torture*. She submits that the Officer’s failure to consider this risk constitutes a reviewable error as the Tribunal is obliged to review all grounds under sections 96 and 97 of the Act.

[34] The *Freedom from Torture* document relied upon by the Applicant suggests that “Tamils with an actual or perceived association with the LTTE remain at particular risk of detention and torture in Sri Lanka” (CTR, p 429). Indeed, the report also states (CTR, p 408) that “[t]he 35 individuals whose medico-legal reports were reviewed come from a range of areas around the country and all report being targeted due to an actual or perceived association with the LTTE, often through family members, or an opposition political party.” To the extent that the Applicant argues that this document should be considered to introduce a new ground inconsistent with the findings of the UNHCR Guidelines or other documentary evidence considered by the Officer, he is overreaching. The Applicant testified that he has never been associated with the LTTE; therefore, the *Freedom from Torture* document cannot be relied upon to suggest that he would be at any greater risk as a returnee from abroad than he would be upon simply resuming his life in Sri Lanka, the situation which was the focus of the Officer’s analysis.

[35] The Applicant has also failed to establish that the Officer erred in finding that any risk of extortion constituted a generalized risk. Counsel for the Applicant argues that the Officer's conclusion is unreasonable as Tamils are disproportionately targeted by such crime; however, in light of the Officer's negative credibility findings, counsel has not produced sufficient evidence to establish that the Applicant would be specifically targeted or subject to a personalized risk of extortion were he to return to Sri Lanka. As such, any claim on the basis of his nationality should be argued in relation to section 96 of the Act.

c) Did the Officer err in his assessment of the availability of an IFA in Colombo?

[36] The Applicant has not made any specific submissions regarding the Officer's IFA findings or attempted to rebut the Respondent's submission that the Officer's conclusion regarding the existence of an IFA in Colombo was reasonable in light of the facts and involved a correct interpretation of the law.

[37] The Board applied the two-step test developed in *Rasaratnam v Canada (MEI)*, [1992] 1 FC 706 (CA) at para 6. Firstly, the Board determined that there is no serious possibility that the Applicant would be at risk in Colombo. The Applicant alleged that upon registering in Colombo, the EPDP in Jaffna would be advised and they would come get him, but the Board found this allegation to be unsupported. Counsel for the Applicant did not pursue this argument before this Court. In addition, the Board found that there was no indication that the police, the SLA and/or paramilitaries would be interested in locating the Applicant. Finally, the Board considered the particular circumstances of the Applicant and found that it would not be unreasonable for the Applicant to seek refuge in Colombo, being an educated man, with computer skills, who would be

one of many Tamils living in the city. Therefore, in light of the Officer's finding that the Applicant has previously passed through Colombo without difficulty, I must conclude that the Officer's IFA finding is not unreasonable.

### **Conclusion**

[38] For all of the foregoing reasons, this application for judicial review ought to be dismissed.

No question of general importance is certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

No question of general importance is certified.

"Yves de Montigny"

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4847-12

**STYLE OF CAUSE:** KEERAN THARMAKULASINGAM v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Québec

**DATE OF HEARING:** January 16, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** de MONTIGNY J.

**DATED:** May 2, 2013

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