

Federal Court



Cour fédérale

**Date: 20150205**

**Docket: IMM-6109-13**

**Citation: 2015 FC 154**

**Ottawa, Ontario, February 5, 2015**

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

**BETWEEN:**

**SIVAKUMARAN SOTHINATHAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter and Background

[1] Mr. Sothinathan [Applicant] applied for Canada's protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], but his claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. He now seeks judicial review pursuant to subsection 72(1) of the IRPA, asking this Court to set aside the negative decision and send the matter to a different panel of the RPD for re-determination.

[2] The Applicant is a 50 year-old Tamil man from Sri Lanka. He came to Canada on January 19, 2012, after spending a couple of months in the United States of America where he was subject to an immigration detention. Upon arrival in Canada, where the Applicant's parents and one of his sisters live, the Applicant immediately sought refugee protection, claiming that the security forces in Sri Lanka were harassing and abusing him because they suspected that he supported the Liberation Tigers of Tamil Eelam [LTTE]. Most recently, the Applicant said that in 2010, he had been renting a room to a boy who later disappeared. He alleged that he was detained and tortured for information about the boy several times before he fled Sri Lanka.

## II. Decision under Review

[3] By reasons dated August 27, 2013, the RPD rejected the Applicant's claims because it did "not find his story to be credible in its material aspects or his fear to be well-founded."

[4] The RPD was not convinced that anyone suspected the Applicant of having links to the LTTE. He was released every time he had been detained by the security forces, and a judge had specifically cleared him of any suspicion of ties to the LTTE in 2008. Furthermore, the Applicant had no difficulty leaving the country using his own passport, and the RPD did not believe the security forces at the border would dare let anyone suspected of sympathizing with the LTTE leave the country. Also, the Applicant's wife and son still live in Sri Lanka and the RPD said that they have not encountered any problems. Ultimately, the RPD decided that the Applicant was just a farmer and vendor, and he did not belong to any of the groups that the United Nations High Commissioner for Refugees identify as at-risk in Sri Lanka.

[5] The RPD was also not satisfied that the Applicant subjectively feared persecution. He said he had been granted asylum in the United States when he was released from detention there, but abandoned either that status or at least his claim by coming to Canada. Since the United States was a safe country, the RPD found that this suggested a lack of subjective fear and it did not accept the Applicant's excuse that he left because he had family in Canada. Furthermore, the Applicant did not disclose that he had claimed asylum in the United States in his Personal Information Form [PIF], and the RPD drew a negative inference from that omission.

[6] The RPD also found that the Applicant would not be mistreated as a failed asylum claimant upon returning to Sri Lanka, since he was of no real interest to the authorities. Although the Applicant claimed to have been abused when he was detained, there was no objective evidence of that and the RPD said that he had shown no signs of outward distress when telling his tale. The RPD therefore had serious doubts about the Applicant's story.

[7] Lastly, the RPD considered the risks of extortion and kidnapping posed by rogue elements of the security forces and paramilitary groups. In its view, this was a risk of crime faced generally by other individuals in the country and so was excluded from the scope of paragraph 97(1)(b) of the *IRPA* by subparagraph 97(1)(b)(ii).

[8] The RPD therefore decided that the Applicant was neither a Convention refugee under section 96 of the *IRPA* nor a person in need of protection under section 97(1).

III. The Parties' Submissions

A. *The Applicant's Arguments*

[9] The Applicant states that the decision under review should be quashed and remitted to another member of the RPD for three reasons. First, the panel member made a fundamental error of fact. Second, although the RPD said the determinative issue was credibility, the RPD did not address any specific issues of credibility with respect to the Applicant. Third, the RPD made unreasonable inferences from the facts it found.

[10] The Applicant says that the RPD made a fundamental error when it decided that the Applicant's family had not experienced any problems such as he had. The Applicant argues that this finding was completely contrary to the evidence and attracts relief under paragraph 18.1(4)(d) of the *Federal Courts Act* (citing *Owjee v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 423 (QL) (CA); and *Mehrabi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 428 (QL) (CA)).

[11] Despite basing its decision on credibility, the Applicant says that the RPD did not explain why it disbelieved the Applicant. The Applicant says that case law from this Court requires that negative credibility findings be clearly stated for the decision to be transparent and intelligible (citing *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236, 15 Imm LR (2d) 199 (FCA) [*Hilo*]).

[12] The Applicant further states that the RPD's decision is an overly simplistic analysis of the Applicant's circumstances. The Applicant does not need to prove that he is on a wanted list or a threat to the government. The fact of the matter, according to the Applicant, is that the Applicant has been a victim of abuse. His detention for three months by government authorities was verified by the International Red Cross. According to the Applicant, he has independently corroborated evidence of his persecution in Sri Lanka. The fact that there is no arrest warrant is an unwarranted and unreasonable inference by the RPD (citing *Rayappu v Canada (Citizenship and Immigration)* (24 October 2012), IMM-8712-11 (FC) [*Rayappu*]; and *Sinnathamby v Canada (Citizenship and Immigration)* (21 January 2013), IMM-3828-12 (FC) [*Sinnathamby*]).

[13] Another unreasonable inference, according to the Applicant, is the RPD's decision and finding with respect to the U.S. refugee claim. In this regard, the Applicant cites the decision in *Paramananthan v Canada (Citizenship and Immigration)* (16 November 2010), IMM-6206-09 (FC) [*Paramananthan*], noting that, like in that case, the RPD failed to consider the statutory objective of family reunification and the provisions advancing that purpose in the U.S.-Canada Safe Third Country Agreement.

[14] The Applicant argues that the RPD's decision is therefore unreasonable and contrary to the requirements of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. The Applicant further claims that these errors cannot be rescued by the RPD's discussion of generalized risk since that is only relevant under section 97 of the *IRPA*.

B. *The Respondent's Arguments*

[15] The Respondent argues that the RPD's decision falls within the range of reasonable outcomes and this Court should defer to it.

[16] As to the alleged error of fact concerning the Applicant's family and their experience of persecution, the Respondent notes that the key word in this aspect of the decision is "apparently." The Respondent says that this is a conclusion by the RPD that the Applicant's family members have not been detained in the same way as the Applicant. This is not, according to the Respondent, a blatant error that makes the decision unreasonable.

[17] As to the credibility findings, the Respondent says that this is not a case where there are inconsistencies in the Applicant's testimony. Rather, the RPD does not take issue with the Applicant's story, but has regard to other factors which undermine his fear of persecution; these factors include his ability to obtain a passport and pass through security at the airport. The RPD correctly asked itself whether the Applicant has a credible fear based on other factors. The Respondent says that it is not unreasonable to draw conclusions with respect to the Applicant's credibility from that analysis, and that the absence of information about the U.S. refugee claim in the PIF also goes to the Applicant's credibility even though the Applicant did say he made a claim during the hearing before the RPD.

[18] The Respondent says it is reasonable for the RPD to conclude that the Applicant may have been detained in Sri Lanka, but that even in the face of such detention there is no well-

founded fear of persecution if he returns to Sri Lanka. The Respondent says that the RPD reasonably found that there was insufficient evidence of the Applicant's fear of persecution.

[19] The Respondent agrees with the Applicant that any generalized risk under section 97 is not relevant to the matter at hand.

#### IV. Issues and Analysis

##### A. *Standard of Review*

[20] The RPD's assessment of the Applicant's credibility is to be reviewed on a standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at paragraph 4, [1993] FCJ No 732 (QL) (CA)). Credibility findings have been described as the "heartland of the Board's jurisdiction," in that they are essentially pure findings of fact (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, 228 FTR 43; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339 [*Khosa*]). Likewise, the interpretation and assessment of evidence by the RPD is reviewable on the reasonableness standard (*Oluwafemi v Canada (Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286 (QL); *Lin v Canada (Citizenship and Immigration)*, 2008 FC 1052 at paragraphs 13-14).

[21] Consequently, this Court should not intervene with the RPD's decision so long as it came to a conclusion that is transparent, justifiable, intelligible, and within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir*, at

paragraph 47; *Khosa* at paragraph 59). A reviewing court can neither substitute its own view of a preferable outcome, nor can it reweigh the evidence (*Khosa* at paragraphs 59 and 61).

B. *The Applicant's Credibility*

[22] The determinative issues for the RPD in this case were “credibility and/or well-foundedness of the claimant’s fear,” and it did not find the Applicant’s story “to be wholly credible and/or fear to be well-founded.”

[23] However, having stated at the beginning of its analysis that credibility was determinative, the RPD then proceeded to make only generalized and vague credibility findings. I agree with the Applicant that negative credibility findings must be clearly stated for the decision to be transparent and intelligible. As Madam Justice Mactavish recently confirmed in *Zaytoun v Canada (Citizenship and Immigration)*, 2014 FC 939 at paragraph 7: “[t]he Refugee Protection Division is required to make negative credibility findings in clear and unmistakable terms.”

[24] Nowhere in its analysis or reasons did the RPD reasonably question the Applicant’s account of his detentions, beatings and abuse. On the contrary, the RPD only refers obliquely and indirectly to aspects of the Applicant’s credibility on just four occasions in the 10 pages of its written reasons. First, it notes that the Applicant’s wife and children still live in Colombo “apparently without the problems he alleges he underwent, adding to the serious doubt on his own story, on the basis of similarly-situated persons” (emphasis added as there is no earlier negative inference in the reasons). Second, the RPD noted that the Applicant “did not enter his U.S. asylum claim or status in section 26 of his Personal Information Form, an omission from



which the panel draws a further negative inference.” Third, the RPD found that the Applicant’s demeanour during the hearing “was such that the panel did not notice any outward distress relative to his treatment during detentions by Sri Lankan authorities.” Fourth, the RPD stated that documentary evidence should be “given prominence where there are serious doubts to the claimant’s story, as there are in this case.”

[25] The foregoing references in the RPD’s reasons do not constitute an assessment of the Applicant’s credibility “in clear and unmistakable terms”. On the contrary, the RPD does not reject any part of the Applicant’s evidence but, to quote from *Hilo* at paragraph 6, merely “appears to cast a nebulous cloud over its reliability.” The RPD cannot have it both ways by, on the one hand, saying at the outset of its reasons that credibility is the determinative issue and, on the other, then making only generalized and vague conclusions as to credibility without stating why or how such credibility is impugned or lacking. The RPD’s assessment of the Applicant’s credibility in this case is neither transparent nor intelligible.

[26] This is fatal to the decision as a whole. The finding that the Applicant had no subjective fear cannot survive, since credibility is often determinative of that issue (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 722-723, 103 DLR (4th) 1). It is also impossible to tell how it affected the decision that the fear was not well-founded. For instance, the RPD said that the fact that a judge released the Applicant from detention in 2008 confirmed that the Applicant was not suspected of LTTE connections. However, he had also said in his PIF narrative and in his testimony that he had been detained since then and questioned about events that transpired after his first release. As such, the RPD’s inference could only be reasonable if it had disbelieved

the Applicant's account of the more recent detentions, and the unreasonable credibility findings thereby tainted the RPD's analysis of well-founded fear. I also note that this Court has found many of the RPD's other rationales unreasonable on several other occasions (*Rayappu* at paragraphs 2 and 5-6; *Sinnathamby* at paragraph 6; *Paramanathan* at 3; and *Rajaratnam v Canada (Citizenship and Immigration)*, 2014 FC 1071 at paragraphs 43, 46 and 49-53).

V. Conclusion

[27] In the result, the application for judicial review should be and is hereby allowed. The RPD's decision is set aside and the Applicant's application for refugee protection is remitted to a differently constituted panel of the RPD for re-determination.

[28] Neither party suggested a question for certification; so, no such question is certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the Applicant's application for refugee protection is remitted to a differently constituted panel of the Refugee Protection Division for re-determination. No serious question of general importance is certified.

"Keith M. Boswell"

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Judge

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

**DOCKET:** IMM-6109-13

**STYLE OF CAUSE:** SIVAKUMARAN SOTHINATHAN v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

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