

Federal Court



Cour fédérale

Date: 20181211

Docket: IMM-858-18

Citation: 2018 FC 1244

Ottawa, Ontario, December 11, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**THILIP JOYFRED EDWARD JEYARATNAM
IRIN THILIP JOYFRED
ASHLYNN THILIP JOYFRED
AIDEN THILIP JOYFRED**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

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 the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD or the Board], dated February 1, 2018

[Decision], which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] Thilip Joyfred Edward Jeyaratnam [Male Applicant], his wife Irin Thilip Joyfred [Female Applicant], and their two children (together, the Applicants) arrived in Canada in October 2017. The Male Applicant is a citizen of Sri Lanka. The Female Applicant and the two children are citizens of India. The Applicants claim that they are at risk in both Sri Lanka and India.

[3] The Applicants say they will face persecution, and even death, at the hands of an Islamic organization called Tamil Nadu Thowheed Jamath [TNJT] if returned to India. The Applicants are Christian and allege that members of the TNJT have engaged in a pattern of harassment since 2017. According to the Applicants, members of the TNJT have repeatedly demanded large sums of money from the Male Applicant. Additionally, the Applicants claim that members of the TNJT have threatened the Female Applicant with violence if she does not convert to Islam.

[4] Additionally, the Male Applicant claims that he fears persecution by the Sri Lankan government due to his imputed membership in the Liberation Tigers of Tamil Eelam [LTTE]. The Male Applicant alleges that he was arrested by police officers in Sri Lanka and was subjected to a prolonged assault by the officers during an interrogation. He fears that the Sri Lankan government will detain him if he returns to that country.

[5] Finally, the Male Applicant alleges that a Sri Lankan Buddhist extremist group with a reputation for violence called the Bodu Bala Sena [BBS] has repeatedly targeted him with demands for money. He fears that the BBS will kill him if he returns to Sri Lanka.

[6] The Male Applicant claims that he cannot return to India because he does not have valid immigration status in that country.

III. DECISION UNDER REVIEW

[7] On February 1, 2018, the RPD determined that the Applicants are not refugees or persons in need of protection. The RPD held that the credibility of the Applicants as well as the country of reference were the determinative issues.

[8] The RPD determined, on a balance of probabilities, that the Female Applicant and the children are citizens of India. Additionally, the RPD determined, on a balance of probabilities, that the Male Applicant is eligible to apply for citizenship in India. The RPD based this conclusion on an analysis of the Indian *Citizenship (Amendment) Act, 2015*. According to the RPD, the Male Applicant is eligible to apply for Indian citizenship because he meets the criteria contained in that statute.

[9] The RPD then assessed whether it was within the Male Applicant's control to acquire Indian citizenship. In order to complete this analysis, the RPD used the two-part test set out in *Canada (Citizenship and Immigration) v Williams*, 2005 FCA 126 and clarified in *Tretsetsang v Canada (Citizenship and Immigration)*, 2016 FCA 175. In respect of the first part of the test, the

RPD concluded that “there does not exist a significant impediment that prevents the principal claimant from exercising his citizenship rights.” In respect of the second part of the test, the RPD held that the Male Applicant had made no reasonable efforts to obtain Indian citizenship. Examples of reasonable efforts would have included submitting an application for Indian citizenship and undergoing a security clearance assessment.

[10] The RPD considered the arguments that Indian citizenship is not automatically granted upon application and that India discriminates in immigration matters against Sri Lankan Tamils. The RPD held that, on a balance of probabilities, the Male Applicant would be granted Indian citizenship if he applied. Additionally, the RPD determined that the Male Applicant’s race, on a balance of probabilities, did not represent a significant impediment to the acquisition of Indian citizenship.

[11] According to the RPD, any efforts made by the Male Applicant to acquire Indian citizenship in 2012 and 2013 do not demonstrate reasonable efforts because of the changes to the citizenship legislation in 2015. The RPD held that it was unreasonable for the Male Applicant to have made no reasonable efforts to obtain Indian citizenship under the governing legislation.

[12] The RPD also determined that the presumption of credibility was rebutted in this case for several reasons. Firstly, the RPD held that there were numerous unexplained omissions in the Applicants’ documentation. Significantly, the Applicants had omitted from their Basis of Claim [BOC] forms, without reasonable explanation, that the Female Applicant’s family had threatened to kill the Applicants after the couple were married. Additionally, the Applicants omitted from

their BOCs, without reasonable explanation, that the Female Applicant's family members belonged to the TNTJ.

[13] Secondly, the RPD held that the Applicants had failed to provide a reasonable explanation for failing to provide documentation corroborating the claim that the TNTJ operates in India.

[14] Finally, the RPD determined that the presumption of truth was rebutted due to the lack of objective evidence proving that the TNTJ operates in India.

[15] The Male Applicant explained that he omitted from his BOC the threats from the Female Applicant's family members because the TNTJ is the singular entity which threatens them with harm. It would have been redundant, according to the Male Applicant, to list each and every individual who could cause them harm. The RPD found this explanation unreasonable and inconsistent with the clear instructions on the BOC form. This undermined the Applicants' credibility.

[16] The Male Applicant's explanation for why he omitted the claim that the Female Applicant's family members are TNTJ members followed a similar line of logic. The Male Applicant argued that members of the Islamic faith are one community. The RPD found this explanation unreasonable and took judicial notice of the fact that Muslims are a diverse group of individuals. Mentioning the TNTJ cannot, therefore, automatically include the Female Applicant's family members. This undermined the Applicants' credibility.

[17] The Male Applicant explained that he did not submit documentary evidence about the presence of the TNTJ in India because such evidence could be found on Google's search engine. The RPD found this explanation unreasonable because the burden is on the Applicants to prove the bases of their claim. Additionally, the RPD found that such information can be found easily on Google. This undermined the Applicants' credibility.

[18] The RPD determined that there was no objective basis for the claim that the Applicants have a well-founded fear of persecution by the TNTJ in India. An assessment of the available documentary evidence led the RPD to conclude that there is no objective basis for the claim that the Applicants are being persecuted by the TNTJ due to their Christian faith.

[19] The RPD also considered whether the Applicants face a serious risk of persecution in India due to their Christian faith. The RPD first examined the circumstances facing Christians in Tamil Nadu, where the Applicants reside in India. The RPD found that incidents of mistreatment are less common in Tamil Nadu than in northern areas of the country. The RPD also determined that the Christian population in Tamil Nadu is sizeable. The RPD concluded that the Applicants could, due to their Christianity, be subject to discrimination but this would not, on a balance of probabilities, rise to the level of persecution. In reviewing the evidence, the RPD acknowledged that "one source states that Christians are at risk everywhere [in India] because they reside in relatively small pockets," but concluded that "[a]s there are portions of India with majority Christian populations, Christians are not exposed, on a balance of probabilities, to risk everywhere in India by virtue of them residing in relatively small pockets spread throughout India."

[20] In sum, the RPD determined that India is the correct country of reference because the Male Applicant is eligible to apply for Indian citizenship, that the Applicants lack credibility, and that the Applicants failed to establish, on a balance of probabilities, that they would face a serious possibility of persecution if returned to India. As a result, the RPD held that the Applicants were neither Convention refugees nor persons in need of protection. The RPD rejected the Applicants' claims.

IV. ISSUES

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

1. What is the standard of review?
2. Did the RPD breach the duty of procedural fairness?
3. Was the RPD's Decision reasonable?

V. STANDARD OF REVIEW

[22] 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.

[23] Courts have recently held that the standard of review for an allegation of procedural unfairness is ‘correctness’ (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43, 59 and 61 [*Khosa*]).

[24] While an assessment of procedural fairness accords with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada’s decision in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated (at para 74) that the issue of procedural fairness,

requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[25] The recent Federal Court of Appeal decision in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 is instructive (Applicant’s Reply Memorandum of Argument at para 9). In that decision, Rennie JA stated (at para 54) that:

A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.’s observation in *Eagle’s Nest* (at para. 21) that, **even though there is awkwardness in the use of the terminology, this reviewing exercise is “best reflected in the correctness standard” even though, strictly speaking, no standard of review is being applied.**

(Emphasis added.)

[26] The standard of review applicable to the RPD's findings of fact as well as the assessment of credibility and evidence is reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2011 FC 969 at para 22).

[27] 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 *Khosa*, above, 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

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

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail
themselves of the protection of
each of those countries; or

(b) not having a country of
nationality, is outside the
country of their former
habitual residence and is
unable or, by reason of that
fear, unwilling to return to that
country.

Person in need of protection

97 (1) A person in need of
protection is a person in
Canada whose removal to their
country or countries of
nationality or, if they do not
have a country of nationality,
their country of former
habitual residence, would
subject them personally

(a) to a danger, believed on
substantial grounds to exist, of
torture within the meaning of
Article 1 of the Convention
Against Torture; or

(b) to a risk to their life or to a
risk of cruel and unusual
treatment or punishment if

(i) the person is unable or,
because of that risk, unwilling
to avail themselves of the
protection of that country,

(ii) the risk would be faced by
the person in every part of that
country and is not faced
generally by other individuals
in or from that country,

(iii) the risk is not inherent or
incidental to lawful sanctions,

crainte, ne veut se réclamer de
la protection de chacun de ces
pays;

b) soit, si elle n'a pas de
nationalité et se trouve hors du
pays dans lequel elle avait sa
résidence habituelle, ne peut
ni, du fait de cette crainte, ne
veut y retourner.

Personne à protéger

97 (1) A qualité de personne à
protéger la personne qui se
trouve au Canada et serait
personnellement, par son
renvoi vers tout pays dont elle
a la nationalité ou, si elle n'a
pas de nationalité, dans lequel
elle avait sa résidence
habituelle, exposée :

a) soit au risque, s'il y a des
motifs sérieux de le croire,
d'être soumise à la torture au
sens de l'article premier de la
Convention contre la torture;

b) soit à une menace à sa vie
ou au risque de traitements ou
peines cruels et inusités dans le
cas suivant :

(i) elle ne peut ou, de ce fait,
ne veut se réclamer de la
protection de ce pays,

(ii) elle y est exposée en tout
lieu de ce pays alors que
d'autres personnes originaires
de ce pays ou qui s'y trouvent
ne le sont généralement pas,

(iii) la menace ou le risque ne
résulte pas de sanctions

unless imposed in disregard of accepted international standards, and	légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicants*

[29] The Applicants say that the RPD applied the wrong test in assessing whether they have a well-founded fear of persecution. While the RPD assessed this issue on a balance of probabilities, the Applicants contend that there does not need to be a probability of persecution. In support of this argument, the Applicants refer to the decision in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 in which the Federal Court of Appeal distinguished between the standard of proof for the purpose of factual findings and the legal test for demonstrating a well-founded fear of persecution. The Applicants argue that the appropriate standard is whether there is a reasonable chance, or good grounds to believe, that the Applicants

would face persecution in the country of reference. By using an elevated standard, the RPD reached an unreasonable decision.

[30] The Applicants also argue that the RPD breached the rules of procedural fairness by finding that the Applicants incorrectly relied on an outdated version of India's citizenship legislation. The Applicants say that they should have been afforded a chance to make written or oral submissions regarding the updated citizenship legislation relied upon by the RPD. The Applicants bolster this argument by describing how the issue of citizenship was of enormous importance to the Male Applicant's claim.

[31] The Applicants say that the RPD unreasonably concluded that the Male Applicant had made insufficient attempts to secure citizenship in India. Specifically, the Applicants argue that the Male Applicant provided a reasonable explanation as to why he did not apply for Indian citizenship once in Canada.

[32] The Applicants also argue that the RPD failed to conduct an appropriate assessment of the Board's *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [*Gender Guidelines*]. They say that the RPD stated that the *Gender Guidelines* were considered, but did not actually provide a specific assessment in respect of the Female Applicant. While the Applicants admit that the *Gender Guidelines* do not have the status of law, they assert that it can be unreasonable in some circumstances to fail to consider them.

[33] The Applicants further argue that it was unreasonable for the RPD to make credibility findings on the basis of the Applicants' failure to submit corroborative evidence to support the existence of the TNJT in India. It is unreasonable to impugn a claimant's credibility on the basis of a lack of corroborative evidence.

[34] The Applicants say that the RPD's credibility findings were unreasonable due to a lack of reasons and reviewable errors. Specifically, the Applicants argue that the omissions identified by the RPD were minor. This form of "microscopic nitpicking" makes the Decision unreasonable. In support of this argument, the Applicants cite a long line of jurisprudence which confirms that an improper focus on trivial details can render a decision unreasonable.

[35] The Applicants also say that the RPD failed to assess the totality of the evidence. Specifically, they argue that documentary evidence demonstrating the mistreatment of religious minorities in India and ethnic Tamils in Sri Lanka was not sufficiently considered.

B. *Respondent*

[36] The Respondent defends the RPD's Decision as being reasonable. The Respondent says that the RPD's credibility concerns were based on material omissions that were not minor. It was reasonable for the RPD to have credibility concerns about these omissions.

[37] The Respondent also says that it was reasonable for the RPD to require corroborative evidence about the presence of the TNTJ in India. This is particularly true when the evidence was readily available to the Applicants.

[38] The Respondent says the *Gender Guidelines* were properly considered by the RPD. Furthermore, due to the credibility concerns in respect of the Female Applicant, further consideration of the *Gender Guidelines* would not have had a material impact on the claims.

[39] The Respondent says that it was reasonable for the RPD to conclude that the Male Applicant is eligible for Indian citizenship. Additionally, the Respondent asserts that it was reasonable for the RPD to find that the Male Applicant had made insufficient efforts to acquire Indian citizenship.

[40] The Respondent also argues that it was not a breach of procedural fairness for the RPD to rely on the amended Indian citizenship legislation of 2015. The Respondent disagrees with the Applicants' claim that they were not afforded an opportunity to make submissions in respect of this legislation. The Applicants were aware that the potential for the Male Applicant to obtain Indian citizenship was an issue. Therefore, the Applicants had the opportunity to make submissions on this matter. Further, the Respondent says that the Indian citizenship legislation is publicly available and has been since 2015.

[41] The Respondent says that the RPD did properly assess the documentary evidence about the country conditions in Sri Lanka and India. The RPD made specific reference to instances of mistreatment of religious minorities in India.

[42] Finally, the Respondent argues that the RPD did not conflate the standard of proof with the legal test. According to the Respondent, the RPD explicitly used the correct legal test on numerous occasions.

VIII. ANALYSIS

[43] The Applicants allege a number of errors that I will address in turn. However, my conclusion overall is that there is no reviewable error that would justify returning this matter for reconsideration.

A. *Application of Wrong Test*

[44] The Applicants say that the RPD applied a “balance of probabilities” test to determine if they have a well-founded fear of persecution pursuant to s 96 of the Act and that this improper test tainted the entire Decision.

[45] A reading of the whole Decision makes it clear that the RPD did not conflate the standard of proof test (“balance of probabilities”) with the legal test for persecution (“serious possibility” or “reasonable chance or good grounds”). Wherever the RPD invokes the “balance of

probabilities” test, it is clearly referring to the standard of proof, and the distinction is enforced in the conclusion:

[59] After assessing all the [sic] of the evidence before it, the panel concludes that:

- a. India is a country of reference as the adult claimant and minor claimants are all citizens of India, and the principal claimant is eligible to acquire Indian citizenship;
- b. Due to a lack of credibility, the claimants failed to establish, on a balance of probabilities, that they will face a serious possibility of persecution at the hands of TNTJ, upon their return to India; and
- c. The claimants as Christians do not, on a balance of probabilities, face a serious possibility of persecution upon their return to India.

B. *Breach of Rules of Natural Justice*

[46] The Applicants say that the RPD committed a breach of procedural fairness when it relied upon the Indian *Citizenship (Amendment) Act, 2015*, to find that the Male Applicant met all of the criteria for citizenship in India.

[47] The Applicants do not say that this more recent legislation is not applicable to the Male Applicant’s situation, or that he does not qualify for citizenship under its terms. They simply say that the Male Applicant was not given an opportunity to respond:

24. As the Panel relied on the *Citizenship Act (Amendment), 2015*, she was required to give the Applicants an opportunity to respond to that issue. The Panel should have asked for written submissions from the Applicants’ counsel, or requested another oral hearing so the Applicants could have presented their case in a meaningful way to address the issue of Indian citizenship under the *Citizenship Act (Amendment), 2015*.

[48] The RPD deals with this issue in the following way:

[13] The principal claimant meets all the criteria for citizenship as:

- a. The marriage was registered in India.
- b. The marriage between the principal claimant and adult claimant has subsisted for more than two years.
- c. There is no persuasive evidence that the principal claimant would fail the security clearance, as he has never been charged or convicted of a criminal offence.
- d. Neither the principal claimant nor the adult claimant's parents, grandparents or great grandparents are/were citizens of Pakistan or Bangladesh. The National Documentation Package (NDP) for India does not list Sri Lanka as a country designated by the Central government as one from whose ancestors excludes a person for citizenship in India. Nor did the claimants present any evidence to the contrary.

[14] The panel finds that, on a balance of probabilities, the claimants' counsel is incorrectly applying the citizenship law in India as it relates to foreign nationals married to Indian citizens. The claimants' counsel argued that the principal claimant is unable to obtain citizenship as he does not meet the requirements. Specifically, the claimants' counsel argued that the principal claimant must be married to an Indian citizen, and have lived in India legally for seven years. However, the *Citizenship Amendment Act, 2003* which the claimants' counsel relies on to support this argument pre-dates the *Citizenship Act (Amendment), 2015*. The *Citizenship Act (Amendment), 2015* added wording within Section 7A allowing foreign nationals married to Indian citizens to register as citizens abroad, and reduced the eligibility requirements for citizenship.

[Footnotes omitted.]

[49] No issue of procedural fairness arises in this case because:

- (a) The Applicants and their counsel were made fully aware before the hearing that the countries of reference were Sri Lanka and India and that it was their responsibility to go

to the Board's website to review the relevant documents in the National Document Package [NDP]. The Board's disclosure letter of November 7, 2017 reads, in relevant part, as follows:

- 1) The countries of reference in your refugee claim are Sri Lanka and India. Please take note that the index of the documentation for Sri Lanka can be found in the 'National Documentation Packages' page in the Research section of the Board's website: [...].

Please take note that it is your responsibility to go to the IRB website to review the documents in the National Documentation Packages (NDP) of the country (or countries) named above, as the Division may consider some of the information contained in the NDP when deciding the claim. It is your responsibility to check the IRB Website for the newest version of the relevant NDP prior to the hearing.

- (b) The NDP lists the *Citizenship (Amendment) Act, 2015* from India as a document the Applicants had to review. See Certified Tribunal Record [CTR], p 220, para 3.12;
- (c) The Applicants and their counsel were made fully aware at the hearing that eligibility for Indian citizenship was a major concern for the RPD;
- (d) The Applicants had every opportunity to address this issue at the hearing and their responses were clearly considered by the RPD in its Decision;
- (e) The updated and applicable Indian legislation is publicly available so that it is not extrinsic evidence (it pre-dates the hearing by two years) and there is no reasons to suggest why the Applicants and their counsel could not have been aware of it, particularly when they were directed to it in the NDP;

(f) The fact that the Applicants and their counsel chose to rely upon out-dated legislation is not a procedural fairness issue. The Applicants now argue, the “importance of the Male Applicant’s citizenship is enormous.” Yet, the Applicants failed to respond adequately to this “enormous” issue when they were made aware of it, and they chose to rely upon out-dated legislation when they were told to examine NDP 3.12. Even now, they do not say that the Male Applicant would not qualify under the governing Indian legislation.

C. *Efforts to Obtain Status in India*

[50] The Applicants say that it was unreasonable for the RPD to expect the Male Applicant to try to apply for Indian citizenship as he maintained he had a well-founded fear of persecution in that country.

[51] The RPD, in deciding that it was unreasonable for the Male Applicant not to try to obtain citizenship in India, took into account and assessed the Applicants’ fear of persecution in India and found that it was not well-founded:

[24] The panel asked the principal claimant if he tried to make any efforts to obtain Indian citizenship, while in Canada. The principal claimant responded that he did not make any efforts as he recently arrived in Canada. The panel asked the principal claimant why he did not make any efforts to obtain Indian citizenship in Canada. The principal claimant stated that he was only in Canada a month. His life is in danger in India because he married a Muslim and she converted to Christianity for him.

[25] The panel finds unreasonable the principal claimant’s explanation that he made no efforts to try to obtain Indian citizenship while in Canada because he recently arrived, and had only been in Canada for a month. The principal claimant is a

sophisticated individual with a university education from India and the United Kingdom. Though recently arrived in Canada, the principal claimant had the sophistication, and knowledge, to retain counsel for this refugee hearing. The panel would expect that an individual with the principal claimant's level of education, and life experience, would explore all legal avenues including citizenship in India.

[26] For the reasons explained below, the panel finds not credible the principal claimant's allegation that he fears for his life in India because he married a Muslim, and she converted to Christianity for him. As the panel finds this allegation not credible, it also finds unreasonable this explanation as to why he made no efforts to obtain Indian citizenship.

[52] There is nothing unreasonable in these findings.

D. *The Gender Guidelines*

[53] The Applicants argue that, with respect to the Female Applicant, the RPD made no assessment pursuant to the *Gender Guidelines*:

39. Given all of the above information, the Applicants argue the Female Applicant's well-founded fear of persecution needed to be assessed by the Panel with respect to the Guidelines. The Panel made no negative credibility assessment with the Female Applicant's evidence regarding the reasons she was at risk in India. The Female Applicant meets the definition of the four broad categories outlined in the Guidelines, yet there is no substantive consideration of the Guidelines applied to this specific claim. The Guidelines were implemented to recognize the vulnerable position of female refugee claimants. The importance of following these guidelines can't be understated. The Panel made a generic statement that the Guidelines were followed, however the Applicants argue the Panel did not conduct any assessment pursuant to the Guidelines. As such, the Panel committed a reviewable error.

[54] The RPD makes clear in its reasons that it took the *Gender Guidelines* into account when assessing the Female Applicant's claim. See para 4 of the Decision. However, the *Gender Guidelines*, in and of themselves, cannot cure all deficiencies that might appear in an applicant's claim or evidence (*Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at para 7; *Manege v Canada (Citizenship and Immigration)*, 2014 FC 374 at para 31).

[55] The Decision as a whole shows that, in the present case, the Applicants were found to be generally lacking in credibility in ways that could not be attributed to the vulnerabilities set out in the *Gender Guidelines*. I shall address the credibility findings below, but the RPD's own summary of the credibility issues is as follows:

[50] The omissions in the BOC regarding the adult claimant's relatives death threats towards the claimants, the relatives involvement with TNTJ, and the lack of objective documentary evidence establishing the existence of TNTJ, rebuts the presumption of truthfulness of the claimants' allegation that they are persecuted in India by TNTJ.

[51] For the above reasons, the panel finds that, on a balance of probabilities, the claimants have failed to establish a serious possibility of persecution upon their return in India.

[56] The evidence for the credibility concerns is found in the serious omissions from the Applicants' BOCs concerning threats made by the Female Applicant's family members, and that the family members were members of the TNTJ in India. The Male Applicant attempted to explain these omissions in ways that were not credible and, in doing so, he undermined the claims of all of the Applicants, including the Female Applicant who, although represented by competent counsel, made no attempt at the hearing to attribute these credibility concerns to her vulnerabilities as a woman. In fact, the Female Applicant's BOC simply attaches the

Male Applicant's narrative. She provides no narrative of her own and shows she is relying upon his evidence. The Applicants complain that the RPD makes no mention of para 17 of the Applicants' narrative that reads as follows:

17. After this incident the TNTJ members started visiting my wife at the hospital and home and harassing her saying that she is a traitor for marrying a person other than a Muslim, converting to Christianity and not following Islam. They threatened her that if she did not return to her original religion and convert me to Islam my family will be destroyed. They also approached her parents and threatened them.

[57] Paragraph 29 of the Decision reasons as follows:

[29] The principal claimants testified that the adult claimant's family members have threatened them from the start of their marriage until the present. The principal claimant testified that they were threatened that if they did not convert to Islam their life would be in danger. The principal claimant further elaborated that the adult claimant's family members meant to murder them by informing TNTJ about them. However, the BOC omits threats the principal claimant alleges the adult claimant's family members made towards them.

[58] Paragraph 17 of the narrative does not refer to threats by family members, which is the principal inconsistency relied upon for the adverse credibility finding.

[59] The Applicants say that, given her vulnerabilities, the Female Applicant's testimony should have been assessed separately from her husband on the credibility findings, given the documentary evidence that speaks to violence against women in India.

[60] The specific concern in this case was the omission of the threats from the Female Applicant's family. In this regard, the Female Applicant chose to rely upon the

Male Applicant's narrative so that it was reasonable for the RPD to question the author of that narrative. The Applicants now complain that the "Panel made no negative credibility assessment with the Female Applicant's evidence regarding the reasons she was at risk in India." But the RPD did conduct a negative credibility assessment of the Male Applicant whose BOC narrative the Female Applicant chose to rely upon. The issue had nothing to do with the categories of vulnerable women set out in the *Gender Guidelines*. The issue was omissions from a BOC narrative that had been authored by the Male Applicant and adopted by the Female Applicant.

[61] I think it is also relevant that Applicants' counsel in written submissions (CTR, vol III, pp 562-582) requested that the Applicants be considered together as "claimants." In fact, the Female Applicant is only singled out briefly with regards to India:

India

The female and minor claimants are citizens of India. The fear with respect to India is based on the female claimant's conversion to Christianity. In the documentary evidence, the following is of relevance:

There were reports of religiously motivated killings, assaults, riots, coerced religious conversions, actions restricting the right of individuals to change religious beliefs, discrimination, and vandalism. According to the Evangelical Fellowship of India, a Christian advocacy organization, there were 177 incidents of violence, harassment, or discrimination across the country targeting Christians.

Christians who reported that they were victims of religiously-motivated violence or other animus voiced concern about the lack of police action against such incidents, as well as of hostility by the police towards Christians. According to the All India Christian Council and the Evangelical Fellowship of India, police resisted filing criminal complaints and had in several instances threatened falsely to incriminate the victims.

The country has experienced periodic outbreaks of large-scale communal violence against religious minorities. . .

Sources report that Christians in India may face mistreatment . . . Christians may be subject to intimidation (AICC 31 Jan. 2012; MRG July 2010, 117), threats, discrimination (ibid., 119), and attacks. . . Attacks can take place in both rural and urban (though usually economically disadvantaged or slum) areas. However, because the Christian community is spread across nearly all of India, in relatively small pockets, there is at least some risk everywhere they exist, including in the principal cities. (23 Jan. 2012).

. . . the US Commission on International Religious Freedom placed India on its watch list in 2009, citing its failure to adequately protect religious minorities and a growing “culture of impunity” for those who commit religious attacks . . .

There are theoretical avenues of recourse for Christian victims of violence, but these often do not work effectively. The support and protection received by Christians is variable, and depends on a wide range of factors. It is very rare for cases of anti-Christian violence to be prosecuted effectively and for the perpetrators to be brought to justice. In some cases, police side with the perpetrators and may even file cases against the victims. Most commonly, police fail to follow proper procedure or simply do not investigate attacks.

It is submitted that, in light of all of the foregoing the claimants’ fears are well-founded within the meaning of the definition, in that their fear is one of persecution and not just discrimination and/or harassment, that there is a serious possibility that they would be persecuted returned to Sri Lanka or India, and that there is a clear and demonstrable failure of state protection.

[Footnotes omitted.]

[62] The Applicants complain that the RPD provides no particularized assessment specific to the Female Applicant returning to India as a woman, and they reference the violence against women referred to in the CTR at pp 289-94, 372 and 385. These pages refer generally to problems of domestic violence, or other forms of gender-based violence and are not related to the claim made by the Applicants except for the alleged threats by the Female Applicant's family, and the TNTJ that were found not to be credible.

[63] In their BOCs, the Applicants make it clear that, in India, they fear persecution from an Islamic organization called Tamil Nadu Thowed Jamath [TNTJ] because of their Christian religious beliefs. The Female Applicant did not indicate that she feared gender-based persecution. Justice MacTavish in *Diallo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 explained the role of the *Gender Guidelines* as follows (at para 32):

The Chairperson's Gender Guidelines recognize that cross-cultural misunderstandings can come into play when gender-based claims are assessed by the Board. In order to minimize the risk of this happening, members are alerted to the effect that social, cultural, traditional and religious norms can have on the testimony of those claiming to fear gender-based persecution.

[64] Had the Female Applicant wanted to attribute the omissions identified by the RPD to her vulnerability as a woman under the *Gender Guidelines*, then she and her counsel were free to do so. However, they chose, instead, to rely upon the answers given by the Male Applicant. And, as the RPD points out, the Male Applicant and the Female Applicant are professional people with years of education:

[40] The claimants bear the onus of presenting sufficient evidence to establish their claims. The principal claimant, and adult claimant, have many years of formal education. The principal claimant ran his own business in India. The adult claimant was a

working professional in India. The claimants were able to provide documentation to this panel, including a medical report from Sri Lanka, identity documents, and education credentials.

[Footnotes omitted.]

E. *Corroborative Documents*

[65] The Applicants say that the RPD erred by stating that the presumption of truthfulness was rebutted due to a lack of corroborating evidence, and the RPD “completely erred in stating the lack of objective documentation undermined the Applicants’ subjective fear.” This is not accurate.

[66] What the RPD says about the rebuttal of the presumption of truth is as follows:

[28] The presumption of truth was rebutted in this case because:

- a. The principal claimant provided no reasonable explanation for omitting from the BOC that the adult claimant’s family members threatened to kill the claimants from the start of their marriage until now.
- b. The principal claimant omitted, without reasonable explanation, from the BOC that the adult claimant’s family members were members of TNTJ.
- c. The principal claimant gave no reasonable explanation for failing to provide documents to corroborate that TNTJ operates in India.
- d. There is no objective documentary evidence before the panel that TNTJ exists in India.

[67] As regards 28(c), above, the RPD elaborates as follows:

No Efforts to Provide Documents of TNTJ's operation in India

[39] The principal claimant testified that TNTJ operated throughout India. However, he did not obtain any documents to corroborate that TNTJ operates throughout India. The panel asked the principal claimant to explain why he did not obtain any documents to corroborate that TNTJ operates throughout India. The principal claimant explained that he did not do so because one can find that information on Google.

[40] The claimants bear the onus of presenting sufficient evidence to establish their claims. The principal claimant, and adult claimant, have many years of formal education. The principal claimant ran his own business in India. The adult claimant was a working professional in India. The claimants were able to provide documentation to this panel, including a medical report from Sri Lanka, identity documents, and education credentials.

[41] However, the claimants failed to make any efforts to provide documentation to this panel of the existence of TNTJ in India. Evidence of TNTJ's existence in India is important to establish as the claimants allege that this group is persecuting them.

[42] The panel finds unreasonable the principal claimant's explanation for his failure to produce documents. Firstly, the claimants have demonstrated that they are aware of their obligation to put forward evidence in support of their claim by the fact that they submitted evidence to the Board. The panel reasonably expected, given the principal and adult claimants' level of education, that they would produce evidence of TNTJ's existence particularly since such information is allegedly readily available through Google.

[43] Secondly, the claimants allege that they fear being killed by TNTJ, if returned to India. Given the threat faced by the claimants upon return, the panel would expect that the principal claimant would perform an easily accessible Google search to prove the existence of the group that is responsible for such a threat.

[44] The panel, therefore, finds that the claimants' failure to provide any evidence of TNTJ's existence in India, undermines the credibility of the claimants' subjective fear of persecution at the hands of TNTJ.

[Footnotes omitted.]

[68] The RPD is entitled to ask for an explanation as to why documents have not been produced in situations where their availability is reasonably expected. See *Sonmez v Canada (Citizenship and Immigration)*, 2015 FC 56 at para 26 [*Sonmez*]; *Gulabzada v Canada (Citizenship and Immigration)*, 2014 FC 547 at para 11.

[69] In addition, any presumption of truthfulness in this case was rebutted by the omissions from the BOC narrative so that the RPD was entitled to refer to a lack of corroborative documents (*Radics v Canada (Citizenship and Immigration)*, 2014 FC 110 at para 31; *Sonmez*, above, at para 26).

[70] In the particular circumstances of this case, what undermines the Applicants' subjective fear is their failure to produce documentation which they say is readily available on Google to support an alleged fear of being killed by the TNTJ, knowing full well that they had to provide evidence to support their claim. There is nothing unreasonable in the RPD's inferring from this behaviour that it does not suggest any real fear of the TNTJ.

F. *Unreasonable Credibility Findings*

[71] The Applicants say that the RPD's negative credibility inferences "are based largely on two minor omissions [in the BOC] that the Panel zeroed in on to support her finding of a lack of credibility" and this "microscopic nitpicking has been found by the Federal Court to be grounds for review."

[72] The Applicants also say that even if the RPD found the threats from the Female Applicant's family members and the family members' involvement with the TNTJ were not credible, the RPD was still required to assess the claim as a whole and it failed to do so.

[73] The Applicants elaborate on their nit-picking argument as follows:

53. From their BOC, the Applicants' fear stemmed from the Bodu Bala Sena and the Sri Lankan authorities (army, police and CID officers) in Sri Lanka and the Tamil Nadu Thowheed Jamath in India. Although the Applicants' family members' involvement with the TNTJ should have been included in their BOC, that omission does not diminish the central aspects of their claim.

54. The Applicants' BOC was clear that the Male Applicant faced persecution as a Tamil Christian man from Buddhist monks and state authorities in Sri Lanka, where he had been extorted, detained, arrested, and assaulted.

55. The Applicants gave evidence that the TNTJ was the group that threatened them in India because the Male Applicant was a Christian and the Female Applicant converted from Islam to Christianity. The Panel never considered the direct threats the Applicants received or the violence the Male Applicant suffered. The crux of the Applicants' refugee claim was ignored by the Panel based on minor omissions, and this improper consideration of the evidence warrants intervention.

[Reference omitted.]

[74] What the Applicants are leaving out of account here is that the RPD reasonably found that the Male Applicant could acquire Indian citizenship, so that the claims were assessed against India and not Sri Lanka. This is why the RPD points out that:

[22] A review of the objective documentary evidence demonstrates that Tamil persons are generally well treated by Indian society, and government. There no is [*sic*] restriction to their mobility and Tamil persons commonly relocate to other parts of India. A Tamil person's ability to find housing, and employment depends on their caste, and socio-economic class, and not

specifically their race/ethnicity. Tamils have not been targeted, directly or indirectly, when moving to large city centres outside of Tamil Nadu, like Mumbai or Bangalore. While there may be private incidents, there have been no outright discrimination or violence within state or city policies.

[Footnotes omitted.]

[75] In India, the Applicants said they feared the Female Applicant's family and the TNTJ. However, the death threats from the family were omitted from the BOC, as was the later assertion that the family members were members of the TNTJ. These important omissions were put to the Male Applicant and his answers were found to be unreasonable. The Applicants also failed to establish that the TNTJ existed in India, and the objective documentation makes no mention of the TNTJ's existence in India:

[46] The claimants allege that they fear persecution at the hands of TNTJ on the basis of their religious beliefs. However, the objective documentary evidence for India makes no mention of TNTJ's existence, or of any acts of violence committed by TNTJ on India's Christian population. While the claimants' counsel submitted documentary evidence that supports the existence of Sri Lanka Thowheed Jamath, the country conditions evidence submitted by counsel makes no mention of TNTJ's existence in India or of any acts of violence committed by TNTJ within India against the Christian population.

[47] The claimants are represented by experienced counsel, and counsel is, or ought to be, aware that establishing an objective basis is essential to any refugee claim.

[48] As there is no objective documentary evidence before the panel of TNTJ's existence in India, the panel finds that the claimants failed to establish an objective basis for their fear of persecution at the hands of TNTJ.

[Footnotes omitted.]

[76] Given the principal threats relied upon by the Applicants – family and TNTJ – it cannot be said that the omissions regarding family threats from the BOC were “minor omissions” and “microscopic nitpicking.” In fact, the Male Applicant said that the TNTJ were all together, so the omissions of the family threats from the BOC, and, the omissions that the Female Applicant’s family members were members of the TNTJ went right to the heart of what the Applicants said they had to fear in India. As the RPD points out,

[36] The panel finds unreasonable the principal claimant’s explanation. Firstly, the panel expected the claimants to name in their BOC all the agents of persecution whom they fear, and how they are interconnected, if at all. After all, the agents of persecution, and their interconnectedness, is significant to establish who the claimants fear, the reach those persons have within the country, and the extent of the harm faced, upon return.

[77] Given that the claim was assessed against India, and not Sri Lanka, the RPD did assess the claims appropriately.

G. *Failure to Assess the Totality of the Evidence*

[78] The Applicants’ claim that they provided documentary evidence to demonstrate that persons similarly situated to them face persecution and risks to their lives in India which the RPD failed to adequately assess:

[59] After assessing all the [sic] of the evidence before it, the panel concludes that:

- a. India is a country of reference as the adult claimant and minor claimants are all citizens of India, and the principal claimant is eligible to acquire Indian citizenship;
- b. Due to a lack of credibility, the claimants failed to establish, on a balance of probabilities, that they will face a serious

possibility of persecution at the hands of TNTJ, upon their return to India; and

- c. The claimants as Christians do not, on a balance of probabilities, face a serious possibility of persecution upon their return to India.

[79] When it comes to threats to Christians in India, the Applicants claim that the RPD “cherry picked the evidence to support her finding and only referred to passages from the NDP that supported her position.”

[80] The RPD is under no obligation to refer to every piece of evidence individually, provided it assesses the evidence as a whole and indicates its awareness of conflicting evidence, and provides a reasonable rationale for preferring evidence it finds more persuasive.

[81] The RPD points out that the objective documentation “makes no mention of the TNTJ’s existence, or of any acts of violence committed by TNTJ on India’s Christian population.” The Applicants do not challenge this finding.

[82] The RPD then goes on to consider whether the Applicants face a serious possibility of persecution in India as Christians:

[53] For the following reasons, the panel finds that, on a balance of probabilities, the claimants, as Christian, do not face a serious possibility in India.

[54] The claimants are less likely to be targeted, as they reside in Tamil Nadu, the southern part of India where incidents of mistreatment are less frequent. A review of the objective documentary evidence demonstrates that the majority of incidents take place in the northern provinces of India.

[55] Christians are more likely to be mistreated where anti-conversion laws are enforced. As the seven states that adopted the anti-conversion laws are located in the north, the claimants whom reside in Tamil Nadu, the south, are less likely to be subjected to violence or mistreatment.

[56] The majority of the Muslim population, whom the claimants allege to fear, reside in the northern provinces of India away from the claimants whom reside in the south.

[57] While one source states that Christians are at risk everywhere because they reside in relatively small pockets, the panel prefers the majority view that the Christian population is sizeable in Tamil Nadu, and that in at least three states Christianity is the majority religion.” As there are portions of India with majority Christian populations, Christians are not exposed, on a balance of probabilities, to risk everywhere in India by virtue of them residing in relatively small pockets spread throughout India.

[58] While the claimants, as religious minorities, may be subject to discrimination, the panel finds that, on a balance of probabilities, this discrimination does not rise to the level of persecution.

[Footnotes omitted.]

[83] This is not nit-picking. It is a summary of the objective evidence that acknowledges that Christians face risks in India but concludes that there are “portions of India with majority Christian populations” so that “Christians are not exposed, on a balance of probabilities, to risk everywhere in India by virtue of them residing in relatively small pockets spread throughout India.”

[84] This does not suggest that the RPD ignored evidence of risks to Christians in India. In fact, the RPD specifically refers to incidents of mistreatment of Christians, but points out that the “majority view” supports that Christians are not at risk “everywhere in India.” The Applicants

have not pointed to evidence that directly contradicts this summary of the situation that was not addressed by the RPD.

[85] The Applicants also argue with regard to the Residual Profile analysis that the RPD fails to assess the totality of the evidence and, in particular, the threats to women and threats from Hindus referred to, for example, in the Home Office report of April 2015, India: *Religious Minority Groups*. In other words, the Applicants say that they provided a significant amount of documentary evidence to demonstrate that persons similarly situated to them face persecution and risks to their lives which the RPD failed to adequately assess.

[86] It is clear, however, that the RPD does consider the contrary evidence. In paragraphs 57 of the Decision, it says: “[w]hile one source states that Christians are at risk everywhere because they reside in small pockets, the Panel prefers the majority view....” This is clearly picking up the words emphasized by the Applicants in paragraph 68 of their Memorandum:

However, because the Christian community is spread across nearly all of India, in relatively small pockets, there is at least some risk everywhere they exist, including in the principal cities.

[87] As well as referring to Tamil Nadu, the RPD also points out that “in at least three states Christianity is the majority religion,” which the Applicants do not dispute. None of the documents cited by the Applicants as being overlooked contradict the RPD’s general conclusions that,

As there are portions of India with majority Christian populations, Christians are not exposed, on a balance of probabilities, to risk everywhere in India by virtue of them residing in relatively small pockets spread throughout India.

H. *Conclusions*

[88] It is possible to disagree with the RPD's findings but I cannot find a reviewable error.

IX. CERTIFICATION

[89] The parties agree that no question for certification arises in this case and I concur.

JUDGMENT IN IMM-858-18

THIS COURT'S JUDGMENT is that

1. The proper name of the Respondent under statute is the Minister of Citizenship and Immigration, therefore, the style of cause is amended as such.
2. The application is dismissed,
3. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-858-18

STYLE OF CAUSE: THILIP JOYFRED EDWARD JEYARATNAM ET AL v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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DATED: DECEMBER 11, 2018

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