

Federal Court



Cour fédérale

Date: 20190513

Docket: IMM-3812-18

Citation: 2019 FC 632

Ottawa, Ontario, May 13, 2019

PRESENT: Mr. Justice Favel

BETWEEN:

CHITHIRA RASAI AH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] against a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [Board], dated July 18, 2018. The RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the IRPA.

[2] For the reasons outlined below, the Court finds the RPD's decision to be unreasonable and the application for judicial review is therefore allowed.

II. Background

[3] The Applicant, aged 47, is a citizen of Sri Lanka of Tamil ethnicity. The Applicant's father is deceased. Her mother and two sisters reside in Toronto while her brother lives in the United Kingdom [UK]. The Applicant is divorced and has no remaining family in Sri Lanka.

[4] On January 17, 2001, the Applicant's lawyer advised her to leave Sri Lanka. The Applicant decided to move to India. The Applicant fears persecution from Sri Lankan authorities, due to her previous history of arrests as well as her brother's alleged ties with the Liberation Tigers of Tamil Eelam [LTTE].

[5] In 1993, the Applicant claims that she and her mother were arrested by the Sri Lankan police in place of her brother who had already left the country. The Applicant claims to have been beaten by the police. The Applicant was also asked to give information about her brother's whereabouts and was subsequently accused of having connections with the LTTE. The Applicant and her mother were both detained at the police station, however, were able to obtain conditional release after two weeks.

[6] In 2000, Sri Lankan authorities arrested the Applicant during a Tamil rally, following a suicide attack in Colombo. The Applicant was once again accused of assisting the LTTE. The Applicant claims to have been detained for twenty days at the police station where she was

allegedly tortured and interrogated by members of the Sri Lankan police. The Applicant was released on bail with the condition of presenting herself at court on February 28, 2001.

[7] Following her arrest in 2000, the Applicant left Sri Lanka in January of 2001 and resided in India until 2003. She then travelled to the UK to meet with her Tamil husband through an arranged marriage. However, the Applicant's marriage turned out to be disingenuous after she discovered that her sponsor was living with another woman. In 2004, the Applicant's husband filed for a divorce from India which caused the Applicant to lose her status in the UK. In 2008, the Applicant applied for asylum in the UK, however, her application was refused and she was issued with an order to leave. In 2012, the Applicant filed for refugee protection after arriving in Canada with the help of a smuggler. The Applicant's application was not considered before 2013, due to the new refugee processing system.

III. Decision under Review

[8] In its decision dated July 16, 2018, the RPD determined that the Applicant is not a Convention refugee or a person in need of protection and, therefore, rejected the claim, pursuant to subsection 107(1) of the IRPA.

[9] The Applicant submitted several documents which confirmed, on a balance of probabilities, that she was a citizen of Sri Lanka. The panel found that the claimant was credible as there were "no material omissions, inconsistencies or discrepancies" between the claimant's testimony and her Personal Identification Form [PIF]. The determinative issue at the hearing was whether the Applicant had a well-founded fear of persecution in Sri Lanka.

[10] At the RPD's hearing, the claimant's counsel highlighted the following elements in the claimant's risk profile to demonstrate that the claimant fears persecution in Sri Lanka for being suspected of having links with the LTTE:

- The claimant is a single Sri-Lankan woman without family support in Sri Lanka.
- She has a history of prior arrests and was suspected of being an LTTE supporter.
- There is an outstanding charge against her which would make her a target for further interrogation and investigation.
- On returning to Sri Lanka from Canada, her travel documents would indicate that she has lived in Canada since 2012, a country where the Tamil diaspora has been viewed by the Sri Lankan government as supporters of the LTTE.
- As well, it would likely be uncovered that she resided in the UK for nearly nine years, also a country where the Tamil diaspora has been viewed by the Sri Lankan government as supporters of the LTTE.
- Her brother was wanted for having been a supporter of the LTTE.

(Certified Tribunal Record [CTR], RPD's Decision dated July 18, 2018, p 6)

[11] In rejecting the claim, the RPD found that the situation in Sri Lanka had improved since the end of the civil war in 2009 and that "[n]ot all Tamils are routinely screened" for being suspected of having ties with the LTTE. However, the RPD acknowledged that the country conditions evidence with regards to Tamils being suspected as supporters of the LTTE in Sri Lanka is mixed. Based on a Response to Information Request dated February 11, 2015, on the treatment of Tamils in Sri Lanka, the RPD cited the Executive Director of the National Peace

Council of Sri Lanka who stated that “[a]rrests and detentions are not common unless for some reasonable suspicion of criminal activities” (CTR, National Documentation Package for Sri Lanka dated April 30, 2018, p 120). In contrast, the RPD found that Tamils suspected of being LTTE supporters were still being detained under the Prevention of Terrorism Act, according to Amnesty International. Having considered the entire country conditions evidence, the RPD noted the importance of reviewing the *United Nations High Commissioner for Refugees eligibility guidelines for assessing the international protection needs of asylum-seekers from Sri Lanka* when assessing the claimant’s risk profile.

[12] After hearing the claimant’s testimony and reviewing the evidence on file, the RPD was not satisfied that the claimant’s family members were perceived as being part of the LTTE. The panel considered the claimant’s “individual situations” and noted that the claimant had been arrested twice in Sri Lanka. The RPD found that the claimant did not “have any direct ties to the LTTE [...] either in Sri Lanka or during her time in Canada”. Although the Applicant had a court order against her in Sri Lanka, the RPD was of the view that it was unlikely that “seventeen years later, authorities would arrest the claimant for her relatively minor offense”. The RPD concluded that the claimant was not, on a balance of probabilities, a person who is perceived to be affiliated with the LTTE.

[13] The RPD considered the claimant’s personal situation which is that of a single Tamil woman. The panel took the question of Internal Flight Alternative [IFA] into consideration and found that it was possible for the claimant to re-establish in Colombo notwithstanding certain challenges she would face. The RPD found that the claimant’s “profile is significantly different

from other Tamil women who have re-located to Colombo” because of her education and her ability communicate in English. The claimant had also lived in Colombo for many years before her departure from Sri Lanka.

IV. Issues

[14] In her written submissions, the Applicant raised the following issues:

1. Was the Board’s assessment of the evidence unreasonable, in light of the Applicant’s particular profile;
2. Did the Board ignore or misinterpret the evidence regarding those previously accused of being linked to the LTTE, and facing related charges;
3. Did the Board err in its consideration of the Applicant’s gender-related persecution, and in failing to duly consider the IRB’s *Gender Guidelines*;
4. Did the Board err in its consideration of factors arising after the Applicant’s departure from the country, which give rise to a *sur* place claim;
5. Did the Board err in its assessment of country conditions, by implicitly assuming that the conditions had changed but failing to consider whether these changes were “significant, effective and durable”;
5. Did the Board also err in its assessment of IFA;

(Applicant’s Record [AR], Applicant’s Memorandum of Argument, pp 144-145)

[15] After carefully reviewing both parties’ submissions, the Court is of the view that the central issue in the present matter is to determine whether the RPD’s decision is reasonable, in light of the evidence on file.

V. Standard of Review

[16] The reasonableness standard applies to the RPD's determinations of fact and mixed fact and law, such as its consideration of evidence, as well as its risk profile findings (*Tariq v Canada (Citizenship and Immigration)*, 2015 FC 692 at para 9; *Ye v Canada (Citizenship and Immigration)*, 2014 FC 647 at paras 17-18). Therefore, the Court should show deference to the RPD's conclusions if they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

VI. Analysis

[17] For the following reasons, the application for judicial review is allowed.

[18] In the Court's view, the RPD improperly reviewed the evidence on record. It was clearly expressed by the Applicant, herself, that she fears persecution in Sri Lanka due to her history with the authorities for being perceived as a supporter of the LTTE. In support of her claim, the Applicant submitted several documents before the panel, including a court order from Colombo. The Court notes that the RPD neither disregarded this piece of evidence nor did it question the court order's authenticity. In 1993, the Court of Mount Lavinia, District of Colombo issued an order against the Applicant, as well as 22 other suspects arrested on suspicion, to present herself before the court in 2001. The Court recognizes that it is within the Board's expertise to determine how much weight to accord to each piece of evidence, however, finds the following passage from the RPD's decision to be problematic:

[...] The panel finds that, while it is likely that there would be a record of the claimant having failed to appear at the 2001 court date, there was no evidence that an arrest warrant was ever issued or that now, seventeen years later, authorities would arrest the claimant for her relatively minor offense. The panel finds that while the claimant may face additional scrutiny upon her return to Sri Lanka as a result of her failure to attend the court date in 2001, her activities subsequent to her departure from Sri Lanka do not indicate any reason for any current interest in her by authorities.

(RPD's Decision dated July 18, 2018, para 25)

[19] The Applicant's personal story is that of a single, Tamil woman who may be perceived to be a supporter of the LTTE and who, until today, has a court order against her. The Court finds that the RPD's finding that Sri Lankan authorities would not arrest the claimant after "seventeen years" had gone by since the Applicant's court order is unfounded and is not supported by any piece of documentary evidence.

[20] The Respondent argued that the country conditions evidence is complex and evolving and that the evidence was properly considered when reading through the RPD's decision in its entirety. After carefully reviewing the objective evidence found in the CTR, the Court notes that "Sri Lankan authorities maintain a computerized "stop' list" accessible at the airport, which comprises a list of persons with an extant court order or arrest warrant; individuals on the list will be stopped and directed to Sri Lankan authorities" (CTR, Response to Information Request dated April 8, 2015, p 155). Therefore, the Applicant's previous arrests and detention, accompanied by her court order, should have alerted the panel that the Applicant is likely to be on that list and would be at risk of persecution if returned to her country.

[21] The Applicant argued that the RPD erred in its consideration of the Applicant's gender-related persecution, and in failing to duly consider the Chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* [Gender Guidelines]. The Respondent, on the other hand, argued that Gender Guidelines are not binding; they serve as a tool that the panel can utilize for the assessment of evidence when considering a female Applicant's refugee claim (*Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 44; *Newton v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 738 at para 17).

[22] The Court reminds that individuals with particular profiles must be carefully examined with regards to the possible risks they face (*Ariprasatham v Canada (Citizenship and Immigration)*, 2016 FC 16 at para 22 [*Ariprasatham*]). While the RPD clearly acknowledged the importance of considering claimants' individual situations, it failed to consider the Applicant's profile as a Tamil woman who fears persecution in Sri Lanka. The RPD solely addressed the Applicant's gender in the assessment of IFA. The Court agrees with the Respondent that Gender Guidelines are not binding. "Nevertheless, the RPD's failure to apply them in appropriate cases may constitute a reviewable error" (*Ariprasatham* at para 15; *Khon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 at paras 18-20). The Court therefore finds that the RPD failed to consider the possibility that the Applicant may not only face a well-founded fear of persecution in Sri Lanka based on her ethnicity, but also based on her gender.

[23] The Court finds that the RPD erred in considering the Applicant's situation as a failed asylum seeker. The RPD indicated in its reasons that the Applicant does not have sufficient grounds to fear persecution as a failed asylum seeker in Sri Lanka because it found that the

Applicant would not be perceived to be linked to the LTTE. However, the RPD seems to be silent in its reasons on the sole possibility that a failed asylum seeker may bring the Sri Lankan government to presume that an individual of Tamil ethnicity is a member or a supporter of the LTTE. Counsel for the Applicant also made oral submissions at the RPD hearing with regards to Tamils who have lived abroad for several years in countries such as the UK and Canada. It was submitted that Tamils who return to Sri Lanka risk facing mistreatment by Sri Lankan authorities simply because they are perceived as having ties with the LTTE:

[F]ailed asylum seekers are more likely to be readily associated with the LTTE either by virtue of the fact that they sought asylum or because of a presumption of involvement in Tamil diaspora activities which are viewed by the Sri Lankan government as being supportive of the LTTE.

(CTR, Response to Information Request dated February 11, 2015, p 117)

[24] The Respondent argued that it is not an error for the RPD to consider actual links to the LTTE. The Court is persuaded by the Applicant's argument that the RPD placed its focus on the Applicant's actual involvement or ties with the LTTE and did not fully consider the presumption of involvement by Sri Lankan authorities.

[25] The Court finds that the RPD was required to consider the entire evidence before it. "Officers must consider all the risk factors put forward by the Applicant, cumulatively (*K.S. v Canada (Citizenship and Immigration)*, 2015 FC 999 at para 42). The Officer cannot view the evidence of such risks in isolation." (*Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 at para 19).

[26] For the reasons above, the Court concludes that the RPD's decision is unreasonable as it does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[27] An award of costs will not to be afforded in the present matter. The Applicant was unable to demonstrate that there are special reasons for granting costs in this case. The Board's errors do not justify a cost award in accordance with Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

VII. Conclusion

[28] The application for judicial review is allowed. The matter is remitted to a differently-constituted panel of the RPD for reconsideration. No question of general importance will be certified. There is no order as to costs.

JUDGMENT in IMM-3812-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is returned to a differently constituted panel of the RPD for redetermination;
3. No question of general importance is certified;
4. There is no order as to costs.

“Paul Favel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3812-18

STYLE OF CAUSE: CHITHIRA RASAI AH v THE MINISTER OF
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