

Federal Court



Cour fédérale

**Date: 20230707**

**Docket: IMM-1639-22**

**Citation: 2023 FC 934**

**Ottawa, Ontario, July 7, 2023**

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

**BETWEEN:**

**THANUSKODY AIAPACHETTIAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the “RPD”), dated January 17, 2022 (the “Decision”), which ceased the Applicant’s refugee protection on the grounds that the Applicant had reavailed himself of the protection of his country of nationality contrary to paragraph 108(1)(a) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA].

[2] Based on this, the RPD found that the Applicant was no longer a Convention refugee nor a person in need of protection within the meaning of the *IRPA*.

## II. Background

[3] The Applicant, Thanuskody Aiapachettiar, is a 72-year-old citizen of Sri Lanka. He sought refugee protection in Canada in May 1989 and was granted such protection. He became a permanent resident on December 3, 1991 and was issued a refugee travel document in 1992 that allowed him to travel to any country except Sri Lanka.

[4] The Applicant's wife and three of their children live in Germany and their two other children live in India. In 1992 and 1993, he used his Canadian refugee travel document to visit his family members in Germany.

[5] The Applicant's refugee travel document was renewed until June 1996, but his application to renew again was denied and he was advised to apply for Canadian Citizenship. He did not do so because he lacked fluency in English.

[6] In 2002, the Applicant used his Sri Lankan passport to visit his children in India.

[7] While in India, the Applicant's passport was stolen. He sought the assistance of the Sri Lankan consulate and was issued an emergency passport that allowed him to travel only to Sri Lanka. He then went to Sri Lanka where he obtained a regular Sri Lankan passport.

[8] Between 2002 and 2018, the Applicant used his Sri Lankan passport to travel to Sri Lanka. The Applicant admitted to 13 trips during this time and the Minister submitted that the Applicant made 17 trips to Sri Lanka during these years. The Applicant's travel history, based on passport stamps, indicates that he spent a total of five years and nine months in Sri Lanka between December 2004 and January 2018.

[9] In December 2004, the Applicant returned to Sri Lanka to visit his mother. He was detained by the Liberation Tigers of Tamil Eelam in January 2005 and held until sometime between June and September 2006. He applied to renew his Permanent Residence Card ("PR Card"), but the application was denied because he did not meet the residency requirement of 730 days of residence within the most recent five-year period. The Applicant thereafter went back and forth between India and Sri Lanka to obtain or renew Indian visitor visas to permit him to live temporarily in India until he returned to Canada in 2018.

[10] The Applicant returned to Canada in 2018 and the Minister brought a cessation of refugee protection application before the RPD alleging that the Applicant had reavailed himself of Sri Lanka's protection.

### III. Decision under Review

[11] On January 17, 2022, the RPD issued a decision granting the Minister's application and stripping the Applicant of refugee protection.

[12] The RPD found that the Applicant had voluntarily, intentionally and actually reavailed himself of the protection of his country of nationality.

[13] With respect to the voluntariness of the Applicant's reavilment, the RPD found that:

- A. The decision is to be guided by the *United Nations' High Commission on Refugees Determining Refugee Status* ("UNHCR Handbook").
- B. The Minister may rely on the presumption of reavilment that is created when a claimant obtains or renews a passport from their country of nationality. The type of protection relevant to a cessation proceeding is diplomatic protection and not state protection. In a cessation hearing the RPD need not perform a forward looking risk analysis.
- C. The Applicant travelled voluntarily using a Sri Lankan passport to India in 2002. Their decision was not compelled by an administrative or government requirement.
- D. The Applicant made a series of voluntary decisions:
  - a. He voluntarily chose to return to Sri Lanka in 2004 using his Sri Lankan passport;
  - b. He knew from his previous experience with a Canadian travel document that travel to Sri Lanka was prohibited to him as a Convention refugee;

- c. He voluntarily made the decision to remain in Sri Lanka after being released from captivity in 2006, notwithstanding that he had a valid passport that would have allowed him to return to Canada at that time, if he had wanted to;
- d. He voluntarily renewed his Sri Lankan passport in 2006, despite his having a passport that was still valid into May 2007;
- e. By his actions, he let his PR Card lapse; and
- f. He created the conditions that prevented him from returning to Canada. His need for Indian passports was predicated on a series of interrelated, voluntary actions.

[14] The RPD found that through the totality of his actions, the Applicant demonstrated an intention to reavail himself of Sri Lanka's protection:

- A. He travelled to India using his Sri Lankan passport and, in doing so, he represented himself as a Sri Lankan national, who could expect the considerations and protection accorded to Sri Lankan citizens who carried its passport.
- B. By remaining in Sri Lanka after he was released from captivity for approximately two years, the Applicant demonstrated his intention to reavail himself of Sri Lanka's protection.

- C. By failing to return at the earliest opportunity, the Applicant demonstrated an intention to reavail.
- D. Renewing his Sri Lankan passport demonstrates an intention to reavail and establishes the presumption of reavilment upon which the Minister may rely.
- E. Because of these reasons, the Applicant failed to rebut the presumption of reavilment.

[15] Finally, the RPD found that the Applicant *actually* reavailed himself of Sri Lankan protection:

- A. Starting in 2002 when the Applicant travelled to Sri Lanka using his Sri Lankan passport, he represented himself as a national of Sri Lanka, who could expect the considerations and protection accorded to Sri Lankan citizens who carried its passport.
- B. After losing his Sri Lankan passport in 2002, the first thing the Applicant did was turn to Sri Lanka for help. He turned to the Sri Lankan High Commission in Chennai and used its consular services to obtain an emergency passport that enabled him to travel to Sri Lanka.

- C. The Applicant used his new Sri Lankan passport to represent himself as a Sri Lankan national to High Commission of India in Colombo, India where he was granted a visa to enter that country.
- D. After his release from captivity in 2006, the Applicant remained in Sri Lanka representing himself as a Sri Lankan national and then in 2008, he again used his Sri Lankan passport to obtain another Indian visa, which he used to travel there. It was only in his attempt to return to Canada that he represented himself as a Canadian permanent resident.
- E. The Applicant used his Sri Lankan passports to obtain at least eleven Indian visas. Each time he represented himself as a Sri Lankan national who was relying on his valid Sri Lankan passport.
- F. Taken as a whole, the Applicant actually received the diplomatic protection of Sri Lanka.

#### IV. Issues

[16] Did the RPD err in concluding that the Applicant voluntarily, intentionally and actually reavailed himself of the protection of Sri Lanka contrary to paragraph 108(1)(a) of the *IRPA*?

V. Standard of Review

[17] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]).

VI. Analysis

[18] Paragraph 108(1)(a) of the *IRPA* addresses cessation of refugee protection. It states the following:

**108 (1)** A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

**(a)** the person has voluntarily reavailed themselves of the protection of their country of nationality;

**108 (1)** Est rejetée la demande d’asile et le demandeur n’a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

**a)** il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

[19] Subsection 108(2) permits the Minister to apply to the RPD for a determination that a person’s refugee protection has ceased for any of the reasons described in subsection 108(1) and subsection 108(3) provides that if an application for cessation is allowed, the refugee claim of a claimant is deemed rejected.

[20] The case law has established three relevant, conjunctive components required to establish that an individual has reavailed themselves of diplomatic protection:



- A. Voluntariness;
- B. Intentionality; and
- C. Actual reavailment.

*(Jing v Canada (Citizenship and Immigration), 2019 FC 104 at para 16)*

[21] The Applicant disputes the RPD reasoning with respect to each of these elements, arguing broadly that the RPD made errors in ignoring evidence that render the decision unreasonable.

[22] I disagree.

[23] The RPD did not ignore the Applicant's evidence that the decision to renew his passport was not voluntary because he thought he had no other way to maintain relationships with his children and mother. The RPD reasonably considered his desire to visit his family, but concluded that using his Sri Lankan passport for this purpose was voluntary, because it was not compelled by administrative or governmental requirement.

[24] The RPD also did not ignore the Applicant's evidence that he was going to visit his elderly mother when he went to Sri Lanka in December 2004. It considered the Applicant's desire to visit his family, but concluded that the Applicant travelled using a Sri Lankan passport to visit her and not to care for her. In these circumstances, the RPD found that the visit must be

viewed as voluntary as there was no persuasive evidence that he was compelled to visit by an exceptional or unavoidable circumstance or by any requirement.

[25] The Applicant also takes issue with the RPD's conclusion that he was aware that travel to Sri Lanka was prohibited based on his Canadian refugee travel document. However, the evidence before the RPD demonstrated that the travel document clearly stated "This Document is Valid for All Countries Except Sri Lanka". As such, the RPD reasonably found that the Applicant knew from this document that travel to Sri Lanka was prohibited.

[26] While the Applicant argues he did not know English and therefore could not have understood what the document stated, the evidence before the RPD demonstrated that the Applicant lived and worked in Canada from 1989 to 2004. Moreover, the Immigration Appeal Division has in the past concluded that the Applicant "has knowledge of the English language". This coupled with the prominence of the statement on the travel document lead to the conclusion that the RPD's finding that he was aware of the requirement was reasonable. The Applicant's arguments to the contrary are based on speculation, at best.

[27] Additionally, the RPD made no error in concluding that the Applicant chose to remain in Sri Lanka voluntarily after his detention.

[28] Moreover, the RPD did not broadly ignore the Applicant's desire to maintain his family relationships after Canadian officials refused him a travel document. The RPD reasonably considered the Applicant's evidence on this front and concluded this was a personal and

voluntary choice. Counsel for the Applicant's imported gloss on the facts on this front is not supported by the record before the Court.

[29] In *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*], Justice Fothergill addressed the onus on the refugee to adduce sufficient evidence to rebut the presumption of reavilment and stated that it is only in "exceptional circumstances" that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status. *Abadi* is on all fours with this case. The Applicant similarly attempted to visit family, travelling using a Sri Lankan passport and not a Canadian travel document.

[30] The RPD's determination that, although the Applicant was returning to visit family, the visits were voluntary and intentional, is reasonable. The cumulative and contextual effect of the evidence as a whole here supports the reasonableness of the RPD's decision.

[31] The RPD's decision was reasonable.

## VII. Conclusion

[32] The application is dismissed.

**JUDGMENT in IMM-1639-22**

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

1. The application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

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Judge

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

**DOCKET:** IMM-1639-22

**STYLE OF CAUSE:** THANUSKODY AIAPACHETTIAR v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** JUNE 27, 2023

**JUDGMENT AND REASONS:** MANSON J.

**DATED:** JULY 7, 2023

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