

Federal Court



Cour fédérale

**Date: 20160106**

**Docket: IMM-685-15**

**Citation: 2016 FC 13**

**Ottawa, Ontario, January 6, 2016**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**R.S.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. BACKGROUND**

[1] This application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, (Act) is of a decision of the Refugee Protection Division (RPD) dated January 23, 2015 (Decision) in which the applicant's claim for refugee protection under sections 96 and 97 of the Act was rejected because it was determined that the applicant

was neither a Convention Refugee within section 96 of the Act nor a person in need of protection under subsection 97(1) of the Act.

[2] The Minister intervened in this case and participated at the hearing before the RPD. The Minister took the position that there was insufficient credible evidence to find the claimant a Convention Refugee and the claimant is not a person in need of protection.

[3] This matter was heard in camera and the facts of this decision, including the applicant's name have been anonymized by virtue of an order of this Court to remove any information that could serve to disclose the identity of the applicant or any of the applicant's family members or associates, including name, age, place of birth, and any similar information.

[4] The applicant came to Canada on August 13, 2010 aboard the MV Sun Sea. He claimed refugee protection based on his fear of persecution, risk of torture and risk to his life. He claimed he fears the i) Sri Lankan Government, ii) the Sri Lankan Security Forces, iii) the deadly paramilitary groups and the unlicensed White Vans EPDP, and iv) the LTTE.

[5] For the reasons which follow I have determined this application for judicial review shall be dismissed.

## II. **DECISION UNDER REVIEW**

### A. *Overview*

[6] The RPD decision found the applicant was not credible and the fear which was claimed was not well-founded. As an alternative, the RPD found there was a change in circumstances of country conditions and, on a balance of probabilities, the applicant would not face a risk of persecution or harm if he were removed to his home country. The RPD also found the applicant

did not have a profile as a failed asylum seeker or a passenger aboard the MV Sun Sea to support a sur place claim. The decision is slightly over 25 pages long, 19 pages of which are analysis and findings. Reference is made throughout the decision to jurisprudence of this court as well as a wide variety of country condition documents.

[7] The RPD was satisfied the claimant is a citizen of Sri Lanka and is a Tamil from the Northern Province who came to Canada aboard the MV Sun Sea. The applicant testified at the hearing in the Tamil language using an interpreter to translate his testimony to English.

#### B. *Credibility Findings*

[8] The RPD found the determinative issue was credibility. The critical findings by the RPD were that with respect to credibility the claimant concocted a story that he was arrested by Sri Lankan authorities then beaten, interrogated, and placed on conditions to report to them. He also said that an armed group went to his home and tried to extort money from him and when he refused they returned 15-16 times over a three-year period and are still looking for him.

[9] In rejecting the applicant's story the RPD found he "used a basic set of facts" that the Sri Lankan government has a long record of torture and mistreatment and determined that the evidence provided by the applicant was untrustworthy and unreliable.

[10] The RPD found the applicant's oral testimony lacked important details and explanations such as:

1. the nature of the threat to him in his PIF was he would be shot but in his testimony this was omitted
2. he crossed out the word *ransom* in his PIF and initialled the change but could not explain it at his hearing

3. how he could stand up to the armed men to refuse to pay the money extorted and yet fainted when they pointed a gun at him
4. he failed to mention in his PIF a similarly situated person but raised it at the hearing

[11] The RPD summarized its credibility findings as being that “inconsistencies, vagueness, confusion and incoherence in the claimant’s answers and explanations” led the panel to find the claimant was not a victim of persecution in his country at the hands of the SLA or any armed groups. They found he made the story up to advance his refugee claim and “through exaggerations and embellishments concocted a story of personal persecution”. Having made that finding the RPD then determined at paragraph 31 of its decision, that:

Despite the documentary evidence, the oral testimony and counsel’s written submissions, this panel finds no basis of a subjective fear in this claim.

[12] As a result, the RPD found there was no subjective fear of persecution held by the applicant so the claim under section 96 of the Act was not proven.

C. *Change of Circumstances and Sur Place claim*

[13] The RPD considered whether there were changed circumstances in Sri Lanka such that the reasons the applicant sought refugee protection have ceased to exist. It acknowledged that when weighing changed country conditions factors such as durability, effectiveness and substantiality have to be taken into account and the more durable the changes are “the heavier they will weigh against granting the claim” for protection.

[14] The RPD acknowledged counsel for the applicant submitted:

There is ample documentary evidence indicating that the Sri Lankan government *has repeatedly linked the MV Sun Sea to the LTTE: the Sri Lankan High Commissioner in Australia told a Sri*

*Lankan newspaper that a ship called the Sun Sea was carrying 200 suspected LTTE cadres.*

[15] Counsel then referred to favourable RPD decisions saying there was a core set of facts which create a risk of persecution and torture based on objective documentary evidence which is all the same in all the MV Sun Sea claims and that is the reasoning which should be applied to the applicant's claim.

[16] The RPD reviewed and summarized the Tamil experience by referring to four different country condition documents. It acknowledged that Tamils from North and East Sri Lanka suffered human rights abuses at the hands of the LTTE and other groups. It also acknowledged the Sri Lankan government declared victory over the LTTE in May 2009. The RPD then indicated it relied on the July 5, 2010 UNHCR Guidelines and the December 21, 2012 UNHCR Guidelines in concluding on a balance of probabilities that it did not believe the applicant is considered by the Sri Lankan government and its security forces to be an LTTE member or supporter or sympathizer and does not face the risks contemplated if he were to return. The RPD also found the applicant is not an individual to be considered in any of the four groups considered at risk by the UNHCR in 2010 or an individual in any of the seven groups considered at risk in the 2012 UNHCR report.

[17] With respect to whether the applicant would be suspected of links with the LTTE, the RPD found no credible evidence was presented to indicate the applicant was suspected of any links to the LTTE when he left Sri Lanka in August 2009, and there was no direct or indirect evidence indicating he was or is a wanted person or on a security alert list of the government. The panel found the applicant would not face a serious risk of persecution upon his return to Sri Lanka based simply on his identity as a Tamil male from northern Sri Lanka who travelled on

the MV Sun Sea as he had little or no profile with Sri Lankan authorities and he expressed no links to or sympathies with the LTTE.

[18] The panel found it important that Canadian law would find any individual determined to be a member of the LTTE to be ineligible to apply for refugee status or excluded from refugee protection and those had not been claimed against the applicant. Based on that, the panel found it is:

reasonable to expect that if Sri Lankan officials come to know that the claimant was aboard the MV *Sun Sea*, they would also have logically concluded that Canadian officials investigated whether or not he had ties to the LTTE.

[19] The panel reviewed various actions taken by the Sri Lankan government, both positive and negative. It considered the Danish Immigration Service Report on Human Rights and Security Issues Concerning Tamils in Sri Lanka, portions of which cover Tamils returning from abroad to live in Jaffna. The report found that refugees from abroad would not be at particular risk when returning to Sri Lanka and they were distinguished from refugees returning from camps within Sri Lanka.

[20] Relying on *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, the RPD identified the test under sections 97(1)(a) and (b) of the Act as being that:

- i. there must be persuasive evidence, on a balance of probabilities, establishing the facts on which a claimant relies to say he or she faces a substantial danger of being tortured or of having cruel and unusual treatment or punishment inflicted upon his or her return; and
- ii. the danger or risk must be such that it is more likely than not that he or she would be tortured or subjected to other cruel and degrading treatments.

[21] The RPD also relied on *Yusuf v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 629 (FCA) that “changed circumstances” is a question of fact and the only test is “does the claimant now have a well-founded fear of persecution?”

[22] The RPD concluded that although there are many negative reports on Sri Lanka, when considering the totality of the evidence in this case the situation, while not perfect, is not such that the claimant will be persecuted due to any Convention ground or harmed pursuant to section 97 of the Act as the Applicant is not, on a balance of probabilities, perceived to be a LTTE member and would not likely be targeted by the Sri Lankan government.

### III. **Standard of review**

[23] The parties agree, as do I, that the issues before me involve decisions by the RPD involving questions of mixed fact and law therefore the standard of review for the Decision is reasonableness. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 (*Dunsmuir*).

[24] On a reasonableness review I will be determining whether the decision-making process was justified, transparent and intelligible and whether the decision itself falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. *Dunsmuir* at para. 47.

### IV. **Was the RPD decision reasonable?**

#### A. *The Credibility Findings*

[25] The Applicant says the panel failed to consider the totality of the evidence in assessing his credibility. In particular he alleges the panel seized upon minor slipups on insignificant issues such as his oral testimony was not as detailed as his PIF and at one point the panel

unreasonably concluded the applicant was confused with respect to the word “ransom” when in fact any confusion was caused by the fact that the interpreter used the wrong word in English.

[26] Counsel for the applicant reviewed a number of alleged inconsistencies the panel relied upon such as who was targeted by the armed group, failing to mention a similarly situated person in his PIF and testimony regarding whether there actually was money with which to pay the armed group. It was submitted that the panel’s interpretation of the applicant’s answers was either wrong or not reasonable.

[27] The applicant then says the adverse credibility findings tainted the overall decision and cites both *Becerra Vazquez v Canada (Citizenship and Immigration)*, 2011 FC 9 and *Chen v Canada (Citizenship and Immigration)*, 2012 FC 510 to support his position that the Decision must be quashed because of that flaw.

[28] The respondent submitted that determining credibility is at the heartland of the RPD’s jurisdiction and expertise as a specialized tribunal. As a result they should be accorded a high level of deference. It also submits the applicant is conducting a microscopic assessment of the Decision by referring to selected portions of the transcript rather than the entire record.

[29] With respect to possible misinterpretation of words when translated to English, the respondent points out that it would mean two different interpreters (in the PIF and at the hearing) each made the same wrong interpretation. The respondent says any argument now by the applicant that he did not understand questions is without merit as he was represented by counsel and the issue was raised by counsel, not the applicant, who at other times did tell the RPD that he did not understand the question.



B. *The Sur Place Claim*

[30] The applicant says the RPD analysis of the applicant's sur place claim suffers from three related errors:

1. it dealt with whether the applicant was identified as an LTTE member at the time he *left* Sri Lanka rather than whether he would be identified as such upon his *return* as result of his voyage on the *MV Sun Sea*;
2. it failed to consider the serious risk of torture from the interrogation process used to obtain information about which individuals aboard the *MV Sun Sea* are LTTE and which are not;
3. it failed to consider each of the risk factors amounting to persecution *as a whole* and instead performed a disjunctive analysis.

[31] The applicant says the panel did not conduct a thorough analysis of the effect of his having travelled on the *MV Sun Sea*, which was a central ground of risk raised by him.

Furthermore, he submits the three related errors noted above show the analysis was faulty. He relies on decisions of this Court in *Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 532 and *B407 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1085, that only looking at whether he had already been linked to the LTTE as opposed to whether he would be so linked upon his return is an error which requires the Decision to be quashed.

[32] The applicant also says with respect to his passage on the *MV Sun Sea* that the panel ignored "compelling objective evidence that the Sri Lankan authorities perceive the boat to be linked to the LTTE" and that torture is routinely used to get information about the LTTE.

[33] In response, the respondent says:

1. the RPD made its finding based on the totality of the evidence including the lack of credibility of the applicant and a review of objective country condition documents;

2. contrary to the applicant's submission the RPD specifically found that there was insufficient evidence to suggest the Sri Lankan government would find the Applicant had links to the LTTE by virtue of having travelled to Canada on the *MV Sun Sea* alone;
3. the RPD considered that Canada considers the LTTE to be a terrorist organization and if Canada identified the applicant as being LTTE he would have been deemed inadmissible for refugee protection and have been ordered deported; therefore, although a number of LTTE members were on the *MV Sun Sea*, that in itself was not sufficient to establish his claim.

[34] The respondent submits the Decision is reasonable and, when considered in context, the way in which the applicant was treated before he left Sri Lanka, the fact that he left legally and he makes no claim to be an LTTE sympathizer, all support the finding that he had no LTTE profile before he left Sri Lanka.

[35] The respondent relies upon the decision in *S.K. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 78 to say that it cannot be assumed there is more than a mere possibility that all *MV Sun Sea* passengers will be tortured and the question is whether any particular claimant will be tortured, which requires consideration of the specific circumstances of that claimant, and whether the authorities are likely to conclude he was associated with the LTTE.

[36] Similarly, the respondent relies upon *B198 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1106 (B198) to support the RPD finding that when the applicant had no real or suspected ties to the LTTE when he was in Sri Lanka and he left legally, simply being a passenger on the *MV Sun Sea* would not be enough to create a risk.

### C. *Analysis*

[37] The RPD made several non-contentious findings, including that the applicant was questioned once in 2006 and again in 2007, which were the only two contacts with the army. He

also obtained a passport shortly after his second detention and in March 2010 passed through checkpoints without incidence. Ultimately, the applicant successfully left Sri Lanka. In the end, the Applicant's sur place claim fell to be determined on whether passage on the MV Sun Sea in and of itself could establish his section 97 claim.

[38] The applicant is picking and choosing particular instances where the RPD may have misinterpreted some of his testimony but, even if that is accurate (which is not a finding I need to make one way or the other) it ignores the 'big picture', which is that the applicant even by his own admission was not and is not an LTTE sympathizer. The credibility findings by the RPD were well supported by reference to the facts and there were extensive, detailed and lucid reasons for making the findings. The applicant is, in effect, asking the Court to re-weigh the evidence but that function is not within the purview of the Court.

[39] This Court has on at least 60 prior occasions dealt with refugee claims made by passengers on either the MV Sun Sea or its sister ship the Ocean Lady. In some cases passage on the ship was sufficient to found the claim while in other cases it was not. Justice Kane in *B198* at para. 66 noted that "despite what appear to be different approaches to similar situations, no two claims are the same. The role of the Court is to consider the reasonableness of the Board's decision, not to impose its own determination" and then referred to the following passage from the decision by Justice Snider in *P.M. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77:

[17] Moreover, and more importantly, the decision is reviewable on a standard of reasonableness. It is possible for different conclusions to be reached on similar facts. I acknowledge that the Applicant put forward a rational line of reasoning for finding that the Applicant was at risk because of his passage on the *M/V Sun Sea*. However, that does not mean that the line of reasoning

followed by the Board is unreasonable. The existence of a range of possible outcomes is the hallmark of the reasonableness standard and is the foundation of the deference owed to decision makers. Whether this Applicant would face more than a mere possibility of persecution is a factual question to be determined by the Board. While I or another panel member might have come to a different conclusion, the decision of this Board was reasonably open to it on this particular evidentiary record. The Court should not intervene.

[40] I agree completely with these statements. The onus is on the applicant to establish his claim. It is the responsibility of the RPD to determine whether the evidence presented by the applicant is credible and trustworthy and then apply the law to the facts as found. The RPD is a specialized tribunal and assessing whether the evidence is credible and trustworthy is within the particular expertise of the RPD.

[41] While findings by the RPD, as with any adjudicator, are not infallible, in this particular case I am satisfied the panel fairly considered the evidence and provided detailed reasons for rejecting the applicant's claim. This enables the Court to determine why the panel came to the conclusion it did and whether it applied the correct legal tests in arriving at the Decision. The record before the panel supports the Decision and is within the range of possible, acceptable outcomes. Whether I would have come to the same conclusion or not is immaterial when the RPD has performed the function assigned to it by Parliament and has met the Dunsmuir requirements of reasonableness.

[42] As the reasons are justified, transparent and intelligible and the conclusion is within the range of possible, acceptable outcomes, defensible on the facts and law, the application for judicial review is dismissed.

[43] Neither party submitted a question for certification nor do I find one exists on these facts.

**JUDGMENT**

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

1. The application for judicial review is dismissed.
2. There is no serious question of general importance for certification.

“E. Susan Elliott”

---

Judge

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

**DOCKET:** IMM-685-15

**STYLE OF CAUSE:** R.S. v THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 20, 2015

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** JANUARY 6, 2016

**APPEARANCES:**

Tara McElroy

FOR THE APPLICANT

Sybil Thompson

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Waldman & Associates  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General  
of Canada  
Toronto, Ontario

FOR THE RESPONDENT