

Federal Court



Cour fédérale

**Date: 20171218**

**Docket: IMM-1789-17**

**Citation: 2017 FC 1160**

**Ottawa, Ontario, December 18, 2017**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**KIRUPAITHASAN JESUTHASAN AND  
JULIAT VALANTINA ANTONY**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Background**

[1] The Applicant spouses, Kirupaithasan Jesuthasan and Juliat Valantina Antony, seek judicial review of a visa officer's decision made on February 23, 2017, determining that Mr. Jesuthasan was inadmissible to Canada under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Jesuthasan is an ethnic Tamil living in northern Sri Lanka. In 2009, he made an asylum claim in France on the basis of his and his family's involvement with the Liberation Tigers of Tamil Eelam [LTTE]. The French authorities determined that his claim was not credible. He returned to Sri Lanka from France in June 2013.

[3] In September 2013, Mr. Jesuthasan married Ms. Antony, a naturalized Canadian, in Sri Lanka, who then applied to sponsor him as a member of the family class in August 2014. Mr. Jesuthasan indicated in his application forms for permanent residence that he had made an unsuccessful asylum claim in France. He was later asked for the documents from this claim. In the documentation he provided and during his oral interviews, he recanted the story given to the French authorities, alleging that his claim had been written by an agent, without his input, for a considerable fee. He explained that he was motivated to make the claim because he wanted a better life for himself, coming from a country which has widespread violence and political instability. To support his submission that he was now telling the truth, Mr. Jesuthasan sought to corroborate the untruthfulness of the account given to the French authorities by noting its factual inconsistencies and submitting evidence from his wife and others that he was never a member of the LTTE.

[4] The sponsorship application was refused on February 23, 2017.

[5] The visa officer noted that he did not know which version to believe – Mr. Jesuthasan's written submissions to the French authorities claiming that he was an active member of the LTTE, a known terrorist organization, or the current version that he had made it up. Faced with

two (2) conflicting accounts, the visa officer referenced two (2) credibility issues that caused him to “lean towards” accepting the account Mr. Jesuthasan had given to the French authorities. First, the visa officer found it implausible that Mr. Jesuthasan would not have checked to see whether or not a fraudulent passport he travelled with contained his photograph. The visa officer was also doubtful of Mr. Jesuthasan’s evidence that he tore up the fraudulent passport and disposed of it in an airplane washroom, noting that it would take a very strong person to do so. Second, the visa officer did not accept Mr. Jesuthasan’s evidence that he had not been examined by Sri Lankan authorities upon his return from France, commenting that it was “open knowledge” that all returning refugee claimants were subject to questioning or detainment.

[6] The visa officer then decided that “on balance” he would base his decision on the written account Mr. Jesuthasan gave to the French authorities. The visa officer concluded that Mr. Jesuthasan was an active member of an organization – the LTTE – which engaged in acts of terrorism. As a result, he found Mr. Jesuthasan to be inadmissible under paragraph 34(1)(f) of IRPA.

## II. Analysis

[7] The parties agree that the visa officer’s decision is reviewable on a reasonableness standard, which requires this Court to consider the justification, transparency, and intelligibility of the decision-making process, and whether the decision falls within a range of outcomes defensible in fact and law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[8] While the Applicants raised a number of issues in their application for judicial review, I find that one issue is determinative and justifies this Court's intervention.

[9] The Applicants submit that the visa officer arbitrarily based his decision on the account Mr. Jesuthasan gave in his failed French asylum claim without providing any reason for doing so, while at the same time ignoring material contrary evidence before him. The Applicants argue that the story of Mr. Jesuthasan's membership in the LTTE was both rejected by the French authorities and contradicted by objective evidence in their application materials before the visa officer.

[10] The Respondent submits that the standard of proof for a finding of inadmissibility is relatively low, being more than a mere suspicion, but lower than on the balance of probabilities (*Nagulathas v Canada (Citizenship and Immigration)*, 2012 FC 1159 at para 27). The Respondent contends that Mr. Jesuthasan had the onus to prove that this standard was not met.

[11] The Respondent further submits that it was open to the visa officer to prefer the evidence given by Mr. Jesuthasan under oath to the French authorities, citing the visa officer's conclusion that Mr. Jesuthasan was generally "inconsistent, evasive, untruthful, and lacking credibility" during his interviews. The Respondent argues that these unfavourable credibility findings tipped the scales in favour of accepting the account offered to the French authorities and, consequently, a reasonable finding of inadmissibility.

[12] The Respondent relies on this Court's decision in *Fouad v Canada (Citizenship and Immigration)*, 2012 FC 460 [*Fouad*], which rejected a line of reasoning similar to that advanced by the Applicants in this case. In *Fouad*, this Court found that it was reasonable for a visa officer to accept the applicant's sworn statements relating to membership in a terrorist group on a failed Swiss refugee claim, even though the account given in the claim was rejected by the Swiss authorities.

[13] Upon review of the record and having heard from the parties, I am of the view that the decision of the visa officer must be set aside on the basis that the visa officer either ignored relevant evidence or failed to address it in his reasons.

[14] While the decision in *Fouad* involved similar facts to those at issue in this application, its reasoning is distinguishable. The Court stated in *Fouad* that there was nothing in the documentation that contradicted or otherwise called into question the visa officer's membership finding (*Fouad* at paras 7, 19, 21). That is not the case here.

[15] In their submissions to the visa officer, the Applicants pointed to objective factors that made the French account unbelievable. For instance, in the French account, Mr. Jesuthasan claimed that his father and brother participated in the LTTE movement. He claimed that his brother was arrested by the Sri Lankan military and that his father was killed by the military in 2007. He also stated that his sister was forced to participate in the armed movement because members of his family were under surveillance by the military.

[16] To refute the information contained in the French account, the Applicants included statements from two (2) church pastors indicating that Mr. Jesuthasan was an only child, as well as a letter from Mr. Jesuthasan's mother to the same effect. The Applicants also provided the visa officer with the death certificate of Mr. Jesuthasan's father showing that he passed away in 1986, not 2007. This information was corroborated by Mr. Jesuthasan's mother in her letter. In addition, the Applicants' materials included a clearance certificate from the Sri Lankan police stating that Mr. Jesuthasan had not come to their attention, as well as a letter from a Sri Lankan justice of the peace stating that Mr. Jesuthasan had not participated in any terrorist activities. Finally, Ms. Antony had also informed the visa officer directly that her family had done a full background check on her husband prior to their marriage and that the marriage would not have been arranged by her family if he had been in the LTTE.

[17] I recognize that deference is owed to the visa officer and that his reasons need not refer to all of the evidence or be as elaborate as those of administrative tribunals. However, in my view, it was incumbent upon the visa officer to address the Applicants' contrary evidence as it was directly relevant to the central issue of Mr. Jesuthasan's inadmissibility. The visa officer's failure to do so constitutes a reviewable error (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (FC) at para 17; see also *Francis v Canada (Citizenship and Immigration)*, 2016 FC 1366 at para 18; *Kalsi v Canada (Citizenship and Immigration)*, 2016 FC 442 at para 12; *Alade v Canada (Citizenship and Immigration)*, 2013 FC 845 at para 25).

[18] Consequently, the Court finds that the decision is unreasonable and must be set aside. As a result, the application for judicial review is granted. No question of general importance will be certified.

**JUDGMENT in IMM-1789-17**

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

1. The application for judicial review is granted;
2. The decision is set aside and the matter is remitted back to a different officer for redetermination;
3. The style of cause is amended to remove the "Minister of Public Safety" as Respondent; and
4. No question is certified.

"Sylvie E. Roussel"

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Judge



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

**DOCKET:** IMM-1789-17

**STYLE OF CAUSE:** KIRUPAITHASAN JESUTHASAN AND JULIAT  
VALANTINA ANTONY v MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 11, 2017

**JUDGMENT AND REASONS:** ROUSSEL J.

**DATED:** DECEMBER 18, 2017

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