

Federal Court



Cour fédérale

**Date: 20191218**

**Docket: IMM-3814-18**

**Citation: 2019 FC 1621**

**Ottawa, Ontario, December 18, 2019**

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

**BETWEEN:**

**VELAUTHAM THAMBAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Veultham Thamban, seeks judicial review of the decision of the Refugee Protection Division (RPD) denying his refugee claim. He is a Tamil citizen of Sri Lanka, and claimed refugee protection because he feared persecution since the authorities there would perceive him to be a supporter of the Liberation Tigers of Tamil Elam (LTTE).

[2] The RPD rejected his claim, because it found that he lacked credibility, and that country conditions had changed so he would not be at risk if he returned to Sri Lanka. The Applicant argues that the RPD made several errors, and asks that its decision be overturned.

[3] For the following reasons, I am granting this application.

I. Context

[4] The Applicant left Sri Lanka in November 2010 and arrived in Canada from the United States in February 2012. He made his refugee claim at the port of entry.

[5] The Applicant alleges that between 1990 and 2010, when he left Sri Lanka, he and his family were subjected to various incidents of extortion, arrests, violence and destruction of property during the war. The Applicant states that the Sri Lankan army suspected him of being a LTTE supporter because he made his living by fishing. He said that he had been detained and mistreated by security forces on numerous occasions throughout this time. His wife was killed by bombing. At one point, his entire village had to flee because of the fighting, and when they returned their homes had either been destroyed or damaged. In addition, he was subject to extortion by the LTTE.

[6] In November 2008, the Applicant was fishing at night, as was the usual practice, when a navy boat approached and began shooting at him and his two companions. The Applicant attempted to escape but was apprehended by security forces. He stated that he was interrogated, beaten and tortured – his fingers were irreparably damaged by these beatings. The security forces accused him of helping the LTTE and smuggling arms for them. He was held for one year, although his detention was not documented. During his detention, he was occasionally made to work, cleaning the camp.

[7] The Applicant was released in November 2009, after the war had ended. He says security forces visited him in August and October 2010, and warned that he was on a watch list of persons who had helped the LTTE. They asked him to gather information about LTTE activities. The Applicant decided to flee Sri Lanka.

[8] The RPD heard the Applicant's claim at the same time as his daughter's claim, although she had arrived in Canada later than the Applicant and had filed a separate claim. The RPD dismissed both claims. It found that the determinative issues in respect of the Applicant's claim were credibility and the change in circumstances in Sri Lanka.

[9] The Applicant seeks judicial review in respect of the denial of his claim. The separate claim of his daughter is not before the Court in this application.

## II. Issues and Standard of Review

[10] The Applicant submits that the decision is unreasonable because the RPD: (i) engaged in a selective assessment of the evidence such that it ignored significant and credible evidence; (ii) engaged in speculation without an evidentiary foundation; and (iii) misinterpreted section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[11] The standard of review of an RPD decision on these issues is reasonableness. The Applicant argued that within this standard it is necessary to consider the context for the decision under review, which in this case involves a potential risk to the Applicant's life, liberty and security of the person interests protected by section 7 of the *Canadian Charter of Rights and*

*Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. In light of the conclusions I reach in this case, it is not necessary for me to rule on this specific point. I would simply note that there is no doubt that refugee claims involve issues of fundamental human rights, but the jurisprudence has not determined whether this somehow affects the application of the standard of review: see, for example *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31.

[12] The Supreme Court of Canada has summarized the proper approach to a judicial review on the standard of reasonableness in *Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38, [2016] 2 SCR 80:

[18] Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit “justification, transparency and intelligibility within the decision-making process”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. While the adequacy of a tribunal’s reasons is not on its own a discrete basis for judicial review, the reasons should “adequately explain the bases of [the] decision”: *Newfoundland Nurses*, at para. 18, quoting from *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para. 163 (per Evans J.A., dissenting), rev’d 2011 SCC 57, [2011] 3 S.C.R. 572.

III. Analysis

[13] It is not necessary to address all of the issues, because I find the RPD's analysis of the Applicant's claim relating to fears of persecution arising from the prior detention to be unreasonable because it is speculative.

[14] The Applicant claimed refugee protection because he feared persecution if he returned to Sri Lanka. He said the authorities would view him as a LTTE supporter and that although his last year of detention was not recorded, his previous detentions likely would be in the record that was available to security forces there. He based his claim, in part, on his prior mistreatment while in detention. In particular, the Applicant pointed to his most recent detention from November 2008 until November 2009 as an indication that the security forces were still interested in him.

[15] The RPD rejected his claim. Its analysis and findings in relation to the most recent detention are set out in the following passage:

[55] With respect to the Associate Claimant's final detention, if this detention occurred as alleged, I do not find that it is evidence of him being wanted by the state or suspected of LTTE ties. The Associate Claimant alleged that he was illegally fishing in the middle of the night when an army vessel approached his boat. He alleged that he and the two other men that were in the boat jumped out and tried to swim away, but he got caught. He alleged that he was kept in detention at an army base, where he was made to do chores on the army base, such as cleaning. He alleged that he was released several months after the end of the civil war. The Associate Claimant stated that there was no record of this detention. He stated that none of his family members knew where he was being held.

[56] I find it more likely than not that the Associate Claimant was not held in formal detention. I find it more likely than not that the Associate Claimant's detention was opportunistic. The Associate Claimant was not wanted by the state or arrested based on a

warrant. He was caught and captured doing illegal fishing in the middle of the night. I find it more likely than not that his detention was not formal, or authorized by the state. I find that in all likelihood he was taken into detention for the purpose of having someone to do work on the army base. I make this finding based on the fact that there is no record of his detention, and based on the fact that the Associate Claimant was kept in detention despite the fact that the war had been over for several months. I find that this detention is not indicative of the state's interest in the Associate Claimant, that he has a history of being suspected of LTTE involvement, or that he currently would be suspected of LTTE involvement. I find that this evidence indicates that the state has not had any interest in the Associate Claimant since his detention in 2000.

[16] The Applicant contends this was speculation by the RPD that is not supported by the record, and that in fact is contradicted by the substantial evidence regarding the number of persons in Sri Lanka who have "disappeared." The Applicant contends that the fact that the detention was undocumented is not an indication that it was merely "opportunistic" or related to concerns about illegal fishing. Rather, it is consistent with the practice of detaining people without charge or without formally documenting the fact.

[17] The Applicant submits that the documentary evidence indicates that Sri Lanka had a very large number of undocumented disappeared persons, and that enforced disappearances had been used in a systematic fashion over many years to suppress political dissent, to combat terrorist activities and as a tactic in the internal armed conflict. He argues that it was unreasonable for the RPD to ignore this evidence.

[18] In addition, the Applicant states that the RPD's explanation for his arrest and detention as having someone to work on the army base is pure speculation that is not supported by any evidence. This is unreasonable, in particular when it goes to an essential element of his claim.

[19] The Respondent argues that the overall findings of the RPD that the Applicant had not established a well-founded fear of persecution was reasonable. It is open to the RPD to make findings based on implausibility, common sense and rationality. That is what the RPD did here. It found that the most recent detention did not support the forward-looking risk of persecution of the Applicant. The RPD reasonably concluded that any past interest in the Applicant by security forces had most likely diminished with the passage of time and change of circumstances in Sri Lanka. It is not the role of a reviewing court to engage in a weighing of the evidence.

[20] I agree with the Applicant that his most recent detention is a central aspect of his claim, because it supports the fact that the security forces are still interested in him, which is the basis of his fear of persecution. The RPD's conclusions on this point are unreasonable because they are not supported in the evidence, and appear to be contradicted by substantial evidence in the record. I am unable to find that the decision is justified, transparent or intelligible in this respect. It is therefore unreasonable.

[21] In the passage cited earlier, the RPD makes a number of findings and draws conclusions about the circumstances and rationale for the Applicant's detention by the security forces, which are not supported by any references to the evidence. Nor are they explained as reasonable inferences drawn from the evidence.

[22] I agree with the Respondent that the jurisprudence is constant that it is not the role of a reviewing Court to engage in its own assessment of the evidence or to reach its own conclusion on the preferred outcome: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. It is equally not the role of a reviewing court to ignore key conclusions relating to an essential aspect of a refugee claim if these are based on speculation that is not supported in the record.

[23] In this case, there is abundant evidence in the record of the extent to which undocumented detentions were a feature of the armed conflict in Sri Lanka for many years. The RPD did not point to any evidence that supported the conclusion that security forces engaged in “opportunistic” detentions to have people to work in their camps, and no party was able to identify any such evidence in the volumes of evidence filed on this application. The RPD did not challenge the evidence of the Applicant that he had previously been detained on several occasions because security forces perceived him to be supporting the LTTE. It is not evident why the RPD concluded that his most recent detention was not based on the same perception.

[24] It is true that the RPD is entitled to choose the evidence it prefers where there is a conflict in the record, and unless specific contradictory evidence on an essential point is not addressed, the RPD’s exercise of discretion in assessing the evidence and drawing inferences based on the record will often be found to be reasonable: see, for example *Liang v Canada (Citizenship and Immigration)*, 2013 FC 765 at paras 66-67. However, as noted by Justice Denis Gascon in *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757:

[62] Speculation is not to be confused with inference. It is acceptable for a decision-maker to draw logical inferences based on clear and non-speculative evidence (*Laurentian Pilotage*



*Authority v Corporation des pilotes du Saint-Laurent central inc*, 2015 FCA 295 at para 13). In the same vein, it is well accepted that a decision-maker can rely on logic and common sense to make inferences from known facts. While an immigration officer cannot engage in speculation and render conjectural conclusions, he or she can draw logical inferences from the evidence (*Dhudwal v Canada (Citizenship and Immigration)*, 2016 FC 1124 at para 21; *Ma v Canada (Citizenship and Immigration)*, 2015 FC 838 at para 54). A reasoned inference is not speculation.

[25] In this case, it is simply not possible to determine that the RPD’s conclusion about the reasons for the Applicant’s detention amounts to a reasoned inference, because the decision does not explain the basis for the conclusion.

[26] On judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly “engaged” with the evidence, applying the appropriate legal test. The standard is not perfection. It must be recalled that Parliament assigned the task of conducting the initial inquiry into the facts to the RPD.

[27] Deference is due to a decision-maker in particular in a context where the inquiry is primarily factual, and it is within the decision-maker’s area of expertise, in a situation where greater exposure to the nuances of evidence or a greater awareness of the policy context may provide an advantage. If the chain of reasoning of the decision-maker can be understood, and if it shows that this type of engagement occurred, the decision will generally be found to be reasonable. However, where the reasons are silent on a critical issue or the chain of reasoning is simply opaque, a reviewing court may find the decision to be unreasonable because it cannot “connect the dots” of the analysis: *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, at para 11.

[28] In this case, although the reasons are not silent, the basis for the finding on a key point for the Applicant's claim is simply not explained. The conclusion of the RPD amounts to speculation. It also appears to be contrary to substantial evidence in the record, although none of this evidence is addressed or analyzed in the decision. That is not reasonable. The decision is not "transparent" or "justified."

[29] In light of my findings on this issue, it is not necessary to address the other issues raised by the Applicants that the RPD misinterpreted section 96 of *IRPA* and engaged in a selective assessment of the evidence

[30] The decision of the RPD in relation to the refugee claim of the Applicant is overturned, and the matter is remitted back for reconsideration by a different panel.

[31] It should be noted that this application concerned only the refugee claim of the Applicant. Although the RPD heard the Applicant's claim together with that of his daughter, her claim is not subject to this application for judicial review. Therefore, this decision only addresses the RPD findings in relation to the Applicant's claim.

[32] There is no question of general importance for certification.

**JUDGMENT in IMM-3814-18**

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

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division in relation to the refugee claim of Velautham Thamban is overturned.
3. The refugee claim of Velautham Thamban is remitted back for redetermination by a different panel of the Refugee Protection Division.
4. There is no question of general importance for certification.

“William F. Pentney”

---

Judge

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

**DOCKET:** IMM-3814-18  
**STYLE OF CAUSE:** VELAUTHAM THAMBAN v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION  
**PLACE OF HEARING:** TORONTO, ONTARIO  
**DATE OF HEARING:** FEBRUARY 20, 2019  
**JUDGMENT AND REASONS:** PENTNEY J.  
**DATED:** DECEMBER 18, 2019

**APPEARANCES:**

Barbara L. Jackman

FOR THE APPLICANT

Teresa Ramnarine

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Jackman, Nazami & Associates  
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT