

Federal Court



Cour fédérale

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Docket: IMM-9763-12

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[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Montréal, Quebec, April 17, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SATHEESKUMAR KULASEKARAM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary comments

[1] The relevant excerpts from the latest report of the United Nations High Commission for Refugees (UNHCR), entitled UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, HRC/EG/SLK/10/03, which was published in July 2010, read as follows:

Given the cessation of hostilities, Sri Lankans originating from the north of the country are no longer in need of international protection under broader refugee

criteria or complementary forms of protection solely on the basis of risk of indiscriminate harm. In light of the improved human rights and security situation in Sri Lanka, there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country.

At the time of writing, the security situation in Sri Lanka had significantly stabilized, paving the way for a lasting solution for hundreds of thousands of internally displaced persons (IDPs) in the country's north and east. In response to calls for an independent international investigation into allegations of human rights and international humanitarian law violations by the parties to the conflict, the Government of Sri Lanka has recently announced the establishment of a truth and reconciliation commission mandated to examine the "lessons to be learnt from events" between February 2002 and May 2009. On 22 June, the UN Secretary-General also appointed a Panel of Experts mandated to advise on the issue of accountability with regard to any alleged violations of international human rights and humanitarian law during the final stages of the conflict in Sri Lanka.

At the time of writing, the greatly improved situation in Sri Lanka is still evolving. UNHCR recommends that all claims by asylum-seekers from Sri Lanka need to be considered on the basis of their individual merits in fair and efficient refugee status determination procedures taking into account up-to-date and relevant country of origin information. Particular attention is drawn to the profiles outlined in these Guidelines.

[2] The report notes that the post-conflict situation in Sri Lanka is unstable and evolving. It describes five high-risk profiles, including people suspected of having links with the Liberation Tigers of Tamil Eelam [LTTE]:

In the wake of the conflict, almost 11,000 persons suspected of LTTE links were arrested and detained in high-security camps, while over 500 former child soldiers were transferred into rehabilitation centres. By the end of May 2010, all former LTTE-associated child soldiers had reportedly been released from rehabilitation centres. Some of the adult detainees have also been released after completing rehabilitation programmes or because they were no longer deemed to present a risk, including some persons with physical disabilities. By May 2010, around 9,000 alleged former LTTE cadres reportedly remained in closed camps.

In the immediate post-conflict period, there have been allegations of enforced disappearances of persons suspected of LTTE links. Furthermore, the broad powers of arrest and detention under the Prevention of Terrorism Act (PTA) and the Emergency Regulations, have reportedly generated considerable controversy around issues such as

the arrest and detention of persons suspected of LTTE links, in a number of cases allegedly on limited evidence and often for extended periods. Human rights observers have also expressed concerns regarding the broadly defined offences under the Emergency Regulations, which allow, inter alia, detention without charge for up to 18 months, and use of informal places of detention. In May 2010, the Government, however, relaxed the Emergency Regulations by withdrawing several provisions, including those dealing with the imposition of curfews, propaganda activities, printing of documents and distributing them in support of terrorism, as well as those restricting processions and meetings considered detrimental to national security.

Amongst issues relevant to the determination of eligibility for refugee protection are allegations by a number of sources regarding: torture of persons suspected of LTTE links in detention; death of LTTE suspects whilst in custody; as well as poor prison conditions, which include severe overcrowding and lack of adequate sanitation, food, water and medical treatment. According to some reports young Tamil men, particularly those originating from the north and east of the country, may be disproportionately affected by the implementation of security and anti-terrorism measures on account of their suspected affiliation with the LTTE.

In light of the foregoing, persons suspected of having links with the LTTE may be at risk on the ground of membership of a particular social group. Claims by persons suspected of having links with the LTTE may, however, give rise to the need to examine possible exclusion from refugee status.

II. Introduction

[3] The applicant, a Sri Lankan citizen of Tamil ethnicity, is seeking judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD], which, on September 7, 2012, rejected the applicant's claim for refugee protection, finding that he was neither a Convention refugee nor a person in need of protection under section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[4] For the reasons below, the intervention of this Court is necessary because the RPD erred in its assessment of the documentary evidence and the testimony; consequently, the applicant's claim for refugee protection must be re-examined.

III. Facts

[5] The applicant, Satheeskumar Kulasekaram, is a young, 24-year-old Tamil man from Sri Lanka. In support of his claim for refugee protection, the applicant alleges that he was persecuted because of his Tamil ethnicity and his membership in a particular social group, namely, young Tamil men in northern Sri Lanka, and that as a result he would be at risk of persecution if he had to return to his country. In fact, his claim for refugee protection described the problems he had over several years with the Sri Lankan army and paramilitary groups involved in the civil war.

[6] The applicant was born in Vaddakachi, his mother's home town, but grew up in Vaddukodai in the Jaffna peninsula, which is situated in the north of Sri Lanka and was controlled by the Sri Lankan army during the conflict. Before coming to Canada, the applicant lived and studied in Jaffna. The applicant's father owned farms in Araly, Jaffna, and in Vaddakachi, Killinochi, traveling there regularly for his work.

[7] In his Personal Information Form [PIF], the applicant alleges that, in August 2006, he went to Vaddakachi (Vanni) to help his father out on the farm. However, they had to return to Jaffna because of the war, and leave the farms behind. The applicant alleges that, in January 2007, paramilitaries from the Eelam People's Democratic Party [EPDP] approached his father demanding a ransom. When his father refused to pay what they asked for, they informed the Sri Lankan army that the applicant had visited Vanni and accused him of having links with the LTTE. As a result of this complaint, the applicant was arrested by the army and held for two

months. The applicant alleges that, during his detention, he was interrogated and tortured so badly that he had to be hospitalized.

[8] Also according to the narrative in his PIF, in July 2008, the applicant was kidnapped by the EPDP. This time, his father had to pay a ransom to have him released. Later, in May 2009, members of the Karuna faction threatened to have the applicant arrested by the army on false charges if the applicant's father refused to pay a large sum of money. The applicant's parents therefore decided to send him to Colombo in July 2009.

[9] The applicant alleges that, upon his arrival in Colombo, he was rearrested by the army and taken blindfolded to an unknown location. Later, the applicant learnt that he had been taken to a military camp in Kany. Again, he was questioned and beaten. The applicant also alleges that he was tortured and sexually abused. He remained in detention for nine months with other young Tamil men, until his father found him and managed to pay a bribe to get him released in April 2010.

[10] After his release, the applicant decided to leave Sri Lanka for good and to come to Canada, where his paternal uncle lives. In October 2010, the applicant was intercepted by American authorities while passing through the United States. He applied for refugee protection, but after being released, went to Canada on December 7, 2010, and immediately claimed refugee protection.

IV. Decision under review

[11] The RPD was satisfied with the applicant's identity on the basis of his birth certificate and his driver's licence. It rejected, however, the applicant's claim, essentially because the applicant generally lacked credibility, but also because, according to the 2010 UNHCR report, the applicant no longer had an objective fear of persecution.

[12] In short, the RPD found that it was unlikely that the applicant would have travelled in an area controlled by the LTTE in 2006 and 2007 when he risked being recruited by them. The RPD further found it unlikely that the army would have authorized a young 18-year-old male to travel to the northern part of the country during this particularly violent period or that the LTTE would have allowed him to return to Jaffna when they could have forced him to join them. The RPD rejected the applicant's explanation that he travelled to Vanni in the company of his father during a relatively peaceful period, referring to the documentary evidence describing suicide attacks, assaults and assassinations committed by the LTTE as of April 2006 and the documentary evidence showing that the government retaliated against the LTTE in the Eastern Province and took control of it in July 2007 (National Documentation Package, 4 June 2012, Tab 1.5: *The Europa World Year Book 2011*. 2011. "Sri Lanka," pp. 4206 - 4234. London: Routledge).

[13] The RPD also noted that the applicant's testimony was contradictory about the dates of his travels to Vanni and the period during which he stayed there. While the narrative in his PIF states that he went there in August 2006, the applicant first testified that he went there in June, and then in July 2006. The RPD rejected the applicant's reply that he travelled back and forth between Jaffna and Vanni several times.

[14] In addition, the applicant testified that he spent one month in total in Vanni in 2006, while, according to his PIF, he left for Vanni in August 2006 and his father was extorted by members of the EPDP in January 2007: according to the RPD, this implied that the applicant stayed in Vanni until the end of 2006 and not only a month.

[15] The RPD noted that according his reply to question 11 of his PIF, the applicant was in Vaddakachi, in the Vanni area, from July 2006 to September 2007, while in response to question 43, he stated that the Sri Lankan army arrested him in Jaffna in 2007. It should be noted that according to the hearing transcripts on the record, the applicant testified that his last trip to Vanni took place in July 2006 and that he did not go there in 2007. Furthermore, the applicant did not indicate which month he was detained in 2007, be that in his PIF or in his testimony before the RPD.

[16] The RPD also questioned the authenticity of the applicant's birth certificate on the ground that it bears a stamp stating Jaffna District, Vattakachchi Division. The RPD noted that Vattakachchi is in the Killinochi District and that there is no Vattakachchi in Jaffna. The RPD also remarked that one of the stamps appearing on the documents suggests that the certificate was obtained in the Killinochi District. The RPD referred to documentary evidence indicating that the forgery of identity documents and passports is common practice in Sri Lanka and that false Sri Lankan national identity cards are easy to obtain (National Documentation Package, 4 June 2012, Tab 3.2: LKA103785.E. 22 July 2011. *Prevalence of fraudulent National Identity Cards (NICs)*). The RPD also noted that the date on which the applicant obtained his passport

was February 19, 2010, even though he was in detention from July 2009 to April 2010. The applicant explained that he obtained his passport with the help of an intermediary, but the RPD rejected this explanation on the ground that it would have been very dangerous for the applicant if the authorities had found out that he was being held in a camp by the army.

[17] The RPD concluded that the applicant's allegations regarding his arrests were not credible, especially as he had not provided any documentation to corroborate his testimony. Further on in its reasons, the RPD found credible the applicant's testimony that his parents did not report his arrest to the Human Rights Commission of Sri Lanka because they were afraid that his kidnappers would kill him. It rejected this explanation, however, on the ground that there were other credibility problems in the applicant's evidence.

[18] Lastly, the RPD stated that in his refugee claim to the United States, the applicant spoke of his fear of the Sri Lankan army without referring to the EPDP or the Karuna faction, the basis of his fear according to the claim for refugee protection he made in Canada.

[19] In conclusion, the RPD wrote that it was not satisfied, on a balance of probabilities, that the applicant's allegations were true and that, consequently, the applicant was neither a Convention refugee nor a person in need of protection. The applicant's allegation that he risks persecution as a young Tamil man was rejected on the basis of the UNHCR's 2010 Guidelines and on the ground that he succeeded in leaving Sri Lanka using his own passport.

V. Issues

- [20] (1) Did the RPD err in its assessment of the applicant's credibility?
- (2) Did the RPD err in failing to consider all of the evidence by concluding that, since the end of the war, young Tamil men no longer need international protection?
- (3) Did the RPD err in not applying the correct standard of proof to its analysis of the well-founded fear of persecution?

VI. Analysis

Standard of review

[21] It is well established that conclusions by the RPD on credibility and implausibility are factual in nature and are entitled to considerable deference on the part of the Court. The appropriate standard of review for such conclusions is reasonableness, which reflects the deference owed to them (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 732 (QL/Lexis) (FCA)). This is generally speaking the case when it comes to Board decisions regarding the assessment of evidence (*Sokola v Canada (Citizenship and Immigration)*, 2010 FC 168 at para 7).

[22] The criteria the RPD's decision has to satisfy on a standard of reasonableness, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, are nonetheless clear: the reasonableness of a decision can be determined by "the existence of justification, transparency and intelligibility within the decision-making process" and by whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para 47).

(1) Did the RPD err in its assessment of the applicant's credibility?

[23] The applicant alleges that it was not reasonable for the RPD to require of him to provide documentation corroborating his allegation regarding his two detentions yet finding his explanation for not having such documentation in his possession both credible and plausible. The applicant submits that such evidence is not required according to sections 196 and 197 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1

[Refugee Handbook], which read as follows:

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant. [Emphasis added.]

[24] Moreover, sections 201 to 204 of the Refugee Handbook provide as follows:

201. Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be "the last straw"; and although no single

incident may be sufficient, all the incidents related by the applicant taken together, could make his fear “well-founded”

202. Since the examiner’s conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding a

203. . . . It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.

[25] The question of whether it is reasonable for the RPD to draw an adverse inference regarding an applicant’s credibility in the absence of documentation supporting the applicant’s allegations was recently discussed in *Khazaei v Canada (Citizenship and Immigration)*, 2013 FC 13. Relying on *Morka v Canada (Minister of Citizenship and Immigration)*, 2007 FC 315, the Court provided the following explanation in this decision:

[47] . . . the position of the *Refugee Handbook* is that supporting documentation may not be required of a claimant for refugee protection from countries from which it may be difficult to do so, but, should a claimant’s account be devoid of credibility or plausibility, it requires substantiating documentation. Recognizing that (as the *Refugee Handbook* observes) refugees may face difficulties in assembling information to substantiate their claims, it may, nevertheless, be wholly reasonable for the RPD to require an applicant, whose account lacks credibility and plausibility, thus devoid of inherent logic to produce third party attestations in place of other documentation. [Emphasis in original.]

Obtaining such documentation must not, however, become an unreasonable requirement having regard to the circumstances.

[26] This is why, according to the case law of this Court, it is reasonable for the RPD to check information which is important to the refugee status claim if it is able to do so (*Sitoo v Canada*

(*Minister of Citizenship and Immigration*), 2004 FC 1513; *Florez v Canada (Minister of Immigration and Citizenship)*, 2004 FC 1230). Failing that, even though the absence of documentary evidence to corroborate an applicant's story can undermine the credibility of a particular incident, the panel must refer to the remaining evidence to assess the refugee claimant's credibility, while keeping in mind the basic principle established in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, according to which a claimant's sworn testimony is presumed to be true unless there are good reasons to doubt its truthfulness.

[27] The Court notes that, according to *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, "[w]here . . . evidence is not available in documentary form, the claimant may still be able to establish that the fear was objectively well-founded by providing testimony with respect to similarly situated individuals" (para 137).

[28] Coming back to the matter at bar, the applicant alleges that the RPD erred in interpreting the evidentiary requirements too strictly, without taking into account the applicant's circumstances and in imposing a more onerous burden of proof than the balance of probabilities on him. The applicant also challenges the RPD's conclusions regarding the authenticity of his identity documents, when it stated at the beginning of its reasons that it was satisfied with the applicant's identity on the basis of these very documents.

[29] Even though this is not an essential factor at issue for the parties, the RPD's findings regarding the applicant's credibility, specifically with regard to the plausibility of the central

issues of his claim, and the authenticity of his identity documents make this decision somewhat fragile.

[30] In focusing exclusively on the minor inconsistencies in the applicant's testimony, the RPD failed to take relevant factors, such as the current situation in Sri Lanka and the real risk faced by the applicant, into account and incorrectly assessed the evidence before it. None of the RPD's negative conclusions and inferences relates to the applicant's testimony on the circumstances of his arrests, even though this was central to his claim. The applicant's explanations of these contradictions and implausibilities were generally reasonable. The applicant repeatedly mentioned that he made several return trips between Jaffna and Vanni to help his father out on the farm. His not remembering the exact date of these trips or answering in reply to one of the questions in his PIF that his place of residence from July 2006 to September 2007 was Vanni does not contradict this allegation.

[31] Moreover, the RPD could not speculate that the applicant's father would not have authorized him to travel in an LTTE-controlled area even though the travel took place at the beginning of the clashes between the Sri Lankan army and the LTTE. The documentary evidence referred to by the RPD describes isolated incidents that do not contradict the applicant's testimony that he thought the situation to be stable enough for travel. The RPD also should have considered that the goal of the applicant's trip was work and that it was therefore not a fully informed choice.

[32] Also, contrary to the RPD's conclusion, the refugee claim the applicant made in the United States corroborates the main allegations of his claim for refugee protection to Canada, namely, that he was persecuted by the Sri Lankan army because he was suspected of having links to the LTTE and that he was in danger of being persecuted again. The fact that the applicant did not mention the paramilitary groups, the EPDP and Kanura, who had informed on him and had caused him to be arrested, is perfectly understandable given the circumstances in which the applicant claimed refugee protection in the United States. The two claims do not actually contradict one another.

[33] Regarding the weight of the applicant's identity documents, the RPD's findings are contradictory. It was not reasonable for the RPD to state its satisfaction with the applicant's identity on the basis of these papers and then conclude that they were not genuine. The documentary evidence to which the RPD refers essentially concerns national identity cards and passports, even though it also discusses the forgery of Sri Lankan birth certificates.

[34] Regarding his passport, the applicant stated that his parents obtained it with the help of an intermediary in February 2009, while he was in detention, and that, before this second arrest, a smuggler had taken care of obtaining a passport for him. In his testimony, the applicant stated that the smuggler had asked him only for a copy of his national identity card.

[35] The respondent submits that, as pointed out at the hearing with the Refugee Protection Officer, according to the documentary evidence, Sri Lankan citizens must report in person to obtain a passport (National Documentation Package, 4 June 2012, Tab 3.4: LKA100501.E. 12

December 2005. *Passport issuance procedures; whether a minor can obtain his or her own passport; physical description of passport (2003 - 2005)*). The Court reviewed this argument even though it is not reflected in the RPD's reasons.

[36] However, given the various assessment errors, the Court is not satisfied that the RPD could simply reject the claim on the basis of a general finding that the applicant lacked credibility. It was also not reasonable for the RPD to require, as it did, evidence corroborating the applicant's arrests, given that it found the applicant's explanation credible and plausible, meaning that his narrative was not devoid of inherent logic so as to require documentary evidence.

[37] In any event, even if the lack of credibility finding was reasonable, it would be insufficient to save the impugned decision. Analyzing the documentary evidence to determine the objective basis for the risks and fears alleged by the applicant was central to the RPD's duty. As stated by Justice Anne Mactavish in *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 773:

[5] It is well established in the jurisprudence of this Court that, pursuant to the provisions of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, the Board is under a legal obligation to assess the risk that would be faced by a young Tamil male from the north of Sri Lanka if he returned to Sri Lanka, independent of any issue as to his credibility: see, for example, *Balasubramaniam v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1438 at ¶ 10, *Satkunarajah v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 28, at ¶ 5, and *Mylvaganam v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1195, at ¶ 10.

[38] Justice James O'Reilly restated this principle more recently in *Joseph v Canada (Minister of Citizenship and Immigration)*, 2011 FC 548, using the following terms:

[11] The Board must be careful not to dismiss a refugee claim on the basis that it disbelieves parts of the claimant's testimony, or evidence that does not go to the core of the claim. Sometimes claimants embellish their stories, or they forget minor details. It is unreasonable for the Board to dismiss claims simply because they find evidence at the fringes not to be reliable or trustworthy. Even if the Board finds some evidence not to be credible, it must go on to consider whether there remains a residuum of reliable evidence to support a well-founded fear of persecution. (See, e.g. *Seevaratnam v Canada (Minister of Citizenship and Immigration)* (1999), 167 FTR 130, 88 ACW (3d) 650 (TD); *Mylvaganam v Canada (Minister of Citizenship and Immigration)* (2000), 98 ACWS (3d) 1089, [2000] FCJ No 1195 (FCTD) (QL); *Kanesaratnasingham v Canada (Minister of Citizenship and Immigration)*, 2008 FC 48).

[39] It is also interesting to recall the observations of Justice James Hugessen of the Federal Court of Appeal in the landmark decision *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ no 444 (QL/Lexis) (FCA):

... the Board's decision appears to turn entirely on questions of credibility and therefore to be beyond review by this Court on section 28 proceedings. In particular the Board identified three aspects of the applicant's tale of arrest, beating and escape from his native Ghana which it said "lacked credibility". Upon analysis, however, it appears that in its zeal to find the applicant unbelievable the Board itself has strayed into error.

...

I have mentioned the Board's zeal to find instances of contradiction in the applicant's testimony. While the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of the evidence of persons who, like the present applicant, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.

...

... Whether or not the applicant was a credible witness, and I have already indicated that the Board's reasons for finding him not credible are based in error, that does not prevent him from being a refugee if his political opinions and activities are likely to lead to his arrest and punishment. In those circumstances, the only conclusion that was open to the Board was to find that the applicant was indeed a Convention refugee.

[40] The Court will now turn to the issue of whether the RPD properly analyzed the documentary evidence substantiating the applicant's well-founded, objective fear of persecution before rejecting his claim.

(2) Did the RPD err in failing to consider all of the evidence by concluding that, since the end of the war, young Tamil men no longer need international protection?

[41] It is well established that while the RPD does not have to refer to each piece of evidence, the more important the evidence is, the greater the obligation to provide reasons for its rejection (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 at para 17; *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504, 409 FTR 176 at para 73; *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486, 408 FTR 200 at para 24). The failure to explain the rejection of important contradictory evidence seriously affects the reasonableness of a decision.

[42] Indeed, the case law has established that the panel has a duty to examine the most recent sources of information in its assessment of the documentary evidence even if the updated country reports are not filed by the applicant (*Hassaballa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 489 at paras 33-35; *Jessamy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 20, 342 FTR 250 at para 81).

[43] In the circumstances of the present matter, there was no justification for the RPD to give preference to the, both controversial and mixed, conclusions of the UNHCR Report, which is over three years old, over a great deal of other more recent information and documents that appear in the Package and that describe the constant persecution to which young Tamil men have

been subjected since the end of the conflicts (see, for example, National Documentation Package, Tab 13.1: LKA103663.E. 21 February 2011. Treatment of suspected Liberation Tigers of Tamil Eelam (LTTE) members or supporters, including information about how many are in detention; whether the government continues to screen Tamils in an attempt to identify LTTE suspects (January 2010 - 21 January 2011); Tab 13.2: LKA103782.E. 12 July 2011. Whether there has been increased surveillance, arrests and detentions of Tamil citizens since February 2011; forced registration of Tamil citizens in the north and east of Sri Lanka; Tab 14.1: LKA103651.E. 22 February 2011. Sri Lanka: Situation in northern Sri Lanka, including information on internally displaced persons (IDPs), emergency regulations, mobility rights, security checks and treatment of women (December 2009 - January 2011); Tab 14.5: LKA103815.E. 22 August 2011. Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport).

[44] In light of this evidence, and without there being a need to reproduce the relevant excerpts, the Court is of the view that the extensive documentary evidence describing the Tamil population's situation in Sri Lanka's current political context was either completely disregarded or misinterpreted by the RPD. Before the RPD, the applicant had also adduced the US Country Reports on Human Rights Practices, 2011, published on May 24, 2012, and a recent Human Rights Watch report entitled "UK: Suspended Deportations of Tamils of Sri Lanka Further Reports of Torture of Returnees Highlights Extent of Problems", dated May 29, 2012, both of which clearly contradict the hasty conclusion the RPD drew on the basis of the UNHCR report. Even if the RPD had reviewed all of the evidence and still found the UNHCR Report to be more

convincing than the others—which the Court very much doubts—the RPD should have considered that as a young, unmarried, 24-year-old Tamil male from the north of the country, who had potentially already been targeted by the military and paramilitary forces, the applicant’s profile matches one of the profiles recognized in that same report as being at very high risk. This fact alone required a more careful review of the evidence.

[45] Given the fact that the RPD did not mention any of these documents, or recognize that other more recent sources reported information that was less relevant, in the case at bar, the Court is not satisfied that the RPD actually analyzed the prospective risks faced by the applicant as it was its duty to do. Even if the RPD did not question the credibility of the applicant in that matter, the Court entirely agrees with the conclusions of Justice Luc Martineau in

Sivapathasuntharam, above, as follows:

[17] The Court finds that the documentary evidence considered by the RPD and referred to in the impugned decision is highly selective and very hastily analyzed. The conclusion that the finding that the current circumstances of the country demonstrate a durable change is unreasonable in view of the evidence in this specific case. This is all the more compelling that the applicant has been accused of being involved with LTTE forces and arrested for that reason on two occasions in 2009, and that the RPD member does not question the credibility of his account or the fact that he suffered personalized persecution.

...

[19] In the case at bar, a review of the documentary evidence reveals that different sources of information are less unanimous on the question of durability of change since the end of the Sri Lankan war than what the RPD’s decision seems to suggest. . . .

[46] The respondent relies on decisions of this Court in which it was deemed reasonable for the RPD to conclude that Tamil refugee claimants would not be persecuted in Sri Lanka simply because of their ethnic origin. The cases referred to by the respondent are very different from the

case at bar, in that in these decisions the RPD had analyzed the documentary evidence and properly weighed the applicants' circumstances and the various pieces of objective evidence regarding the current situation in Sri Lanka. In *Iyer v Canada (Citizenship and Immigration)*, 2012 FC 1435, at paragraphs 27-28, the Court was satisfied that the panel did not ignore evidence that went directly against its finding. In that decision, the applicant alleged that he had been harassed and extorted by masked men who accused him of working for the LTTE because his uncle was suspected of being a member of the LTTE. When reviewing the risk faced by the applicant, the RPD recognized that Sri Lanka continues to experience problems despite the May 2009 defeat of the LTTE, but pointed out that since the test was forward-looking, there were no reports on remaining groups of the LTTE in the north after the war (paras 16-17). This is not the approach that was followed by the RPD in the case at bar.

[47] Consequently, the Court finds that the RPD's decision cannot be upheld in light of the reasonableness requirements set out in *Dunsmuir*, above. The RPD therefore had a duty to consider all of the objective evidence on the situation in Sri Lanka and the entire UNHCR Report, and not only the excerpts that suited it.

(3) Did the RPD err in not applying the correct standard of proof to its analysis of the well-founded fear of persecution?

[48] As his final argument, the applicant submits that the RPD imposed an inappropriate legal burden on him with regard to proving his risk of being persecuted and did not apply the correct standard of proof in its analysis of his claim for refugee protection, as stated in *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680, namely a reasonable chance or serious possibility, which is less demanding than the balance of probabilities:

[8] What is evidently indicated by phrases such as “good grounds” or “reasonable chance” is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a “reasonable” or even a “serious possibility”, as opposed to a mere possibility.

[49] The standard applicable to a refugee claimant’s fear of persecution is explained in *Adan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 655, 391 FTR 33:

[35] However, a “well-founded fear” of persecution may exist where the danger of persecution is demonstrated on less than a balance of probabilities. As the Federal Court of Appeal explained in *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, the standard of proof on a balance of probabilities should not be confused with the legal test to establish the claim. In this case, the legal test is whether there is a “reasonable chance” of persecution, which may be less than a 50% chance:

¶10. However, the standard of proof must not be confused with the legal test to be met. The distinction was recognized in *Adjei v. Canada (Minister of Employment & Immigration)*, [1989] 2 F.C. 680 (Fed. C.A.), in the context of a claim for Convention refugee status.

...

¶11. At page 682 of *Adjei*, McGuigan J.A. stated:

It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not. [Emphasis added.]

¶12. McGuigan J.A. adopted the “reasonable chance [of] persecution” test as the legal test to meet to obtain Convention refugee status, i.e. not necessarily more than a fifty percent chance but more than a minimal possibility of persecution. [Emphasis added.]

[50] According to the case law, even though the standard of proof for findings of fact, including the applicant’s allegations of risk, is the balance of probabilities, the legal test for an

objective basis for a well-founded fear of persecution amounts to whether there is a “reasonable chance” or “more than a mere possibility” that a claimant faces a prospective risk of persecution (see *Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681, 391 FTR 681 at paras 21-24).

[51] In the matter at bar, the applicant alleges that the RPD required him to demonstrate a risk of a more than 50% chance of persecution to establish that his fear of persecution was well-founded. However, all the excerpts from the RPD’s decision to which the applicant referred relate to the applicant’s allegations, which should actually have been proven on a balance of probabilities (Decision at paras 11, 18 and 31).

[52] As regards the test applied to the objective basis for the applicant’s fear, the question of which test the RPD could have applied in its review of the documentary evidence is irrelevant since the Court has found that the RPD’s analysis of that evidence was flawed, unjustified and unreasonable (*Adan*, above, at paras 38-39).

[53] For all of the above reasons, the applicant’s application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the applicant's application for judicial review be allowed and that the matter be referred back to a differently constituted panel for reconsideration. No serious question of general importance is to be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

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**REASONS FOR JUDGMENT
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