

Federal Court



Cour fédérale

**Date: 20150827**

**Docket: IMM-7879-14**

**Citation: 2015 FC 1022**

**Ottawa, Ontario, August 27, 2015**

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

**BETWEEN:**

**C.D.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board made October 29, 2014 wherein it was determined that the Applicant is not a Convention Refugee nor a person in need of protection under section 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant seeks that the Court set aside the decision of the RPD and order this matter referred back for redetermination by a different member of the RPD.

[3] For the reasons that follow, this application is allowed.

I. Background

[4] This proceeding is subject to a Confidentiality Order applicable to any information that could serve to disclose the identity of the Applicant or any of his family or associates, including their names, ages, or places of birth. As such, these Reasons will refer only to background facts that are necessary for purposes of the analysis herein and will not disclose information of the sort that is the subject of the Confidentiality Order. Counsel for both parties confirmed at the hearing of this application that this represents in this particular case an appropriate method of addressing confidentiality concerns in the Court's Judgment and Reasons. This will eliminate in this case the need for issuance of separate Confidential Reasons and Public Reasons.

[5] The Applicant is a citizen of Sri Lanka. He is of Tamil ethnicity and from the north of the country.

[6] He alleges that in February 2007, the Liberation Tamil Tigers of Eelam [LTTE] captured and forced him to do labour work for them including construction and loading. In June 2007, the Applicant was injured while working and taken to the hospital where he underwent surgery. It is alleged that this injury resulted in a permanent, visible disability. In September 2009, the Applicant escaped from the hospital and went back to his home.

[7] During the following years, he was displaced a number of times due to fighting between the Sri Lankan Army [Army] and the LTTE. In May 2009, the Army captured the area in which the Applicant was residing. He was interned at a school and later, after receiving an Identity Card from the International Committee of the Red Cross [ICRC], he was transported to another school and housed in a camp. While at the camp, the Applicant was questioned by the Army and the Criminal Investigation Department [CID]. After eleven months of interrogation, he was released. He stated before the RPD that he was told the ICRC was pressuring the Army to release prisoners.

[8] On April 22, 2010, in fear that he might be kidnapped, the Applicant travelled to Colombo then to Thailand. He boarded the *MV Sun Sea* and arrived in Canada on August 13, 2010, following which he claimed refugee status. The Applicant's claim was rejected on November 4, 2014.

## II. RPD Decision

[9] In conducting its analysis, described in more detail below, the RPD considered the Applicant's credibility, relevant country conditions and his association with the *MV Sun Sea*.

### A. *Credibility*

[10] The RPD acknowledged the difficulties faced by the Applicant in establishing his claim including cultural factors and stress during his eight successive interviews between August 25, 2010 and June 5, 2012. However, while allowing for certain latitude in the Applicant's

statements as a result, the RPD nonetheless questioned his credibility. The interviews were held over a period of close to two years, which the RPD considered to allow any initial fear or trepidation that may have been experienced by the Applicant to dissipate. The RPD found that there were strong indications of inconsistency in his statements as to when he was held by the LTTE and his time at camp, where he was investigated.

[11] Specifically, the RPD noted that the Applicant's earlier evidence indicated that he was released by the Army because there was no information to support that he was a member of the LTTE, but that his evidence before the RPD evolved to suggest that he was released due to political pressure applied by the ICRC. The RPD found this evolution was intended to support his argument that he is at risk because Sri Lankan authorities would perceive him to be associated with the LTTE. Although the Applicant had previously not mentioned the ICRC, he amended his Personal Information Form [PIF] provided in support of his refugee claim to include the ICRC and their impact on his release. He stated that he had previously wanted to protect the identity of the individual who had provided him this information. The RPD found that this explanation made little sense as there was no way to identify this individual through the Applicant's testimony.

[12] The RPD found on a balance of probabilities that the Applicant failed to act as a credible witness in his quest for refugee protection.

*B. Basis of Claim*

[13] The RPD found that the documentary evidence painted a rather confusing picture as to who is at risk and why in Sri Lanka. The RPD preferred the United Nations High Commissioner for Refugees [UNHCR] documentation because it is internationally recognized and supported by the United Nations. Relying on the July 5, 2010 Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka and subsequent updates [UNHCR Guidelines], the RPD recognized the potential risk profiles including those suspected of certain links with the LTTE and the categories of persons likely to be suspected of having such links.

[14] The RPD found that both the Army and the CID questioned the Applicant extensively during an eleven-month period. If there were any concerns on these occasions about an association with the LTTE, he would have continued to be detained along with other LTTE combatants, perhaps imprisoned and certainly not allowed to leave the country. In his oral testimony before the RPD, he denied any association with the LTTE beyond having been captured for a four-month period. In reviewing the profiles provided by the UNHCR Guidelines, the RPD found that none of the listed criteria applied to the Applicant, and therefore there was little risk that he would be persecuted on this basis upon his return. The RPD also considered that the UNHCR is assisting Tamil refugees who wish to return to Sri Lanka.

*C. Failed Asylum Seekers*

[15] The RPD noted that recent fact-finding missions in Sri Lanka had examined in detail the issue of failed asylum seekers returned under voluntary and enforced removal programs and their successful implementation.

[16] The RPD also cited sources which stated that Sri Lanka is not safe for deported asylum seekers, especially those connected to the Tamil Tigers or who left the country illegally. However, the RPD noted that the Applicant did not fall into those categories.

[17] In addition to his release from camp, the RPD also noted that the Applicant did not report any ongoing interest in his whereabouts expressed by any authorities following his departure from Sri Lanka. If the Applicant was a person of interest, he would have been identified as such by the CID and placed on an alert list and subjected to interrogation. The documentary evidence indicated that, if the authorities had doubts about his identity, the Applicant would have been sent for “rehabilitation”.

[18] Similarly, the RPD noted that, following his arrival in Canada, the Applicant was identified by CBSA officials as having a possible association with the LTTE, but the Canadian authorities found no connection other than his four-month capture. The RPD found that, if he were to be questioned upon return to Sri Lanka, there was little basis to arrive at any other conclusion beyond the story provided by the Applicant, that he had been forced to perform labour for the LTTE over a four-month period in 2007. The RPD found that, given the increased

sophistication of records of past arrests and detention kept by the Sri Lankan authorities, should the Applicant's history be consulted, it would reveal the previous investigation and indicate that he was released.

[19] The RPD did not dispute that there was publicity around the arrival of the *MV Sun Sea*. However, it was clear that the Sri Lankan authorities did not believe that all or even most of the passengers aboard the ship were connected with the LTTE.

[20] The RPD also considered the updated US Department of State Country Reports on Human Rights Practices for 2013 [US DOS], which provides details on the recent activities of the Eelam People's Democratic Party [EPDP] and their violent tactics. The RPD considered the information referenced and found that the number of disappearances had decreased from previous years. It appeared that there was a focus on specific individuals such as businessman and political activists. The document also indicates that the authorities continued to release rehabilitated LTTE combatants from detention and that only "hardcore" combatants remained in detention.

[21] The RPD accordingly found, on the balance of probabilities, that the Applicant was not a person perceived to have links to the LTTE by Sri Lankan authorities and that he did not have good grounds to fear persecution as a failed asylum seeker were he to return to Sri Lanka.

*D. Sur Place Claim*

[22] The RPD found that no credible evidence was adduced that the Sri Lankan government suspected individuals as having links to the LTTE by virtue of having been smuggled to Canada aboard a ship owned and operated by the LTTE. It reviewed a series of Federal Court decisions that do not support the argument that, simply by virtue of travelling on the *MV Sun Sea* or *Ocean Lady*, an individual becomes a refugee *sur place*. Where the Court has found a valid claim, it is due to a combination of factors, only one of which is having been on one of these ships.

[23] Finally, the RPD cited case law and documents relevant to economic migrants being exploited by the LTTE, before concluding that the Sri Lankan government would not perceive the Applicant to be a member or supporter of the LTTE simply on the basis of his travel on the *MV Sun Sea*, given his alleged history in Sri Lanka before coming to Canada.

*E. Generalized Risk*

[24] The Applicant alleged before the RPD that he feared he will be at risk from paramilitary groups extorting money. He further stated that because he has injuries, they would accuse him of being with the LTTE. When asked why he specifically would be asked for money, the Applicant stated that he did not know. The RPD concluded that the Applicant did not present persuasive evidence that these groups would personally target him.

[25] Documentary evidence indicated that there is a common problem of extortion of wealthy people or those perceived to be wealthy, including returnees from Western countries, by rogue



elements of the government security forces and paramilitaries, particularly the EPDP, taking advantage of the post-civil war conditions, as each group attempts to consolidate its revenue sources. Citing applicable case law, the RPD noted that fear of being extorted by criminal elements did not provide the claimant with a link to one of the Convention grounds, as it is the same risk to which that the general public is subject. The RPD found that the Applicant would not face an extortion risk personally, but as a result of a generalized risk faced by members of his community.

### III. Issues

[26] The Applicant submits the following issues for the Court's consideration:

- A. Whether the RPD erred in finding that the Applicant's 2009 release from the Army camp translates into a lack of well-founded fear of persecution in returning to Sri Lanka at present;
- B. Whether the RPD erred in its assessment of the Applicant's profile;
- C. Whether the RPD erred in its assessment of the Applicant's *sur place* claim; and,
- D. Whether the RPD erred in assessing the Applicant's risk from the EPDP.

[27] Based on these arguments raised by the Applicant, I would characterize the issue for consideration in this application, based on the standard of review canvassed below, to be whether the RPD's decision is reasonable.

IV. Standard of Review

[28] Both parties take the position, and I concur, that the applicable standard of review is reasonableness.

[29] The RPD's finding with respect to the Applicant's *sur place* claim is reviewable on a standard of reasonableness (see *B198 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1106 at para 24; *Ganeshan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 841 at para 9).

[30] With respect to the RPD's finding of generalized risk, and its assessments under the other issues raised by the Applicant, being issues of mixed fact and law, the reasonableness standard is also applicable (see *Lozano Navarro v Canada (Minister of Citizenship & Immigration)*, 2011 FC 768).

V. Submissions of the Parties

A. *Applicant's Position*

[31] The Applicant is not contesting the RPD's credibility findings.

[32] The Applicant submits that the RPD remained tied to the Applicant's release from detention as being indicative of a lack of future persecution. The RPD was required to assess whether the Applicant could now be perceived to be associated with the LTTE according to the

UNHCR Guidelines. The Applicant's current profile is multifaceted and consists of former camp detainee, visibly disfigured as a result of shelling, passenger involvement on the ship and young male from the north. There is no evidence that those being reintegrated into society match the Applicant's profile.

[33] The Applicant argues that the RPD was required to consider whether, despite having been released from detention and having left Sri Lanka legally, his current profile creates a suspicion of LTTE association such that the Applicant might face persecution upon return to Sri Lanka.

His specific arguments include the following:

- A. There is no evidence that those people identified in the fact-finding mission match the Applicant's profile;
- B. There is no guarantee that the scars could not raise a new suspicion in light of the totality of the profile factors;
- C. The lack of respect for the rule of law in Sri Lanka is such that release from an Army camp six years ago could actually trigger authorities to renew their suspicion;
- D. His voyage on the *MV Sun Sea* might be enough to subject the Applicant to a high level of scrutiny;
- E. Relying on the conclusion made by the Canadian authorities ignores the difference in human right conditions between Canada and Sri Lanka; and,
- F. The factors related to his previous detention are different than the current factors, which include him being a passenger on the ship.

[34] In addition to these specific points, the Applicant submits that the decision is unreasonable because it fails to look at the cumulative effect of the various factors it assessed.

[35] With respect to the *sur place* claim, the Applicant submits as follows that the RPD's decision is unreasonable:

- A. The Applicant notes that there are media reports that suggest connections between the *MV Sun Sea* passengers and the LTTE;
- B. The RPD's reasoning that he could produce the RPD decision to protect himself, if he was ever questioned in Sri Lanka about LTTE connections, has been determined by the Federal Court to be unreasonable (see *Thanabalasingham v Canada (MCI)*, 2015 FC 397 at paras 18-19);
- C. There was evidence in the record that returned ship passengers were detained, notwithstanding that one of them had been cleared of LTTE activity prior to leaving Sri Lanka. This evidence was not analyzed by the RPD; and,
- D. The RPD failed to assess whether the process the Applicant could face upon return to Sri Lanka would represent persecution even though he could in the end be cleared of any LTTE suspicion. Given the human rights record of the Sri Lankan authorities generally, the evidence concerning ill-treatment of returnees and the Applicant's own experience of detention, physical abuse and interrogation, failure by the RPD to assess the process is unreasonable.

[36] The Applicant relies on Federal Court decisions on other refugee claimants from the *MV Sun Sea* and *Ocean Lady*, arguing that they support his position that the RPD erred in assessing

how the Sri Lankan authorities could perceive him upon return. The Applicant refers to *YS v Canada (MCI)*, 2014 FC 324 [YS] and other cases that followed that decision. In *YS*, Justice Russell concluded that the RPD erred in equating a finding of being cleared of LTTE connections in the past with the lack of a *sur place* claim upon return to Sri Lanka.

[37] Finally, the Applicant argues that the risk of persecution by the paramilitary falls within both sections 96 and 97. The evidence establishes that the EPDP targets Tamils, and therefore there is an element of ethnicity to the targeting. Aside from the nexus of ethnicity, the UNHCR states that the EPDP operates with both a political and criminal focus, thereby also revealing a political basis for the nexus. The RPD ignored the mixed motive aspect of the section 96 claim and the relevance of the government affiliation and ethnic targeting to the section 97 element of the claim. The Applicant relies on *Gunaratnam v Canada (MCI)*, 2015 FC 358, in which Justice Russell found such errors in reviewing the RPD's consideration of a claim based on targeting by the EPDP.

#### *B. Respondent's Position*

[38] The Respondent submits that the RPD reasonably assessed the objective basis for the Applicant's subjective fear. It examined the totality of the evidence and judiciously determined that, since the cessation of hostilities in Sri Lanka, the Applicant lacked a profile that put him at risk. The supporting evidence revealed:

- A. The Applicant was released from camp and the Sri Lankan government had little continuing interest in him;

- B. The Applicant denied association with the LTTE and the Canadian government found the same;
- C. The Applicant did not fit the risk profile – he was not a senior LTTE affiliate or a LTTE combatant; and,
- D. The fact finding missions indicate that nationals, who left Sri Lanka legally with genuine documents, generally have little difficulty passing through the security checks.

[39] The Respondent also submits that the RPD reasonably assessed the evidence before it and found that there was insufficient evidence that returning *MV Sun Sea* passengers are at risk of persecution by the Sri Lankan government, whether or not they have visible scars. The RPD's determination was rationally based on supporting documentary evidence. In particular:

- A. The Respondent's Memorandum of Argument argues that RPD examined the treatment of returned *MV Sun Sea* passengers, including B005 and B016, and determined that rumours of their mistreatment were false. Rather, the Sri Lankan government had appropriately processed returning criminals;
- B. The RPD examined relevant case law and determined that the jurisprudence did not support the argument that a passenger becomes a refugee *sur place* simply by virtue of travelling on the *MV Sun Ship* or *Ocean Lady*;
- C. The RPD examined the evidence and found that the Applicant would not be viewed as a LTTE member or associate. During his interviews with the CBSA, he consistently stated he had no association with the LTTE; and,

- D. The RPD examined relevant case law and determined that the Applicant had a generalized risk of crime in relation to extortion but not a personalized risk.

VI. Analysis

[40] The argument that resonates with the Court is the position of the Applicant that the RPD erred, in its analysis of the *sur place* claim, by failing to analyze the evidence in the record that returning passengers from the *MV Sun Sea* were detained and in one case tortured by Sri Lankan authorities.

[41] Counsel for both parties devoted substantial time in oral argument to this issue. It is not in dispute that the record before the RPD included approximately 100 pages of documentary evidence related to the alleged mistreatment of two *Sun Sea* passengers, identified as B005 and B016. This evidence was provided by the Respondent by way of post-hearing disclosure and includes both evidence supportive of a conclusion of such mistreatment having occurred and evidence supportive of a conclusion that such claims were false. I agree with the Applicant's position that it is not the Court's role to consider argument on the reliability of this evidence, but rather to address whether the RPD was obliged to give this evidence such consideration.

[42] The Applicant refers to the decision of Justice Harrington in *B135 et al v Canada (MCI)*, 2013 FC 871 [B135], in which the Court allowed an application for judicial review on the basis that the Minister of Citizenship and Immigration had failed to disclose certain information related to the experiences of B005 and B016 upon their return to Sri Lanka. As held by Justice Harrington at paragraph 19:

[19] It seems to me that the best predictor of the fate of those passengers of the Sun Sea, whose refugee claims are pending, is the fate of those who were actually returned.

[43] In her recent decision in *NR v Canada (MCI)*, 2015 FC 425 [NR], Justice Mactavish considered *B135* and efforts by the applicant in that case to file with the RPD post-hearing evidence surrounding the treatment of B005 and B016, described as follows at paragraphs 11-12:

[11] Counsel for N.R. also referred to Justice Harrington's discussion of B005's experience in the *B135* decision, observing that although B005 had been accused of LTTE-related criminality in Sri Lanka, the Chief Magistrate's Court in Sri Lanka had subsequently cleared him of all charges. Counsel noted Justice Harrington's observation that "if anyone would not be considered by the Sri Lankan authorities as being associated with the LTTE, it was B005", yet he was still detained on his arrival in Sri Lanka: at para. 22.

[12] With her reply submissions, counsel for N.R. also sought leave to file post-hearing evidence in the form of two news reports. The first report described the torture and other forms of mistreatment that B016 had endured at the hands of Sri Lankan authorities during the year that he was in detention. This article also suggested that B016's death may not have been accidental. The second article discussed the *B135* decision and the fact that even though the Sri Lankan courts had cleared B005 of all allegations of LTTE-related criminality, the Sri Lankan authorities had nevertheless detained him on his return to Sri Lanka, and neither his family nor his lawyer had any information regarding his whereabouts.

[44] After concluding that it was not possible to discern from its reasons whether the RPD had considered the applicant's request to admit the post-hearing evidence, Justice Mactavish held as follows at paragraphs 20-24:

[20] If the Board did in fact admit the post-hearing evidence, it committed a further error in assessing N.R.'s *sur place* claim.



[21] As noted earlier, Justice Harrington observed in B135 that the experiences of similarly-situated individuals are “the best predictor” of what might happen to a claimant returning to his country of origin. He thus found it important to have as much information as possible about the experience of the *MV Sun Sea* passengers who have returned to Sri Lanka.

[22] N.R. sought to adduce relevant post-hearing evidence that the Sri Lankan authorities had detained the two *MV Sun Sea* passengers who had returned to Sri Lanka, and had tortured at least one of them. However, the Board never mentions the experiences of either B005 or B016 in its reasons.

[23] The respondent seeks to distinguish N.R.’s profile from that of B005 and B016, arguing that he is not in fact similarly-situated to these individuals and is thus not at risk in Sri Lanka. With respect, it is not this Court’s role to make a factual determination of this sort when sitting in review of a Board decision – that the Board’s job.

[24] On its face, the post-hearing evidence adduced by N.R. was probative evidence that ran directly contrary to the Board’s central finding regarding his *sur place* claim. While it was open to the Board to distinguish the profile of N.R. from that of B005 and B016, it was not open to the Board to ignore the evidence indicating that at least some returning Sun Sea passengers are at risk in Sri Lanka: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, at paras. 14-17, [1998] F.C.J. No. 1425 (F.C.T.D.).

[Court’s emphasis]

[45] My conclusion is that the same analysis must apply in the case at hand. The Applicant makes the point that significant components of the RPD’s analysis of the risk faced by the Applicant turn on the Army’s past determination that he was not associated with the LTTE. As such, the evidence of the detention of B005, even though the Sri Lankan courts had cleared him of all allegations of LTTE-related criminality, would appear probative of the risk faced by the Applicant. However, there is no indication in the RPD Decision that the evidence surrounding B005 or B016 was given any consideration by the RPD.

[46] As noted above, the Respondent's Memorandum of Argument submits that the RPD examined the treatment of returned *MV Sun Sea* passengers, including B005 and B016, and determined that rumours of their mistreatment were false and that the Sri Lankan government had simply processed returning criminals. However, in oral argument, the Respondent acknowledged that the RPD Decision does not contain such an analysis. Instead, the Respondent's position on this issue is that the evidence in the record before the RPD surrounding B005 and B016 supports such an analysis and that the RPD was not asked by the Applicant to comment on this evidence. In advancing this argument, the Respondent relies on the RPD's reference in the Decision to the post-hearing disclosure made by the Minister and the fact that counsel for the Applicant was provided an opportunity to respond and declined.

[47] It would have been within the RPD's mandate to treat this evidence as the Respondent originally argued it had done, concluding that the rumours of mistreatment of B005 and/or B016 were false. However, it is not possible to conclude from the Decision that it engaged in such an analysis. Rather, it appears to have ignored this evidence which, as explained in NR, it was not entitled to do. As in NR, this was probative evidence that ran directly contrary to the RPD's findings regarding the Applicant's *sur place* claim. Especially given that it based its analysis of the *sur place* risk faced by the Applicant in significant measure upon the Army's past determination that he was not associated with the LTTE. I do not regard the fact that the Applicant did not make post-hearing submissions on this evidence to alter the RPD's obligation to consider it.

[48] While the Applicant acknowledges that the RPD is not required to refer in its reasons to all potentially relevant evidence, I agree with the Applicant's position that it is also well-accepted that the more important the evidence that is not specifically mentioned and analyzed in a decision-maker's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR. 35, at paras. 14-17, [1998] FCJ No 1425 (FCTD)). However, such an inference is hardly required in the case at hand given that the RPD made express statements that there has been no evidence or report of persons from the *MV Sun Sea* or *Ocean Lady* returned to Sri Lanka having been subject to persecution as a result of having been smuggled by the LTTE on board those vessels. This makes it clear that the evidence surrounding the B005 and B016 must not have been considered.

[49] On this basis, I find that the Decision is unreasonable and outside the range of acceptable outcomes and that this application for judicial review must be allowed. It is therefore unnecessary to consider the other arguments raised by the Applicant.

[50] The parties were consulted and neither proposed a question for certification for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review of the Decision of the RPD is allowed and this matter is referred back for redetermination by a different member of the RPD. No question is certified for appeal.

"Richard F. Southcott"

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Judge

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

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