

**Date: 20060817**

**Docket: IMM-4111-05**

**Citation: 2006 FC 988**

**OTTAWA, Ontario, August 17, 2006**

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

**BETWEEN:**

**SASIKUMAR RATHINASINGAM**

**a.k.a. RASALINGAM VELAUTHAM**

**a.k.a. SASIKUMAR RATNASIGAM**

**a.k.a. DEL FUTCH SILVYN**

**a.k.a. VELAUTHAM RASALINGAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Sasikumar Rathinasigam, a.k.a. Rasalingam Velautham, a.k.a. Sasikumar Ratnasigam, a.k.a. Del Futch Sil Vyn, a.k.a. Velautham Rasalignham (the “Applicant”) is a Hindu Tamil citizen of Sri Lanka. He arrived in Canada on July 30, 2003 and made a claim for refugee protection on that same day pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (“IRPA”).

[2] The Immigration and Refugee Protection Division of the Immigration and Refugee Board (“RPD”) determined in a decision dated June 16, 2005 (the “RPD

Decision”) that the Applicant is excluded from the definition of Convention refugee and from the status of a person in need of protection pursuant to Articles IE and/or IF(a) and 1F(c) of the United Nations Convention Relating to the Status of Refugees (the “Convention”). The RPD also held that if it erred in its finding on exclusion, the Applicant’s refugee claim was rejected because of a lack of credibility.

[3] The Applicant presently applies for judicial review of the RPD Decision.

## II. Background

[4] The Applicant provided contradictory evidence in support of his refugee claim. He submitted two Personal Information Forms (“PIFs”), the second filed just two days before his refugee hearing. The Applicant’s narrative is initially the same in both PIFs. He stated that in 1993 and 1994, the Liberation Tigers of Tamil Eelam (“LTTE”) held meetings at the Applicant’s school, and he and other students were encouraged to join them. The Applicant claims that while he was in school he was forced to dig bunkers for the LTTE on several occasions. The Applicant stopped attending school in December 1994, and started working as a farmer. The LTTE allegedly took vegetables from him on several occasions without paying. In November 1999, the LTTE asked the Applicant to work for the Hero’s Day, and out of fear he agreed to work for the week. According to the PIF narratives, the LTTE asked the Applicant to join them on the last day of his work. When he refused, the LTTE allegedly detained him in an underground camp until his mother secured his release the following day by giving them jewellery.

[5] The Applicant stated that he moved to Vavuniya after the November 1999 incident, but was arrested by Sri Lankan authorities for having moved from an area controlled by the LTTE. He claims to have been detained nearly two months, during which time he was beaten, had his head immersed in water, and had his hands tied behind his back. He was released only after a relative of his who had a store in Vavuniya paid a bribe for his release.

[6] In 2000, the LTTE allegedly came to the Applicant’s relative’s store and demanded money. As the Applicant’s relative was not in the store at the time, it fell on the Applicant to refuse to give them any money. The LTTE made threats and took goods without paying.

[7] In June 2001, two members of the LTTE allegedly demanded that the Applicant join them, and upon his refusal, demanded Rs. 100,000 to be paid within one week. The LTTE returned to collect the sum the next week, and allegedly threatened the Applicant with a pistol. The Applicant claims that at this point he decided to leave Sri Lanka. His relative assisted him in obtaining a passport in July 2001, but the Applicant stated that he lacked the sufficient funds to leave.

[8] At this point, the Applicant’s two PIF narratives diverge. In his first PIF narrative, which the RPD includes in its overview of the Applicant’s allegations, the Applicant claims that in November 2002, the LTTE demanded that the Applicant and his friend Theepan join them. Upon hearing their refusal, the LTTE insisted they would return. In January 2003, members of the People’s Liberation Organisation of Tamil Eelam (“PLOTE”) allegedly accused the Applicant of being a member of the

LTTE, demanded he pay them Rs. 10,000, and received this amount from him. Theepan allegedly disappeared in May 2003, and the Applicant fled to Columbo later that month. The Applicant admits to giving a false name and date of birth upon entering Canada on July 30, 2003.

[9] In contrast, in his second PIF, the Applicant claims that in October 2001 he left Vavuniya to go to Colombo, and then left Sri Lanka on November 26, 2001 for Switzerland. The Applicant claims that he could not make a refugee claim in Switzerland because he had arrived on a tourist visa, so he travelled to Holland in March 2002, and made a refugee claim there under his real name. He claims that in his application he stated that he was a member of the LTTE because it was known in the Tamil community that the Dutch authorities would grant refugee status on this basis. The Applicant alleges that his claim was rejected, not because he was a member of the LTTE, but because he could not prove that he was a member of the LTTE.

[10] The Applicant then allegedly left Holland in December 2002, and once back in Switzerland made a refugee claim under a false name. The Applicant testified that he again claimed to be a member of the LTTE, and the claim was refused for lack of evidence to support his claim. The Applicant then left Switzerland in June 2003. The Applicant testified that he passed through France before arriving in Canada.

[11] The Applicant's second PIF is signed May 5, 2004, just two days before his refugee hearing took place. In it, he apologizes to the Government of Canada for his previous actions. In this second PIF he claims that he used a false story in both Holland and Switzerland and that he is not and never has been a member of the LTTE.

[12] As will be shown below, a further difficulty with respect to the consistency of the Applicant's claim is that the Applicant's counsel conceded before the RPD that the Applicant told an Immigration Officer at the Port of Entry that he was a member of the LTTE. The Port of Entry notes indicate that the Applicant was a soldier who had guarded a village: RPD Record, at 79.

### III. Relevant Provisions

[13] The relevant provisions of the *IRPA* are as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la

that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless

nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes —

imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

**98.** A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

#### *SCHEDULE*

*(Subsection 2(1))*

#### *SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES*

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to

sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

#### *ANNEXE*

*(paragraphe 2(1))*

#### *SECTIONS E ET F DE L'ARTICLE PREMIER DE LA CONVENTION DES NATIONS UNIES RELATIVE AU STATUT DES RÉFUGIÉS*

E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont

any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

on aura des raisons sérieuses de penser :

a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

#### IV. The Decision Under Review

[14] The RPD found that the Applicant is excluded from the definition of Convention refugee, and in the alternative, held that if it erred in the finding on exclusion, the Applicant's claim is rejected because the Applicant lacks credibility, and was therefore unable establish that he is a Convention refugee.

##### A. *Credibility*

[15] The RPD Decision begins with an examination of the Applicant's credibility. The RPD held that the Applicant was not credible. It was not satisfied by the Applicant's explanations as to why he delayed until just two days before the hearing to tell the truth through a second PIF, and found that this contributed to negative credibility.

[16] The RPD noted several inconsistencies in the Applicant's claims. The Applicant testified that he had been taken by the LTTE in November 1999 to work for two days, and was locked up for a week. In contrast, both PIFs indicated that the Applicant worked for the LTTE for a week, but do not mention working two days and then being detained for a week. The RPD noted that the Applicant remained consistent in his testimony, but could not understand why the Applicant failed to at least modify his second PIF.

[17] The RPD also had difficulty with inconsistencies between the PIFs and the Applicant's testimony regarding when the LTTE asked the Applicant to join their

organisation. The RPD also disbelieved the Applicant's testimony with respect to the November 1999 incident because the Applicant admitted that the LTTE beat and shoot those who betray them, but was unable explain why he was treated differently when he refused to join them and was subsequently detained.

[18] The RPD took issue with inconsistencies between the Applicant's PIFs and testimony regarding the June 2001 incident. The Applicant testified that the LTTE pursued him three times, although the PIFs stated that the LTTE visited him just once in June 2001. When confronted by this inconsistency, the Applicant repeatedly adjusted his testimony, which the RPD found rendered him not credible.

[19] The RPD also found the Applicant lacked credibility due to discrepancies between his testimony as to his travels and his flight itinerary, and between his claim in his PIF and testimony that he feared the PLOTE and his failure to mention any difficulties with the PLOTE in his second PIF.

[20] The RPD found that the Applicant's failure to make a refugee claim in France undermined his claim to fear of persecution. It also held that the Applicant's failure to decide or make efforts to leave Sri Lanka before 2001 did not help his refugee claim, as the Applicant's alleged problems began as early as 1993. The RPD also noted that the Applicant stated that he had not received any news about himself since he left and consequently, the RPD did not believe that the LTTE had come looking for him. The RPD found that this made it difficult to believe the Applicant's earlier testimony that he would be arrested if he were to return to Sri Lanka.

### *B. Exclusion*

[21] According to the Applicant's own testimony, he made unsuccessful refugee claims in the Netherlands and Switzerland. In both of these countries he had claimed refugee status on the basis that he was a member of the LTTE. The Applicant's counsel conceded that upon entering Canada the Applicant told an Immigration Officer at the airport that he was a member of the LTTE. The RPD noted that the jurisprudence has held that a person's first story is usually the most genuine, and therefore the one to be believed. The RPD relied on *Jumriany v. Canada (M.C.I.)*, [1997] F.C.J. No. 683 (QL), *Mongu v. Canada (Solicitor General)*, [1994] F.C.J. No. 1526 (QL), and *Lee v. Canada (M.E.I.)*, (V87-6196X). In the present matter, the Applicant's first story is that he is a member of the LTTE. The RPD considered the Applicant's testimony as to his previous refugee claims, his statement to the Immigration Officer, and the above jurisprudence, and held that the Applicant was a member of the LTTE. It must be stressed, however, that the RPD found that the Applicant "did not play an important role" in the LTTE: RPD Decision, at 8.

[22] The RPD sought to determine whether the Applicant met the test for complicity. It referred to the Federal Court of Appeal decision in *Ramirez v. M.E.I.*, [1992] F.C.J. No. 109 (QL) ["*Ramirez*"], as setting out the test, and examined the issue of complicity as follows:

1. Recruitment methods – whether the claimant voluntarily joined the organisation (the claimant's declaration to the Immigration

- Officer that he was a member of the LTTE implies that his involvement was free and conscious);
2. How long the claimant was associated with the organisation (from at least August 1998);
  3. Nature of the organisation: goals and methods to achieve them (brutal terrorists);
  4. Role of the claimant within the organisation (minor: worked on the Hero's Day celebration, dug bunkers, and was a soldier working for LTTE from August 1998 to December 1999 – see Exhibit M-2 – not clear latter while member);
  5. Knowledge of acts/atrocities being committed by the organisation and its members (knowledge about its organisation and workings);
  6. Opportunity to dissociate from the organisation; attempts made to leave (none mentioned);
  7. Whether acting on orders of superiors – this only being a legitimate defence or excuse where the damage risked in case of refusal to comply to orders is equal to or outweighs the damage being inflicted on the victim (it was not raised; the burden of proof lies with the claimant).

[RPD Decision, at 9. Footnote removed].

[23] The RPD then referred to *Ramirez*, above, for the proposition that mere membership in a limited brutal purpose organisation may be sufficient to exclude a person from refugee status. The RPD did not conclude that the LTTE is such an organisation, but went on to find that the Applicant is excluded under Articles 1F(a) and (c) of the Convention.

#### V. Applicant's Submissions

[24] The Applicant submits that the RPD erred in law by failing to provide reasons for its conclusion that he was excluded under Article 1F(c), for having engaged in acts that are contrary to the purposes and principles of the United Nations. The Applicant notes that the finding of exclusion under Article 1F(c) is a particular finding requiring acts to have been committed, and consensus in international law that these acts were serious and sustained violations of fundamental human rights or are explicitly recognized as contrary to the UN purposes and principles: *Pushpanathan v. M.C.I.*, [1998] 1 S.C.R. 982 [*"Pushpanathan"*].

[25] The Applicant also claims that the RPD erred by finding that by virtue of being a member of the LTTE, the Applicant is excluded under Article 1F(a). The Applicant submits that the RPD erred in finding that he was a member of the LTTE by over-relying on the Applicant's statements made at the Port of Entry.

[26] Even if it were assumed that the Applicant was a member of the LTTE, the Applicant submits that this factor alone could not have led to a finding of complicity. *Ramirez*, above, held that membership in an organisation is not usually in and of itself sufficient grounds to exclude an applicant. The exception is when the membership is in a limited brutal purpose organisation. However, the Applicant notes that the RPD



did not conclude that the LTTE was a limited brutal purpose organisation, and it follows that the Applicant could not have been excluded on the basis of membership alone.

[27] The Applicant claims that the relevant factors to be considered to reach a finding of complicity do not support the RPD's conclusion. The Applicant argues that it was not shown that he had sufficient knowledge of the LTTE's activities, or that he shared the organisation's purpose in committing atrocities. The Applicant highlights the RPD's finding that the Applicant played a "minor" role in the LTTE. There was no evidence that the Applicant had personal involvement in violence. It is argued that he engaged in little more than the digging of bunkers, planting of poles, and decorating of roads. Although the Applicant stated at the Port of Entry that he had been a soldier, he testified that this was untrue, and there was no evidence suggesting that he was a fighter.

[28] The Applicant also maintains that there was no evidence that he had any knowledge of any particular atrocities. It is argued that the Applicant's testimony about the LTTE offered no details beyond those known by the general Sri Lankan public. According to the Applicant, the evidence simply cannot support the conclusion that he had active and knowing participation in specific crimes against humanity.

[29] Moreover, the Applicant claims that the RPD erred by failing to link the finding of complicity to a specific crime which, it is argued, the case of *Barqri v. Canada (M.C.I.)*, 2002 2 FC 85 established as a prerequisite for a finding of complicity. It is also argued that the RPD erred in its failure to find that he had the requisite *mens rea*, which the jurisprudence holds is an essential element for culpability for crimes against humanity: *Ramirez*, above; *Sivakumar v. Canada (M.C.I.)*, [1994] 1 FC 433 ["*Sivakumar*"]. In this case, it is argued that the RPD did not even recognize the need to have *mens rea* at all.

[30] The Applicant submits that the RPD erred in its credibility findings. As noted above, the Applicant claims that the RPD erred by finding that he was a member of the LTTE. The Applicant argues that the only evidence as to his membership in the LTTE were the statement made to the Immigration Officer at the Port of Entry, and his statements that he claimed to be a member of the LTTE in two prior separate refugee claims. But the Applicant explained that he felt intimidated at the Port of Entry and continued to make the statements he had always made. The Applicant highlights that he did not state in his first PIF that he was a member of the LTTE. His testimony supported a finding that he was not a member of the LTTE. The Applicant submits that the over-reliance on the statement made at the Port of Entry without any corroboration is patently unreasonable.

[31] It is also argued that the RPD relied selectively on the Applicant's statements after finding him to be not credible. The RPD stated it was "not prepared to consider anything except the admissions against interest as being believable". It is argued that this is a selective and punitive approach. The Applicant argues that the RPD cannot find him not credible, then rely on certain statements as true in order to exclude him, citing *Hilo v. Canada (M.E.I.)*, [1991] F.C.J. No. 228 (C.A.) (QL) ["*Hilo*"].

[32] The Applicant also claims that the RPD erred in law with respect to its credibility findings by conducting a microscopic examination of the evidence to find the Applicant not credible. The Applicant claims that the RPD erred by engaging in an overzealous approach: *Attakora v. Canada (M.E.I.)* (1989), 99 N.R. 168; *Owusu-Ansah v. Canada (M.E.I.)* (1989), 8 Imm. L.R. (2d) 106. The RPD allegedly focused on minor discrepancies with respect to the 1999 incident, and was overzealous in its focusing on the number of times that the LTTE came to demand that the Applicant join or pay them in 2001.

[33] The Applicant argues that the RPD's difficulty in believing him with respect to his comments as to whether the LTTE and Army officials had come to look for him was a matter regarding country conditions, and should not have been used to impugn his credibility. It is also argued that the Applicant should not have been required to explain why his persecutors did not torture him.

[34] The Applicant also submits that the RPD erred by failing to assess his risk as a young Tamil from the North. The Applicant claims that there was documentary evidence before the RPD of the risks facing those who fit this profile. The argument is that when the Applicant's identity was accepted, the RPD had an obligation to assess the risk to the Applicant pursuant to section 97 of *IRPA* even when his claim was found to be not credible: *Balasubramaniam v. Canada (M.C.I.)*, [2003] F.C.J. No. 1438.

## VI. Respondent's Submissions

[35] The Respondent submits that it was reasonably open to the RPD to find that the Applicant was a member of the LTTE. Applicant's counsel conceded that the Applicant told the Immigration Officer that he was a member of the LTTE. At the hearing the Applicant testified that he did not tell the Immigration Officer that he was a member of the LTTE, but when reminded that his counsel had conceded the matter, agreed with that concession. The RPD referred to the jurisprudence that states that an Applicant's first story is usually the most genuine, and the Respondent submits that it was reasonable for the RPD to have found that the Applicant was a member of the LTTE.

[36] The Respondent argues that it was reasonable for the RPD to find that the Applicant was complicit in atrocities committed by the LTTE. He asserts that the RPD correctly applied the test for determining complicity when it found the Applicant was complicit in crimes against humanity committed by the LTTE due to his voluntary association with them, his knowledge of their activities, his role with the organisation, and his failure to leave them.

[37] The Respondent submits that the RPD did not err in finding that the Applicant was excluded pursuant to Article 1F(c) of the Convention. He claims that the documentary evidence and the Applicant's admission that the LTTE was a terrorist organisation provided the RPD with ample evidence to reach the conclusion that the LTTE was a terrorist organisation. The Respondent submits that the Supreme Court has stated that acts of terrorism can be contrary to the purposes and principles of the United Nations in *Pushpanathan*, above, at para. 66. It follows that the RPD

acted reasonably in finding that the Applicant was excluded pursuant to Article 1F(c) of the Convention.

[38] The Respondent maintains that the RPD reasonably found that the Applicant was not credible on the basis of significant inconsistencies, omissions, and implausibilities. He also claims that the RPD reasonably found that the Applicant was not credible when it discussed its exclusion finding and the Applicant's evidence as to whether he was a member of the LTTE. The Respondent argues that the RPD's credibility findings withstand scrutiny since the Applicant has failed to demonstrate that the RPD made any patently unreasonable findings.

[39] In this case, the RPD did not believe that the Applicant was persecuted, but did believe that he was a member of a terrorist organisation. The Respondent argues that it was reasonable for the RPD to find the Applicant not credible yet rely on certain statements as true, and that this logic, does not run counter to the principles in *Hilo*, above.

[40] The Respondent submits that it was reasonably open to the RPD to find that the Applicant had not presented credible evidence to show that he had a reasonable chance of being persecuted if returned to Sri Lanka. The Respondent claims that the RPD accepted that the Applicant was a Tamil male, but never accepted that he was from the North. The Respondent notes that the Applicant claims to have last resided in Vavuniya and Colombo, which are both areas controlled by the Sri Lankan government.

## VII. Analysis

### A. *Standard of Review*

[41] The RPD's credibility findings are reviewed against the standard of patent unreasonableness, and its findings as to exclusion are a question of mixed fact and law, and therefore are reviewed against the reasonableness *simpliciter* standard: *Chowdhury v. Canada (M.C.I.)*, [2006] F.C.J. No. 187 (QL), 2006 FC 139 at paras. 12-13.

### B. *Exclusion*

[42] This Court has recognized that exclusion findings are extremely significant to an applicant, and that "Caution must be exercised to ensure such findings are properly made": *Alemu v. Canada (M.C.I.)*, [2004] F.C.J. No. 1210 (QL), 2004 FC 997 at para. 41. It is trite law that a finding of complicity requires the existence of a shared common objective and knowledge of this objective on the part of all interested persons, and that both determinations are findings of fact: *Ramirez*, above; *Moreno and Sanchez v. Canada (M.E.I)* (1993), 159 N.R. 210, *Sivakumar*, above; *Penate v. Canada (M.E.I.)*, [1994] 2 F.C. 79 (T.D.); *Musansi v. Canada (M.C.I.)*, [2001] F.C.J. No. 65 (QL); *Valère v. Canada (M.C.I.)*, 2005 FC 524 ["*Valère*"]. The onus is on the Minister of Public Safety and Emergency Preparedness to establish that the Applicant has been complicit in crimes against humanity: *Valère*, above, at para. 16; *Ramirez*, above, at para. 10. The jurisprudence has provided guidance as to the level of participation required to establish complicity. When dealing with an organisation that

has not been deemed a limited brutal purpose organisation, membership alone is generally insufficient to find complicity: *Ramirez*, above.

[43] In my view, in this case the RPD erred in the manner whereby it excluded the Applicant from refugee protection. The RPD did not find that the LTTE is a limited brutal purpose organisation. Had the RPD made this finding, then it may have been able to exclude the Applicant for being a member in a limited brutal purpose organisation. However, the RPD's reasons do not adequately support its decision to exclude the applicant for complicity in crimes against humanity.

[44] As will be shown below, it was entirely open to the RPD to determine that the Applicant was a member of the LTTE. However, in my view, the RPD misapplied the remaining facts to exclude the Applicant for having been complicit in crimes against humanity. Even if the RPD's findings are accepted that the Applicant had worked for the LTTE on a Hero's Day celebration, dug bunkers for them, and was a soldier working for the LTTE from August 1998 to December 1999, these comparatively minor roles, in and of themselves, provide insufficient evidence that the Applicant shared common objectives and had knowledge of the LTTE's objectives as required for a finding of complicity. The RPD found that the Applicant served as a soldier, but his role as a soldier was not the focus of detailed inquiry, and there is nothing in the evidence suggesting that he participated in combat, or was involved in acts of violence or persecution committed by the LTTE. The RPD held that the Applicant was "a full member of the LTTE in his country and did not play an important role in it": RPD Decision, at 8 [emphasis added]. It called the Applicant's role in the LTTE "minor": RPD Decision, at 9. Although the Applicant was a member of the LTTE, the RPD's finding as to his role in the organisation does not support a finding that he could be found complicit in crimes against humanity. Having not found that the LTTE a limited, brutal purpose organisation, the RPD could not find the Applicant complicit in crimes against humanity on the basis of mere membership.

[45] I agree with the Applicant that the RPD engaged in a mechanical reasoning to determine that the Applicant was complicit in atrocities committed by the LTTE. In engaging in a cursory examination, the RPD improperly equated membership in the LTTE with complicity in crimes against humanity. In sum, the RPD erred in the manner whereby it excluded the Applicant from protection as a refugee due to his complicity in crimes against humanity committed by the LTTE.

[46] Since the exclusion finding based on 1F(c) of the Convention was also based on complicity, and the RPD failed to show that the Applicant was complicit in acts that are contrary to the purposes and principles of the United Nations, this finding was similarly made in error. The exclusion finding based on 1F(c) was also in error as the RPD's finding on this point was not made in a sufficiently explicit manner: *Chowdhury*, above, at paras. 17-18.

### *C. Inclusion*

[47] At the hearing of June 20, 2006, Applicant's counsel stated that he was relatively certain that jurisprudence from the Federal Court of Appeal stating that if the RPD has dealt with exclusion pursuant to Article 1F of the Convention, then it should not deal with inclusion. That is, the Applicant's counsel claimed that inclusion

cannot be an alternative finding in such cases. The hearing was adjourned to allow the parties to find and exchange jurisprudence on this point.

[48] The Applicant has provided case law to support his argument. He relies principally on *Gonzalez v. Canada (M.C.I.)*, [1994] 3 F.C. 646, [1994] F.C.J. No. 765 (QL) [*“Gonzalez”*], as well as on *Alemu*, above, *Saftarov v. Canada (M.C.I.)*, [2004] F.C.J. No. 1246, and *Lai v. Canada (M.C.I.)*, [2005] F.C.J. No. 584. Contrary to the submissions from Applicant’s counsel, the Federal Court of Appeal did not state that a RPD is prohibited from addressing inclusion if it has dealt with exclusion. Rather, in *Gonzalez*, above, it stated that while it is open to the RPD to make no finding as to the merit of a claim once it has excluded an applicant, there is “a practical reason for the Refugee Division to deal with all elements of a claim in its decision”: *Gonzalez*, above, at para. 13. The Federal Court has since examined a RPD’s inclusion determination after finding reviewable error in the RPD’s exclusion finding: *Alemu*, above. The jurisprudence makes it clear that it is open to the RPD to find an applicant excluded from refugee protection and also make an alternative finding in respect of whether the applicant establishes that he or she is a Convention refugee or a person in need of protection.

[49] It follows, in this case, that although the RPD’s exclusion findings do not withstand judicial scrutiny, its inclusion findings should be reviewed by the Court to determine whether the Applicant’s refugee claim ought to be sent back to the RPD for re-hearing on that matter.

[50] The Applicant claims that if the RPD was entitled to make findings with respect to inclusion, then these findings cannot stand since they are based on erroneous credibility findings. The Applicant took issue with the RPD’s conclusion that it was “not prepared to consider anything except the admissions against interest as being believable”. The Applicant claims this was a punitive approach. I am satisfied that this is simply a clear explanation by the RPD that the only parts of the Applicant’s claim that could be found credible were those that went against his refugee claim, as most of what the Applicant had to say could not be believed. The RPD’s conclusion reproduced above does not tarnish its decision regarding the Applicant’s credibility as the conclusion reflects a decision that was both reasonably open to the RPD and perfectly acceptable for it to have made.

[51] In my view, it was more than reasonable for the RPD to conclude that the Applicant was a member of the LTTE. The decision of *Puvanenthiram v. Canada (M.C.I.)*, 2005 FC 1268 is directly on point, and affirms the principle that Courts ought to be deferential towards credibility and factual determinations made by the RPD. In that case, the applicant claimed that she had voluntarily become a member of the LTTE and had received training in self-defence and weaponry. She later claimed that she had fabricated this claim, and that even if her evidence was true, since there was no corroborating evidence, the RPD could not have made a finding of exclusion. The Court held that the RPD had clearly explained why it preferred the applicant’s first account, and refused to interfere with the RPD’s finding that it had reasonable grounds to believe, based on the applicant’s admission, that she was a member of the LTTE.

[52] The only difference between the above decision and the present matter is that the Applicant here never explicitly stated that he had voluntarily joined the LTTE. However, in my view, it is more than reasonable to infer the voluntariness based on the Applicant's statement to the Immigration Officer that he was a soldier for the LTTE. He did not state at the Port of Entry that he was forced into becoming a soldier, or that he was forced into labour by members of the LTTE. I find that *Puvanenthiram*, above, applies with equal force to the facts in the present matter, and the Court will not interfere with the RPD's finding that the Applicant was a member of the LTTE.

[53] Moreover, I find that the RPD reasonably impugned the Applicant's credibility as it did when it found it implausible that the Applicant would continue to use the same fabricated story, namely, that he was a member of the LTTE, in making his refugee claim in Canada, after that story had repeatedly failed to assist him in successfully obtaining refugee status in Europe. It was open to the RPD to doubt the veracity of the Applicant's new account given that it was not provided until just two days before the hearing. It was open to the RPD to find that the Applicant's explanation as to why he previously claimed to be a member of the LTTE was unacceptable, and to infer that his statements made to the Immigration Officer and officials in Europe as to his membership and work as a soldier for the LTTE were the truth.

[54] The RPD could also reasonably take issue with the Applicant's accounts of persecution. The RPD reasonably impugned the Applicant's credibility by reference to the Applicant's delay before fleeing Sri Lanka, and by contradictions between the Applicant's alleged travels and his flight plan. The RPD also found the Applicant less credible due to inconsistencies regarding whether the Applicant feared the PLOTE. Most importantly, the RPD also doubted the Applicant's credibility by referring to inconsistencies between the Applicant's testimony with respect to the November 1999 and June 2001 incidents and his PIF accounts of these events. In my view, all of these credibility findings were open to the RPD.

[55] However, I find that the RPD did act in a patently unreasonable manner by impugning the Applicant's credibility on the basis that he was unable to explain why he was not shot or beaten when detained by the LTTE. The Applicant explained that he heard that the LTTE beat or shot those who went against them. When asked why he wasn't beaten or shot, he claimed that although he chose not to join the LTTE, this was not tantamount to going against them: RPD Record at 797. In my view, the RPD should not have impugned the Applicant's credibility on the basis that the Applicant was not more brutally treated while in detention. The RPD's reasoning supposes that all people detained by the LTTE are beat or shot, although it provided no evidence supporting this assumption. As such, I find that the RPD erred by then impugning the Applicant's credibility on the basis that he could not explain why his treatment did not conform to the so-called norm.

[56] Although I find the RPD made this one error with respect to its credibility analysis, such an error does not warrant the intervention of the Court. The remaining grounds noted above for impugning the Applicant's credibility withstand scrutiny against a patent unreasonableness standard, or, in fact, against a reasonableness standard. In my view, it was entirely reasonable for the RPD to doubt the Applicant's

allegations of persecution, and also find that he was a member of the LTTE. The Court therefore will not interfere with the RPD's findings that the Applicant is a member of the LTTE, that he lacks credibility, and that the Applicant did not establish that he is a Convention refugee under s.96 of the *IRPA*.

[57] However, I find that the RPD erred in respect of the Applicant's claim pursuant to s.97 of the *IRPA*. The Applicant correctly submits that, regardless of its credibility findings, the RPD erred by failing to assess the Applicant's risk as a Tamil from the North. The Applicant submitted in his PIF that he was from Killinochchi, a Northern province of Sri Lanka. The case law supports the Applicant's position that even if the Applicant is not found credible, so long as his identity is accepted, that is, that he is a Tamil male from the North, then the RPD should have assessed his risk under section 97 of the *IRPA*: *Balasubramania v. Canada (M.C.I.)*, [2003] F.C.J. No. 1438 (QL), 2003 FC 1137; *Sivalingam v. Canada (M.C.I.)*, [2006] F.C.J. No. 965 (QL), 2006 FC 773.

[58] The Respondent claims that the present case is distinguishable since the RPD did not state that it found that the Applicant was a Tamil from the North. In my view, had the RPD doubted the Applicant's claim that he was from the North, it should have stated as much in unmistakable terms. While the Respondent highlights that the Applicant lived in areas that were controlled by the Sri Lankan government, the RPD did not explicitly mention this as a factor it considered in deciding not to conduct a risk assessment. The RPD failed to review the evidence, and failed to provide adequate reasons for its decision not to conduct an assessment of the Applicant's claim under section 97 of the *IRPA*. In my opinion this constitutes a reviewable error against even the most deferential standard of review.

### VIII. Conclusion

[59] In summary, I find that the RPD erred by improperly applying the test for finding complicity in crimes against humanity and by improperly applying the test for excluding an applicant for complicity in acts contrary to the purposes and principles of the United Nations. The RPD therefore erred in the manner whereby it excluded the Applicant from refugee protection by virtue of s.98 of *IRPA*. Moreover, I find that the RPD erred by not conducting an analysis of the Applicant's refugee claim under section 97 of the *IRPA*. However, I find that the RPD did not err in finding that the Applicant is a member of the LTTE, and in concluding that the Applicant had not established a well-founded fear of persecution pursuant to section 96 of the *IRPA* on the basis that the Applicant is not credible.

[60] As a result, I would allow this application for judicial review, and would remit the matter to the RPD for re-determination in accordance with these reasons. I wish to emphasize that the reason for returning this matter for rehearing is to ask the Board to conduct an analysis of the Applicant's refugee claim under section 97 of the *IRPA*.

[61] The Board's decision on the issue of credibility is correct. I am also satisfied that the Board's decision that the Applicant is a member of the LTTE is also correct.

## **JUDGMENT**

The application for judicial review is allowed and the matter is returned to a different panel for redetermination. No question was submitted for certification.

“Max M. Teitelbaum”

Judge