

Federal Court



Cour fédérale

Date: 20150330

Docket: IMM-1081-14

Citation: 2015 FC 397

Ottawa, Ontario, March 30, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THANABALASINGAM ET AL.

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Uthayapalan Thanabalasingam, Sivapalan Thanabalasingam and Tharmapalan Thanabalasingam (collectively the Applicants) have brought an application for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board or RPD) dated February 4, 2014. The Board concluded that the Applicants are neither Convention refugees nor persons in need of protection pursuant to ss 96 or 97(1) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 (the IRPA). The determinative issues were the Applicants' credibility and whether they had a well-founded *sur place* claim.

[2] For the reasons that follow, the application for judicial review is allowed and the matter is remitted to the Board for re-determination by a different member of the RPD.

II. Background

[3] The Applicants are Tamil brothers from the island of Pungudutivu in the Jaffna Province in northern Sri Lanka. They claim to fear persecution by Sri Lankan State security agents and paramilitary groups due to their perceived political affiliation with the Liberation Tigers of Tamil Ealam (LTTE or Tamil Tigers).

[4] Two of the Applicants, Sivapalan and Tharmapalan, arrived in Canada aboard the ship MV *Sun Sea* in August 2010. The MV *Sun Sea*, which carried approximately 494 Sri Lankan ethnic Tamils, was widely reported to be owned and operated by the Tamil Tigers, and its arrival in Canada received significant domestic and international media attention. Uthayapalan travelled to Canada in 2010 circuitously by land and by airplane via the United States and several South American countries. He sought asylum in the U.S. but left the country before any final determination of his claim was made. On July 25, 2010 he initiated a refugee claim in Canada. The Applicants were all placed in immigration detention in Fraser, British Columbia, pending an inquiry into their identities, motives for travelling to Canada, security checks and a broader investigation of the MV *Sun Sea*.

[5] The Applicants made a number of assertions before the Board with respect to their past persecution in Sri Lanka. The Board found these assertions not to be credible and this conclusion is not challenged by the Applicants in this proceeding.

III. The Board's Decision

[6] In addition to finding the Applicants not to be credible with respect to their allegations of past persecution in Sri Lanka (Decision at para 157), the Board also rejected their *sur place* claim. A *sur place* refugee is defined in the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (the UNHCR Handbook) as a person “who was not a refugee when he left his country, but who becomes a refugee at a later date.” The UNHCR Handbook describes two situations in which a *sur place* claim may arise: (1) a change in circumstances in the country of origin during the person's absence, or (2) as a result of a person's own actions such as associating with refugees already recognized or expressing political views in the new country of residence.

[7] In its *sur place* analysis (paras 180-190 of the Decision), the Board found that there was no credible, persuasive evidence that the Government of Sri Lanka suspects individuals of having links to the LTTE solely by virtue of their having been smuggled to Canada aboard the MV *Sun Sea*. The Board acknowledged that the arrival of the MV *Sun Sea* in Canada attracted significant publicity, and that the Sri Lankan authorities may learn that two of the Applicants travelled aboard it. The Board nevertheless concluded that the three Applicants have little or no profile with the Sri Lankan authorities, and they would not now be of interest to the authorities simply because of their connection to the MV *Sun Sea*.

IV. Issue

[8] The central issue in this application for judicial review is whether the Board's assessment of the Applicants' *sur place* claim was reasonable.

V. Analysis

[9] The Board's assessment of a *sur place* claim is reviewable against a standard of reasonableness: *B381 v Canada (Minister of Citizenship and Immigration)*, 2014 FC 608 at para 27; *(M (P) v Canada (Minister of Citizenship and Immigration))*, 2013 FC 77 at para 5; *Ganeshan v Canada (Citizenship and Immigration)*, 2013 FC 841 at para 9.

[10] Since early 2010, this Court has considered a large number of applications for judicial review brought by persons arriving in Canada aboard the MV *Sun Sea* and its sister ship the MV *Ocean Lady*. These claims have generally required a *sur place* analysis. Claimants allege that, regardless of their actual affiliation with the LTTE, their profile changed once they boarded the MV *Sun Sea* or MV *Ocean Lady*.

[11] There has been considerable variation in the determination of these *sur place* claims by both the Board and this Court. Presumably this is because each decision is based on (sometimes subtly) different facts and evolving reports of country conditions in Sri Lanka. As Justice Locke noted in *Canada (MCI) v A037*, 2014 FC 754 at para 5, "there are many decisions on both sides of this issue, and it is generally recognized that such decisions turn on the evidence that has been placed before the Court and the findings of the RPD in each case."

[12] It is possible for the Board to either accept or reject a *sur place* claim by a passenger aboard the MV *Sun Sea* or MV *Ocean Lady*, and for the Board's decision to be upheld by this Court as reasonable. However, it is an error for the Board to engage in a selective analysis of the documentary evidence and to ignore contradictory evidence without providing a reasonable explanation: *Manoharan v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 356 (TD) at para 6). The error is compounded where the evidence is especially relevant: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (CA) at paras 14-17.

[13] In this case, the Board acknowledged that the Sri Lankan authorities would likely discover that two of the Applicants had travelled aboard the MV *Sun Sea*. There was evidence before the Board that failed asylum-seekers undergo several hours of questioning and security interviews by the State Intelligence Service upon their return (for example, National Documentation Package document #1.13, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", December 21, 2012 (the Guidelines)). The Board referred to the Guidelines, but neglected to mention references therein to reports that failed asylum-seekers, particularly those who are Tamil, have been detained, ill-treated or tortured after being forcibly returned to Sri Lanka (the Guidelines at page 8; Certified Tribunal Record at page 267).

[14] The Board was also provided with a report titled "Amnesty International Concerns with respect to forced returns to Sri Lanka for passengers of the Ocean Lady and MV Sun Sea" (Certified Tribunal Record at page 635) (the AI Report). The AI Report concluded that failed

asylum claimants face a serious risk of detention, torture and mistreatment if the Sri Lankan government suspects that they travelled on the MV *Sun Sea*.

[15] Nevertheless, the Board stated the following:

[182] I find, however, that no credible, persuasive evidence has been proffered that the Government of Sri Lanka suspects individuals as having links to the LTTE by virtue of having been smuggled to Canada aboard a ship allegedly owned and operated by the LTTE. Although Sri Lankan authorities may come to know how the claimants, Sivapalan and Tharmapalan, came to Canada, the panel has considered if, in fact, those two claimants face an increased risk of persecution by having travelled aboard the M.V. *Sun Sea*, or if their brother, Uthayapalan, faces an increased risk because they did so.

[16] In *Y.S. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 324 [Y.S.], a case that bears a marked resemblance to this one, Justice Russell wrote:

[68] The RPD – with other claimants – has found that those returning with connections to the MV *Sun Sea* or the MV *Ocean Lady* are at a risk of torture for perceived LTTE connections, even when no prior connection has existed, and this Court has endorsed such decisions. See, for example, Justice Blanchard's analysis in *Canada (Minister of Citizenship and Immigration) v. A032*, 2013 FC 322 at para 17 and *Canada (Minister of Citizenship and Immigration) v. B377*, 2013 FC 320.

[69] There was significant evidence in this case that Sri Lankan authorities are fully cognizant of the connections between the MV *Sun Sea* and LTTE membership. This doesn't mean they believe all MV *Sun Sea* passengers have LTTE links, but all returnees are suspects and are questioned on arrival and failed refugee claimants are questioned more closely. It is inevitable that the authorities will ask the Applicant how he got to Canada, and this will immediately identify his association with the MV *Sun Sea*. This means that he

will be detained for some amount of time to ascertain whether, for instance:

- a. he is an LTTE member;
- b. he has organized for the LTTE abroad; and
- c. he possesses LTTE intelligence.

Hence, upon his return, the Applicant will be detained and interrogated about possible LTTE connections. Amnesty International says that individuals in the position of the Applicant face a real risk of torture or other ill-treatment if returned to Sri Lanka. The RPD's finding that there is "insufficient evidence to show that the Sri Lankan authorities will have the knowledge that the claimant was a passenger on the Sun Sea" and that "there was insufficient evidence that the Sri Lankan government would treat the claimant any different than any other returnee to the country ..." in my view simply ignores the evidence and the reality of what the Applicant faces.

[70] Notwithstanding the credibility issue regarding the Applicant's problems with the authorities before he left Sri Lanka, and his own evidence that he has no past association with the LTTE, there is no doubt that he is a young Tamil male from the North (and not Colombo as the RPD finds) who arrived in Canada on the MV Sun Sea. The Applicant will be detained and interrogated upon his return because of his association with the MV Sun Sea. Although the RPD concludes that Tamils, as well as others, "may be victims of abuse of power from Sri Lankan police or CID," the RPD shies away from a consideration of what will happen to the Applicant when he is interrogated in the face of evidence that Sri Lankan authorities are very interested in links between the MV Sun Sea passengers and the LTTE, and evidence from Amnesty International that individuals who are "suspected of belonging to, or having links to the LTTE face a real risk of torture or other ill-treatment if forcibly returned to Sri Lanka." These risks exist not just for those who do have links, but for those suspected of having links. The RPD appears to assume that the Applicant might not even be identified as a passenger on the MV Sun Sea (which he will) and that, even if he is, he won't be treated "any different than any other returnee ... given his complete lack of past association with the LTTE." In my view, the evidence does not support these findings. The Decision is unreasonable on this ground alone and requires reconsideration.

[17] Both Justice Russell in *Y.S.* and Justice Strickland in *B381 v Canada (Minister of Citizenship and Immigration)*, 2014 FC 608 [B381] emphasized the AI Report in assessing the *sur place* claims of asylum-seekers who travelled on the MV *Sun Sea*. In *B381*, Justice Strickland found that the failure of the Board to explain why it discounted the AI Report rendered its decision unreasonable (at para 58). Similarly in this case, the Board's failure to explain why it discounted the AI Report and other contradictory evidence renders its decision unreasonable.

[18] Finally, I am unpersuaded by the Board's reassurance that:

... all three claimants could produce documentation, including the Immigration and Refugee Board's decisions in their joined claims, to indicate that each and every one of them has been found not to have any association with the LTTE. Thus, in my view, the fact that Sivapalan and Tharmapalan have been subjected to rigorous scrutiny by Canadian officials and been subsequently released, may very well place all three in a better light should any or all of them be returned to Sri Lanka.

[19] I agree with the Applicants that this is unwarranted speculation. As Justice de Montigny wrote in *Canada (Citizenship and Immigration) v. B272*, 2013 FC 870 (CanLII); [2013] FCJ No 957 (QL); 19 Imm LR (4th) 93 at para 70:

It goes without saying that the Sri Lankan authorities, concerned as they are with the potential resurgence of the LTTE, will want to reach their own conclusions as to who is and who is not an LTTE member or sympathizer. They would not necessarily rely on a foreign government's determination in that respect, if only because they would be applying different laws as well as different legal standards, rules of procedure and evidentiary norms.

VI. Conclusion

[20] For the foregoing reasons, the application for judicial review is allowed and the matter is remitted to the Board for re-determination by a different member of the RPD.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to the Board for re-determination by a different member of the Refugee Protection Division.

“Simon Fothergill”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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