Federal Court  Cour fédérale

Date: 20150408

Docket: IMM-494-14

Citation: 2015 FC 425

Toronto, Ontario, April 8, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

N.R.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a young Tamil male who came to Canada from Sri Lanka on board the *MV Sun Sea*. In accordance with a confidentiality order issued by Prothonotary Aalto, he is to be referred to as N.R.

[2] N.R. seeks judicial review of the Refugee Protection Division's decision denying him refugee protection. The Board did not believe N.R.'s claim of past persecution at the hands of Sri Lankan authorities who, he says, wrongly perceived him to have connections to the Liberation Tigers of Tamil Eelam (LTTE). The Board also rejected N.R.'s *sur place* claim, finding that the

Sri Lankan government would not now perceive N.R. to be a member or supporter of the LTTE, simply by virtue of his travel to Canada on the *MV Sun Sea*.

[3] The Board provided lengthy, detailed and careful reasons for disbelieving N.R.'s story of past persecution at the hands of the Sri Lankan authorities, and N.R. does not challenge the Board's negative credibility assessment. He argues, however, that he was denied procedural fairness in this matter because the Minister failed to disclose information regarding the fate of other *MV Sun Sea* passengers who had returned to Sri Lanka. He also says that the Board erred by failing to deal with his motion to adduce post-hearing evidence regarding the experiences of these individuals, and that the Board's assessment of his *sur place* claim was unreasonable.

[4] It is not necessary for me to deal with N.R.'s argument regarding the Minister's alleged failure to comply with his disclosure obligations. This is because I have concluded that the Board erred in its treatment of N.R.'s motion to adduce post-hearing evidence, and that this error undermined the reasonableness of the Board's *sur place* finding.

I. Chronology of Events

[5] N.R.'s refugee hearing commenced on June 13, 2013, although the hearing was not completed that day. The Minister participated fully in the hearing, opposing N.R.'s claim for refugee protection.

[6] The Minister produced some evidence regarding the fate of two *MV Sun Sea* passengers who had returned to Sri Lanka, individuals known as B005 and B016. This evidence consisted of two statutory declarations of a CBSA officer. According to these declarations, B005 and B016 were detained upon their return to Sri Lanka because of their past criminal activities. However,

B005 remained in good health and had not been mistreated in detention, and B016 had since been released from detention.

[7] On September 6, 2013, this Court's decision in *B135 v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 871, 438 F.T.R. 128 was made public. In *B135*, Justice Harrington found that the Minister had treated the claimants in that case unfairly by failing to disclose additional information that had come into his possession concerning the treatment that B005 and B016 had experienced on their return to Sri Lanka.

[8] Noting that refugee claims are forward-looking, Justice Harrington observed that the experiences of similarly-situated individuals are "the best predictor" of what might happen to claimants returning to their homeland: at para. 19. He thus concluded that it was "most important to have as much information as possible as to the treatment of others on board the ship '*Sun Sea*' who have been returned to Sri Lanka in order to consider their risk of persecution": at para. 28.

[9] The Board completed the evidentiary portion of N.R.'s refugee hearing on September 16, 2013, and set a schedule for counsel to file their written submissions. In his submissions, the Minister asked the Court to disregard the evidence regarding B016, as B016 had recently been killed in Sri Lanka in circumstances that were not, as yet, clear.

[10] Counsel for N.R. submitted that the evidence regarding the treatment of B016 while he was in detention should be considered by the Board, as it was highly relevant to the risk faced by returnees to Sri Lanka who had come to Canada on the *MV Sun Sea*.

[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.

[13] The Board released its decision on December 24, 2013. Nowhere in it its reasons does the Board deal with N.R.'s request to adduce post-hearing evidence, nor does it reference the *B135* decision or the experiences of either B005 or B016.

II. The Board's Failure to Deal with N.R.'s Application to Adduce Post-hearing Evidence

[14] Rule 43 of the *Refugee Protection Division Rules*, S.O.R./2012-256 provides that a party who seeks to introduce a document into evidence after the completion of a refugee hearing must apply to the Board for leave to do so. The respondent does not dispute that the applicant made such an application in this case, and that the Board made no reference to that application in its reasons.

[15] Citing the Supreme Court's decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 14-16, [2011] 3 S.C.R. 708, the respondent argues that the Board had no obligation to make an express finding with respect to the post-hearing evidence application, as "a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion". Rather, the respondent says that we should assume that the Board admitted the post-hearing evidence, particularly in light of the fact that N.R.'s application was not opposed by the Minister.

[16] The respondent further submits that recent decisions of the Federal Court of Appeal in cases such as *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at paras. 34-42, 455 N.R. 87, and *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59 at paras. 50-56, 373 D.L.R. (4th) 167, suggest that the Courts should show deference to the procedural choices made by administrative tribunals such as the Board.

[17] I accept this as a general proposition. However, the procedural choice that the Board has made as to how applications to adduce post-hearing evidence are to be dealt with has been codified in Rule 43 of the *Refugee Protection Division Rules*. This Rule provides that in deciding such an application, the Board must consider any relevant factor, including, but not limited to the relevance and probative value of the documents in question, any new evidence that the document brings to the proceeding, and whether the party could have provided the document sooner with the exercise of reasonable diligence. There is nothing in the Board's decision that indicates that it considered these or any other factors in arriving at a decision with respect to the application to

adduce post-hearing evidence. Indeed, we cannot even determine from the Board's reasons whether the application was granted or refused.

[18] The jurisprudence of this Court has established that once a proper Rule 43 application has been made, the Board must deal with it: *Nagulesan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1382 at para. 17, [2004] F.C.J. No. 1690. This remains the case after *Newfoundland Nurses*, above: see, for example, *Cox v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1220 at para. 24, 420 F.T.R. 68. The Board's failure to deal with a properly constituted application to adduce post-hearing evidence constitutes a breach of procedural fairness: *Howlader v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 817 at paras. 3-4, [2005] F.C.J. No. 1041.

[19] The fact that the Board did not even mention the application to adduce post-hearing evidence in its reasons means that we have no way of knowing whether the request was considered, and if it was, whether it was granted or refused. For this reason, the Board's decision cannot stand.

III. The Reasonableness of the Finding Regarding *Sur Place* Claim

[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.).

IV. Conclusion

[25] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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