

Federal Court



Cour fédérale

Date: 20150413

Docket: IMM-6681-14

Citation: 2015 FC 450

Ottawa, Ontario, April 13, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AB

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] by the Refugee Protection Division [RPD], rejecting the Applicant's claim to refugee protection under sections 96 and 97 of the IRPA.

II. Factual Background

[2] The Applicant is a male Tamil from Northern Sri Lanka, who claims refugee protection on the basis of a fear of persecution by the Sri Lankan army and security forces [SLA], Sri Lankan paramilitary groups, and the Liberation Tigers of Tamil Eelam [LTTE].

[3] In January 2006, in the context of the progressive erosion of the Cease Fire Agreement entered between the Sri Lankan government and the LTTE, and in the LTTE'S effort to recruit new members, the Applicant was forcibly brought to an LTTE camp, where he was tortured.

[4] On the third day of his detention by the LTTE, the Applicant managed to escape and went into hiding. Shortly thereafter, on suspicion of being an LTTE member on the basis of his Tamil ethnicity, the SLA and paramilitary groups brought the Applicant to a camp, where he was tortured. The Applicant was beaten and administered electric shocks to his fingers.

[5] In February 2006, the Applicant's uncle presented himself to the camp where the Applicant was held and bribed the SLA in exchange for the Applicant's release.

[6] With the help of his uncle, the Applicant fled Sri Lanka and worked in a third country under a false work permit.

[7] With the help of an agent, the Applicant traveled to Canada aboard the *MV Sun Sea* ship on August 13, 2010 and claimed refugee protection on October 7, 2010.

[8] A hearing was held before the RPD on March 13, 2014.

III. Impugned Decision

[9] By reasons dated August 21, 2014, the RPD concludes that the Applicant is neither a Convention refugee nor a person in need of protection under the IRPA.

[10] Although, the RPD identifies some issues with the evidence provided by the Applicant, the RPD finds the Applicant's overall testimony to be credible; however, the RPD concludes that the Applicant failed to demonstrate the required objective basis of his fear, for the purposes of sections 96 and 97 of the IRPA.

[11] More precisely, the RPD concludes that on a balance of probabilities, the Applicant's "profile is not one such that he would be at risk of being associated with the LTTE", that he had "no connections with the LTTE, nor was he, or would he be, targeted by the government as a LTTE supporter" (RPD Decision, at para 29).

[12] In respect of the Applicant's *sur place* claim, as a passenger on the *MV Sun Sea*, the RPD concludes that the Applicant's profile is not one of heightened risk as a result of his manner of travel to Canada, nor does not face a risk contemplated by section 97 as a Tamil failed refugee claimant returnee.

IV. Legislative Provisions

[13] The following provisions of the IRPA are applicable to the RPD's determination of refugee status:

Convention refugee

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 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.

Person in need of protection

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

Définition de « réfugié »

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 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.

Personne à protéger

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

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 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.

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 — 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.

V. Standard of Review

[14] The RPD's assessment of the Applicant's credibility, and of whether the Applicant faces a risk upon return to Sri Lanka are determinations of fact and of mixed fact and law, which are reviewable on the deferential standard of reasonableness (*S.A. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 146 at para 21; *Sivanathan v Canada (Minister of Citizenship and*

Immigration), 2014 FC 184 at paras 6 and 7 [*Sivanathan*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[15] Therefore, it is not within this Court's jurisdiction to substitute its own view of a preferable outcome, or reweigh the evidence (*Dunsmuir*, above at para 47; *Khosa*, above at para 59).

VI. Arguments and Analysis

[16] The Applicant puts forth five main arguments in support of his claim, which the Court will address in turn.

A. *Standard of proof*

[17] First, the Applicant submits that the RPD applied the incorrect burden of proof in determining whether the Applicant falls within the meaning of sections 96 and 97 of the IRPA. According to the Applicant, this error must be reviewed on the non-deferential standard of correctness. In particular, the Applicant submits that the RPD applied a higher burden of proof upon the Applicant of proving a *probability of persecution*, which is inferred by the RPD's use of words such as "personally targeted", "would he be", "would be" and "seriously suspected".

[18] The Court agrees with the Respondent's view according to which the RPD reasonably identified and applied the adequate legal test in accordance with the jurisprudence.

[19] First, the words used by the RPD, taken in context, do not reflect an erroneous understanding or application of the applicable analytical framework in respect of interpreting sections 96 and 97 of the IRPA (*Thanapalasingam v Canada (Minister of Citizenship and Immigration)*, 2013 FC 830 at paras 19 and 20).

[20] Second, the Court's view is grounded in the distinction between the applicable standard of proof and the legal test to be met. As summarized by the Court in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420 at para 184; aff'd in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171:

[184] A distinction has to be drawn between the legal test to be applied in assessing the risk of future persecution, and the standard of proof to be applied with respect to the facts underlying the claim itself. While the legal test for persecution only requires a demonstration that there is more than a mere possibility that the individual will face persecution in the future, the standard of proof applicable to the facts underlying the claim is that of the balance of probabilities: *Adjei*, at p. 682. See also *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1 at para. 9-14 and 29.

B. *The RPD's credibility assessment*

[21] Third, the Applicant takes issue with the RPD's overall positive credibility finding in respect of the Applicant's testimony – which includes the Applicant's arbitrary arrest, detention and torture, and ultimate finding that the Applicant does not face persecution or risk to life, harm, or unusual treatment as contemplated by the IRPA.

[22] The Applicant maintains that the RPD was compelled to clearly state its reasons for rejecting the Applicant's credibility in these respects.

[23] The Respondent argues that the presumption of truth of the Applicant's testimony does not extend to the inferences the RPD may draw from those facts. It was therefore reasonable for the RPD to find that the Applicant was credible in his testimony, but to conclude that he was not, at the time of the hearing, suspected of having links with the LTTE.

[24] The Court observes that the RPD's reasons are at first glance ambiguous, to the extent that the RPD identifies credibility as one of the "determinative issues [i]n this claim" (RPD Decision, at para 11) while sustaining that the Applicant was generally credible in his testimony and that the shortcomings in respect of the Applicant's documents are "insufficient on a balance of probabilities to finding him not credible" (RPD Decision, at para 33).

[25] A careful examination of the RPD's reasons reveals that the RPD's findings in respect of credibility are consistent, inherently logical, and anchored in the evidence.

[26] It was not unreasonable for the RPD to conclude on the one hand, that the Applicant was credible in his testimony, but to find, on the other hand, that the Applicant did not establish the existence of more than a mere possibility that he would face a risk to his life upon return to Sri Lanka, as contemplated by section 97.

[27] The RPD's positive credibility findings in respect of the Applicant's detention and arrest, do not automatically lend themselves to a finding that the Applicant would be subjected to persecution on the same basis today, nor that he faces a prospective risk upon return to Sri Lanka for having been suspected of LTTE support or membership, in the past.

C. *Applicant's allegations of torture*

[28] Fourth, the Applicant takes issue with the RPD's determination that the Applicant was subjected to torture but that his "treatment was not so egregious as to support a claim for compelling reasons" and that the "fact that his torture was not sustained and that he was freed with a bribe suggest [...] that he would not be at a high risk of torture in the future" (RPD Decision, at paras 41 and 60). According to the Applicant, the RPD's conclusions imply that it was necessary for the Applicant to have sustained torture for him to demonstrate a well-founded fear of persecution in Sri Lanka. The Applicant contends that the RPD unreasonably equated torture with persecution, and that its finding in this respect is not only speculative, but also an error in law.

[29] The Court agrees with the Respondent that the legal tests for refugee status determination are forward-looking and the onus rests upon an applicant to demonstrate that, at the time of the hearing, he meets the requirements of section 96 or of section 97 of the IRPA. Therefore, as mentioned above, although past incidents of alleged persecution are possible indicators of the risk of future persecution, proof of past persecution is not sufficient, in and of itself, to form a basis to grant refugee protection under the IRPA. Also, it has been found that the fact that a refugee claimant was merely onboard the *MV Sun Sea* is not sufficient, in and of itself, to establish a *sur place* claim (*Sivanathan*, above at para 12). Moreover, "the fear of persecution must be forward-looking and the risk must be personalized" (*Thavachchelvam v Canada (Minister of Citizenship and Immigration)*, 2013 FC 83 at para 16).

[30] The Court cannot accept the Applicant's argument according to which the RPD's own findings that the Applicant could face arrest and detention upon return to Sri Lanka is equivalent to an admission of the well-foundedness of the Applicant's objective fear.

[31] Finally, the RPD's finding of absence of "compelling reasons" for the purposes of subsection 108(4) of the IRPA is not unreasonable. A "compelling reasons" assessment under subsection 108(4) does not need to be undertaken in every case but rather should be made, for instance, when a claimant was found to be a refugee but nevertheless had been denied refugee status given the change of circumstances in the country of origin (*Martinez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 343 at para 19; *Kalumba v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ 879 at paras 18 and 19).

D. *The Applicant's membership in the LTTE*

[32] Fourth, the Applicant argues that the RPD created an unreasonable distinction between LTTE suspects who are "truly", and those who are "not truly" suspected of supporting the LTTE. According to the Applicant, the RPD does so by recognizing on the one hand that the Applicant was questioned by the SLA on the basis of possible ties with the LTTE, but that he was not, on the other hand, "truly" suspected of such ties, because it is unlikely that a bribe would have been accepted in exchange for his release. The Applicant further submits that the RPD created a new category of "true" LTTE suspects, which suggests that a higher involvement in the LTTE is necessary for the Applicant to demonstrate a well-founded fear of persecution.

[33] The Respondent submits that the Applicant expresses a disagreement with the RPD's assessment of the evidence, which is insufficient to warrant the Court's intervention; the RPD was entitled to attribute greater weight to some portions of the evidence, with supporting reasons.

[34] The Court considers that the Applicant's reading of the RPD's findings fails to consider the RPD's findings within their inherent logic or context.

[35] Consistent with the *United Nations High Commissioner for Refugees* [UNHCR] *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* of July 5, 2014, this Court has stated that each claim must engage an individualized assessment (*B198 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1106 at paras 17 and 51; *P.M. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77 at para 16 [*P.M.*]).

[36] The RPD considered the Applicant's testimony and evidence provided, in conjunction with the documentary evidence which suggests that returning Tamils are subjected to the same screening process for all persons returning to Sri Lanka, regardless of whether they are returning on a voluntary basis or as the result of a failed refugee claim, and with evidence attesting to programs and initiatives which have been implemented since the end of the armed conflict in April 2009 through which:

[...] former LTTE combatants and LTTE members and many others suspected of having links with the LTTE have been mobilized and have gone through a "rehabilitation" programme. This has been implemented by the Rehabilitation and Prison Reform Ministry, under the overall guidance and control of the Ministry of Defence. A total of 11,000 individuals with alleged

links to the LTTE – mostly former combatants, but also drivers, cooks and other aides – have undergone this process (RPD Decision, 44).

[37] The RPD further adds, in respect to the Applicant's individual circumstances:

The claimant has not alleged that he was seriously suspected in the past of having links with the LTTE. He was able to leave the country using his own passport and was not detained at the airport security points as someone wanted by the government. I conclude that the claimant was not suspected of having links with the LTTE.

The claimant has been away from Sri Lanka for over eight years. There is no evidence that he has participated with the LTTE during his time outside the country. Returnees are subject to inspection when arriving in Sri Lanka. Some groups have suggested that failed asylum claimants are being tortured when questioned on their return. The same document provides equally credible evidence that this is not occurring and that the UNHCR has long-term monitoring programs for refugee returns. On balance, I find that the claimant would not be at risk of cruel and unusual punishment or any other harm on his return (RPD Decision, at paras 44 and 45).

[38] The RPD then proceeds to evaluate the risk faced by the Applicant upon return to Sri Lanka, as a passenger who traveled to Canada aboard the *MV Sun Sea*. Following a balanced review of the documentary evidence and a number of factors, the RPD concludes that the Applicant does not fit the profile of someone who would be suspected of having ties to the LTTE on the basis of having traveled aboard the *MV Sun Sea*.

[39] It was reasonably open to the RPD to find that on a balance of probabilities, the Applicant was not suspected of LTTE involvement or of having any association with the LTTE and that he therefore lacked an objective basis to his alleged fear and risk upon return, which in his particular circumstances, was detrimental to his claim.

[40] As stated by Justice Catherine M. Kane, in *Yathavarajan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 297 at para 64:

[64] The Board did not ignore any evidence; rather, it attached greater weight to some evidence, identified the evidence that it did not rely on and provided reasons for doing so. The Board conducted an individualised assessment of the applicant and concluded that upon return to Sri Lanka, he would be questioned, but that he would not face a risk to his life, or a risk of cruel and unusual punishment or treatment, or a danger of torture, because he would not be suspected or perceived to have ties to the LTTE. The Board's decision is reasonable.

E. *The RPD's assessment of the documentary evidence and the Respondent's duty to disclose*

[41] Finally, the Applicant argues that the RPD erred in its assessment of the documentary evidence.

[42] Upon review of the Certified Tribunal Record [CTR], the Court is of the view that the RPD's reasons reflect a careful weighing of competing evidence, including evidence which demonstrated both that returning Tamil Sri Lankans have faced torture upon return, as well as evidence which pointed to a low probability that the Applicant would face a risk of harm upon return. The RPD also acknowledged that the current situation in Sri Lanka is not perfect for Tamils, especially for those suspected of ties with the LTTE.

[43] The Court finds that the RPD's findings are nuanced and anchored in the evidence, in conformity with the requirements of transparency, intelligibility and justification. The Court adopts the reasoning expressed by Justice Judith A. Snider in *P.M.*, above at para 17:

[17] Moreover, and more importantly, the decision is reviewable on a standard of reasonableness. It is possible for different conclusions to be reached on similar facts. I acknowledge that the Applicant put forward a rational line of reasoning for finding that the Applicant was at risk because of his passage on the M/V Sun Sea. However, that does not mean that the line of reasoning followed by the Board is unreasonable. The existence of a range of possible outcomes is the hallmark of the reasonableness standard and is the foundation of the deference owed to decision makers. Whether this Applicant would face more than a mere possibility of persecution is a factual question to be determined by the Board. While I or another panel member might have come to a different conclusion, the decision of this Board was reasonably open to it on this particular evidentiary record. The Court should not intervene.

[Emphasis added.]

[44] Finally, the Court rejects the Applicant's submission that the Respondent failed to meet his disclosure obligation, in particular, of a declaration of another passenger of the *MV Sun Sea*, (B016), who was detained and tortured upon return to Sri Lanka. Although each and every case is a case to be assessed on its own merits, thus, on its own evidence and any evidence which may be relevant thereto, the affidavit of passenger B016 is included in exhibit C-5 in the CTR and was therefore not omitted from disclosure.

VII. Conclusion

[45] In light of the foregoing, the Application must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no serious question of general importance to be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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