

Federal Court



Cour fédérale

Date: 20150610

Docket: IMM-5209-14

Citation: 2015 FC 730

Ottawa, Ontario, June 10, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**AMARAVATHY SRIRENGANATHAN
(A.K.A. AMARAVATHY SRIRANKANATHAN)
SRIRANKANATHAN THARMALINGAM
(A.K.A. SRIRANGANATHAN THARMALINGAM)
JEYASEELAN SRIRENGANATHAN
LATHUSAN SRIRENGANATHAN
VINUJAH SRIRENGANATHAN**

Applicants

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This application concerns a Tamil family who traveled to Canada aboard the *MV Sun Sea*. The mother and principal applicant, Amaravathy Srirenganathan, along with her husband, Srirankanathan Tharmalingham, and their three children arrived in Canada on August 13, 2010,

and made their refugee claims that same day. The Refugee Protection Division of the Immigration and Refugee Board denied the family's claims for refugee protection on June 17, 2014.

[2] While the applicants have raised a number of issues, I do not need to address all of these issues as I have decided to allow the application on the basis that I cannot be certain that the Board applied the correct legal test in concluding that the claims should be dismissed.

I. Background

[3] The applicants are from Northern Sri Lanka and are of Tamil ethnicity. They claim that Mr. Tharmalingham's deceased brother was a member of the Liberation Tigers of Tamil Eelam. While it is not at all clear from the decision whether the Board accepted the brother's LTTE membership as a fact, a review of the transcript shows that it did.

[4] The applicants allege that they were threatened by various paramilitary groups and by Sri Lankan army personnel, and that they were displaced several times after the ceasefire between the Sri Lankan government and LTTE broke down. The applicants further allege that the LTTE took Mr. Tharmalingham to a labour camp in March of 2009. After Mr. Tharmalingham escaped from the camp, the family made their way to a government-controlled area where they were interrogated by army personnel and taken to the Arunachalam welfare camp for refugees. Following their release from this camp in October of 2009, the family returned to their home in Veerapuram.

[5] In November of 2009, unidentified armed men surrounded the applicants' house, interrogating Ms. Srirenganathan and her son about the family's LTTE connections and

threatening to kill Mr. Tharmalingham, who was not home at the time. Fearing for their lives, the applicants went into hiding. They then travelled to Colombo where they hired an agent to help them obtain passports, air tickets and visas to Thailand.

[6] The applicants left Sri Lanka for Thailand on January 13, 2010. From Thailand, they boarded the *MV Sun Sea*, arriving in Canada on August 13, 2010. The arrival of the *MV Sun Sea* received significant domestic and international media attention, much of which reported that the ship was owned and operated by the Tamil Tigers.

[7] Although the Board had serious concerns with respect to the applicants' credibility, I do not have to address the reasonableness of the Board's credibility assessment because I have concluded that the Board erred in law. It is, however, not disputed that the applicants are Tamils from the north of Sri Lanka with a close family member who was a member of the LTTE. Nor is it disputed that the applicants are failed asylum seekers who travelled to Canada aboard the *MV Sun Sea*.

II. Analysis

[8] The applicants submit that the Board misstated and misapplied the section 96 test for refugee protection. The respondents agree that the Board misstated the test at various points in its reasons, but argue that when the reasons are read as a whole, it is clear that the correct legal test was applied.

[9] Whether the Board selected and applied the right test in determining whether an applicant meets the refugee definition is a pure question of law reviewable on the standard of correctness:

Mohammed v. Canada (Minister of Citizenship and Immigration), 2009 FC 768 at para. 36, 348 F.T.R. 69.

[10] The parties agree that in order to establish a well-founded fear of persecution for the purposes of section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, claimants must prove that they have a subjective fear of persecution, and that this fear is well-founded in an objective sense: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at para. 47, [1993] S.C.J. No. 74. Although claimants must establish their case on a balance of probabilities, they do not have to prove the persecution would be more likely than not. In other words, “there need not be more than a 50 per cent chance (i.e., a probability)”: *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 at para. 8, 57 D.L.R. (4th) 153. They need only show that there is more than a mere possibility that that they will face persecution in their country of origin.

[11] While this Court will not intervene if the Board has articulated “the gist of the appropriate standard of proof”, this Court will remit a matter in circumstances where it is unclear which test has been applied or if the wrong test has been applied: *Alam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para. 9, 41 Imm. L.R. (3d) 263; *Canada (Citizenship and Immigration) v. Neubauer*, 2015 FC 260 at para. 24; *Arrinaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 773 at para. 44, [2005] F.C.J. No. 971.

[12] At the outset of its analysis, the Board framed the issue before it as whether Mr. Tharmalingham’s “profile as a male Tamil puts him at *personal heightened risk* in Sri Lanka today” (emphasis added). Later in its reasons, the Board considered whether “the claimants face *an increased risk of persecution* by virtue of having travelled aboard the *Sun Sea*” (emphasis

added). I understand the parties to agree that the refugee analysis is not an exercise in relativity, and that an applicant is not required to demonstrate that they face a personal heightened risk in their country of origin.

[13] Having carefully reviewed the Board's reasons in their entirety, I cannot be certain what test the Board actually applied in reaching its conclusion. It is true that the Board stated the appropriate standard of proof at certain points in its reasons, including in the summary of its conclusions. At the same time, however, paragraph 13(2) of its reasons demonstrates that it framed its entire analysis on a misstatement of the law. Consequently, the decision must be set aside.

III. Conclusion

[14] 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:

1. 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

DOCKET: IMM-5209-14

STYLE OF CAUSE: AMARAVATHY SRIRENGANATHAN
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CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 3, 2015

JUDGMENT AND REASONS: MACTAVISH J.

DATED: JUNE 10, 2015

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