

Federal Court



Cour fédérale

Date: 20160712

Docket: IMM-4602-15

Citation: 2016 FC 768

St. John's, Newfoundland and Labrador, July 12, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MIRAJH DEVANANDAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Mirajh Devanandan (“the Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the “RPD”) dated September 21, 2015, denying his claim to be found a Convention refugee or a person in need of protection, pursuant to section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[2] The Applicant is a citizen of Sri Lanka. He claims to be at risk of persecution because he is perceived to be a person with links to the Liberation Tigers of Tamil Eelam (the “LTTE”). He also claims to be at risk because he is a failed refugee claimant.

[3] The RPD found that the Applicant had not filed persuasive evidence that he fit the risk profiles identified in the UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* (the “UNHCR Guidelines”). It also concluded that there were insufficient grounds to fear persecution as a failed asylum seeker.

[4] The RPD considered the risk to the Applicant from pro-government groups, paramilitary groups and other groups involved in criminal activities to be a generalized risk faced by most Tamil communities in Sri Lanka. It found that the Applicant had not provided sufficient evidence that he would be personally targeted by those groups.

[5] The Applicant submits that the RPD erred in its application of section 96 of the Act by considering “generalized risk” and by applying inconsistent standards of proof in its assessment of the risk pursuant to section 96 of the Act.

[6] The Applicant also alleges that the RPD ignored and misinterpreted evidence by relying solely on the UNHCR Guidelines and the UK Home Office risk profiles. He argues that the RPD failed to consider contradictory evidence which suggested that failed asylum seekers are at risk of persecution in Sri Lanka and evidence that states release from detention was not determinative of the state authorities’ interest in the detainee; see the decisions in *Orgona v. Canada (Minister*

of Citizenship and Immigration), 2001 FCT 346 and *Rayappu v. Canada (Minister of Citizenship and Immigration)*, IMM-8712-11, October 24, 2012.

[7] The Applicant further submits that the RPD made unreasonable credibility findings.

[8] Finally, the Applicant argues that the RPD erred by not considering whether there were compelling reasons under subsection 108(4) of the Act to not force the Applicant to return to Sri Lanka.

[9] The Minister of Citizenship and Immigration (the “Respondent”) submits that the Applicant has not shown any reviewable error. He argues that the RPD properly considered “generalized risk” in its assessment of the Applicant’s risk under section 97(1) of the Act.

[10] He further contends that the Applicant has confused the “legal test” with the “standard of proof”. He says that the Applicant must establish, on a balance of probabilities, the necessary facts to meet the legal tests pursuant to section 96 and subsection 97(1) of the Act, relying on the decision in *Ferguson v. Canada (Minister of Citizenship and Immigration)* (2008), 74 Imm. L.R. (3d) 306 at paragraph 22.

[11] The Respondent submits that the RPD does not need to refer to every piece of evidence before it; see the decision in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35. He argues that the Applicant is dissatisfied with the RPD’s interpretation of the documentary evidence but this does not amount to a reviewable error.

[12] The Respondent submits that the RPD's credibility findings are reasonable.

[13] Finally, the Respondent argues that the Board correctly did not consider the "compelling reasons" exception pursuant to subsection 108(4) of the Act since that exception only applies where the claimant had established a valid claim under section 96 or subsection 97(1). The RPD did not find the Applicant's claim to be valid and accordingly, did not need to address subsection 108(4).

[14] The first issue to be addressed is the applicable standard of review. The RPD's selection of the burden of proof pursuant to section 96 and subsection 97(1) of the Act is a question of law and is reviewable upon the standard of correctness; see the decisions in *Gopalarasa v. Canada (Citizenship and Immigration)*, 2014 FC 1138 and *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 44.

[15] The RPD's credibility finding and assessment of evidence are reviewable on the standard of reasonableness; see the decision in *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.).

[16] Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, and requires the decision fall within a range of possible, acceptable outcomes defensible in respect of the facts and law; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[17] The second issue to be addressed is the RPD's selection of the legal test pursuant to section 96 of the Act.

[18] In order to succeed upon a Convention refugee claim, a claimant must establish the facts of his case on a balance of probabilities; see the decision in *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.

[19] A claimant must also show that there is more than a mere possibility he will be persecuted if returned; see the decision in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (F.C.A.) at 682. This burden of proof may be described as "good grounds" or "reasonable chance"; see *Adjei, supra* at 683.

[20] In my opinion, the RPD applied the proper legal test and burden of proof. The Applicant cannot succeed on this argument.

[21] I am also not persuaded that the RPD erred in finding that the Tamil communities face a generalized risk of criminality; see the decisions in *Mohamed v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 758 and *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 319.

[22] The third issue is the RPD's consideration of the documentary evidence. It is not the role of a reviewing court to reweigh evidence before the decision; see *Khosa, supra* at paragraph 61. A reviewing court should only intervene where it is clear that the decision maker ignored key contradictory evidence; see the decision in *Gopalarasa, supra* at paragraphs 37 to 39.

[23] The RPD's assessment of the evidence before it was reasonable. I am also not persuaded that the RPD ignored any contradictory evidence.

[24] In my opinion, it was reasonable for the RPD to find the Applicant's description of his escape from a group of kidnappers to be not credible.

[25] Finally, did the RPD err in not applying subsection 108(4) of the Act which provides as follows:

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L'alinéa (1)e ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[26] I agree with the Respondent's submissions that the application of this subsection requires a finding by the RPD, pursuant to paragraph 108(1)(e), that the reasons for which the person sought refugee protection no longer exist; see the decision in *Jaioro v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 622. The RPD, in this case, did not make such a finding.

[27] In the result, this application for judicial review is dismissed. There is no question for certification arising.

JUDGMENT

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

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4602-15

STYLE OF CAUSE: MIRAJH DEVANANDAN V. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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