Date: 20060511

Docket: IMM-5759-05

Citation: 2006 FC 542

BETWEEN:

MOHAMED RIZAN MUSTHAFA SAMSEEN,

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 18, 2005, wherein the Board found that the applicant is not a "Convention refugee" or "a person in need of protection" as defined in sections 96 and 97 respectively of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[2] Mohamed Rizan Musthafa Samseen (the applicant), a 24-year-old citizen of Sri Lanka, alleges a fear of returning to his home country because of his Muslim Tamil origin.

[3] According to the applicant, the Board made numerous errors in the determination of his case. First, the applicant submits that the Board erred in indicating that he did not mention his fear from and detentions by the army in his Personal Information Form (PIF), and finding that this undermines his claim to fear the army. According to the applicant, he did include this information in his PIF narrative.

[4] However, in its decision, the Board did not find that the applicant had not mentioned his fear from and detentions by the army in his PIF, but stated specifically that he had not mentioned these under question 9 of his PIF. Question 9 asks “Have you ever been sought, arrested or detained by the police or military or any other authorities in any country, including Canada? By whom?”, to which the applicant answered with “Singhalese police”. The applicant is correct that his fear and detentions by the army were clearly mentioned in the narrative portion of his PIF, which is part of the PIF. Therefore, though there is actually no inconsistency, *per se*, there is an omission in question 9 of his PIF, which is what, it seems, the Board was remarking upon.

[5] The respondent is correct that “it is the responsibility of the applicant to ensure that any statement he signs is correct” (*Yilmaz v. Minister of Citizenship and Immigration*, 2003 FC 1498). However, in this circumstance, though the applicant omitted evidence under question 9 that he had been detained by the army, he did not omit this information from his PIF as a whole, as he clearly indicated in his PIF narrative that he had been detained by the army.

[6] According to the applicant, because he could only remember that he was taken by the army in mid-October 2002, and not the exact date, the Board unfairly doubted that the incident occurred.

However, the incident in question took place approximately three years ago, and to expect him to know the exact date places an unfair burden on him. Similarly, the Board expected the applicant to correctly remember the date that he departed for Colombo, which occurred a year and a half before the hearing.

[7] The applicant submits that the Board should have appreciated that memory gaps are common among refugee claimants. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting details, since memory failures are experienced by many persons who have been the objects of persecution.

[8] The Federal Court of Appeal in *Attakora v. Canada (M.E.I.)*, [1989] F.C.J. No. 444 (QL), is clear that the Board should not be over-vigilant in its microscopic examination of the evidence.

[9] In my opinion, the Board was over-vigilant in requiring the applicant to know exact dates of events that occurred three years, and a year and a half, before the hearing.

[10] However, this Court has also stated that it is reasonable for the Board to doubt the truthfulness of an account when an applicant fails to mention important facts in his PIF but subsequently adds them in his oral testimony, "thus giving the impression that he is exaggerating the events of his life to increase his chances of success" (see *Hammoud v. Canada (M.C.I.)*, [1999] F.C.J. No. 251 (T.D.) (QL) and *Robles v. Minister of Citizenship and Immigration*, 2003 FCT 374).

[11] In this case, the applicant did not mention in his PIF that in January 2000, while returning from Siduvai, the police took him into custody for a day and beat him, accusing him of being a spy for the Tigers. As well, the applicant omitted from his PIF the lengths of his detentions in December 2002 and 2003. The Board found it incredible that the applicant would not state in his PIF that he was detained in December 2003 by the Tigers for seven days, when he had specifically stated the time frame for his 10-day detention by the army in October 2002, nor that the same two individuals that he had mentioned in his PIF were taken with him in October 2002 were taken along with him by the Tigers in December 2003.

[12] It is my view that it was reasonable for the Board to doubt the truthfulness of the applicant's account as he had failed to mention these important details in his PIF and subsequently added them in oral testimony.

[13] The Board mentioned in its decision that the applicant had testified that he did not know if there were similar problems in his shop before the October 2002 incident, adding that his uncle ran the store, and stated that it does not understand why the applicant's uncle or the employees would not have problems before October 2002, or that he would not know about them. Whether or not the Board's confusion as to why the shop had not experienced similar problems in the past is relevant, it certainly is reasonable that the applicant's response that he did not know if there were similar problems in his shop before October 2002 raised credibility concerns. In a shop of only 13 employees, certainly, after he commenced work, an employee would become aware of whether employees have been taken and detained for several days at a time by the army or Tigers in the

recent past. It seems even more certain that an employee in a shop of 13 would know if this happened during his tenure at the shop.

[14] It is trite law that the applicant bears the onus of establishing the elements of his claim for protection (*Gill v. Minister of Citizenship and Immigration*, 2004 FC 1498). This includes giving truthful, coherent and non-evasive answers to basic questions about events which are alleged to have happened to him and which form the basis of his claim. It was reasonable for the Board to draw negative conclusions from the fact that the applicant was unable to answer basic questions in a satisfactory manner, and was further unable to offer reasonable explanations for the key omissions found in his story (*Minister of Employment and Immigration v. Dan-Ash* (1988), 93 N.R. 33 (F.C.A.)).

[15] The applicant submits that the insufficiency of reasons may be so great as to constitute a violation of the principles of natural justice (*Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476). As stated in *Coronel v. Minister of Citizenship and Immigration*, 2004 FC 186, my colleague Justice James O'Reilly indicated that:

> [5] The Board did not explain its finding that Ms. Flores was untruthful. Nor did it give reasons for finding parts of her testimony implausible. I cannot conclude, therefore, that the Board met its duty to state its credibility findings in "clear and unmistakable terms": *Hilo v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (QL) (F.C.A.).

[16] According to the applicant, in the case of *Papaskiri v. Minister of Citizenship and Immigration*, 2004 FC 69, Justice John A. O'Keefe of this Court points out:

> [35] . . . It was patently unreasonable to dismiss the applicant's explanations without any reasons. My decision might have been different if the Board had explained its reasoning for rejecting the applicant's testimony. It was also patently unreasonable for the Board to base its non-credibility findings on the conflicts between the oral testimony and the statements in the PIF without stating why the Board did not accept the applicant's explanations for the discrepancies.

[17] However, the Board did consider the explanations offered by the applicant to justify the various omissions from his PIF to wit that he did not think it was a "big point" and that "he thought he could tell it here". These explanations were included in the decision. It was certainly within the Board's purview not to be satisfied of the reasonableness of these explanations. In my opinion, the Board's decision fully explains its reasoning.

[18] According to the applicant, the Board indicated in its decision that it failed to understand why the applicant would not pursue his refugee claim in France where he had gone before reaching Canada. The Board concluded that the applicant acted in a manner which was not consistent with a person fearing for his life.

[19] The applicant submits that he had explained at the hearing that the agent had instructed him that he could not stay in France and that he would be sent to Canada after the paper work had been completed. Canada, therefore, was the ultimate place of destination where a refugee claim would be initiated, processed, and finalized. Also, the applicant submits that he was told by the agent that Canada accepts refugees and that France does not. According to the applicant, as a layman, he simply listened to and followed the advice and instructions of his agent and did not pursue his

refugee claim in France. The applicant submits that at any rate, he made a claim in France, as he did in Canada.

[20] However, the Board is entitled to reject the applicant's explanations as to why he decided to leave France, a country which "is a signatory to the Convention, has a reputable international human rights record, and has an established system to process claims", while his refugee claim was pending.

[21] In my opinion, it was not unreasonable for the Board to find his explanations and behaviour incompatible with the behaviour expected from that of someone who genuinely fears for his life.

[22] As stated by my colleague Justice Max M. Teitelbaum in *Saleem c. ministre de la Citoyenneté et de l'Immigration*, 2005 CF 1412, at paragraph 28:

> Cette affirmation ne peut pas suffire pour permettre à un demandeur d'asile de passer dans deux pays, soit l'Angleterre et les États-Unis et revendiquer le statut de réfugié au Canada plus d'un mois après avoir quitté le Pakistan. On ne peut pas permettre le forum shopping, c'est-à-dire on ne peut pas permettre au demandeur le luxe de déterminer quel pays sera, pour quelque raison que ce soit, le plus convenable pour revendiquer le statut de réfugié.

[23] It is well established law that a person who really fears persecution must claim protection at the first opportunity possible; this includes pursuing a claim in one country until it has finally been adjudicated. Otherwise, the Board is entitled to consider a person's claim as not being serious (see *Melgar Reyes v. Minister of Citizenship and Immigration*, 2005 FC 418 and *Skretyuk v. Canada (M.C.I.)*, [1998] F.C.J. No. 783 (T.D.) (QL)).

[24] It seems that the applicant is merely attempting, in his submissions, to “explain away” testimony and explanations that were already found to not be credible by the Board (*Kabir v. Minister of Citizenship and Immigration*, 2002 FCT 907 and *Hosseini v. Minister of Citizenship and Immigration*, 2002 FCT 402).

[25] Finally, the Board referred in its decision to the National Identity Card (NIC), and pointed out that he did not know the meaning or significance of the number “4” thereon. According to the applicant, his lack of knowledge of such matters does not mean that he obtained his NIC fraudulently, as was the conclusion of the Board. Moreover, that he produced no other evidence at the hearing as proof of his residency or that he worked in Jaffna, does not signify that he obtained his NIC fraudulently. They are separate issues and should not be confused, as seems to be the case with the Board’s appreciation of the evidence. No negative inferences should be drawn on the matter, and this should not be seen as a basis to conclude that the NIC was obtained fraudulently.

[26] However, this is not what the Board concluded. Instead, the Board noted that the applicant’s NIC was obtained in Negambo on January 13, 2000 and indicated a Jaffna address although, as testified by the applicant, he and his family would have been residents of Negambo during that specific time frame.

[27] According to the respondent, it was open to the Board to question this fact and assess the explanations provided by the applicant and draw its own conclusions on the merits of this document, and could do so, in accordance with *Hossain v. Canada (M.C.I.)*, [2000] F.C.J. No. 160 (T.D.) (QL):

> [4] . . . This Court has stated before that the panel is not obliged to conduct an assessment as long as there is enough evidence to cast doubt on the authenticity of a document [(1997), 136 F.T.R. 241], which applies in the case at bar.
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> […]
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> [6] Moreover, as the respondent's counsel notes, the panel went to the trouble of assessing the explanations given by the applicant when confronted with the improbability of the document in question. It thought these explanations were unsatisfactory. As I stated in the *Tcheremnykh* [*v. Canada (M.C.I.)* (September 15, 1998), IMM-5437-97 (F.C.T.D.)] case, it is the task of the Refugee Division to assess the explanations provided and to draw its own conclusions concerning the merit of the document.

[28] In light of the evidence before it, it was open to the Board to find that this document was highly suspicious and unreliable and therefore, of little probative value.

[29] Moreover, the fact that the applicant did not know the meaning of "number 4" on his NIC was only one other element which the Board found reflected negatively on his credibility. It was reasonable for the Board to find it questionable that the applicant would not know information of that nature, based on its experience that other applicants from that region knew the meaning of this number on their NIC (*Segundo v. Minister of Citizenship and Immigration*, 2005 FC 703).

[30] Furthermore, the Board was entitled to take into account the applicant's lack of effort to obtain corroborative evidence to establish his presence in Jaffna at the alleged time and to draw a negative inference of his credibility based on this (see *Akhtar v. Minister of Citizenship and Immigration*, 2004 FC 1319 and *Quichindo v. Minister of Citizenship and Immigration*, 2002 FCT 350).

[31] In the end, the position of the applicant solely amounts to a disagreement with the manner in which the Board weighed the evidence and assessed his credibility. However, it does not afford a legal basis for this Court to intervene (*Akinosho v. Minister of Citizenship and Immigration*, 2005 FC 268).

[32] It is my opinion that the Board was overzealous in its search for inconsistencies in finding the applicant's omission in question 9 of his PIF that he was detained by the army to be of significance, since he had included this information in his PIF narrative.

[33] It is also my opinion that it was unreasonable for the Board to expect the applicant to remember the exact date that he was detained by the army, after three years.

[34] However, I do not find that these two elements were determinative of the Board's conclusion. The Board found that the applicant had omitted a detention by the police in his PIF, as well as key information about his detentions by the army and the Tigers. The Board also found the applicant's explanations for not pursuing his refugee claim in France to be unreasonable, and the allegation that he did not know if others in his shop had had similar problems in the past to be incredible. As well, his NIC indicated a Jaffna address although he testified that he was a resident of Negambo during that time frame, lacked knowledge one would be expected to know if he hailed from Jaffna, and presented no evidence to corroborate that he was a resident of Jaffna.

[35] Considering all of the above, it is my opinion that the Board's decision was not patently unreasonable and therefore this Court should not intervene.

[36] Consequently, the application for judicial review is dismissed.

"Yvon Pinard"

Judge

Ottawa, Ontario
May 11, 2006

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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