

Federal Court



Cour fédérale

Date: 20110706

Docket: IMM-6439-10

Citation: 2011 FC 830

Montréal, Quebec, July 6, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FERNANDO WARNAKULASOORIY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Overview

[1] To examine core evidence in a case, piecemeal, each part out of context, not as part of an entirety, is as if a decision-maker examined a forest by looking at each tree and omitted to see the forest as a whole, thus missing the big picture. Where uncontradicted evidence, declared credible, is shredded, piecemeal, said evidence lacks understanding.

[2] It is no different than dissecting a narrative, considered credible, to such a degree that it loses its overall cohesiveness and no part separately then resembles its origin as part of the whole. All of which leads to unreasonable conclusions.

[3] *Lai v Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 826 (C.A.)(QL) clearly states that when assessing the objective aspect of a claimant's fear, the Board must consider all the evidence it finds credible to ensure that a valid analysis will have been undertaken.

Introduction

[4] The Applicant is a 55-year-old citizen of Sri Lanka.

[5] The Applicant arrived in Canada on February 28, 2009 and claimed refugee status on March 12, 2009.

[6] The Claim of the Applicant was heard by the Immigration and Refugee Board in Montreal [hereinafter the Board] on August 18, 2010. A negative decision was eventually rendered on September 21st, 2010. Hence, the present Application for Judicial Review.

Background

[7] The Applicant was active in politics in Chilaw from 1983 until he left Sri Lanka in February 2009.

[8] First running for Council as an independent candidate in 1983, the applicant became the first inhabitant of the division to be appointed to Council.

[9] In 1985, the Applicant joined the UNP.

[10] In 1991, the Applicant was again elected to Council as a UNP member.

[11] In 1992, he was the Council Representative in a dispute between local fishermen. When the courts found in favour of the sea beach fishermen, he was attacked in Chilaw with a sword. His right hand was badly cut, and this resulted in permanent damage to four of his fingers.

[12] In 1994, as soon as the *Sri Lankan Freedom Party United Front* came into power, its supporters, together with the group that previously attacked the Applicant in 1992, filed 11 false cases against the Applicant. In the end, he was acquitted.

[13] In 1997, the Applicant was elected Deputy Mayor in the Chilaw Urban Council. This Council was the only administrative body in the district that was won by the UNP in local elections.

[14] On December 5, 1997, shortly after these elections, the Applicant was arrested by the police on false allegations. The case was made public and appeared on the television news and in the papers. The Applicant remained in detention for 42 days and was then released on bail.

[15] In the 2002 elections, the Applicant was re-elected to the position of Deputy Mayor to the Chilaw Urban Council.

[16] In December 2003, a group of Catholics were arrested by the navy when they were discovered on a vessel travelling to Italy, illegally. In January 2004, the Applicant was arrested on the accusation that he had helped certain members of this group. The Applicant was detained for 100 days. He was finally released on bail and on condition of reporting once a month to the CID office in Colombo. After four years, the Applicant was acquitted.

[17] In the April 2006 elections, the UNP lost but the Applicant still won in his position as Leader of the Opposition Group to the Council.

[18] In January 2007, 18 opposition members of Parliament from the UNP left the party and crossed over to the ruling party of PA. One of them was Neomal Perera who was appointed to the position of Deputy Minister of Fisheries.

[19] On March 5, 2008, Perera forcibly appointed the Applicant as his advisor although the Applicant maintained his affiliation with the UNP. As a result, the Applicant found himself in a difficult position – on the one hand, his own party suspected him of being a traitor, on the other hand, the Sri Lankan Freedom Alliance party members did not trust him.

[20] The Applicant began receiving anonymous calls to his home threatening him not to continue in politics. His wife was also threatened and told to leave the village. The Applicant was afraid to go fishing and the whole family was under duress.

[21] On February 8, 2009 the Applicant was present during a political rally. In the midst of the rally, Perera publicly offered him the position of Mayor of the town in the next North Western Provincial Council elections which were to take place on February 14, 2009, if the Applicant would join him on the government side.

[22] On the night before the elections, unknown men came to the Applicant's house, fired two shots and threatened that if he worked on election day, he would be killed.

[23] The Applicant obtained a Canadian visa to attend a conference in February of 2009. He arrived in Montreal on February 28, 2009 and filed a claim for refugee protection on March 12, 2009.

[24] In 2010 and while in Canada, the Applicant called Perera in Sri Lanka. Perera, once again, asked him to join him if he had planned to return. The Applicant believes that his absence has been a major setback for Perera who has dropped in rank/popularity. Perera became angry with the Applicant when told that the Applicant had claimed refugee status, and then, hung up on him. The Applicant believes that Perera was angry at him because the latter is aware of confidential information that the Applicant might relate to Canadian authorities.

[25] The following exhibits were included in support of the present Application:

- a. **Exhibit P-1:** The Applicant's Personal Information Form;
- b. **Exhibit P-2:** The exhibits produced by the Applicant before the Board;
- c. **Exhibit P-3:** The 2009 US Department of State Report which forms part of the package submitted by the Applicant.

[26] The compilation in this case is specified in that most of the allegations of the Applicant are supported by uncontradicted comprehensive evidence.

Decision rendered by the Board

[27] The tribunal found the Applicant to be credible. The tribunal noted that his testimony was "clear, detailed, honest and spontaneous" (par. 8 of the decision).

[28] Nonetheless, the tribunal found that the Applicant does not have a well-founded fear of persecution should he return to Sri Lanka (par. 9 of the decision).

[29] When it comes to the Applicant's fear of unknown persons from the opposition party, the tribunal found that there was no evidence in the general documentation to support his claim that members of the opposition, *PA*, were actively persecuting members of the *UNP* (par. 13 of the decision).

[30] Moreover, the tribunal found that the applicant could obtain state protection if he was to be threatened in the future by unknown thugs (pars 22-27).

[31] The Applicant also did submit an article detailing the murder of a municipal opposition leader who was killed by unknown persons. The Applicant explained that he knew the individual who was an opposition leader like himself and that he feared that the same fate could befall him. Nevertheless, the tribunal found that the article does not provide a motive for the killing and concludes that one article does not support the applicant's fear that he will suffer the same fate (par. 14 of the decision).

[32] The tribunal also dismissed another article also submitted by the applicant which reported the release of five UNP members after an attack on a fellow UNP member. The tribunal found this to be an intra-party incident without details regarding the original situation (par. 15 of the decision).

[33] The tribunal also dismissed another report because it found that it did not stand for the proposition that the police are subject to the whim of the politicians as alleged by the applicant. Instead, the tribunal found such protection is limited to members of parliament (pars 16-17 of the decision).

[34] The Applicant testified that he spoke to Perera in May of 2010. During this conversation, Perera again asked the applicant to join him and was angry when he came to know that the applicant had claimed refugee status in Canada. The tribunal found that Perera made no threats against the applicant and that there were no reasons to believe that he would be persecuted because of "secrets" of which the Applicant might be aware (par. 18 of the decision).

[35] The tribunal finds that although the applicant has a subjective fear, there is insufficient objective evidence to support his fear of persecution by Perera.

[36] The tribunal also dismissed the applicant's fear of the navy because of previous charges against him which had been dropped (par. 20 of the decision).

[37] In light of the above, the tribunal found that the applicant is not a person in need of protection under section 97 of the Act (pars 28-30 of the decision).

Analysis

[38] The Court agrees with the position of the applicant and finds the tribunal has erred by not evaluating the cumulative effect of what the Applicant has experienced in addition to the specific events that led to his decision to claim refugee status. This is an error of analysis as the tribunal was satisfied with the Applicant's credibility.

[39] The uncontradicted narrative must be recalled.

[40] In 1992, he was the Council Representative in a dispute between local fishermen. When the courts found in favour of the sea beach fishermen, he was attacked in Chilaw with a sword. His right hand was badly cut, and this resulted in permanent damage to four of his fingers.

[41] In 1994, as soon as the *Sri Lankan Freedom Party United Front* came into power, its supporters, together with the group that previously attacked the Applicant in 1992, filed 11 false cases against the Applicant. In the end, he was acquitted.

[42] On December 5, 1997, shortly after the elections in the same year, the Applicant was arrested by the police on false allegations. The case was made public and appeared on the television news and in the papers. The Applicant remained in detention for 42 days and was then released on bail.

[43] In December 2003, a group of Catholics were arrested by the navy which discovered that they were on a vessel travelling to Italy illegally. In January 2004, the Applicant was arrested on the accusation that he had assisted members of the group. The Applicant was then detained for 100 days and released on bail and on condition of reporting once a month at the CID office in Colombo. After four years, the Applicant was acquitted.

[44] After Perera appointed the Applicant as his advisor on March 5, 2008, the Applicant began receiving anonymous threatening calls.

[45] On February 13, 2009, one day before the elections, at night, some thugs came to the Applicant's house, fired two shots and threatened him that if he worked on election day, he would be killed.

[46] In light of the above, the tribunal had an obligation to consider the cumulative effects of all the acts of alleged persecution that the Applicant has faced during his political career. The failure to do so amounts to an error in law, the whole in accordance with *Retnem v. Canada (Minister of Employment & Immigration)* [1991] 13 IMM. L.R. (2d) FCA.

[47] The tribunal has committed a further error by considering each element of the Applicant's claim separately and not in combination with others so as to conceive of the Applicant's narrative as a whole.

[48] The tribunal finds that the Applicant would be able to obtain state protection against the threats by the unknown persons (pars 22-27 of the decision); however, the tribunal also acknowledges documentation which states that the degree of protection afforded to MPs is subject to "the whim of the government" (at par. 16 of the decision). The Applicant is clearly not in good terms with the ruling party and has refused their attempts to recruit him. In this situation, he has good reason to question whether he would be able to obtain state protection in the future against further threats.

[49] Actually, the Applicant has no way of knowing whether "unknown thugs" making threats against him and firing shots outside his house are not in fact connected to the authorities; the government has been linked to paramilitary groups which are believed to be responsible for human rights abuses. [For example, please see Introductory section of 2009 US Department of State report, submitted herein as **Exhibit P-3**].

[50] As already stated, the Board found that the Applicant could obtain state protection against the threats by unknown persons. The tribunal wrote that Sri Lanka is a functioning democracy with two major elections held in 2010. In May 2009, government forces defeated the LTTE after more than 25 years of conflict. The tribunal found that the situation is not perfect but that human rights violations pertain primarily to events which led to and followed the defeat of the LTTE (par. 25 of the decision).

[51] Essential to this case is the evidence at the time in question. The 2009 US Department of State report has been submitted herein as **Exhibit P-3**; and, it contains numerous significant grave examples of human rights abuses committed after May 2009.

[52] Annual reports for 2010, at the time of the hearing, were not yet available and there is therefore no actual documentary basis for finding that there had been significant changes in country conditions. Improvements would have occurred following the end of the war, however, that does not in itself mean that the security forces and judiciary system in Sri Lanka were, or are able, to protect the Applicant based on his specific uncontradicted evidence.

[53] Moreover, although the tribunal had conducted a very meticulous separate analysis of each element raised by the Applicant, the tribunal has not actually paused to consider the consequences (as a whole) of the Applicant's refusal to join Perera's side after the latter had made considerable efforts to recruit him and have him cross the floor from the UNP side.

Conclusion

[54] In light of the above, as the decision demonstrates a lack of reasonableness, the present Application for Judicial Review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review be granted. Therefore, the file is to be returned to the Board to be redetermined anew by a newly constituted panel. No question for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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