

Federal Court



Cour fédérale

Date: 20120426

Docket: IMM-6073-11

Citation: 2012 FC 477

Ottawa, Ontario, April 26, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

PUSHPALEELA KANAPATHIPILLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by Ms. Pushpaleela Kanapathipillai (the Applicant), made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of the decision of the Immigration and Refugee Board (the Board) dated August 11, 2011, where the Board concluded that the Applicant is neither a Convention refugee under section 96 nor a person in need of protection under section 97 of the *IRPA*.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] The Applicant is a 48 year old woman from Sri Lanka. She and her husband were the owners of a profitable farm in Vellankulam. In October 1995, the Liberation Tigers of Tamil Eelam [LTTE] occupied their area. The LTTE extorted money from the Applicant and her husband and imposed a tax on their income. Their houses and farm were subsequently seized and occupied by the LTTE.

[4] For over ten years, the Applicant and her family suffered extortion and physical abuse at the hands of the LTTE. They were forced to work long hours and had to give a large portion of their crop away.

[5] In May 2009, the armed conflict between the army and the LTTE resumed. After defeating the LTTE, the Sri Lankan army started seeking their supporters. It suspected the Applicant and her family. Consequently, they were allegedly detained and physically abused on several separate accounts.

[6] In 2010, the Applicant and her family were detained by the army and interrogated in relation to their affiliation with the LTTE. The Applicant's husband called upon a friend to secure their

release in exchange for a large amount of money. Having been victims of extortion, threats and physical abuse, the Applicant and her family sold their land and fled Vellankulam.

[7] They were taken to Colombo by an agent and expediently brought to Singapore. The Applicant arrived in Canada alone on July 10, 2010. She immediately applied for refugee protection. According to the Applicant, her family is still in Malaysia.

[8] The Board dismissed the application on the basis of the Applicant's lack of credibility. It also found that the Applicant faced a generalized risk under the exception of paragraph 97(1)(b) of the *IRPA*. The Board concluded that the Applicant was neither a Convention refugee nor a person in need of protection.

III. Legislation

[9] Sections 96 and 97 of the *IRPA* provide as follows:

Convention refugee	Définition de « réfugié »
<p>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,</p> <p>(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</p>	<p>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 :</p> <p>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</p>

each of those countries; or

de chacun de ces pays;

(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.

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.

Person in need of protection

Personne à protéger

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

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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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 Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou

generally by other individuals in or from that country,

qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(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.

(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.

IV. Issues and standard of review

A. Issues

[10] The Court identifies the issues raised by this application as follows:

1. Did the Board err when it found a general lack of credibility on the part of the Applicant?

2. Did the Board err in failing to address specifically the risk the Applicant faces upon her return to Sri Lanka as a failed Refugee claimant?

B. Standard of review

[11] A credibility finding is a question of fact that is reviewable on a standard of reasonableness (see *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558, [2010] FCJ No 673 at para 11).

[12] A question of generalized risk is a question of mixed fact and law and is also reviewable on a standard of reasonableness (*De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845, [2009] FCJ No 1021 at para 19).

[13] The Court must examine the justification, transparency and intelligibility of the decision-making process, "[b]ut it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Parties' submissions

A. Applicant's submissions

[14] The Applicant does not challenge the Board's findings with respect to her general lack of credibility.

[15] The Applicant submits that she is a Tamil from the Northern Province of Sri Lanka and that evidence before the Board suggested that Tamils who return to Sri Lanka as failed asylum seekers face arrest, imprisonment and torture. Sri Lankan authorities take the position that any Tamil who fled the country are sympathizers of the LTTE. The Applicant alleges that the Board erred in failing to consider this evidence.

[16] According to the Applicant, the Board failed to consider the fact the Applicant faces a serious possibility of torture, risk to life or risk of cruel and unusual treatment or punishment by virtue of being a Tamil female who would be sent back as a failed asylum seeker. The Applicant alleges that the Board is required to consider all grounds of persecution (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1; *Li v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 2037; *Adan v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1030).

B. Respondent's submissions

[17] The Respondent notes that the Applicant does not challenge the Board's credibility findings.

[18] The Respondent submits that the Applicant failed to explain how the documentary evidence, adduced before the Board, applied to her case. The article from Amnesty International relied on by the Applicant clearly does not indicate that all Tamil asylum seekers are considered to be LTTE supporters. Furthermore, according to the Respondent, the document emanating from the Catholic Social Justice Organization contradicts the Applicant's evidence as she admitted herself that she would not have been released from her detention of 2010 if Sri Lankan authorities had believed that her family supported the LTTE (see para 26 of the Board's decision).

[19] The Respondent further alleges that submissions alone are generally not sufficient to satisfy the burden of proving a risk or hardship. The Board could not have granted the Applicant refugee status by relying solely on her counsel's oral submissions.

[20] In *Xu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1373 at para 16, the Court determined that "to allow a person to remain in Canada after a failed refugee claim, based only on the failed refugee claim, would be a circular argument that defeats the refugee system". According to the Respondent, this does not mean, however, that the Applicant will be returned to Sri Lanka without a Pre-Removal Risk Assessment [PRRA], whereby applicants whose claims to refugee protection have been rejected may present new evidence of risks that arose after their rejection (see *Kaybaki v Canada (Solicitor General)*, 2004 FC 32 at para 11; *Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 at para 5).

VI. Analysis

1. Did the Board err when it found a general lack of credibility on the part of the Applicant?

[21] The Applicant does not dispute the Board's conclusion with respect to her general lack of credibility and the Court concludes it is reasonable. The Board's finding falls within the range of possible, acceptable outcomes which are defensible in respect of the facts of the case and the applicable legislation.

2. Did the Board err in failing to address specifically the risk the Applicant faces upon her return to Sri Lanka as a failed Refugee claimant?

[22] In *Prophète v Canada (Minister of citizenship and Immigration)*, 2009 FCA 31, [2009] FCJ No 143 at para 7, the Court specified that an "examination of a claim under subsection 97(1) of the [IRPA] necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" [...]" (see also *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at para 15).

[23] In *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, [2011] FCJ No 1477 at paras 27-28, Justice Zinn made two important remarks on the scope of subparagraph 97(1)(b)(ii) of the *IRPA*. He wrote:

[27] The majority of cases turn on whether or not the last condition has been satisfied, that is, whether the risk faced by the claimant is

a risk faced generally by others in the country. I pause to observe that regrettably too many decisions of the RPD and of this Court use imprecise language in this regard. No doubt I too have been guilty of this. Specifically, many decisions state or imply that a generalized risk is not a personal risk. What is usually meant is that the claimant's risk is one faced generally by others and thus the claimant does not meet the requirements of the Act. It is not meant that the claimant has no personal risk. It is important that a decision-maker finds that a claimant has a personal risk because if there is no personal risk to the claimant, then there is no need to do any further analysis of the claim; there is simply no risk. It is only after finding that there is a personal risk that a decision-maker must continue to consider whether that risk is one faced generally by the population.

[28] My second observation is that too many decision-makers inaccurately describe the risk the applicant faces and too many decision-makers fail to actually state the risk altogether. Subparagraph 97(1)(b)(ii) of the Act is quite specific: The personal risk a claimant must face is "a risk to their life or to a risk of cruel and unusual treatment or punishment." Before determining whether the risk faced by the claimant is one generally faced by others in the country, the decision-maker must (1) make an express determination of what the claimant's risk is, (2) determine whether that risk is a risk to life or a risk of cruel and unusual treatment or punishment, and (3) clearly express the basis for that risk.

[24] In the present case, the Board addresses the issue in paragraphs 25 to 31 of its decision:

[25] Not everyone who would be subject personally to a risk of cruel and unusual treatment or punishment in their country is a person in need of protection, because section 97(1)(b)(ii) of the IRPA specifically excludes those persons who face a risk that is "faced generally by other individuals in or from that country." Therefore, the risk must not be an indiscriminate or random risk faced by other citizens. In the circumstances particular to this case, the harm feared by the claimant does not amount to persecution or to a personalized risk to his life or to a risk to cruel and unusual treatment or punishment or to a danger of torture, since the risk he faces is a risk that is faced generally by other individuals in Sri Lanka. Moreover, the test under section 97 is more likely than not that the claimant would be harmed upon return to Sri Lanka.

[26] The claimant also testified that the military does not suspect them and had they suspected them of supporting the LTTE by letting

them use on of their houses, otherwise they would still be in custody. She testified that she was released after 2 days and after military investigations.

[27] Canadian Court has found that nothing in s. 97(1)(b)(ii) requires the Board to interpret “generally” as applying to all citizens. The word “generally” is commonly used to mean “prelevant” or “widespread”. Therefore, even if the claimant faces a personal risk, the claim will fail if that risk is one that is faced generally by others in that country.

[28] Generalized risk has to do with the nature of the risk of harm. The exception under s. 97(1)(b)(ii) has been held to exclude generalized risks associated with widespread crime, organized crime, violence, extortion, police corruption and abuse of authority, human rights violations, general insecurity, terrorism, suicide bombing, political extremism and activities of armed military groups.

[29] Even if the claimant was personally targeted as a consequence of her perceived wealth, I find that the risk faced by her is a generalized and this falls under the exception in section 97 of the Act – a risk generally faced by others similar subsets of society.

[30] I find, on a balance of probabilities, the risk faced by the claimant is generalized risk which is faced generally by the population of Sri Lanka. Based on the particular facts of this case, I am not satisfied that the claimant faced particularized risk of harm in accordance with section 97 of the IRPA

[31] Based on the foregoing reasons, I find that the risk faced by the claimant is generalized rather than personalized risk, which falls under the paragraph 97(1)(b) exception, and therefore the claim is denied.

[25] The Court finds that the Board’s assessment under paragraph 97(1)(b) of the *IRPA* could have been more precisely articulated.

[26] The Court notes that the Board conducted a separate analysis of the Applicant’s claim under sections 96 and 97 of the *IRPA* (see *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] FCJ No 1540). Notwithstanding “it is not necessary that there

be a rigid bright line between the s. 96 and s. 97 considerations. A finding that the objective element of s. 96 had not been met could, depending on the circumstances, dispose of the s. 97 issue as well. However, the rejection of the subjective element of s. 96 does not entitle the Board to ignore the objective element of fear particularly in respect of s. 97. The form in which that consideration occurs is not one which the Court should direct -- what is important is that it be done and appear to be done” (see *Balakumar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 20, [2008] FCJ No 30 at para 13).

[27] The Board wrote, in paragraph 11 of its decision, “[the claimant] testified they were well-off and had employees [...] Yet she did not make any efforts to try to obtain any documents to corroborate that she was in Sri Lanka during the alleged time frame. It is not unreasonable for the Board to expect someone like the claimant to be able to provide supporting evidence and its absence provide reasonable explanation. In this case, I have none.’

[28] This finding is reasonable and disposes of the Applicant’s first argument under section 97 that she is at risk in Sri Lanka because of her wealth since there is no evidence to demonstrate that she was wealthy in the first place. The Board correctly rejected that part of the Applicant’s claim on the lack of evidence adduced.

[29] As for the Applicant’s second ground to dispute the Board’s finding that is her fear of returning to Sri Lanka as a failed asylum seeker, the Board noted the Applicant’s testimony that that the army did not suspect the Applicant and her family to be affiliated with the LTTE hence it found there was no risk to the applicant. Was this conclusion reasonable? The Applicant claims the Board

failed to consider country documentation establishing that risk. In fact, the record contained two documents that alluded to the situation of failed asylum seekers.

[30] No specific evidence was adduced by the Applicant to establish that she is a person in need of protection since her own evidence is to the effect that the military did not suspect her or her family of supporting the LTTE. Her counsel, in his closing remarks before the Board, raised a claim that she would be at risk upon her return as a failed refugee claimant. As such, she never testified or present evidence linking her case to the circumstances described in the documentary evidence her counsel referenced.

[31] The Court reviewed all of the record and the totality of the evidence presented. It concludes that the Board's decision is reasonable since there was no factual basis before the Board to support a conclusion that the Applicant would be at risk because of her failed application for refugee status.

[32] The facts in the present case can be distinguished from those in *Biro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1428 and *Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 448, cited by the Applicant.

[33] As stated more recently by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paras 15 and 16:

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it

necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion . . .

VII. Conclusion

[34] The Board's decision regarding its conclusion on generalized risk is reasonable. The Applicant failed to provide sufficient evidence to demonstrate that she would be subject of cruel and unusual treatment or punishment or a risk of torture upon her return to Sri Lanka.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and
2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6073-11

STYLE OF CAUSE: PUSHPALEELA KANAPATHIPILLAI
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto (Ontario)

DATE OF HEARING: March 22, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: April 26, 2012

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