Federal Court Cour fédérale

Date: 20120831

Docket: IMM-387-12

Citation: 2012 FC 1046

Ottawa, Ontario, August 31, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

SANJAYAN SIVALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated December 9, 2011, which refused the applicant's claim to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

Factual Background

[2] Mr. Sanjayan Sivalingam (the applicant) is a citizen of Sri Lanka of Tamil ethnicity. The applicant seeks protection in Canada under sections 96 and 97 of the Act as he alleges that he faces persecution or death in Sri Lanka as a young Tamil male from the North.

[3] The applicant alleges that he grew up in the context of the civil war in Sri Lanka. He maintains that he and his family resided in Jaffna until October of 1995, when the Sri Lankan Army (SLA) displaced them from their home. The applicant further alleges that his family then moved to Vinayagapuram, Mallavi.

[4] In Vinayagapuram, Mallavi, the applicant states that his father was harassed by the Liberation Tigers of Tamil Eelam (LTTE). The applicant maintains that despite the peace accord between the LTTE and the Sri Lankan government in February of 2002, his family continued to be harassed by the LTTE.

[5] The applicant contends that in March of 2006 the LTTE attempted to recruit him at the age of twenty-two (22). Consequently, the applicant affirms that his father decided to move the family to Sithamparapuram, Vavuniya, in August of 2006.

[6] While living in Vavuniya, the applicant alleges that he worked as a mason. However, he maintains that he was continually harassed by the SLA and the People's Liberation Organisation of Tamil Eelam (PLOTE) militants. The applicant submits that the

PLOTE forced him to work for them as a mason without remuneration and that he was threatened if he refused.

[7] In May of 2008, the applicant alleges that he was arrested by the SLA on his way home from work. The applicant affirms that he was accused of being an LTTE militant and was interrogated and tortured at the Joseph military camp. The applicant maintains that he was detained for eighteen (18) days and only released after his father paid a bribe to the SLA. The applicant affirms that he had to receive medical treatment after his release.

[8] In January of 2009, the applicant alleges that he was held by the PLOTE militants for two (2) days when he refused to work for them for free. A similar incident occurred again in June of 2009, however, when the applicant refused, the PLOTE militants falsely informed the SLA that the applicant worked for the LTTE. As a result, the applicant maintains that the SLA arrested him and detained him for four (4) days, where he sustained beatings and interrogations. The applicant affirms that he was released when the father paid another bribe.

[9] The applicant maintains that he continued to be harassed by the PLOTE militants and that he and his father decided to file a complaint at the police station. However, again, the applicant was turned over to the SLA and arrested on December 1, 2009. The applicant submits that his father then paid another bribe which secured his release and he was instructed to "withdraw the complaint" against the PLOTE militants.

[10] After his release, the applicant sought medical attention. At the medical clinic, he learned that the PLOTE were searching for him and had informed his mother that they intended to kill him.

[11] The applicant's father then found an agent to make arrangements for the applicant to flee Sri Lanka. The applicant transited through several countries and was intercepted in the United States. After a two-month detention, the applicant was released and he fled to Canada. The applicant filed a refugee claim at the Canadian border on the day of his arrival.

[12] The applicant submits that in June of 2010, once he had arrived in Canada, he learned that the PLOTE militants had continued to search for him. As well, he learned that his family had moved to Jaffna in May of 2010 after suffering hardship at the hands of the PLOTE militants. The applicant maintains that in Jaffna, his family continues to have problems with the SLA. He affirms that they were interrogated by the SLA and were required to register the applicant's name with the SLA since their arrival in Jaffna.

[13] The applicant's refugee claim was heard by the Board on October 11, 2011.

Decision under Review

[14] The Board concluded that the applicant was not a Convention refugee under section 96 of the Act or a "person in need of protection" pursuant to section 97 of the Act. While the Board accepted the allegations of the applicant to be credible, the Board noted that the determinative issue in the claim was that the Sri Lankan civil war had ended and rejected the applicant's application on this basis.

[15] The Board affirmed that there was only a mere possibility that the claimant would face persecution in Sri Lanka as a young Tamil from the North. Relying on the UNHCR guidance documents, the Board found that the conditions in Sri Lanka have changed since the end of the civil war – and that this change is a durable one. The Board acknowledged that the documents submitted by the applicant provided differing analyses, but after weighing them, the Board concluded that there was no reason to suggest that the UNHCR document was no longer valid.

[16] Moreover, the Board found that it was important to distinguish between crime, regular police action and persecution. The Board noted that the applicant testified that he had never been associated with the LTTE and that the Sri Lankan government released thousands of actual LTTE cadres since the end of the civil war. Also, the Board found that the SLA would not likely have released the applicant in 2009 if it really believed that he was a member of the LTTE. Consequently, the Board concluded that the applicant faced less than a serious risk of being persecuted by the SLA because of his perceived association with the LTTE.

[17] Furthermore, based on the applicant's narrative in his Personal Information Form (PIF) and his testimony, the Board decided that the applicant had been only at risk because he had refused to work as a mason for the PLOTE for free. The Board concluded that this amounted to extortion by a criminal organization, which the Board affirmed was supported by documentary evidence, and which called for an evaluation under section 97(1)(*b*) of the Act. The Board explained that if the applicant were to rejoin his family in Jaffna, it was

hard to believe that the PLOTE militants in the area (if there were any) would know of the organization's previous attempts in Vavuniya extort the applicant for free mason work. The Board held that even if this information were known, it was not necessarily the case that they would also be in need of free mason work. Consequently, the Board concluded that, on a balance of probabilities, the claimant would be safe from the PLOTE in Jaffna.

[18] In terms of the applicant's registration, the Board noted that the evidence demonstrated that the registration onus had been lifted as the "the Jaffna Security Forces Commander gave assurances that the forced registration would be discontinued" and that the PLOTE was not a force or was a diminishing force in Jaffna. The Board further noted that the applicant would be safe from the PLOTE in Colombo, for the same reasons that he would be safe in Jaffna.

[19] Concerning the applicant's allegation that he would be at a risk if he were to return to Sri Lanka as he would be apprehended at the airport, after reviewing the documentary evidence provided by the applicant, the Board concluded that it lacked detail and noted that it preferred the evidence provided by the UK government and the Canadian High Commission which indicated that if failed refugee claimants had "no connection to the LTTE and were not criminals, that this process of entering Sri Lanka would go smoothly." The Board underlined the fact that the Sri Lankan civil war had been over for more than two (2) years and that there had been many asylum seekers that had been returned. Moreover, the Board mentioned that the applicant had left Sri Lanka with his own passport and without difficulty during the period of heightened vigilance of 2009. The Board concluded that this

fact reinforced its conclusion that there was less than a serious possibility that the applicant would be at risk from Sri Lankan authorities if he were to return.

Issues

[20] The issues raised in this case are as follows:

1) Was it reasonable for the Board to conclude that the end of the civil war in Sri Lanka represents a change of conditions such that the applicant could return to his country and live safely in Jaffna or Colombo?

2) Did the Board fail to observe a principal of natural justice or procedural fairness or did it lack the proper competence to render its decision?

Statutory Provisions

[21] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

PART 2	PARTIE 2
REFUGEE PROTECTION	PROTECTION DES RÉFUGIÉS
REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION	NOTIONS D'ASILE, DE RÉFUGIÉ ET DE PERSONNE À PROTÉGER
Convention refugee	Définition de « réfugié »
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,	**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 :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

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 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 themself 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 generally by other individuals in or from that country,

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

Standard of Review

[22] With respect to the first issue, whether it was reasonable for the Board to conclude that the end of the civil war in Sri Lanka represents a change of conditions such that the applicant could return to his country and live safely in Jaffna or Colombo, the Court recalls that the Board's findings on a change of conditions in a country is a question of fact to which the standard of reasonableness applies (*Sow v Canada (Minister of Citizenship and Immigration),* 2012 FC 7, at para 7-8, [2012] FCJ No 19; *Yusuf v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 35 at para 2, 179 NR 11; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[23] In terms of the second issue, whether the Board failed to observe a principal of natural justice or procedural fairness or lacked the proper competence to render its decision, the applicable standard of review is that of correctness (see *Dunsmuir*, above, *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 99-100, [2003] 1 SCR 539; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, [2005] FCJ No 2056).

Analysis

Issue 1: Was it reasonable for the Board to conclude that the end of the civil war in Sri Lanka represents a change of conditions such that the applicant could return to his country and live safely in Jaffna or Colombo?

Alleged Failure to Apply the Correct Tests

[24] The applicant contends that the Board failed to apply the correct test in finding that there has been a change of conditions since the applicant made his claim. However, the Court has to agree with the respondent that the Board indeed applied the correct test regarding the change of circumstances pursuant to the principles outlined in the case of *Tariq v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 540, [2001] FCJ No 822. The applicant is in fact asking the Court to reweigh country conditions.

[25] The applicant also alleged that the Board also committed an error regarding the risk of persecution in Sri Lanka. In the case of *Adjei v Canada (Minister of Employment and Immigration)* (FCA), [1989] 2 FC 680, [1989] FCJ No 67 [*Adjei*], the Federal Court of Appeal concluded that a refugee claimant has to show a “reasonable” or “serious” possibility of persecution, as opposed to a mere possibility of persecution (see also *Lawal v*

Canada (Minister of Citizenship and Immigration), 2010 FC 558, [2010] FCJ No 673; *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] FCJ No 1). The Board noted that the civil war in Sri Lanka is over and the Court agrees with the respondent that it is trite law that the test for refugee status is prospective rather than retrospective (*Pour-Shariati v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 767; [1994] FCJ No 1928; *Katwaru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 196, [2010] FCJ No 232).

[26] After a careful review of the applicable jurisprudence and the evidence, the Court cannot accept the applicant's arguments and finds that the Board applied the correct tests in its evaluation of the applicant's refugee claim.

Treatment of the Evidence

[27] The applicant also contends that the Board ignored or misrepresented the documentary evidence that is at the heart of the claim. Specifically, the applicant submits that the Board ignored the applicant's evidence regarding the risk and danger present in Vavuniya and Jaffna: the fact that his family had been subjected to searches, the danger to his brother, the threats against the applicant, the consequences arising from the forced registration of "absent" members of the family, the existing connection between the PLOTE and the SLA, and the fact that he had been denounced by the PLOTE to the SLA as having supported the LTTE. As well, the applicant maintains that the Board ignored or disregarded documentary evidence from several human rights groups.

[28] Furthermore, the applicant advances that in determining that the applicant was not at risk, the Board relied on a section of a document from the UNHCR dated July 2010 that was broad and difficult to interpret. The applicant maintains that the Board also ignored information in certain sections of this same document and that there is nothing in the documentary evidence posterior to the UNHCR document to suggest that its conclusions are still valid.

[29] In addition, the applicant submits that the Board's conclusions were speculative and that by identifying the PLOTE as a criminal organization, the Board overlooked the applicant's evidence. As well, the applicant affirms that there is no evidence to indicate that the PLOTE has severed its links with the SLA and the Board ignored a large body of documentation which demonstrates that the SLA continues to be a powerful force in Jaffna and a significant agent of persecution. Similarly, the applicant alleges that similar evidence was ignored regarding the possible internal flight alternative of Colombo. Although the applicant acknowledges that the Board was not obliged to comment on every piece of documentary evidence, it argues that the documentation is contradictory and that the Board should have examined and explained the reasons for dismissing this allegation.

[30] On the other hand, the respondent is of the view that the Board's findings were reasonable as the documentary evidence indicates that there has indeed been a change of conditions since the applicant made his claim as the civil war in Sri Lanka came to an end in May of 2009. The respondent explains that this change is substantial and durable and therefore makes the applicant's fear unfounded (see *Barua v Canada (Minister of*

Citizenship and Immigration), 2012 FC 59, [2012] FCJ 70; *Hettige v Canada (Minister of Citizenship and Immigration)*, 2010 FC 849, [2010] FCJ No 1056; *Balasubramaniam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 228, [2012] FCJ No 249; *Selvalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 251, [2012] FCJ No 274; *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 47, [2012] FCJ No 47).

[31] The respondent also submits that it was reasonable for the Board to conclude that the applicant faced extortion by the PLOTE which amount to criminality which cannot be a nexus to the Convention grounds for refugee status under section 96 of the Act (*Aburto v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1049, [2011] FCJ No 1305; *Meneses v Canada (Minister of Citizenship and Immigration)*, 2009 FC 511, [2009] FCJ No 830; *Suarez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 227, [2009] FCJ No 275, among others). The Board was entitled to make this finding as the issue of a nexus is a question of fact.

[32] Moreover, in its evaluation of the applicant's claim under section 97 of the Act, the respondent maintains that the Board's decision was reasonable as the documentary evidence indicates that the PLOTE is a diminishing force that has evolved into criminal gangs. The respondent also asserts that it was reasonable for the Board to conclude that it was unlikely that the PLOTE in Jaffna would be aware of the applicant's previous dealings regarding his mason work and, if so, that it would even be in need of mason work. Also, the respondent reiterates the findings of the Board that the applicant should not be of interest to the SLA

since he was never associated with the LTTE. The respondent underlines the fact that the documentary evidence states that young Tamils from the North do not need international protection since the end of the war. In addition, the respondent explains that the documentary evidence shows that the applicant would not have to register anymore in Jaffna. Furthermore, the respondent affirms that the applicant failed to explain why registering in Colombo would amount to persecution or a risk of return.

[33] The Court agrees with the respondent and notes that the Board clearly examined the documentary evidence and provided a comprehensive explanation as to why it chose to prefer certain documents over others provided by the applicant. Although the Court agrees that some of the documentary evidence on record was more recent that the UNHCR document relied upon by the Board, the Court notes that the Board acknowledged that there was documentary evidence that was more recent than the UNHCR document but explained why it determined that the information in the UNHCR document was still valid (Board's decision, para 15). While the applicant alleges that the Board ignored and misconstrued the evidence about the applicant's family being subjected to searches and threats, these incidents occurred in Vavuniya rather than in Jaffna (where they currently reside).

[34] The Court is also of the opinion that it was open for the Board to find that the documentary evidence did not support the applicant's allegation regarding the risk he allegedly faces upon returning to Sri Lanka. Indeed, the evidence demonstrates that the applicant was not a criminal and did not have connections to the LTTE. As such, it was also reasonable for the Board to find that the applicant would not be at risk upon arrival in Sri

Lanka. Further, the SLA would not likely have released the applicant during 2009 in exchange for a bribe if it really believed that the applicant was associated with the LTTE. It was thus also reasonable for the Board to find that the applicant merely did not fit the risk profile because he was not a member of the LTTE.

[35] The Board analyzed the differences with respect to return and transiting in Sri Lanka by asylum-seekers. Despite the applicant's argument, the Court finds that, amongst the evidence, the Board was entitled to rely on the UK government and Canadian High Commission analyses which indicated that claimants with no connection to the LTTE and who were not criminals in the process of entering Sri Lanka would "smoothly" return home (Board's decision, para 22).

[36] At hearing before this Court, no convincing and compelling evidence was alleged to the contrary and the applicant failed to convince this Court as to why he would be personally targeted.

[37] In essence, at the heart of this application for judicial review is a debate over the treatment of the evidence by the Board. Though the applicant reproaches the Board for failing to consider several documents and for preferring certain documents over others, the Court finds that the applicant's dissatisfaction with the Board's treatment of the evidence does not warrant the intervention of this Court.

[38] At the hearing before this Court, the applicant made reference to the recent case of *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486, [2012] FCJ No 511 rendered by Justice Martineau. The Court finds that the *Sivapathasuntharam* case does not apply to the case at bar. Firstly, it is important to note that Justice Martineau made a point to distinguish the *Sivapathasuntharam* case from other recent cases regarding Sri Lanka as he concluded that the Board's two-page decision was highly selective in its treatment of the evidence and hastily analyzed. However, and it is worthy of note, in the present case, the Board considered the contradictory evidence and provided an analysis in its reasons. Each case turns on its own facts and the parallels that the applicant wishes to make cannot be drawn by the Court in these circumstances.

Issue 2: Did the Board fail to observe a principal of natural justice or procedural fairness or did it lack the proper competence to render its decision?

The Persuasive Decision

[39] The applicant alleges that the Board's decision was clearly based on a persuasive decision from November of 2010 though it was not mentioned in its reasons (Applicant's Record, pp 66-75). As such, the applicant maintains that it was denied the right to a fair and impartial hearing and that it appears that justice was not done.

[40] The applicant submits that the Immigration and Refugee Board (IRB) encourages the use of persuasive decisions. However, the applicant affirms that persuasive decisions are issued without legal authority – as opposed to jurisprudential guidelines which stem from paragraph 158(1)*h*) of the Act. Nonetheless, the applicant states that even if persuasive

decisions are to be considered legal, the Board was still required to fulfill its duty of determining whether the applicant is at risk of persecution.

[41] Conversely, the respondent affirms that the persuasive decision underlined by the applicant was not mentioned in the Board's decision and that there is no indication that the Board relied on it since the Board considered the applicant's personal situation, history and documentary evidence. The respondent submits that this argument is entirely hypothetical and without foundation.

[42] Upon reviewing the Board's decision and the parties' arguments, the Court finds that the applicant's argument on this point is unfounded and without merit.

The Alleged Lack of Competence of the Board Member

[43] Moreover, the applicant submits that it appears that justice was not done due to a possible lack of competence on the part of the Board. Broadly, the applicant contends that certain current IRB members have failed the exam that is required if they wish to remain in office after Bill C-11 comes into force. Thus, the applicant argues that the rate of failure of the current Board members raises serious concerns regarding their competence (Applicant's Record, pp 76-85).

[44] After reviewing the evidence and considering the argument, the Court finds that the argument is speculative and unsupported by the evidence and must therefore be rejected *Faour v Canada (Minister of Citizensip and Immigration)*, 2012 FC 534, [2012] FCJ No

562; *Gillani v Canada (Minister of Citizensip and Immigration)*, 2012 FC 533, [2012] FCJ No 561).

[45] Finally, the applicant is attempting to introduce new evidence in arguing that his profile is similar to some individuals whose claims have been accepted. However, the jurisprudence of this Court is clear that refugee status is determined on a case-by-case basis on the facts alleged. The two decisions submitted by the applicant were rendered after the applicant's case was heard by the Board and were rendered by differently constituted panels. The Board is not bound by the result of another claim. This new evidence is not admissible at this stage of the judicial review and the Court must thus reject the applicant's argument.

[46] For all of these reasons, the Court finds that the Board's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47). As such, the Court must dismiss the application for judicial review.

[47] The parties have not proposed any questions for certification and none arise.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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