

Federal Court



Cour fédérale

Date: 20121119

Docket: IMM-913-12

Citation: 2012 FC 1334

Ottawa, Ontario, November 19, 2012

PRESENT: THE CHIEF JUSTICE

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

B380

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Respondent is a 26 year old Tamil citizen of Sri Lanka who arrived in Canada on August 13, 2010 as a passenger on the *MV Sun Sea*. Among other things, he alleges that he cannot return safely to his country because he is a perceived supporter of the Liberation Tigers of Tamil Eelam [LTTE].

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada accepted his *sur place* claim for refugee protection after determining that:

- a. he is a member of a “particular social group” described in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], by virtue of the fact that he is a Tamil male who was a passenger on the *MV Sun Sea*; and
- b. there is every reason to believe that he will be perceived to be an “LTTE cadre” and will therefore face a serious chance of persecution if he is returned to Sri Lanka.

[3] The Applicant submits that the Board erred in reaching each these two findings. I agree.

[4] For the reasons that follow, this application is granted.

[5] Although the Applicant raised a third issue, in its written submissions, relating to procedural fairness, it stated at the hearing before the Court that it was no longer pursuing that issue.

Accordingly, that issue will not be further addressed in these reasons.

I. Background

[6] From 2005 to 2008, the Respondent lived in an area of Sri Lanka that was controlled by the LTTE. However, he was able to avoid being recruited by the LTTE due to the fact that the LTTE had a policy of obliging only one member of each family to serve in its organization, and one of his siblings had died while serving as an officer in the LTTE.

[7] In September 2008, he was displaced due to the approach of the Sri Lankan army. For the following 8 months or so, he lived for short periods of time in several cities and towns, before being taken to an internally displaced persons camp run by the Sri Lankan authorities. At one point during his stay at that camp, he was suspected of being a LTTE supporter and taken for questioning. He was released from the camp after several months on terms and conditions that included a regular reporting requirement, despite having lost a card which stated that he was exempt from service in the LTTE.

[8] Several months later, the Respondent met up with one of his brothers, who put him in contact with an “agent” who helped him to obtain a passport and a spot on the *MV Sun Sea*.

II. The Decision under Review

[9] After accepting the Respondent’s identity, the RPD stated that it had “significant credibility concerns” with respect to his evidence. Due to those credibility concerns and the absence of reliable corroboration for his alleged fears, as set forth in the Personal Information Form [PIF] part of the Respondent’s claim for refugee protection, the RPD rejected his allegations.

[10] However, the RPD observed that “a number of relevant facts remain”. In particular, it stated that his link to the *MV Sun Sea* as a male Tamil passenger “is a prior association which cannot be altered.” Based on this determination, the RPD found him to be a member of a “particular social group” within the meaning of section 96 of the IRPA.

[11] The RPD then relied on a report published on August 10, 2010 in the *Toronto Star* to conclude that “there is every reason to think [the Respondent] will be perceived to be an LTTE cadre if he is returned to Sri Lanka.” After briefly referring to country documentation which reported that some LTTE fighters have been released from government detention while thousands of others are suffering torture or even extrajudicial execution, the RPD found that the Respondent faces a serious chance of persecution if he is returned to Sri Lanka.

[12] Accordingly, RPD accepted his claim for refugee protection.

III. Standard of Review

[13] The Board’s findings with respect to the issue of nexus to a ground of protection set forth in section 96 raises a question of law and a question of mixed fact and law. The question of law is whether there are limits to the scope of the words “particular social group” in that section and, if so, the extent of those limits. That is a question of interpretation of the Board’s home statute and the related jurisprudence, and does not involve issues of central importance to the legal system that are outside of the RPD’s expertise, issues of true jurisdiction or *vires*, constitutional issues or the jurisdictional lines between two tribunals. Accordingly, the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 55 - 61, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, at paras 30 – 47, [2011] 3 S.C.R. 654).

[14] The question of mixed fact and law in respect of the issue of nexus is whether there was sufficient evidence on the record before the RPD to permit the RPD to conclude that the Respondent is a member of a particular social group, within the meaning of section 96. That is also subject to review on a standard of reasonableness (*Dunsmuir*, above, at paras 51 – 53; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paras 45-46, [2009] 1 S.C.R. 339; *Jimenez Herrera v Canada (Minister of Citizenship & Immigration)*, 2010 FC 499, at para 7; *Chekhovskiy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 970, at para 18 [*Chekhovskiy*]; *Jayasekara v Canada (Minister of Citizenship and Immigration)* [2001] FJC No 1393, at paras 17-24).

[15] Similarly, the issue that has been raised regarding the well foundedness of the Respondent's fears, which largely relates certain factual findings made by the RPD, but also has an element of a question of mixed fact and law, is subject to review on a standard of reasonableness.

IV. Analysis

A. *Nexus*

[16] The Applicant submits that the RPD erred in finding that "Tamil males who were passengers on the *MV Sun Sea*" constitute a particular social group within the meaning of section 96 of the IRPA. I agree.

[17] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at paras 63-70 [*Ward*], the Supreme Court held that "the international community's commitment to the assurance of basic human rights without discrimination," as reflected in the preamble to the *Convention Relating to the*

Status of Refugees, 1951, Can TS 1969 No 6 [Refugee Convention], provides an inherent limit to the scope of protection afforded by section 96. In applying this approach to the meaning of “particular social group” in section 96, it noted that “the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative” should be taken into account. To this end, it identified the following three possible categories of groups that “provide a good working rule to achieve this result”:

- a. groups defined by an innate or unchangeable characteristic;
- b. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- c. groups associated by a former voluntary status, unalterable due to its historical permanence.

[18] In its decision, the RPD grounded its finding with respect to nexus in the third of the above categories, when it found that the Respondent’s link to the *MV Sun Sea* as a Tamil passenger “is a prior association which cannot be altered.”

[19] The Applicant submits that the RPD erred in making this finding because “Travel aboard the *MV Sun Sea* has nothing to do with human rights or anti-discrimination.”

[20] The Respondent disagrees. He maintains that because he is a young Tamil male who travelled to Canada aboard the *MV Sun Sea*, he will be suspected by Sri Lankan authorities of having links to the LTTE, and therefore will be at risk on the ground of his membership in that social group. He further asserts that (i) he falls within the first of the categories identified in *Ward* and set forth above, because he is a young Tamil male, and (ii) he falls within the third of those categories, because the bare fact of having travelled aboard the *MV Sun Sea* places him in a group associated by a former voluntary status that is unalterable due to its historical permanence.

[21] I agree with the Respondent that being a young Tamil male may be a sufficient basis upon which to make him a member of a particular social group that is defined by innate and unchangeable characteristics, as contemplated by the first of the three categories identified in *Ward*, above. However, on the particular facts of this case, the Respondent did not have a well founded fear persecution “for reasons of” his membership in that social group, as contemplated by section 96. This was because the RPD rejected the allegations set forth in his PIF that were related to his membership in that group, after identifying “significant credibility concerns” with his evidence.

[22] It is for this reason that the focus of the parties’ written and oral submissions was upon the Respondent’s membership in a narrower group, namely, Tamil males from Sri Lanka who were passengers on the *MV Sun Sea*. The link between his membership in that group and his claimed well founded fear of persecution was that Sri Lankan authorities would perceive him to be affiliated with the LTTE by virtue of the fact that he was a passenger on the *MV Sun Sea*.

[23] I do not accept the Respondent's position that this narrower group constitutes a "particular social group" within the meaning of section 96. I recognize that the bare fact of having travelled aboard the *MV Sun Sea* may well place the Respondent into a group associated by a former voluntary status, unalterable due to its historical permanence. However, it is implicit in the approach that was adopted in *Ward*, above, that the historical fact of having come voluntarily together in a particular way for the ultimate purpose of travelling to Canada to seek refugee status is not a sufficient basis upon which to become a "particular social group" within the meaning of section 96. Otherwise, every group of people, including even a small family, who might voluntarily come together for this purpose would have a nexus to section 96, and the words "race, religion, nationality ...or political opinion" would be essentially superfluous (*Ward*, above, at para 61).

[24] To come within the scope of a particular social group contemplated by section 96, there must be something about a group which is related to discrimination or human rights. That something can include associating for reasons so fundamental to their dignity that they should not be required to forsake or alter that association. However, that something must be more than simply coming together to seek refugee protection. In addition, that something should relate to what the members are, in an immutable or fundamental way, as opposed to what they do (*Ward*, above, at paras 65, 66 and 69-70; *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, at paras 83-86 [*Chan*] (per LaForest dissenting on an issue not considered by the majority) .

[25] In its very brief discussion of the issue of nexus, the RPD did not identify any considerations related to discrimination, human rights or a purpose of association so fundamental to the Respondent's dignity that he should not be required to forsake or alter that association. I

acknowledge that the human rights situation for people perceived to be “LTTE cadres” was subsequently discussed by the RPD, but that discussion related to a much broader group of persons, and not just those who travelled aboard the *MV Sun Sea*.

[26] There is no discussion anywhere in the RPD’s decision, and nothing in the certified tribunal record, that identified anything about the claimed “particular social group” of Tamil males who travelled on the *MV Sun Sea* that is related to discrimination, human rights, or human dignity. In my view, voluntarily becoming a member of such a group is more analogous to voluntarily joining a taxi driver cooperative (*Chan*, above) or a building contractors’ group (*Chekhovskiy*, above, at para 23), than it is to deciding to have children (*Chan*, above) or to get married. Becoming a parent or getting married cannot be considered to be an activity that one merely does, but is fundamental to a person’s basic humanity (*Chan*, above). No one who decides to have children or to get married should be forced to forsake their “voluntary association” with the “group” of people who have made similar decisions. The same can not be said of people who voluntarily join a taxi cooperative, a building contractor’s group, or a group of people who have decided to travel to Canada on a particular ship.

[27] Accordingly, the RPD erred when it concluded that Tamil males who travelled to Canada on the *MV Sun Sea* constitute a particular social group within the meaning of section 96.

[28] The Respondent also submitted that, although it was not a political action when he boarded the *MV Sun Sea*, “it became a political matter when the Sri Lankan government publicly declared

the links between the vessel and the LTTE.” For the reasons discussed below, there was no reasonable basis in the RPD’s reasons or the underlying evidentiary record for reaching such a conclusion.

B. Well Founded Fear of Persecution

[29] The Applicant submits that the RPD erred by making findings of fact that are not reasonably supported by the evidence. I agree.

[30] First, the Applicant submits that the RPD inaccurately summarized an article published in the *Toronto Star* on August 10, 2010 that it relied upon in concluding that the Respondent has a well founded fear of persecution in Sri Lanka. In this regard, the RPD commenced its short discussion of that article by stating the following:

Counsel provided a useful document this morning which establishes that the Sri Lankan government believed, and certainly loudly proclaimed to the public, that the “Sun Sea” was an operation undertaking for the profit of the LTTE and to rescue its cadres.

[31] However, this mischaracterizes what the government sources quoted or paraphrased in the article actually said. The only person who was identified in the article as representing the Sri Lankan government is Mr. Sumith Dassanayake. He was identified as being with the Sri Lankan High Commission in Ottawa. Although the article did not indicate Mr. Dassanayake’s rank, I am prepared to assume (without necessarily accepting) that if he did in fact make the statements that he was reported to have made, he did so as a representative of the Sri Lankan government.

[32] Mr. Dassanayake was reported as having made the following three statements:

- a. “Most of [the passengers on the *MV Sun Sea*] are hardcore LTTE people (Tamil Tigers).”
- b. “The Tigers are trying to regroup here to keep the movement alive.”
- c. Some or all of the passengers on the *MV Sun Sea* are “a grave security threat to Canada.”

[33] The only other reference in the *Toronto Star* article to a statement purportedly made on behalf of the Sri Lankan government was in the following sentence of that article: “While the Sri Lankan government has warned that the *MV Sun Sea* is engaged in brazen human rights smuggling, human rights experts argue that the people aboard are legitimate refugees.” There is no indication in the article as to who made this statement, allegedly on behalf of the Sri Lankan government.

[34] As is readily apparent, none of the aforementioned statements actually state, let alone establish, that the Sri Lankan government believed that the *MV Sun Sea* was an operation undertaking for the profit of the LTTE and to rescue its “cadres”. As it turns out, this particular statement was reported to have been made by Mr. Rohan Gunaratna, who was identified as being the head of a research centre in Singapore and an expert on the Tamil Tigers.

[35] The Respondent concedes that the RPD “drew some erroneous findings from the [*Toronto Star*] article,” but maintains that “the core of its decision is supported by the article.” I am inclined

to agree that the first statement made by Mr. Dassanayake, quoted at subparagraph 32(a) above, can reasonably be interpreted as suggesting that the *MV Sun Sea* was an operation undertaken for the profit of the LTTE and to rescue its “cadres”.

[36] However, I do not agree with the Respondent that it was “perfectly logical” for the RPD to conclude, based solely on the statements reported upon in the *Toronto Star* article, that “there is every reason to think that [the Respondent] will be perceived to be an LTTE cadre if he is returned to Sri Lanka.” Likewise, I do not agree with the submission made by the Respondent’s counsel during the hearing of this application, to the effect that it was reasonable for the RPD to essentially conclude, based on the statements reported in the *Toronto Star* article, that there is a serious possibility that everyone who traveled to Canada aboard the *MV Sun Sea* and who is forced to return to Sri Lanka will be tortured or otherwise persecuted by Sri Lanka authorities upon their arrival.

[37] As noted at paragraph 32 above, Mr. Dassanayake was simply reported to have stated that most passengers aboard the *MV Sun Sea* “are hardcore LTTE people.” He was not reported to have stated that everyone aboard the *MV Sun Sea* is perceived to be among that group of persons. Even if it were true that the Sri Lankan government believed that most of the passengers who arrived in Canada aboard the *MV Sun Sea* are hardcore members of the LTTE, the RPD erred by failing to discuss why there was a serious possibility that the Respondent would be (i) perceived to be among that group of individuals, as opposed to the other group of passengers on the *MV Sun Sea*, namely, those who are not hardcore members of the LTTE, or (ii) tortured or otherwise persecuted, either as

a result of that perception or for the purposes of providing information about other passengers who travelled on the *MV Sun Sea*.

[38] I recognize that the Respondent's own evidence regarding his experiences in Sri Lanka was found not to be credible. But that did not relieve the RPD of its obligation to address the additional considerations that were part of his specific risk profile and explain why it believed, based on that profile, that he had a well founded fear of persecution. This was particularly important in this case given the evidence in the certified tribunal record that people with low level involvement in the LTTE are routinely released after a short period of questioning that may involve detention. Contrary to the Respondent's assertion, it was not the Applicant's burden to prove that the Respondent would not likely be perceived to be an "LTTE cadre" and that he did not have a well founded fear of persecution if required to return to Sri Lanka.

[39] In summary, I am satisfied that the statement that the RPD appears to have attributed to Mr. Mr. Dassayanake, together with the three statements that he is reported to have made and the statement reported to have made by the unnamed government source (discussed at paragraph 33 above), cannot reasonably support the conclusions reached by the RPD with respect to the risk faced by the Respondent and the well foundedness of his fear of persecution. In my view, those conclusions were not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and they were not appropriately justified or intelligible, given the evidence in the record before the RPD (*Dunsmuir*, above, at para 47).

[40] More fundamentally, it was unreasonable for the RPD to rely solely on general statements reported in a newspaper article to conclude that the Respondent has a well founded fear of persecution in Sri Lanka. Just as it ordinarily would be unreasonable to reject an application for refugee protection solely on the basis of uncorroborated statements reported in a newspaper article, it is ordinarily similarly unreasonable to accept such an application, solely on that basis.

[41] To the extent that the Respondent's submission regarding his perceived political opinions also rely solely on the statement reportedly made by Mr. Dassayanake, to the affect that "[m]ost of [the passengers on the *MV Sun Sea*] are hardcore LTTE people," it is rejected for the same reasons set forth above.

[42] Given the foregoing, it is not necessary to address the Respondent's submissions regarding the risks faced by persons who are perceived to be LTTE cadres, or who can establish that there is a serious possibility that they will be perceived as such, by Sri Lankan authorities.

[43] I would simply add, in passing, that in his PIF and in his testimony, the Respondent mentioned that he was released after a short period of time each time he was questioned by Sri Lankan authorities, that he was photographed on numerous occasions and that he was videotaped at least once. This suggests that he is known to Sri Lankan authorities and is not perceived to be a hardcore member of the LTTE.

V. Conclusion

[44] For the reasons discussed above, the RPD's conclusions with respect to the Respondent's nexus to a "particular social group," as contemplated by section 96 of the IRPA, and the well foundedness of his fear of persecution at the hands of Sri Lankan authorities should he return to that country, were unreasonable.

[45] Therefore, the RPD's decision to grant the Respondent's application for refugee protection is quashed. The matter will be sent back to a different panel of the RPD for consideration in accordance with these reasons for judgment.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT the RPD's decision, dated January 10, 2012, in which it accepted the Respondent's claim for refugee protection under section 96 of the IRPA, is set aside and remitted to a differently constituted panel of the RPD for reconsideration in accordance with these reasons.

There is no question for certification.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

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