

Federal Court



Cour fédérale

**Date: 20130703**

**Docket: IMM-11399-12**

**Citation: 2013 FC 741**

**Ottawa, Ontario, July 3, 2013**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Applicant**

**and**

**B171, B169, B170**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application by the Minister for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 72(1), of a decision by the Refugee Protection Division that the respondents B171, B169, and B170 were Convention refugees.

[2] The three respondents are ethnic Tamils from Sri Lanka who arrived in Canada on board the MV *Sun Sea* on August 13, 2010. The respondents B169 and B170 were unaccompanied children

upon arrival and B170 remains a minor. B171 is an adult and is married to the other respondent's sister.

[3] The Board Member who made the decision noted that the three claimants' identities had been established by documentation. B171 and B169 alleged personal experience of harassment by various authorities seeking information about the Liberation Tigers of Tamil Eelam (LTTE), while B170 did not allege personal experience of mistreatment, but submitted through his counsel that as a minor he was particularly vulnerable to persecution. The Board Member found that the claimants had a genuine fear of returning to Sri Lanka.

[4] The foundation of the refugee determination, however, was the unalterable historical fact that all three respondents had been passengers on the MV *Sun Sea*. The Board Member found that this amounted to membership in a "particular social group" for Convention purposes. He specified that he did not analyze any other basis for protection.

**ISSUE:**

[5] The issue in this application is whether the Board Member erred in finding that the respondents' claim had a nexus to a Convention refugee ground, that being membership in a "particular social group".

[6] As the question is not the definition of a "particular social group" but whether the respondent fell within such a group, a question of mixed fact and law, and as the Board was interpreting its home statute and the related jurisprudence, I find that the standard of review is the

more deferential one of reasonableness (*Canada (MCI) v B380*, 2012 FC 1334, at paras 13-15).

However, I note that there is not unanimity on this point and that the correct identification of the appropriate standard of review was certified as being a serious question of general importance in *Canada (MCI) v A011*, 2013 FC 580 at para 57:

[57] Unfortunately, counsel for A011 did not propose a serious question of general importance to certify. Nevertheless, I shall certify the following question:

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

#### **ANALYSIS:**

[7] The applicant Minister submitted that the Board Member’s reasons clearly identified the “particular social group” as passengers on the Sun Sea and not as some other possible grouping such as “suspected LTTE supporters”. The test for membership in a Convention “particular social group” involves more than identifying a group of people who share some commonality. Citing section 96 of the IRPA and *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], the applicant argued that voluntarily choosing to set sail for Canada on an illegal human smuggling ship did not create a group which defined its members in a way which engaged the defense of human rights and that to include such people would trivialize the notion. There had to be something about a group which was related to discrimination or human rights in order for it to have a Convention nexus.

[8] The respondent B171 argued that the Board Member's determination was in line with the Supreme Court's categories in *Ward*. The *Sun Sea* voyage had been publicly labeled an LTTE operation and therefore it was no longer just another smuggling trip. All of the vessel's passengers had been Tamils and the Sri Lankan authorities continued to target Tamils and suspected LTTE supporters. It was essential to the Board Member's decision that B171 was an ethnic Tamil; Tamil ethnicity coupled with passage on the *Sun Sea* and a perceived political opinion as a supporter of the LTTE had added up to a Convention nexus. B171 argued that even if he did not qualify under the "particular social group" category, the combination of factors sufficed to create a serious possibility of persecution. He submitted that the Board Member had made a mixed motives finding.

[9] The respondents B169 and B170 also argued that the Board Member was correct in finding them to be members of a particular social group. They cited *Canada (MCI) v B420*, 2012 FC 321 at paras 22-23, and *Veeravagu v Canada (MEI)*, [1992] FCJ No 468 (QL) (FCA) as support for the proposition that when a claimant "belongs to a group one of whose defining characteristics is race, (young Tamil males), it is simply impossible to say that such person does not have an objective fear of persecution for reasons of race." The respondents argued that Tamil race together with passage on the vessel combined to create both a particular social group and a perceived political opinion.

[10] I find that the Board Member expressly chose not to analyze any Convention ground for protection other than the "particular social group" he identified and therefore that only his findings on that subject can be reviewed by this Court. I note that while the jurisprudence from this Court on the question of "particular social group" as it pertains to the MV *Sun Sea* is somewhat mixed, this is

largely due to variations in the factual circumstances of each case and the reasons for decision provided by different Board Members.

[11] There is no doubt that the aim of the concept of a “particular social group”, as established by *Ward*, is based on the defense of human rights:

**70** The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, *supra*, *Cheung*, *supra*, and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories:

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

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

[12] It is not every identifiable “particular social group” formed by irrevocable historical facts which faces persecution on a discriminatory ground. As Justice Harrington stated in the similar case of *A011*, at para 40:

[40] In *A011*'s case, given the structure of the decision, references to race and perceived political opinion were part and parcel of why he was found to be a member of a particular social group, Tamils who came to Canada on the *Ocean Lady*. Those passengers did not voluntarily associate themselves for reasons fundamental to their human dignity. The common desire of coming to Canada does not make the passengers members of a particular social group within the meaning of the Convention and s. 96 of IRPA. As I said at paragraph 27 of *B72*:

The “*Sun Sea*”s passengers had a myriad of motives to come to Canada. Some were human smugglers. Some may well have been terrorists. Some were garden-variety criminals who wanted to

escape justice. Some had serious reason to fear persecution in Sri Lanka and some, like Mr. 472, were economic migrants. There is no cohesion or connection to the other refugee grounds set out in section 96 of IRPA.

[13] Even on the deferential standard of reasonableness, given the existing jurisprudence on the question of a “particular social group” resulting from passage on the *Sun Sea*, I find that the Board Member’s decision in the present case did not fall within the range of possible, acceptable outcomes which were defensible in respect of the facts and law. (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at para 47).

[14] The confidentiality order imposed by this Court shall be maintained.

**CERTIFIED QUESTION:**

[15] As there is uncertainty on the appropriate standard of review, I certify the same question as was proposed in *A011*:

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

**CONCLUSION:**

[16] The application is granted. No costs shall be awarded.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. the application is granted;
2. no costs are awarded,
3. the confidentiality order imposed by this Court shall be maintained pending the final determination of the matter, or order to the contrary; and
4. the following question is certified:

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-11399-12

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

AND

B171, B169, B170

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** May 30, 2013

**REASONS FOR JUDGMENT:** MOSLEY J.

**DATED:** July 3, 2013

**APPEARANCES:**

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