



Date: 20131213

Docket: IMM-11548-12

Citation: 2013 FC 1250

Ottawa, Ontario, December 13, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

A44

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board which found that the respondent (who has been identified in the pleadings as A44) was a Convention refugee. A44 is a Tamil from Sri Lanka who came to Canada in 2008 as a passenger on the *M/V Ocean Lady*.

[2] The Minister asserts that the Board erred in finding that A44's claim had a nexus to a Convention ground. In particular, the Minister submits that the Board erred in finding that he

was a member of a “particular social group” (as that term is used in the Refugee Convention) as a result of his having been a passenger on the *M/V Ocean Lady*.

[3] The Minister further submits that the Board did not adequately explain how A44’s travel on the *Ocean Lady* created a nexus to a Convention ground, that it failed to consider A44’s personal circumstances, and that its finding that the claim had an objective basis was unreasonable.

[4] For the reasons that follow, I have concluded that the Board’s decision was reasonable. As a consequence, the Minister’s application for judicial review will be dismissed.

Background

[5] A44 is a young Tamil male from the Jaffna region of Sri Lanka.

[6] Upon his arrival in Canada, A44 initially claimed that he had been abducted and tortured by the Sri Lankan military who suspected that he was involved with the Liberation Tigers of Tamil Eelam (LTTE). He subsequently acknowledged that this did not happen, and the Board did not accept his explanation for this inconsistency in his story.

[7] The Board did, however, accept that A44 had been required to report to the local army camp two or three times a week for a period of approximately one year prior to his departure from Sri Lanka. A44 was frequently slapped in the course of these encounters. He was also

questioned about the LTTE and was asked to identify LTTE members. A44 described these sessions as “mental torture”.

[8] A44 then decided to leave Sri Lanka. His mother arranged for an agent to take him to Thailand on May 3, 2008, where he registered with United Nations High Commission for Refugees. In September of 2009, A44 boarded the *M/V Ocean Lady*, and on October 17, 2009 he arrived in Canada along with 75 other Tamil men from Sri Lanka. A44 filed his refugee claim at the port of entry.

The Board’s Decision

[9] The Board concluded that there was no persuasive evidence that A44 would have been perceived by Sri Lankan authorities to have been a member of, or to have had connections with the LTTE when he left Sri Lanka in the Spring of 2008. However, the Board also found that A44’s profile changed when he boarded the *M/V Ocean Lady*, and that he thereby became a refugee *sur place*.

[10] In coming to this conclusion, the Board referred to evidence from an international expert in South Asian terrorism who stated that the *M/V Ocean Lady* was owned by the LTTE and had previously been used by the LTTE to smuggle weapons. An internal Canada Border Services Report further suggested that the entire journey to Canada may have been organized and financed by the LTTE.

[11] The ship was, moreover, suspected of bringing LTTE members into Canada. Indeed, the Board noted that more than one source indicated that at least a third of the passengers on the *M/V Ocean Lady* were suspected of having connections to the LTTE.

[12] The Board observed that the *M/V Ocean Lady*'s arrival in Canada and its LTTE connections had been widely publicized internationally. Reference was made to statements in the media by the former Public Safety Minister that the LTTE was behind operations to smuggle people into Canada.

[13] The Board also considered evidence which suggested the Royal Canadian Mounted Police had been in communication with the Sri Lankan government in order to investigate the identities and backgrounds of the passengers on the *M/V Ocean Lady*. While recognizing that certain statements attributed to an RCMP officer had been denied by the officer, the Board was nevertheless satisfied that both the Canadian government and the RCMP had been in contact with the Sri Lankan authorities regarding the *M/V Ocean Lady*. The Board concluded that this "strengthened the finding that government of Sri Lanka would have an interest in *Ocean Lady* passengers returning to Sri Lanka".

[14] The Board was further satisfied that if A44 were to return to Sri Lanka, the fact that he had been a passenger on the *Ocean Lady* would likely come to the attention of Sri Lankan authorities and that, as a result, they would perceive him as having links to the LTTE.

[15] Even if Sri Lankan authorities could not know for sure whether A44 was an LTTE member, the Board was nevertheless persuaded that he would be viewed by these officials as a person of interest with possible ties to the LTTE. Sri Lankan authorities would also be interested in information that A44 may be able to provide with respect to his fellow passengers, the journey and the ship.

[16] As a consequence, the Board found that A44 would be detained and interrogated on his return to Sri Lanka. The country condition information before the Board demonstrated that those suspected of having any links to the LTTE are often beaten and tortured in detention and that they thus face more than a mere possibility of persecution at the hands of Sri Lankan authorities. The Board was therefore persuaded that A44 potentially faced treatment in Sri Lanka that rose to the level of persecution.

Standard of Review

[17] I agree with the parties that the issues raised by the applicant are all reviewable on the reasonableness standard, turning as they do primarily on the Board's appreciation of the facts of this case as they related to the legal issue of *nexus*, and its evaluation of the objective country condition information.

[18] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at

para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

Analysis

[19] The primary focus of the Minister's submissions is the Board's finding that A44's claim had a *nexus* to a section 96 Convention ground. According to the Minister, the Board erred in finding that A44 faced a risk of persecution based solely on his passage to Canada on the *M/V Ocean Lady*.

[20] Citing the decision of this Court in *Canada (Minister of Citizenship and Immigration) v. B472*, 2013 FC 151, 56 Admin. L.R. (5th) 55, at para. 27, the Minister submits that passengers on the *M/V Ocean Lady* may have had "a myriad of motives to come to Canada", and "[t]here is no cohesion or connection to the other refugee grounds set out in section 96 of *IRPA*".

[21] However, even if passengers on the *M/V Ocean Lady* may have had a variety of reasons for coming to Canada, this does not, in my view, take away from the fact that an individual's presence on the ship could create a perceived link to the LTTE, which could in turn potentially create a *nexus* to the Convention grounds of race and political opinion.

[22] The Minister further contends that travel to Canada on board a particular ship does not make one a member of a particular social group so as to give rise to a *nexus* to a Convention ground. In support of this contention, the Minister relies on the decision of this Court in *Canada (Minister of Citizenship and Immigration) v. B380*, 2012 FC 1334, 421 F.T.R. 138 ("B380").

[23] In *B380*, the Court was reviewing a claim involving an individual who had come to Canada on board the *M/V Sun Sea* - another ship suspected of having links to the LTTE. In setting aside the Board's decision conferring refugee protection on B380, Chief Justice Crampton found the Board's determination that B380 was a member of a "particular social group" comprised of passengers who had traveled to Canada on the *Sun Sea* was unreasonable.

[24] In coming to this conclusion, the Chief Justice held that in order to come within the Convention ground of a "particular social group", "...there must be something about a group which is related to discrimination or human rights ... [and] that something should relate to what the members are, in an immutable or fundamental way, as opposed to what they do": at para. 24.

[25] I do not need to engage in the debate that has arisen in the jurisprudence with respect to what constitutes a "particular social group", nor do I need to address the contentious issue of what standard of review that should be applied to the definition of a particular social group: see, for example, *Canada (Minister of Citizenship and Immigration) v. A011*, 2013 FC 580, [2013] F.C.J. No. 685 ("A011").

[26] This is because the Board's analysis in this case appears to be fundamentally different than the analysis that confronted Chief Justice Crampton in *B380*.

[27] While the Minister approaches the decision under review in this case on the premise that the Board's reasoning focused solely on whether A44 was a member of a particular social group

as a result of his arrival in Canada on the *M/V Ocean Lady*, this is not, in my view, a fair reading of the Board's analysis when the decision is viewed as a whole.

[28] Indeed, the Board went well beyond the analysis discussed in *B380*. It examined in great detail the potential consequences for A44 as a result of his presence on the *M/V Ocean Lady* and his association with his fellow passengers on board the ship insofar as the Sri Lankan authorities were concerned.

[29] It appears from the Chief Justice's reasons in *B380* that the Board's discussion of the issue of *nexus* was very brief: see para. 25. More importantly, it appears that the Board did not consider in any detail whether B380's presence on board the *Sun Sea* might cause the Sri Lankan government to suspect that he was a member of the LTTE or an LTTE sympathizer, or put B380 at risk because he might have information concerning the LTTE.

[30] In contrast, the Board in this case provided detailed and careful reasons explaining at some length why it was that A44 would be suspected by the Sri Lankan authorities of having links to the LTTE: see, for examples, the Board's reasons at paragraphs 27, 28, 29, 31 and 44.

[31] While the Board does not expressly use the term "perceived political opinion", it is apparent from its analysis that it accepted that A44 would be subjected to harsh treatment based on the confluence of his ethnicity, his suspected complicity with the LTTE and his potential possession of knowledge about the LTTE by virtue of his travel to Canada on board the *M/V Ocean Lady*: paraphrasing Justice Gleason in *Minister of Citizenship and Immigration v. A068*,

2013 FC 1119, [2013] F.C.J. No. 1287, at para. 23, referring to *Canada (Minister of Citizenship and Immigration) v. B399*, 2013 FC 260, [2013] F.C.J. No. 263; *Canada (Minister of Citizenship and Immigration) v. B420*, 2013 FC 321; [2013] F.C.J. No. 396; *Canada (Minister of Citizenship and Immigration) v. B272*, 2013 FC 870, [2013] F.C.J. No. 957; *Canada (Minister of Citizenship and Immigration) v. A032*, 2013 FC 322, [2013] F.C.J. No. 399; *Canada (Minister of Citizenship and Immigration) v. B377*, 2013 FC 320, 284 C.R.R. (2d) 135 (“B377”); *Canada (Minister of Citizenship and Immigration) v. B344*, 2013 FC 447, [2013] F.C.J. No. 547.

[32] I agree with the Minister that the fact that Sri Lankan authorities might suspect that A44 has information about the LTTE does not, by itself, provide a *nexus* to a Convention ground for the purposes of section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27: *A011*, above at para. 42, *B377*, above at para. 27.

[33] Such a suspicion on the part of the Sri Lanka government could, however, potentially expose A44 to a risk to his life or to a risk of torture or cruel and unusual treatment or punishment under section 97 of *IRPA*.

[34] That said, the suspicion that a young Tamil male returning to Sri Lanka is an LTTE member or sympathizer clearly engages the Convention grounds of political opinion (whether actual or perceived) and race.

[35] The next issue, then, is whether the Board's finding that A44 would face more than a mere possibility of persecution in Sri Lanka as a result of suspicions on the part of the Sri Lankan authorities that he had links to the LTTE was reasonable.

[36] In contrast to the situation that confronted the Court in *B380*, the Board in this case did not base its finding that A44 had a well-founded fear of persecution solely on a single article from the *Toronto Star*: see *B380* above, at para. 36.

[37] Instead, the Board carried out a careful analysis of the available country condition information, explaining why greater weight was being afforded to certain evidence that supported a finding of risk than was accorded to evidence leading to the opposite conclusion. The reasons offered by the Board for preferring certain evidence over other evidence are fulsome, logical and cogent.

[38] After weighing the relevant evidence, the Board concluded that A44 would most likely be detained and questioned upon his return to Sri Lanka. The Board further found that the preponderance of the country condition information demonstrates that Tamils suspected of having links to the LTTE continue to be subject to serious abuses, including torture, by the authorities in Sri Lanka. As a consequence, the Board was satisfied that there was more than a mere possibility that A44 would face persecution in Sri Lanka.

[39] The Minister has not identified evidence relating to the question of risk that was overlooked by the Board. At the end of the day, what the Minister takes issue with is the weight

ascribed to the evidence by the Board. That is not a basis for setting aside the Board's decision, which comes well within the *Dunsmuir* parameters of possible acceptable outcomes which are defensible in light of the facts and the law.

Conclusion

[40] The Board did not simply find that A44 was a member of a particular social group by virtue of his being a migrant on the *M/V Ocean Lady*. Rather, the Board was satisfied that A44 would be perceived by the Sri Lankan authorities as having links to the LTTE because he is a young Tamil male from the north of Sri Lanka who came to Canada in the company of passengers who were members of the LTTE on the *M/V Ocean Lady*, an LTTE-owned ship that had been used in the past to smuggle arms.

[41] The Board was further satisfied, in light of the country condition information, that A44 faced more than a mere possibility of persecution if he were returned to Sri Lanka. For the reasons given, I am satisfied that this conclusion was one that was reasonably open to the Board.

[42] I agree with the parties that the case does not raise a question for certification.

Costs

[43] A44 seeks his costs of this application, submitting that the zeal with which the Minister has pursued applications for judicial review with respect to every positive refugee determination in the *M/V Ocean Lady* and *M/V Sun Sea* cases justifies an award of costs.

[44] Costs are not ordinarily awarded in immigration proceedings in this Court. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 provides that “No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders”.

[45] The threshold for establishing the existence of “special reasons” is high, and each case will turn on its own particular circumstances: *Ibrahim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1342, 68 Imm. L.R. (3d) 43, at para. 8. The mere fact that an immigration application for judicial review is brought or opposed does not give rise to a “special reason” justifying an award of costs.

[46] A44 has not persuaded me that “special reasons” exist in this case that would justify an order of costs, and I decline to make such an order.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:**

MACTAVISH J.

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