Federal Court  Cour fédérale

Date: 20140527

Docket: IMM-1241-13

Citation: 2014 FC 511

Ottawa, Ontario, May 27, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MURUGESAKUMAR RAMANATHY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr Ramanathy, a 33 year-old Tamil male citizen of Sri Lanka, seeks judicial review under s 72 (1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of the Refugee Protection Division of the Immigration and Refugee Board, dated January 29, 2013, that he is not a Convention refugee or a person in need of protection.

[2] For the reasons that follow, the application is granted and the matter remitted to the Board for reconsideration by a differently constituted panel.

I. **BACKGROUND:**

[3] The applicant lived with his family in Jaffna and later Vanni, in the 1990's. They experienced difficulties with both the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan Army (SLA). In an effort to join his brother who had been granted asylum in Canada in 1998, the applicant left Sri Lanka in 2005 travelling on a false passport. He was apprehended in South Korea and returned to Sri Lanka. He tried again in 2007 but was detained in Japan and deported. In January, 2009 the applicant got as far as Thailand before he was again caught with false papers, detained and deported to Sri Lanka.

[4] In May 2009, the applicant was separated from his parents in Vanni due to heavy aerial attacks. He and hundreds of civilians were put into detention camps. The applicant was suspected of being a member of or supporting the LTTE because of his age and the fact that he had been living in Vanni. He was questioned and beaten many times. His uncle paid to have him released after seven months of detention. In March 2010 he was abducted by armed men and his uncle paid a ransom for his release. He was arrested in April 2010 and held overnight by the army.

[5] The applicant left Sri Lanka on May 3, 2010. After making his way through several other countries and reaching the United States, he was detained by US immigration authorities in Texas. Upon being released on a $5000 bond paid by his brother, he proceeded to Canada and immediately claimed protection.

II. **DECISION UNDER REVIEW:**

[6] The determinative factors for the Board were the absence of a subjective fear of persecution and the change of circumstances in Sri Lanka. The Board also considered generalized risk with regard to the application of s 97 of the *IRPA* and identified credibility concerns with the applicant's account of his experiences in Sri Lanka.

[7] Some of the incidents related by the applicant involved criminal extortion, a generalized risk factor. In the last incident in April 2010, which allegedly involved the SLA, the applicant was released despite the fact that his identity as a prior internee was established. The Board held that this suggested, on a balance of probabilities, that from the government's point of view, the applicant was not a wanted person or on the security alert list. The Board found that it was not persuaded that the applicant would have been released in April 2010 if he was an "LTTE suspect, a suspected LTTE supporter or if there was a warrant out for his arrest". Thus the Board concluded, on a balance of probabilities, that the applicant's fear that he would be arrested by the authorities upon return to Sri Lanka was not well-founded.

[8] The Board noted that the applicant was able to depart and return to Sri Lanka in 2006, 2007, and 2009 and leave again in 2010 even though the government security forces use airports as security screening points to apprehend LTTE suspects or sympathisers. The Board held, on a balance of probabilities, that this suggested that the applicant is not a wanted person in Sri Lanka and therefore would not face a risk of arrest if he were to return. The Board also concluded, on a

balance of probabilities, that he does not face a serious risk of torture, a risk to his life or to cruel and unusual treatment or punishment if he were to return to Sri Lanka.

[9] The Board listed several credibility concerns with respect to the claim. The applicant testified that his intent was always to come to Canada but that he had told the US immigration authorities that he was seeking asylum in that country. The Board also found a significant omission in the applicant's narrative: he neglected to state that he had been advised by his family in December 2012 that the SLA had told them that he would have to report to their camp upon his return to Sri Lanka. I note that the Board made no general credibility finding against the applicant and proceeded to analyse the merits of the claim.

[10] Upon a review of the documentary evidence, the Board found that conditions had changed in Sri Lanka and that there had been a relatively durable and meaningful change of circumstances that meant Tamils were not being targeted solely on the basis of their ethnicity. The applicant did not have a profile as a person suspected of being a LTTE member, supporter or sympathizer. Nor was he a member of an at-risk group, such as journalists, or human rights activists, considered suspect by the government. He would not, therefore, be at risk of persecution from government security forces. The risk of harm from criminal elements, including rogue members of the security forces and paramilitary units, was speculative but also general to the population as a whole. The applicant was not a wealthy individual or someone likely to be perceived as such. Hence he faced no particularized risk of harm.

III. **ISSUES:**

[11] The applicant has raised a number of issues with respect to the Board's findings and decision. The respondent questions whether any of them amount to material errors that would justify granting the application and submits that, absent such error, the sole issue is whether the decision, read as a whole, is reasonable.

[12] In my view, the question of whether the Board applied the correct test in assessing the s 96 claim is dispositive of this application. My finding in that regard leads directly to the conclusion that the Board's decision, read as a whole, is not reasonable.

[13] As a question of law, the application of the proper test to assess the s 96 claim is reviewable on the standard of correctness: *Ospina v Canada (Minister of Citizenship and Immigration)*, 2009 FC 681; *Ndjizera v Canada (Minister of Citizenship and Immigration)*, 2013 FC 601 at para 22; *Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 532 at para 22. For the decision as a whole, the standard is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 53, 55; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 52-62.

IV. **ANALYSIS:**

A. *Did the Board apply the correct test in assessing the s 96 claim?*

[14] I agree with the applicant that while the Board stated the correct test in the conclusion of the decision, it appears to have otherwise misunderstood and misapplied the test in conducting its analysis.

[15] It is well established that the claimant need not prove that persecution would be more likely than not in order to meet the objective portion of the test under s 96. The claimant must establish, however, that there is more than a "mere possibility" of persecution. The applicable test has been expressed as a "reasonable possibility" or a "serious possibility": *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680, [1989] FCJ no 67 (FCA).

[16] This test is lower than the balance of probabilities evidentiary standard. It may be confused in its application because both the existence of the subjective fear and the fact that the fear is objectively well founded must be established on a balance of probabilities: *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3SCR 593 at para 120 citing *Adjei*, above. As Justice O'Reilly noted in *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 5, while the test is "well known and widely accepted, it is notoriously difficult to express in simple terms." Having reviewed jurisprudence on the application of the standard, Justice O'Reilly concluded at paras 8 to 11:

> 8 The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context.

> Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a risk of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance", "more than a mere possibility" or "good grounds for believing" that they will face persecution.
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> 9 The case law referred to above shows that where the Board has articulated the gist of the appropriate standard of proof (i.e. the combination of the civil standard with the concept of a "reasonable chance"), this Court has not intervened. On the other hand, where it appears that the Board has elevated the standard of proof, the Court has gone on to consider whether a new hearing is required. Further, if the Court cannot determine what standard of proof was applied, a new hearing may be necessary: Begollari v. Canada (Minister of Citizenship and Immigration), 2004 FC 1340, [2004] F.C.J. 1613 (T.D.) (QL).
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> 10 Where the Board imposes a burden of proof that is too high, there is a chance that an unsuccessful claimant might otherwise have succeeded. However, in some cases, an error would be purely academic. This would be the case in situations where the claimant's evidence is so weak that it could not possibly meet even the "reasonable chance" standard: Brovina, above.
>
> 11 Accordingly, the Court's role on judicial review in these circumstances is to determine whether the Board applied the appropriate standard of proof. If not, the Court must then decide whether the error requires a new hearing.

[17] I agree with Justice O'Reilly's analysis. It has also been cited with approval in two post-*Dunsmuir* decisions of this Court: *Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 154 at para 5; *Ospina v Canada (Minister of Citizenship and Immigration)*, 2009 FC 681 at para 33; and has been mentioned (amongst other cases) in *Kaissi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 234 at para 28. I note that in *Basbaydar v Canada*

(Minister of Citizenship and Immigration), 2014 FC 158 [*Basbaydar*] at para 12, Justice Zinn accepted a reference to the s 96 test that read as follows:

> "[b]ased on the foregoing analysis and considering the totality of the evidence, I find that there is no reasonable chance or serious possibility of persecution and, on the balance of probabilities, the claimant would not be personally subjected to a risk of torture, a risk of life, or a risk of cruel and unusual treatment or punishment, if he returns to Turkey" (emphasis added).

[18] *Basbaydar* was decided, however, not on the Board's formulation of the standard but its misapplication.

[19] In these proceedings, there are portions of the Board's analysis where it appears that the Board is applying the higher standard:

> *Well-founded fear*
>
> [17] […] This suggests that, on a balance of probabilities, he was not a wanted person or on the security alert list of the government. I am not persuaded that the SLA would have released the claimant in April 2010 if he were an LTTE suspect, suspected LTTE supporter or if there was a warrant out for his arrest. This would be tantamount to treason […]. This leads me to believe that, on balance of probabilities, his fear that he would be arrested by the authorities on return to Sri Lanka is not well-founded.
>
> [18] […] Even if the claimant's agent assisted the claimant, I am not persuaded, on a balance of probabilities, that airport security or Criminal Investigation Department (CID) personnel would have dared to commit treason to let the claimant through […]. In my view, this points to the fact that, on a balance of probabilities, the claimant is not a wanted person in Sri Lanka and, therefore, does not face a risk of arrest if he were to return to his country. Consequently, I find that the claimant's fear is not well-founded.
>
> […]

> [21] […] I do not accept, on a balance of probabilities that members of the SLA told the claimant's parents that he must report to an SLA camp if he returned to Sri Lanka.
>
> *Change of circumstances*
>
> […]
>
> [34] The claimant left Sri Lanka in May 2010, traveled through a number of countries, and arrived in Canada in September 2010. Given that I have found that the claimant was not in the past, and would not be perceived in the future by the Sri Lankan government to have any ties to the LTTE, I find that, on a balance of probabilities, the claimant would not face a serious risk of persecution from government security forces upon his return to Sri Lanka based simply on his identity as a Tamil male from northern Sri Lanka.
>
> […]

[20] The respondent submits that a review of the reasons as a whole demonstrates that the Board understood the proper test. It specifically found at paragraph 62 that "there is not a serious possibility that [the applicant] will be subjected personally to persecution" and at paragraph 63 that "I am therefore, satisfied that there is less than a serious possibility the claimant will be persecuted should he return to Sri Lanka today". These findings, submit the respondent, are clear, direct and sufficient and apply the appropriate standard. Given the Board's clear findings on the appropriate standard, other references to a different standard are not relevant unless they throw doubt on the clear findings. Any statements reflecting a different standard are "only slips of language", the respondent contends.

[21] However, even the paragraphs cited by the respondent, read as a whole, lend support to the applicant's position.

> [62] Given my determination that, on a balance of probabilities, the claimant would not be identified as an LTTE member or sympathizer by the Sri Lankan authorities, and given that documentary evidence […], I find, on a balance of probabilities, that, should the claimant return to Sri Lanka, there is not a serious possibility that he will be subjected personally to persecution […].
>
> [63] […] Nonetheless, I find, on a balance of probabilities, that the claimant's fear is not well-founded. I am, therefore, satisfied that there is less than a serious possibility the claimant will be persecuted should he return to Sri Lanka today.

[22] This is not a case where the applicant's evidence in support of the claim was very weak and the outcome likely however the test was stated. While the Board raised some credibility concerns, they were matters for which the applicant provided explanations that could have been accepted and the Board made no general credibility determination.

[23] In the result, I am satisfied that the Board incorrectly required the applicant to prove persecution on a balance of probabilities. As this involved an error of law regarding a fundamental issue before the Board and since it is not clear that the claim could not possibly have succeeded, I find that the decision is not reasonable and that a new hearing before a different panel is necessary.

[24] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted to the Board for reconsideration by a differently constituted Panel. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Micheal Crane	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT