

Federal Court



Cour fédérale

Date: 20150106

Docket: IMM-3979-13

Citation: 2015 FC 1

Ottawa, Ontario, January 6, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ARUN PRASATH MUTHUTHEVAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Arun Prasath Muthuthevar sought refugee protection after having been found inadmissible to Canada based on serious criminal activity. He founded his refugee claim on the fact that his father had been forced to assist the Liberation Tigers of Tamil Eelam (LTTE) and had subsequently been detained and tortured by the Sri Lankan Army. Mr Muthuthevar's father

was found to have a well-founded fear of persecution in Sri Lanka and was granted refugee protection here.

[2] A panel of the Immigration and Refugee Board denied Mr Muthuvar's claim given that he did not fit the profile of those at risk of persecution in Sri Lanka. Further, it appeared that security personnel in Sri Lanka were not looking for him as he was able to leave Sri Lanka freely on his own passport. Finally, the evidence did not suggest that Mr Muthuvar would be subjected to mistreatment on his return to Sri Lanka as a failed asylum seeker.

[3] Mr Muthuvar contends that the Board applied the wrong legal test for protection and imposed too great a burden on him to prove his claim. In addition, Mr Muthuvar argues that the Board's decision was unreasonable because it did not take account of critical evidence supporting his claim, or documentary evidence about current conditions in Sri Lanka.

[4] I cannot conclude that the Board applied the improper standard of proof. However, it did overlook relevant evidence. Its conclusion was unreasonable.

[5] There are two issues:

1. Did the Board apply the wrong standard?
2. Did the Board overlook important evidence?

II. The Board's Decision

[6] The Board's principal finding was that, on a balance of probabilities, Mr Muthuvar would not face a risk of persecution or harm if he returned to Sri Lanka. The Board expressed the standard of a "balance of probabilities" numerous times in the reasons both in relation to s 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2002, c 27 [IRPA]).

[7] The Board found that Mr Muthuvar did not fit the profile of persons who may be at risk of mistreatment on return to Sri Lanka. It cited numerous independent reports and studies in which the authors concluded that the persons at risk were those with ties to the LTTE. According to the Board, Mr Muthuvar obviously did not fit that profile as he had been able to leave the country freely on his own passport.

[8] Further, the preponderance of the evidence, according to the Board, indicated that failed asylum seekers returning to Sri Lanka would be questioned on their arrival, but would not be subjected to persecution. Finally, the Board found that any risk relating to Mr Muthuvar's perceived wealth was a generalized risk, one not protected under s 97 of IRPA.

III. Issue One – Did the Board apply the wrong standard?

[9] Mr Muthuvar submits that the Board erred by using the standard of a balance of probabilities in relation to s 96 of IRPA where the burden on a refugee claimant simply is to show more than the mere possibility of persecution. A claimant does not have to show that persecution is more likely than not.

[10] I disagree. For the most part, the Board applied the proper standard. The one instance in which the Board may have articulated the wrong test does not show, in my view, that the Board misunderstood the burden on a refugee claimant.

[11] The standard of proof in refugee cases is a mixture of the ordinary civil standard – the balance of probabilities – and the special standard unique to the immigration context meant to capture the concept of risk. The latter is sometimes expressed as a “reasonable chance of persecution” or “more than a mere possibility of persecution”. Accordingly, the proper standard is proof on a balance of probabilities that the claimant will face a reasonable chance, or more than a mere possibility, of persecution. If a claimant meets that standard, then he or she will have established a well-founded fear of persecution, which is the norm set out in s 96 of IRPA. (See *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, at para 8).

[12] Here, the Board employed the civil standard with respect to discrete findings of fact, which is appropriate and uncontested. The Board also repeatedly combined the civil standard with the concept of risk when determining whether Mr Muthuthevar had met the test under s 96. Some examples:

- “I find there to be a change in circumstances of country conditions so that, on a balance of probabilities, he would not face a risk of persecution or harm”;
- “I also find, on a balance of probabilities, that the claimant does not face a serious risk of harm or to life”;

- “I find that, on a balance of probabilities, the claimant would not face a serious risk of persecution”;
- “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”.

[13] These findings led the Board to its ultimate conclusion that Mr Muthuvar had failed to show on a balance of probabilities that his fear was well-founded. I can find no error on the Board’s part in these expressions of the applicable standard of proof.

[14] The Board made one statement that could give rise to a legitimate concern: “I find that the situation, while not perfect, is not such that the claimant will be persecuted due to any Convention ground” (my emphasis). That sentence suggests that Mr Muthuvar had to prove that he would be persecuted in Sri Lanka in order to succeed on his refugee claim. The Board should have said “I find that the situation, while not perfect, is not such that the claimant will face more than a mere possibility of persecution on any Convention ground”. However, looking at this statement in the context of all of the other expressions of the proper standard, I am not satisfied that the Board misunderstood or misapplied the appropriate standard of proof.

IV. Issue Two - Was the Board’s decision unreasonable?

[15] Mr Muthuvar maintains that the Board’s decision was unreasonable in three respects. First, the Board wrongly inferred that, because he had been able to leave Sri Lanka without drawing the attention of security officials, he would not be targeted on his return. Second, the

Board overlooked recent evidence showing that the situation in Sri Lanka has not improved as much as the Board believed. Third, the Board erred by finding that the risk related to targeting persons perceived to be wealthy was a generalized risk, not coming within the protection provided by IRPA.

[16] I am satisfied that the Board reached an unreasonable conclusion on the first question. Therefore, it is unnecessary for me to consider the other arguments Mr Muthuthevar presented.

[17] In my view, the Board was entitled to take note of the fact that Mr Muthuthevar had no problems leaving Sri Lanka in 2001. Authorities probably did not regard him as being associated with the LTTE at that time.

[18] However, I agree with Mr Muthuthevar that the Board had to go on to consider whether he would now be suspected of having LTTE ties. He was a 16-year-old boy in 2001; he is now a man in his late 20s. He has spent a long time in Canada, a country regarded by some as harbouring LTTE activities. His father was granted refugee status in Canada based on his fear of persecution in Sri Lanka after having been accused of being an LTTE member.

[19] In my view, the Board should have considered whether these additional factors, which obviously arose after Mr Muthuthevar's departure from Sri Lanka, might cause authorities to regard him differently than they did in 2001. Some recent documentary evidence, not considered by the Board, suggests that failed asylum seekers are more likely to be associated with the LTTE and arrested on their return to Sri Lanka. The evidence also shows that detainees are more likely

to be mistreated than they were a few years ago. The Board should have considered this evidence before discounting the risk to Mr Muthuvar on the sole basis that he was able to leave the country freely in 2001.

[20] Accordingly, I am satisfied that the Board's decision did not represent a defensible outcome based on the facts and the law.

V. Conclusion and Disposition

[21] While the Board applied the proper standard of proof, it failed to consider whether Mr Muthuvar might be at risk of persecution in Sri Lanka based on his current profile, rather than his circumstances in 2001. Therefore, its decision was unreasonable, and I must overturn it and order another panel of the Board to reconsider Mr Muthuvar's claim. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, and the matter is returned to another panel of the Board for reconsideration.
2. No question of general importance is stated.

"James W. O'Reilly"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3979-13

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