

Federal Court



Cour fédérale

Date: 20150326

Docket: IMM-6847-13

Citation: 2015 FC 384

Ottawa, Ontario, March 26, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JEGATHEESWARAN KULASEKARAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This judicial review concerns a young male applicant who travelled on the MV Sun Sea.

The Refugee Protection Division [RPD] rejected his claim for refugee status and for protection.

II. Background

[2] The Applicant is a Tamil from Sri Lanka who claimed to leave Sri Lanka for fear of the security personnel and paramilitary groups, the Eelam Peoples Democratic Party [EPDP] and the Karuna group.

[3] In 2007, while in an IDP camp, he experienced the occasional interrogation by security forces. After his move to Colombo as a goldsmith, he claimed that he had to bribe the police; later while in his home town, he was harassed by a paramilitary group and finally in 2010, he fled back to Colombo to escape harassment by the Karuna group, who allegedly are still looking for him.

[4] In early 2010 he fled to Thailand, and boarded the MV Sun Sea.

[5] The RPD did not accept the notion that Sri Lankan authorities suspected him of being a member of the Liberation Tigers of Tamil Eelan [LTTE] or a LTTE supporter. There were multiple occasions where he could have been apprehended if he was a “wanted” person. The RPD noted problems with the Applicant’s story and the absence of corroborating evidence that he was being sought by Sri Lankan authorities.

[6] In the end, the RPD did not believe that the Applicant was wanted by government security forces nor did it believe the evidence of his subjective or objective fear.

[7] The RPD was not persuaded that the Applicant faced a risk upon return. The Applicant did not fit the description of those who had encountered trouble upon return. In the incidents of returning Tamils being questioned, the only detentions upon arrival related to outstanding criminal charges not rejected refugee claims or on the basis of ethnicity.

[8] Ultimately, the RPD concluded that there was insufficient evidence that Canadian authorities share with Sri Lankan authorities the identities of passengers on the MV Sun Sea nor that being a passenger on the MV Sun Sea alone posed a risk of persecution.

III. Analysis

[9] The applicable standards of review are reasonableness as to the decision as a whole (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190) and correctness on matters of procedural fairness.

[10] With respect to the RPD's decision, and particularly the *sur place* element, this Court has established in cases such as *Canada (Citizenship and Immigration) v B380*, 2012 FC 1334, 421 FTR 138, that mere presence on the MV Sun Sea is insufficient to establish a *sur place* claim.

[11] The Applicant argues that the RPD engaged in a flawed credibility assessment, failed to give an objective basis for that assessment and failed to conduct a proper *sur place* analysis.

[12] The RPD gave full and fair consideration to the claim that the Applicant was suspected of being a LTTE or at least a supporter. It was within the RPD's jurisdiction to give varying weight to the relevant evidentiary element in a reasonable objective manner – which it did.

[13] On the matter of credibility, the RPD conducted an independent analysis and assessed the objective and subjective elements of the claim. This is the first step in the “mixed motive” analysis referred to by Justice Zinn in *Pillay v Canada (Citizenship and Immigration)*, 2014 FC 160, 237 ACWS (3d) 1003 [*Pillay*].

[14] As discussed in *Pillay*, at paragraph 7:

This Court has held that despite adverse credibility findings, and despite a lack of history of prior association with the LTTE, the combination of being Tamil and having been aboard the MV Sun Sea may be sufficient to show a serious possibility of persecution as a result of a Convention ground. This is known as the “mixed motives” doctrine.

[15] In respect of the RPD's *sur place* analysis, it considered the personal profiles of those who encounter difficulties, and those who do not, upon return to Sri Lanka.

[16] I do not accept that the RPD inappropriately conflated credibility concerns in respect of past incidents of alleged persecution with credibility of the *sur place* basis of claim and ignored the critical facts that the Applicant's profile “changed” once he boarded the MV Sun Sea.

[17] The RPD considered contrary evidence and referred to the UK COI Report in reaching its conclusions. There is no error in that.

[18] The RPD first determined that the Applicant had not been, prior to leaving Sri Lanka, a person of interest to authorities. This is an important step both from the perspective of the Applicant's claim that he would be persecuted upon return because of his past experience (the credibility aspect of his claim) as well as from the perspective of whether there was "something more" in his *sur place* claim than mere presence on the MV Sun Sea.

[19] There was nothing wrong with this approach by the RPD as each of the MV Sun Sea cases turns on its specific facts. In this instance, the Applicant's circumstances were readily distinguishable from those in *Canada (Citizenship and Immigration) v B272*, 2013 FC 870, 438 FTR 104, where that applicant had pre-existing perceived links to the LTTE before boarding the MV Sun Sea which impacted the analysis of the *sur place* claim.

[20] The RPD did refer at paragraphs 14 and 31 of the decision to the risk faced by the Applicant in terms of "balance of probabilities" but those comments were made in the context of s 97. While it would have been preferable for the RPD to make a specific finding on s 96 (more than a mere possibility) in the context of the Applicant's ethnicity relied upon in his *sur place* claim, viewed as a whole in the context of this case, I find no error in not doing so.

[21] The Applicant had raised in his Memorandum a breach of procedural fairness in not providing adequate reasons. This point was not argued orally at the hearing.

[22] I can find no inadequacy in these reasons. The decision met the test in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011]

3 SCR 708, at paragraph 16:

... In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[23] The reasons have allowed this Court to determine whether the decision is reasonable.

IV. Conclusion

[24] Therefore, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6847-13

STYLE OF CAUSE: JEGATHEESWARAN KULASEKARAM v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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