

Date: 20080417

Docket: IMM-1187-07

Citation: 2008 FC 505

Ottawa, Ontario, April 17, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**THESHANTHA LAKS
DE SILVA RIGAMKORALA**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Theshantha Laks de Silva Rigamkorala applies for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the “IRPA”) of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated March 21, 2007, wherein it was determined that the Applicant was not a person in need of protection.

[2] For reasons that follow, I have decided that this application for judicial review should be granted.

[3] The Applicant is a citizen of Sri Lanka who says he worked as a seaman. He tells of being invited in September 2003 by his Sri Lankan shipping agent to a social function where he was introduced to a local businessman, a Mr. Perera. Mr. Perera asked the Applicant to accept packages, understood to be illicit drugs, on his behalf when travelling overseas and to bring them back to Sri Lanka. Not wanting to offend Mr. Perera, the Applicant agreed. On leaving the social function, the Applicant and his shipping agent were stopped by the police and arrested after a firearm was found in the shipping agent's vehicle. Shortly thereafter, Mr. Perera attended the police station and the Applicant and his shipping agent were quickly released.

[4] On April 15, 2004, at the Taiwan terminus of a voyage, the Applicant was contacted by a Taiwanese shipping agent at the request of Mr. Perera. The agent asked the Applicant to deliver a package to Mr. Perera when he returned by air to Sri Lanka. The Applicant refused. On April 17th, upon arrival in Sri Lanka, the Applicant was met at the airport by his shipping agent and Mr. Perera who confronted him about refusing to accept and deliver the package. The Applicant refused to deliver packages for Mr. Perera. The Applicant then left the airport. Later that evening, the Applicant was telephoned by Mr. Perera who continued to demand an explanation as to why he refused to cooperate. The Applicant ended the call by hanging up on Mr. Perera.

[5] That night, four masked individuals entered the Applicant's home and threatened and assaulted him because he refused to cooperate with Mr. Perera. The assailants warned him not to inform the police. The Applicant was hospitalized for two days as a result of the assault. He gave a report of the assault to the police while at the hospital. He also reported about the role of the shipping agent and about Mr. Perera's efforts to induce him to smuggle drugs. Upon release from the hospital on April 19th, the Applicant went into hiding, staying at a cousin's residence.

[6] On April 22nd, unknown persons abducted and killed the Applicant's twin brother. Both the official Inquirer into Deaths and the police recorded the brother's death as a homicide.

[7] The Applicant sought the advice of a lawyer in Sri Lanka who advised him that his best recourse was to flee the country because he would not be safe in Sri Lanka. The Applicant sold his house to raise the money to pay another shipping agent 12,000 Sri Lankan rupees to be hired on as a seaman on a ship leaving Sri Lanka on June 10, 2004. After stopping at several ports, the ship eventually reached Vancouver on September 16, 2004. The Applicant left the ship without his papers and made his way to Toronto where he applied for refugee status.

DECISION UNDER REVIEW

[8] The Board determined that section 96 of the IRPA was not applicable as persecution by a criminal element is not a Convention ground. The Board's analysis and decision was framed under section 97 of the IRPA. Having accepted the Applicant's identity, the determinative issue for the Board was the availability of state protection.

[9] In giving oral reasons for its decision, the Board stated:

One thing is certain: the burden was on the claimant to provide evidence in a clear and convincing manner, and the panel stresses that the evidence must be clear and convincing of the state's inability to ensure his protection.

[10] The Board rejected the Applicant's claim because it was not satisfied that the Applicant had established that state protection was not available.

ISSUE

[11] The Applicant submits that the issue in this judicial review is the availability of state protection. The Respondent submits that the issue is credibility.

[12] A review of the Board's reasons indicates that its focus was on the issue of state protection. The Board did not accept some of the Applicant's answers to its questions. It is equally clear that significant elements of the Applicant's evidence were not disputed.

[13] I find that the issue in this judicial review is as follows: Did the Board misconstrue the Applicant's evidence and fail to address the question of availability of state protection? In other words, did the Board fail to consider if the Applicant was a person in need of protection and would be personally subject to torture, a risk of life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka?

STANDARD OF REVIEW

[14] In this case, as in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193 at para. 11, the nature of the issue involves determining whether the Applicant has rebutted the presumption of state protection. This requires applying a legal standard to a set of facts. In my view, before a board can apply the legal standard of a “clear and convincing confirmation of a state’s inability to protect” (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at para. 50), a board must first make relevant findings of fact and credibility.

[15] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 34, the Supreme Court of Canada determined that there are now only two standards of review: correctness and reasonableness. In addition, the Supreme Court held that questions of fact should attract deference from the reviewing Court and thus are to be reviewed on the reasonableness standard. This was followed in *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15, where this Court held that, in light of *Dunsmuir*, the reasonableness standard applies to questions of fact.

[16] In *Dunsmuir*, above, at para. 47, the Court also gave useful instruction on applying the reasonableness standard. Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. Justification requires that a decision be made with regard to the evidence before the decision-maker. A decision cannot be a reasonable one if it is made without

regard to the evidence submitted (*Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at paras. 18, 22).

ANALYSIS

[17] The Board began by stating the Applicant failed to provide documentation that he was a seaman. The Board did not accept the Applicant's explanation that he did not have his papers because his seaman and passport documentation was in the possession of the captain of the ship on which he arrived. The Board was of the view that the Applicant should have retrieved or replaced those documents. The Board also made much of the fact that the Applicant did not immediately respond with the name of the company which owned the ship he last sailed on.

[18] The Applicant's evidence of being hospitalized as a result of being assaulted and of making a report to the police was not disputed. The Applicant's evidence that his twin brother was abducted and murdered was confirmed by police, official inquiry and family reports. Finally, the lawyer the Applicant consulted wrote a letter confirming his advice to the Applicant that his only option was to flee the country because he would not be safe in Sri Lanka.

[19] Further, the Applicant provided documentary evidence which indicated that police corruption was a major problem in Sri Lanka. Much of the corruption had to do with the illicit drug trade. The documentary evidence submitted supports a conclusion that the police would be unwilling or unresponsive to dealing with criminal activities by members of the illegal drug trade.

[20] The Applicant testified that he feared for his life because of retaliation by criminals involved in the illegal drug trade. In response to questions by his counsel the Applicant stated:

By Counsel (to claimant)

– Do you – are you still afraid to return to Sri Lanka?

By Claimant (to counsel)

– Yes.

By Counsel (to claimant)

– And who exactly are you afraid of?

By Claimant (to counsel)

– To Chandrasakaram and to supporters of the underworld.

By Counsel (to claimant)

– Do you believe that these people are part of the underworld?

By Claimant (to counsel)

– I think so, definitely.

By Counsel (to claimant)

– What is your opinion; what do you think their business is?

By Claimant (to counsel)

– They are doing drug business.

By Counsel (to claimant)

– What are you afraid of; what do you think would happen if you returned home?

By Claimant (to counsel)

- They will take me away and kill me.

By Presiding Member (to claimant)

- For what – what purpose would kill you? Why do you think they would – why would they kill you?

By Claimant (to presiding member)

- Because I did not perform in accordance with what they told me to do.

By Presiding Member (to claimant)

- I understand, but if you – if you do not perform what they asked you to perform they will kill you only for that? What would they receive; what will be their – why would they kill you, I don't understand that? In other words are they afraid of you, or are you afraid of them?

[21] In response to the questions by the Presiding Member the Applicant tried to respond to the Board's insistent probing on why the Applicant's enemies would want to kill him.

By Presiding Member (to claimant)

- That I understand, sir, you did not do what they wanted you to do, but the rest I don't understand.

By Claimant (to presiding member)

- They will be – they suspect that I will go and give this information to higher authorities, and resulting there from there will be problems for them.

By Presiding Member (to claimant)

- So you're telling me that if you talk to the authorities then the authorities would react against them and they will have problems?

By Claimant (to presiding member)

- I think so, that is the reason they want (inaudible) or need to kill me.

By Presiding Member (to claimant)

- So if I understand you correctly if you would go to higher authorities the higher authorities would react and they could be arrested those guys?

By Claimant (to presiding member)

- Yes, some time they make in to custody, but after that my life will be definitely – my life – I will lose my life.

[22] The Board continues with a focus on the arrest of criminals rather than the consequences to the Applicant.

By Presiding Member (to claimant)

- So then the police would react. The police – if it would be possible that if you tell the police then Mr. Pereira, amongst others, could be arrested?

By Claimant (to presiding member)

- I am unable to tell you – to comment anything about that?

By Presiding Member (to claimant)

- Well I'm only assuming what you're telling me. You say that if you go to higher authorities they would be arrested, but then you're telling me that you can't – you can't answer that to me. I don't understand, you're saying something and then you're saying something contrary.
- What I understood what you said is that if you go to higher authorities those criminals will have problems on the part of the authorities, including they could be arrested; right?

By Claimant (to presiding member)

- Sometimes they could be arrested.

By Presiding Member (to claimant)

- So there would be state protection, right?

By Claimant (to presiding member)

- For who state protection?

By Presiding Member (to claimant)

- Well the persons that are after you would be arrested.

By Claimant (to presiding member)

- It is not one or two persons, it is a large organization which has spread out in to many places.

By Presiding Member (to claimant)

- I understand, sir, but we have that in Canada also; we have criminals also in Canada. If somebody goes to the authorities the authorities will make an investigation and there is a possibility that the person will be arrested. There's a possibility that the person that has given those information can have problems, but that's normal.
- So let me resume; what you're telling is that they're after you because if you give them – if you give to authorities information they might be arrested, right?

By Claimant (to presiding member)

- Before I go to Sri Lanka they will catch me at the airport; I know that they will.

By Presiding Member (to claimant)

- You're not answering my question, answer me that question.

[23] Throughout the hearing, the Applicant was consistent in his testimony that even if he reported the criminals to the police, which he had done, the criminals would still find a way to kill him. This would occur even if the individuals he named were arrested.

[24] The documentary evidence indicates that the police are not likely to interfere with drug trade criminals because of corruption. The risk to the Applicant was that he would be killed because of his refusal to cooperate in the illegal drug trade and ineffective police protection as a result of corruption.

[25] The Board misconstrues the Applicant's evidence. The Boards stated in its reasons:

On thing is certain: his answers certainly did not speak to a lack of state protection, but rather the contrary. For example:

The claimant told the panel that, if he approached senior police authorities, this could result in the arrests of Mr. Perera and the other man. And when he was asked what kind of information he could give them, he replied at one point that he could give them the names of Perera and Chandrasekaram. However, according to Exhibit C-10, he had already given these names.

Later, he told the panel that he had other information that could harm those people. However, this does not correspond to the testimony and written documentation. One thing is sure: at no time and in no circumstances did the claimant tell the panel that he feared the police (emphasis added).

[26] From the Board's reasons and the lines of questioning excerpted above, I conclude that the Board focussed on the whether the police would arrest the criminals rather than whether the police protection would be effective. The following evidence was submitted on the issue of effective state protection for the Applicant: the apparent influence Mr. Perera has with the police; the killing of the Applicant's brother very shortly after the Applicant reported his assault after being warned not to by the assailants; and the documentary evidence of police corruption as a result of bribery by the criminal element involved in the illicit drug trade. The Applicant had already reported his ordeal in sufficient detail to the police and yet there is no indication that the police took any action to protect him from the criminal element.

[27] Given that the Board directed its mind to the erroneous question of whether the police would arrest the criminals and not to the question of whether the Applicant faced risk of being killed on return to Sri Lanka by the criminal element involved in the drug trade, I find that the Board failed to consider the questions of the availability of state protection for the Applicant.

[28] The evidence not disputed by the Board, namely the assault on the Applicant, his brother's death and the country condition information are worthy of assessment. However, the evidence, or lack of evidence, cannot be properly assessed where the Board misconstrues the Applicant's evidence and misdirects itself on the issue of state protection. The Board did not fully engage in a proper analysis of state protection.

[29] I find the Board's assessment of the evidence of state protection to be flawed as its findings of fact were made without regard to the evidence before it. The findings therefore cannot be reasonable (*Katwaru*, above).

CONCLUSION

[30] I find the Board's decision to be unreasonable. As a result, the Board's decision will be quashed. The matter is to be referred to a differently constituted board for redetermination.

[31] The parties did not submit any question for certification. I do not find any question of general importance for certification arising from this judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Board's decision is quashed. The matter will be referred to a differently constituted board for redetermination.
2. There is no question of general importance that is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1187-07

STYLE OF CAUSE: THESHANTHA LAKS DE SILVA RIGAMKORALA
v.
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 9, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mandamin, J.

DATED: April 17, 2008

APPEARANCES:

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