

Date: 20080718

Docket: IMM-1235-07

Citation: 2008 FC 885

Ottawa, Ontario, July 18, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

NICHOLAS ROSMAN WARNAKULASURIYA

Applicant

- and -

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Nicholas Rosman Warnakulasuriya is a fisherman. He is 36 years old, a citizen of Sri Lanka, and of mixed Tamil-Sinhalese background. He began as a fisherman when he was 18 years old. In 1992, he went to Saudi Arabia to work on a boat. In 1995 he returned and resumed fishing. In 1996, he worked as a seaman on a Greek ship. On his return, he again took up fishing. In 1999 he left again for the sea. In August 2003, he returned to Sri Lanka and to fishing. In September, Mr. Warnakulasuriya bought a small used boat and other fishing gear. With the help of an assistant,

Mr. Warnakulasuriya began fishing as a small independent fisherman. In this way, he supported his pregnant wife and two children. Because he was not catching many fish around Negombo, he shifted to another location an hour and a half away near the small island of Bathalangunduwa. The island was, in Mr. Warnakulasuriya's words, "surrounded one side from the sea and the other side from a lagoon", and one side of the lagoon was bordered by a thick jungle. The two, fisherman and assistant, would go beyond the lagoon, often at night, to catch fish: a kind of jackfish, seela ula but mostly kumbalau.

[2] While fishing on the night of September 18, 2004, Mr. Warnakulasuriya and his assistant were approached by a high speed boat with five people aboard, armed with knives and guns. Mr. Warnakulasuriya and his assistant were compelled to transport four boxes to a designated area in the nearby jungle where associates waited. Mr. Warnakulasuriya believed that the armed men were members of the Liberation Tigers of Tamil Eelam (the "LTTE") who could not enter the lagoon because of Sri Lankan navy patrols. Out of fear, he warned his assistant not to tell anyone of the incident.

[3] Three days later, Mr. Warnakulasuriya took his boat to Kalpitiya for supplies. He docked his boat and went into town. While in town, he learned his assistant had been taken into custody and the navy was looking for him. Mr. Warnakulasuriya suspects his assistant had talked about the incident when drinking and as a result Sri Lankan authorities were searching for him in order to arrest him for assisting the LTTE. Nimal, his informant, told him that his boat was likely impounded.

[4] Fearing arrest for helping the LTTE, Mr. Warnakulasuriya fled. He called his wife who told him that the army had come to their home looking for him. He immediately left for Weyongoda to hide, staying with his wife's relations. He took a brief certificate seamanship course to secure employment on an outbound ship. When his ship reached Vancouver, he jumped ship and eventually applied for refugee status.

[5] The Refugee Protection Division of the Immigration and Refugee Board (the "Board") found that Mr. Warnakulasuriya was not credible. The Board held that Mr. Warnakulasuriya was unable to establish the well-foundedness of his fear of persecution. Mr. Warnakulasuriya applies for a judicial review of the Board's decision.

Did the Board err in its credibility findings?

[6] The Board's determination of credibility involves many factual findings. Such determinations are assessed in accordance with either the statutory standard, whether they were made perversely or capriciously or without regard to the evidence (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d)), or on the standard of reasonableness as set out in the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Board's credibility analysis is to be given significant deference by a reviewing Court. The Board's decision will stand unless its credibility findings fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47).

[7] The Board is a specialized tribunal that is entitled to decide adversely on a claimant's credibility on the basis of inconsistencies and contradictions in the claimant's evidence. However,

the deference due to the Board is not without bounds. In *Jamil v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at para. 24, this Court stated:

There is a well-recognized line of cases from the Federal Court of Appeal and this Court which has conveniently been summarized by Justice Martineau in *R.K.L v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 162, 2003 FCT 116 that a Refugee Board must not be zealous to find an applicant not to be credible and "must not be over-vigilant in its microscopic examination of the evidence of persons who testify through interpreters and tell tales of horror in whose objective reality there is reason to believe." See the Federal Court of Appeal's decisions in *Attakora v. Canada (Minister of Employment and Immigration)* (1989) 99 N.R. 168, along with *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989) 98 N.R. 312 and *Frimpong v. (Canada Minister of Employment and Immigration)* (1989) 99 N.R. 164 (emphasis added).

[8] The overarching story told by Mr. Warnakulasuriya is that when he is home in Sri Lanka he works as a fisherman and when not at home he works as a seaman. This is the pattern of his life since he first began to earn a livelihood.

[9] The encounter with the LTTE in September 2004 occurred while he was fishing. The Board did not believe Mr. Warnakulasuriya was a fisherman or that the encounter with the LTTE actually occurred. In its decision, the Board disputed virtually all of Mr. Warnakulasuriya's evidence and found Mr. Warnakulasuriya not credible on numerous separate points.

[10] I find that the Board engaged in a microscopic analysis which raised its prospect for error. Indeed, three categories of errors were committed. Firstly, the Board committed errors on fact; secondly, it committed errors relating to the significance of discrepancies; and most importantly, it committed errors in its analysis. An illustration of each type of error is provided below.

Error on Fact

[11] The Board decided Mr. Warnakulasuriya was not credible because, while he stated that the LTTE were armed in his PIF narrative and later in response to the Board's questions during the hearing, he did not say so when initially describing the September 2004 encounter with LTTE. The Board stated:

When asked if five persons (Tigers) in the above incident were armed, the claimant responded in the affirmative. Asked why he did not provide this detail in his testimony while describing the incident, he said there was no reason for it, he only mentioned what happened to him, adding there was a threat given by them to deliver the parcels (boxes), so he gave no details. He was adjusting. His PIF says these individuals were armed. This is not helpful to his credibility (Tribunal Record at 8).

[12] However, the transcript of the hearing reveals that Mr. Warnakulasuriya did say the LTTE were armed when describing the incident. After being asked by the Board to explain whom he feared, Mr. Warnakulasuriya stated that he feared government forces. He then on went to describe the events of September 18, 2004. In describing out how his boat was boarded, he stated "[and the people who boarded] had sword and other stuff . . ." (emphasis added) (Tribunal Record at 389; see also Tribunal Record at 393).

[13] The Board's credibility finding, based as it on a factual error committed by the Board, is perverse.

Error Relating to Significance of Discrepancies

[14] The Board decided that it did not believe Mr. Warnakulasuriya was a fisherman in September 2004 because, as the Board stated:

When referred to his boat purchase document indicating it was an 18.5 feet long boat, larger in size than his own testimony, he agreed. The panel expected him to know this information correctly if he was owning a boat as fisherman as alleged. The panel does not believe him.

[15] Mr. Warnakulasuriya testified the boat was “about 18 feet long” (Tribunal Record at 403 and 415). To attach great significance to this six inch difference in the description of the length of Mr. Warnakulasuriya’s boat is to engage in a microscopic analysis which displays a degree of over zealotness in finding error. To put it another way, Mr. Warnakulasuriya’s answer about covers the discrepancy.

Error of Analysis

[16] While other errors and irrelevancies exist, the most serious error is the Board’s method of analysis. Upon a careful review of the Reasons and the Transcript, I find that the Board engaged in a piecemeal analysis. On many of the evidentiary issues, the Board decided not accept the fact or evidence in question and then moved on to examine another issue in the alternative. The Board would use the preceding disbelieved evidence to decide that next evidentiary issue.

[17] To give an example, the Board decided that a September 25, 2006 letter from the Vicksopamatha Fishing Society had no probative value. Specifically, the Board doubted the letter’s authenticity and as a result found that its content could not be used to corroborate the Applicant’s testimony relating to his lack of a fishing permit and identification as a fisherman. The letter in question stated Mr. Warnakulasuriya did not require a permit to fish in 2004 nor special identification as a fisherman (Tribunal Record at 12). Later, the Board referred to the same letter, and relied on its content, for the proposition that the general identity card issued by the government

suffices to be identified as a fisherman. (Tribunal Record at 15). This is because the general identity card provides for the description of one's profession. The Board then decided that since Mr. Wanakulasuriya's National Identity card did not indicate his profession as a fisherman and since he had no other identity card showing he was a fisherman, it did not believe he was a fisherman.

[18] One cannot use evidence it disbelieves to support a finding that other evidence is unbelievable. In doing so, the Board makes no finding at all. The Board's approach to credibility findings in the alternative is an error.

[19] I find the Board engaged in a flawed analysis of Mr. Warnakulasuriya's testimony. While some of the errors committed by the Board are not necessarily reviewable, cumulatively, due to their number, they render the decision unreasonable.

[20] The application for judicial review is granted. This matter will be referred to a differently constituted tribunal for re-determination.

[21] No question of general importance has been proposed. None will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is granted. This matter is referred back for re-determination by a differently constituted Board.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1235-07

STYLE OF CAUSE: NICHOLAS ROSMAN WARNAKULASURIYA
v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 23, 2008

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

DATED: July 18, 2008

APPEARANCES:

Ronald Shacter FOR THE APPLICANT

Modupe Oluyomi FOR THE RESPONDENT

SOLICITORS OF RECORD:

RONALD SHACTER FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of
Canada