

Federal Court



Cour fédérale

**Date: 20130524**

**Docket: IMM-10366-12**

**Citation: 2013 FC 511**

**BETWEEN:**

**B223**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**PUBLIC REASONS FOR ORDER**  
**(Confidential Reasons for Order issued 16 May 2013)**

[1] B223 is another young Sri Lankan Tamil male who came to Canada on board the MV Sun Sea in order to claim refugee status or otherwise to seek Canada's protection. This is the judicial review of the rejection of his claim.

[2] B223 was still a minor when he arrived in Canada. I do not find this fact pertinent as the Member of the Refugee Protection Division, of the Immigration and Refugee Board of Canada, who decided the matter, properly applied the Chairperson's *Guideline 3, Child Refugee Claimants: Procedural and Evidentiary Issues*. Likewise, B223 was treated as a vulnerable person under Guideline 8.

[3] I am also not satisfied that the Member got the burden of proof wrong. Counsel has seized upon isolated bits and pieces of the decision. The burden under s. 96 of the *Immigration and Refugee Protection Act* is to establish a serious possibility of persecution, while under s. 97 of the Act the burden is to establish on the balance of probabilities a personal risk of torture or worse. That is the legal burden. However, the evidentiary burden to establish the facts which give rise to a s. 96 claim or to a s. 97 claim is always on the balance of probabilities, as held by the Court of Appeal in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 FCR 239, [2005] FCJ No 1 (QL). The Member did not fall into error.

[4] Like many of those on board of the Sun Sea, B223 lived in northern Sri Lanka and was a witness to many atrocities during the civil war. Following the government's victory in 2009, he and his family were swept up and spent some time in camps before he was permitted to leave,

**[Redacted]**

[5] He fears persecution or torture should he be returned to Sri Lanka. He believes that he would be perceived to be a Liberation Tigers of Tamil Elam [LTTE] sympathiser. He is also afraid of a Tamil paramilitary organisation which had supported the central government, the Eelem Peoples' Democratic Party [EPDP].

[6] In a very lengthy and thoughtful decision, the Member dismissed his claim. He was found not to be credible with respect to the timing of his in-camp interview by the Criminal Investigation Department of the Sri Lanka Police Service. In his Personal Information Form, **[Redacted]** he said the questioning happened some **[Redacted]**. However, he later testified that it was actually some

[Redacted], in other words shortly before [Redacted]. This change of position was construed, not unreasonably, as an effort to bolster up his contention that when he left Sri Lanka he was actually a person of interest to the authorities.

[7] The Member concluded that the Minister's submissions that there had been a change of circumstances in Sri Lanka were of little utility in this case and not dispositive. In like manner, he held that a decision of the Immigration and Refugee Board of Canada designed a "pervasive decision" was not sufficiently relevant. The Member stated that his duty was to determine, as best he could, and based on the evidence, whether the claimant, given his personal circumstances and the current conditions in Sri Lanka, might face a serious possibility of persecution under s. 96 of the *Immigration and Refugee Protection Act*, or a probability of torture or worse under s. 97 of the Act.

[8] He also dealt with the issue of whether B223 could be considered a refugee sur place. In similar cases, some decision makers have granted refugee status on that basis, and others have not. He did not. Indeed, if the basis of a refugee sur place is being a member of the particular social group of Tamil males from northern Sri Lanka who travelled to Canada on board a human smuggling ship, this Court has set aside such decisions as being either unreasonable (*Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334, [2012] FCJ No 1657 (QL)) or incorrect (*Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151, [2013] FCJ No 192 (QL) and *Canada (Minister of Citizenship and Immigration) v B323*, 2013 FC 190, [2013] FCJ No 193 (QL)).

[9] The Member also dealt in a reasonable way with the claimant's fear of the EPDP, and of an outfit known as the "Grease Monkeys".

[10] Given that the standard of review is reasonableness, and given the cogent analysis by the Member, I am not prepared to set aside his decision, which certainly conforms to the standard set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL), at para 47, *i.e.* it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Furthermore, there is ample material on file to justify the conclusions he reached (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, [2011] SCJ No 62 (QL)). He put it extremely well when he said:

After taking all of the evidence into account, including the claimant's personal circumstances upon which I have concluded that the claimant is a known quantity to the Sri Lankan authorities with regard to the LTTE and his age in terms of any Sri Lankan expectations that the claimant would have any significant knowledge about the ship, I find that the claimant has not established with credible and trustworthy evidence that there is a serious possibility he would be persecuted or, likely, be tortured or abused upon his return or that any detention he might face while he is questioned would extend beyond the time necessary to go through that process and retrieve and review the claimant's records.

When considering the submissions and evidence provided to me noted above, I have concluded that the UNHCR's assessment that it should not be presumed that those who are merely of Tamil ethnicity from the North would, for that reason, require protection, is to be preferred. The UNHCR found that there is no longer a need for group-based protection mechanisms for those people. I agree. With regard to the exposure of those with LTTE links, I have dealt extensively with that issue as it pertains to this claimant and find that those connections would not give rise to a serious possibility of persecution or a probability of section 97 risks or danger if he returns to Sri Lanka.

[11] The parties and the Court agree that there is no serious question of general importance to certify.

“Sean Harrington”

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Judge

Ottawa, Ontario  
May 24, 2013

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-10366-12

**STYLE OF CAUSE:** B223 v MCI

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** APRIL 29, 2013

**REASONS FOR ORDER BY:** HARRINGTON J.

**CONFIDENTIAL REASONS  
FOR ORDER DATED:** MAY 16, 2013

**PUBLIC REASONS FOR  
ORDER DATED:** MAY 24, 2013

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