

Federal Court



Cour fédérale

Date: 20130703

Docket: IMM-11315-12

Citation: 2013 FC 740

Ottawa, Ontario, July 3, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

B459

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the Minister for judicial review pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 72(1), of a decision by the Refugee Protection Division that the respondent B459 was a Convention refugee.

[2] The respondent is an ethnic Tamil from Sri Lanka who arrived in Canada on board the MV *Sun Sea* on August 13, 2010. The Board Member who heard his case noted that there were credibility concerns with his account of events prior to the *Sun Sea* voyage. However, the principal

foundation of the refugee determination was the fact that he had been a passenger on the vessel, and that fact was not contested. The Board Member found that B459 merited refugee protection due to his membership in the social group of MV *Sun Sea* passengers. The Member specified that he did not analyze any other basis for protection.

ISSUE:

[3] The issue in this application is whether the Board Member erred in finding that “Tamil passengers on the MV *Sun Sea*” constituted a “particular social group” for the purposes of a Convention refugee definition, sufficient to grant refugee status.

STANDARD OF REVIEW:

[4] As the issue is not the definition of a “particular social group” but whether the respondent fell within such a group, a question of mixed fact and law, and as the Board was interpreting its home statute and the related jurisprudence, I find that the standard of review is the more deferential one of reasonableness (*Canada (MCI) v B380*, 2012 FC 1334, at paras 13-15). However, I note that there is not unanimity on this point and that the correct identification of the appropriate standard of review was certified as being a serious question of general importance in *Canada (MCI) v A011*, 2013 FC 580 at para 57:

[57] Unfortunately, counsel for A011 did not propose a serious question of general importance to certify. Nevertheless, I shall certify the following question:

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration*

and Refugee Protection Act, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

ANALYSIS:

[5] The applicant Minister, citing section 96 of the IRPA and *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], submitted that the Board Member had not found that B459 had a well-founded fear of persecution based on any ground other than membership in a particular social group. The Minister argued that the Member's finding that B459 was a member of a particular social group was an error. Voluntarily choosing to set sail for Canada on an illegal human smuggling ship did not create a group which defined its members in a way which engaged the defense of human rights. The social group in question was unambiguously stated by the Board Member as "passengers on the *Sun Sea*" and not "people perceived by the Sri Lankan government to have links to the LTTE"; a perception of shared political opinion did not therefore arise.

[6] The respondent B459 argued that the Board had examined evidence that the Sri Lankan government believed that the MV *Sun Sea* had carried a substantial number of leaders, cadres, and members of the LTTE, and had reasonably found that a passenger on the vessel would be believed to be linked with the LTTE due to his voyage. He submitted that although "passengers on the *Sun Sea*" did not *per se* constitute a social group, the Board had reached its conclusion on the basis that he would be viewed as a person with links to the LTTE as a result of being a passenger on the voyage and that people with perceived links to the LTTE formed a particular social group and could invoke the "political opinion" Convention ground. The Board Member clearly identified the link to

the LTTE as the nexus to a well-founded fear and the applicant Minister is merely disagreeing with the possible, acceptable outcome of the Member's findings, the respondent contends.

[7] The Board Member stated very clearly that the basis for his finding was membership in a particular social group and not a nexus to any other Convention ground. To conclude otherwise would require the Court to ignore this statement and read into the Member's reasons an analysis which he declined to conduct.

[8] There is no doubt that the aim of the concept of a "particular social group", as established by *Ward*, is based on the defense of human rights:

70 The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, *supra*, *Cheung*, *supra*, and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

[9] While the jurisprudence from this Court on the question of "particular social group" as it pertains to the *MV Sun Sea* is somewhat mixed, this is largely due to variations in the factual circumstances of each case and the reasons for decision provided by different Board Members.

[10] It is not every identifiable “particular social group” formed by irrevocable historical facts which faces persecution on a discriminatory ground. As Justice Harrington stated in the similar case of *A011*, at para 40:

[40] In *A011*'s case, given the structure of the decision, references to race and perceived political opinion were part and parcel of why he was found to be a member of a particular social group, Tamils who came to Canada on the *Ocean Lady*. Those passengers did not voluntarily associate themselves for reasons fundamental to their human dignity. The common desire of coming to Canada does not make the passengers members of a particular social group within the meaning of the Convention and s. 96 of IRPA. As I said at paragraph 27 of *B72*:

The “*Sun Sea*”s passengers had a myriad of motives to come to Canada. Some were human smugglers. Some may well have been terrorists. Some were garden-variety criminals who wanted to escape justice. Some had serious reason to fear persecution in Sri Lanka and some, like Mr. 472, were economic migrants. There is no cohesion or connection to the other refugee grounds set out in section 96 of IRPA.

[11] The Board Member chose not to analyze whether there was a nexus to a Convention ground of political opinion via the perception that the respondent B459 was an LTTE member. Thus, even on the deferential standard of reasonableness, given the existing jurisprudence on the question of a “particular social group” resulting from passage on the *Sun Sea*, I find that his decision did not fall within the range of possible, acceptable outcomes which were defensible in respect of the facts and law. (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at para 47).

COSTS:

[12] The respondent sought costs pursuant to section 22 of the Federal Courts *Immigration and Refugee Protection Rules*, SOR 93-22, on the basis that the applicant Minister had met with mixed success in similar *Sun Sea* cases and had not included in its record on this application new evidence

demonstrating that the Sri Lankan government did view *Sun Sea* passengers as LTTE supporters yet had argued that the Sri Lankan government did not hold such a view.

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[13] As the applicant Minister has been successful, I will not award costs. The confidentiality order imposed at the outset of the proceedings in this Court will be maintained.

CERTIFIED QUESTION:

[14] As there is continuing uncertainty on the appropriate standard of review, I certify the same question as was proposed in *A011*:

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

CONCLUSION:

[15] The application is granted.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. the application is granted;
2. no costs are awarded,
3. the confidentiality order is maintained pending the final determination of the respondent’s claim or order to the contrary; and
4. the following question is certified

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-11315-12

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

AND

B459

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: May 28, 2013

REASONS FOR JUDGMENT: MOSLEY J.

DATED: July 3, 2013

APPEARANCES:

Keith Reimer FOR THE APPLICANT

Gabriel Chand FOR THE RESPONDENT

SOLICITORS OF RECORD:

WILLIAM F. PENTNEY FOR THE APPLICANT
Deputy Attorney General of Canada
Vancouver, British Columbia

GABRIEL CHAND FOR THE RESPONDENT
Chand & Company Law Corporation
Vancouver, British Columbia