

Federal Court



Cour fédérale

Date: 20140106

Docket: IMM-11547-12

Citation: 2014 FC 4

Ottawa, Ontario, January 6, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

And

A25

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is another in the series of judicial review applications involving refugee claims made by passengers who arrived in Canada on one of the two ships bearing Tamil refugee-seekers who arrived in late 2009 and mid 2010. In the present case the Respondent arrived on the *MV Ocean Lady*.

[2] In some of the cases the claimant had a history, prior to arrival in Canada, of troubles with Sri Lankan authorities due to their identification as Tamils from the north and possible association with the Liberation Tigers of Tamil Eelam [LTTE]. However, in this case, the Refugee Protection Division [RPD] did not find the Respondent's pre-arrival narrative to be credible. Therefore, the only basis for the claim is that upon return to Sri Lanka he will be targeted by the authorities due solely to him being a passenger on the ship.

[3] Justice Gleason in *Canada (Minister of Citizenship and Immigration) v A068*, 2013 FC 1119, thoroughly and helpfully canvassed the numerous decisions on similar claims and the central themes which run through those cases. I adopt her line of reasoning and conclusions.

A central point is that each case turns on its own facts and each judicial review turns on the specific conclusions of the RPD.

II. BACKGROUND

[4] The Respondent is a Tamil male citizen of Sri Lanka. He claimed that prior to leaving Sri Lanka, the Respondent and his family had been repeatedly harassed and detained by the Eelam People's Democratic Party. He also claimed that he had been arrested, questioned and beaten and detained by the Sri Lankan police. He then fled to Thailand and from there he travelled on the *MV Ocean Lady* to Canada.

[5] The RPD upheld the Respondent's claim for refugee protection holding that the Respondent 'has a well-founded fear of persecution for a Convention refugee ground in Sri Lanka by reason of his nationality as [a] young Tamil male and membership in a particular social group, namely, young

Tamil males who would be suspected of links to the Liberation Tigers of Tamil Eelam (“LTTE”) because of their travel to Canada on the *MV Ocean Lady*”.

[6] This central finding was supported by a number of factual determinations:

- The Respondent was not credible concerning his alleged persecution while in Sri Lanka but was credible with respect to his travel on the ship. There was no persuasive evidence suggesting that the Respondent would have been considered to have connections with the LTTE prior to his departure.
- The Respondent’s profile changed when he boarded the *MV Ocean Lady* because the ship was identified generally in the public domain as owned and operated by the LTTE and containing some passengers who were connected to the LTTE.
- The Respondent’s presence on the ship would be known to the Sri Lankan authorities; consequently, they would suspect him of LTTE membership or having connections or information.
- The expert evidence and an internal Canadian government report stated that a number of individuals on the *MV Ocean Lady* were suspected LTTE members.
- There was media coverage suggesting that the RCMP were communicating with Sri Lankan authorities to investigate identities and background of passengers. This was denied by the RCMP.
- The UNHCR recommended continuing protection for persons suspected of having links to the LTTE.
- There was evidence of the continued prevalence of torture and disappearances in Sri Lanka and impunity of state officials.

- Other evidence that pointed to returning refugee claimants from the ships were subject to detention and special questioning.
- The evidence of the Canadian High Commission was not persuasive because its source was the Sri Lankan government and was biased.

[7] The Member found that if the Respondent was returned to Sri Lanka, he would be identified as a *MV Ocean Lady* passenger by Sri Lankan authorities, detained so that the authorities could determine his membership status, his information on the LTTE, his participation in LTTE activities on board and/or his role in the trafficking of weapons.

[8] The Member found a nexus to one or more Convention grounds and further found that state protection would not be available because the agent of persecution was the Sri Lankan state itself. The s 97 claim was not assessed.

III. ANALYSIS

[9] The Applicant's concern with the decision was the conclusion of a nexus to a Convention ground, most particularly whether the Respondent was a "member of a particular social group".

A. *Standard of Review*

[10] The jurisprudence of this Court on the standard of review in cases similar to the present tends to favour the "reasonableness" standard but the Court is not unanimous on this point.

[11] In my view one must examine carefully the reasons for the decision to determine whether the RPD was making a legal finding or a factual or mixed factual and law determination and how significant was the legal component of that determination.

[12] I note that the Member does no real analysis of the legal concept of “a member of a particular social group” and tends to mix other parts of s 96 (i.e. nationality) as forming the basis of the particular social group.

[13] Considering the decision as a whole, the Member makes a determination of mixed law and fact. As such, the appropriate standard of review is reasonableness.

[14] The suggestion that merely being a passenger on the ship is sufficient to constitute membership in a particular social group is problematic under s 96. However, the Member’s determination went further than that. The Member reached a decision based on what has been called “mixed motives” but is in reality a confluence of motives.

[15] Consistent with *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Court is to examine the record and the reasons to determine if the decision can be supported. This requires the Court to examine what might be called “the pith and substance” of the reasons – the real core of the determination.

[16] Examined in that light, the reasons for granting refugee status was the Respondent’s “nationality” used in the sense of race/ethnicity as well as in the traditional sense of nationality. His

identification by the authorities with the LTTE speaks to the element of political opinion. In reaching this conclusion, it is not necessary to “read in” political opinion or conclude by reference, political opinion was an evident component of the decision.

[17] To be at risk of persecution for political opinion, in this case, does not require that a claimant hold the particular political opinion but simply that he be perceived by his persecutors to hold that opinion.

[18] The Member’s reasons for concluding that the Respondent had a well-founded fear of persecution are based on race, nationality and political opinion. The element of “membership in a particular social group”, to the extent that it is legally flawed, can be readily divorced from the other grounds.

[19] Based on the Member’s findings set forth in paragraphs 6 and 7 of these Reasons, this forms a reasonable basis for the Member’s conclusion that the Respondent is entitled to refugee protection. There is no reason for this Court to interfere with the RPD’s decision.

[20] There is no question for certification as the judicial review turns not only on the specific facts but on the specific reasons in this case.

IV. CONCLUSION

[21] Therefore, this judicial review will be dismissed.

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-11547-12

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND IMMIGRATION
v A25

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