

Federal Court



Cour fédérale

Date: 20140220

Docket: IMM-1156-13

Citation: 2014 FC 160

Toronto, Ontario, February 20, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALEXANDER GABRIEL PILLAY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Alexander Gabriel Pillay is a 56 year old citizen of Sri Lanka of Tamil ethnicity. He is married and has three sons: one in the USA, one in Germany, and one in Sri Lanka. He arrived in Canada aboard the MV Sun Sea on August 13, 2010. His claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD].

[2] In my view, the RPD reasonably concluded that the Applicant was not credible. He could not credibly identify the people who abducted him or the people who came looking for him

following his abduction. Therefore, it is not clear that these people (if they tortured the Applicant) were associated with the government in any way. The extortion attempts fit squarely within the criminal types of extortion described in the documentary evidence that the general Sri Lankan population faces. There is also no credible evidence to support a claim that the Applicant would face torture if returned to Sri Lanka.

[3] I am also not convinced that the RPD failed to consider the cumulative effects of the various incidents the Applicant claimed, that would lead to a finding of a fear of persecution. He cites *Munderere v Canada*, 2008 FCA 84, to support that it is an error for the RPD to not consider the cumulative effects of incidents leading to a fear of persecution. It is true that the RPD, in conducting its analysis, must consider the cumulative effect of all of the alleged incidents. However, in that case, the Federal Court of Appeal at paragraph 51 states that: “Although it is correct that neither the Board nor the Judge squarely addressed this issue, I am satisfied that the Board’s silence does not constitute a reviewable error, given that the respondents cannot show that the grenade incident was linked to a Convention ground” (emphasis added). These comments are on all fours with this case.

[4] Although the RPD did not conduct an explicit review of the cumulative effects of the incidents, the Applicant did not discharge the onus on him of showing a nexus to a Convention ground. There is simply no evidence of persecution for any of the alleged incidents. There can be no cumulative effect leading to a fear of persecution on the basis of a Convention ground if none of the incidents constitute persecution on that basis.

[5] The Applicant's claims under section 96 and 97, with one exception, failed based on the credibility determination which was transparent and justified.

[6] However, I have determined that the application for judicial review must be allowed on the basis of the assessment by the RPD of the Applicant's *sur place* claim. The RPD did not address evidence that directly contradicted its findings, and it was obligated to consider whether the combination of the Applicant's race and his having been aboard the MV Sun Sea were sufficient on their own to subject him to a risk of persecution based on a Convention ground, independent of his history with the authorities.

[7] This Court has held that despite adverse credibility findings, and despite a lack of history of prior association with the LTTE, the combination of being Tamil and having been aboard the MV Sun Sea may be sufficient to show a serious possibility of persecution as a result of a Convention ground. This is known as the "mixed motives" doctrine.

[8] In *Canada v B344*, 2013 FC 447 [B344], Justice Noël upheld the RPD's decision that the applicant had a valid *sur place* claim on the basis of the combination of his Tamil ethnicity and his being a passenger on the MV Sun Sea. The RPD found that the evidence showed that: (1) the Sri Lankan authorities perceived the Sun Sea to be part of an LTTE-administered trafficking operation regardless of the Applicant's previous lack of association with the LTTE; (2) Tamils suffered systemic discrimination in Sri Lanka by the government; and (3) the government sometimes used torture and abusive force against suspected terrorists or those who may have information about terrorists. Justice Noël stated:

The mixed motives approach to a finding related to section 96 of the IRPA is not new. The Federal Court of Appeal has been recognizing the validity of this type of analysis for more than 20 years. Indeed, in both *Salibian v Canada (Minister of Employment and Immigration)* (1990), 11 Imm LR (2d) 165 at paras 17-19, 73 DLR (4th) 551 (FCA), Dé Cary JA and Veeravagu, above, the Federal Court of Appeal recognized that race can be a "causal factor" when an individual is at risk to suffer persecution at the hands of state agents and that this causal factor, considered along with other motivations can establish a serious possibility of persecution:

In our view, it is obvious beyond any need of demonstration that if a person faces "real and oppressive" risks, including a risk of "substantial violence," from state sponsored sources (the IPKF) because he or she belongs to a group one of whose defining characteristics is race, (young Tamil males), it is simply impossible to say that such person does not have an objective fear of persecution for reasons of race.

(See Veeravagu, above at 2.)

It is not a question of whether the persecution can be connected to a Convention ground but rather an issue of whether a ground such as race can be a contributing or causal factor. (emphasis added)

[9] Therefore, while neither being a passenger on the MV Sun Sea ship nor being Tamil alone is sufficient on the evidence to show a nexus to a Convention ground, when combined, there may be a serious possibility of persecution.

[10] In this case, the RPD indirectly evaluated the mixed motives doctrine when it said that “[d]espite having lived in the north [that is to say, despite being Tamil] he has never been arrested or detained by the SLA or police.” However, it came to this conclusion without having any regard to evidence that the combination of being Tamil and having been aboard the MV Sun Sea may be sufficient to garner suspicion from the Sri Lankan authorities.

[11] Some of the evidence ignored by the RPD includes the following statement from the Amnesty International Report on Country Conditions in Sri Lanka dated June 16, 2011: “Tamils... but particularly young Tamil men from Northern or Eastern Sri Lanka... have been disproportionately subject to arrest and detention based solely on their ethnicity. Anyone suspected of affiliation with the LTTE is a likely target of abuse” (emphasis added). Amnesty International also reports that “[m]any are arrested and detained on suspicion of links to the LTTE pending investigation and interrogation by Sri Lanka’s intelligence and security forces” and that “some detainees report being tortured and beaten by military personnel and paramilitary cadres working with government forces, such as the army and navy; by police, by inmates and by prison guards.”

[12] Further, while the RPD relies on the portion of document LKA.103815.E which states that there have been only four cases of persons being detained upon arrival and that these cases involved outstanding criminal charges, the same document goes on to say that Human Rights Watch has “noted that its research ‘shows that Sri Lankan authorities have frequently violated the basic rights of people suspected of being affiliated with or supporters of the LTTE.’” The same document also states that “[r]eturnees are also viewed with ‘suspicion,’ and are generally seen as ‘traitors,’ ‘those who brought the country to disrepute’ [and] ‘...lied about the situation in the country abroad.’” (emphasis added).

[13] Finally, an Amnesty International report titled “Concerns with respect to forced returns to Sri Lanka for passengers of the Ocean Lady and MV Sun Sea” states that: “The Sri Lankan Ministry of Defence has accused the passengers on by [*sic*] the MV Sun Sea and Ocean Lady of having links

to the LTTE suggesting passengers included leaders, members and their families,” that those who are detained were interrogated and that such interrogations “focused on this association [with the LTTE]; on forcing a confession to LTTE connections or activities; and/or on gaining information about others associated with the LTTE....”

[14] These documents support the following set of facts in support a *sur place* claim:

1. Tamils are subject to discrimination by the state;
2. Returnees are regarded with suspicion;
3. Those suspected of being connected with the LTTE are subject to detention, interrogation, and torture by the state; and
4. The Sri Lankan government perceives the MV Sun Sea as being linked to the LTTE.

[15] The Applicant is a returnee who is a Tamil and was aboard the MV Sun Sea. It could be inferred that he would be at risk of persecution as a result of these factors.

[16] That is not to say that all Tamils who were aboard the MV Sun Sea will automatically succeed on a *sur place* claim under section 96. In fact, I agree with the RPD that the Applicant does not have any prior association with the LTTE and it appears that the government has not previously suspected him of any connection to the LTTE.

[17] However, in light of the decision in *B344*, the RPD had to at least turn its mind to the possibility that the Applicant would face a serious possibility of persecution on a combination of his

race and the fact that he was on the MV Sun Sea, and directly address the evidence that spoke to that possibility.

[18] By focusing only on the passages in the evidence that indicate that returnees have generally been reported to have not been mistreated and that only four were detained, it ignored passages in the evidence that suggest that most returnees are regarded with suspicion, that the government associates the Sun Sea with the LTTE, that Sri Lankan authorities have frequently violated basic rights of people suspected of being affiliated with the LTTE, and that Tamils are disproportionately subject to arrest and detention. And for that reason, its decision must be set aside.

[19] No question for certification was proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and that part of the Applicant's claim for refugee protection based on a *sur place* claim is to be redetermined by a different Member of the Refugee Protection Division of the Immigration and Refugee Board of Canada.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: ALEXANDER GABRIEL PILLAY v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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