

Federal Court



Cour fédérale

**Date: 20140226**

**Docket: IMM-12625-12**

**Citation: 2014 FC 184**

**Ottawa, Ontario, February 26, 2014**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**NIREKAN SIVANATHAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Defendant**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the Board) on November 20, 2012, wherein the Board rejected the applicant's application for refugee protection.

### Background

[2] Nirekan Sivanathan (the applicant) is a twenty-five (25) year-old citizen of Sri Lanka. He is a Tamil from the Vavuniya district, located in the Northern Province of the country.

[3] On August 13, 2010, the applicant arrived in Canada aboard the *MV Sun Sea* ship. He made a refugee claim the same day. The applicant fears that he would be arrested, tortured and indefinitely detained if he were to return to Sri Lanka.

[4] The Board determined that the applicant was neither a Convention refugee in accordance with section 96, as he did not have a well-founded fear of persecution and failed to make a *sur place* claim, nor a person in need of protection pursuant to subsections 97(1)(a) and 97(1)(b) of the Act.

### Issues

[5] The current application raises the following issues:

1. Did the Board apply the correct test?
2. Was the Board's finding that the applicant's profile did not make him a refugee reasonable?
3. Was the Board's finding that the applicant was not a refugee *sur place* reasonable?
4. Did the Board reasonably find that the applicant only faced general risk of crime?
5. Did the Board make reasonable credibility findings?

### Standard of review

[6] The Board's findings concerning the issues raised are questions of mixed fact and law. As such, they are reviewable under the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334 at paras 13-15, [2012] FCJ No 1657 (QL); *B231 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1218 at paras 27-29, [2013] FCJ No 1316 (QL) [B231]). As to the Board's credibility findings, they should be given significant deference (*Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929 at para 18, [2009] FCJ No 1143 (QL); *Aguebor v (Canada) Minister of Employment and Immigration* (FCA), [1993] FCJ No 732 at para 4, 160 NR 315).

[7] When applying the reasonableness standard, a reviewing court is not allowed to reweigh the evidence that was before the decision-maker. It should limit its examination to "[...] the existence of justification, transparency and intelligibility within decision-making process" and should be concerned with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

### Analysis

[8] The applicant argues that the Board applied incorrect tests in its analysis of section 96 claim. The applicant refers to passages where the Board insists on the positive evolution of the human rights situation in Sri Lanka (Board's decision at paras 29-30), on the fact that the applicant was never directly targeted as an LTTE supporter (Board's decision at para 43), or on its view that the applicant did not face a "heightened" (Board's decision at para 34) or "increased" risk (Board's

decision at para 53). According to the applicant, “it is clear that Member da Silva applied a series of incorrect tests” (Applicant’s Memorandum of Argument at para 15). The Court is not convinced that the passages cited by the applicant are indicative that the Board applied a modified and incorrect test. When reading the decision as a whole, the Court is rather of the view that the Board conducted an analysis of the evidence documenting the evolving situation in Sri Lanka and of the particular situation of the applicant in order to determine whether he faced a serious possibility of persecution. The Board did not conduct an exercise in “relativity” as suggested by the applicant (Board’s decision at paras 25, 34, 43). More particularly, the wording of the Board does not suggest that it applied a more stringent test, but merely that it tried to assess if the applicant, being a member of an ethnic group facing general difficulties in an evolving country, faced serious possibility of persecution. The Board’s conclusion is apposite: “[...] the claimant has not satisfied the burden of establishing a serious possibility of persecution on Convention grounds, or that, on a balance of probabilities, he would be subject personally to a danger of torture, or face a risk of cruel and unusual treatment or punishment” (Board’s decision at para 62).

[9] The applicant’s claim that the Board ignored several documents substantiating the harassment, discrimination and violence committed by the Sri Lankan authorities and paramilitary groups towards Tamil males cannot succeed. The applicant provided a list of elements of the documentary evidence indicating that his fear of persecution was well-founded, whether as a young Tamil or as a failed refugee, but that these were not directly mentioned by the Board. However, and as observed by Justice Snider in a decision dealing with similar facts, the Court is of the view that “the Board did deal with the substance of the document[s]” (*SK v Canada (Minister of Citizenship and Immigration)*, 2013 FC 78 at para 16, [2013] FCJ No 137 (QL)).

[10] Indeed, the Board repeatedly acknowledged and mentioned many pieces of evidence suggesting that the situation is still difficult in Sri Lanka, especially for Tamils originating from the Northern Province. However, it chose to rely on other elements of the documentary evidence indicating that, since the end of the war, the situation has steadily improved to the point where group-based protection mechanisms are no longer warranted and individual assessments of the circumstances of each claim are required. The applicant suggested a different reading of the evidence but it failed to convince the Court that the Board's weighing of the evidence was unreasonable.

[11] Turning to the Board's challenged credibility finding, the Board's adverse findings are based on the evidence adduced, omissions, inconsistencies, and are sufficiently motivated. For instance, it was open to the Board to conclude that the fact that the applicant convinced his captors at the camp that he had his scar since childhood makes it likely that the scar would not in itself raise suspicion that he was involved with the LTTE. It was also reasonable to conclude that, because the applicant was released by the CID after being interrogated on suspicions of LTTE involvement and was not sent to special camp for LTTE supporters, he was not perceived by the Sri Lankan authorities as being affiliated with the organization.

[12] With respect to the *sur place* claim, the applicant contends that the Board ignored documents that clearly state that Sri Lankan government officials believed that the operators and passengers of the *MV Sun Sea* ship were affiliated with the LTTE and the cumulative effect of its findings constitutes an error. However, the Court notes that the Board directly mentioned that some documents suggest that both Canadian and Sri Lankan officials believed that the *MV Sun Sea's*

passengers had links with the LTTE (Board's decision at paras 46, 50). While acknowledging that evidence, the Board believed that it did not confirm that all *MV Sun Sea*'s passengers were perceived as LTTE supporters (Board's decision at para 53). The Board then proceeded to analyze the applicant's personal situation and concluded that merely being onboard the *MV Sun Sea* was not sufficient, in and of itself, to establish a *sur place* claim in his particular case. This conclusion is supported by a number of decisions from this Court (*Canada (Minister of Citizenship and Immigration) v B459*, 2013 FC 740 at paras 8-10, [2013] FCJ No 779 (QL); *Canada (Minister of Citizenship and Immigration) v B171*, 2013 FC 741 at paras 9-13, [2013] FCJ No 821 (QL); *Canada (Minister of Citizenship and Immigration) v B420*, 2013 FC 321 at paras 16-17, [2013] FCJ No 396 (QL); *Canada (Minister of Citizenship and Immigration) v A011*, 2013 FC 580 at para 40, [2013] FCJ No 685 (QL); *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151 at paras 24-28, [2013] FCJ No 192 (QL)).

[13] Regarding the issue of generalized risk, it was not unreasonable for the Board to conclude, based on the documentary and testimonial evidence, that the EPDP and the Karuna Group do not pose a particular threat to the applicant, who seems to have been targeted while in Sri Lanka through routine checks, and not because of his ethnicity. The Board committed no reviewable error in concluding that the extortion threats described by the applicant amounted to a generalized risk. There is ample evidence to that effect (Tribunal Record, vol. 2, pp 319, 320, 322, 341 and 342; vol. 3, pp 430 and 559).

[14] For all of these reasons, the Board's decision is reasonable as it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*).

Hence, the Court's intervention is not warranted. The application will be dismissed.

[15] Counsel for the applicant suggested the following question for certification:

"Is "heightened risk" or "increased risk" the proper test for determining whether or not a person has a well-founded fear of persecution".

[16] Given the Court's conclusion regarding the test applied by the Board, and the fact that the question submitted by the applicant relates therefore to the assessment of the evidence and not the burden of proof, the Court will decline to certify the question as it is not an issue of broad significance and it is not determinative of this case.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application be dismissed. No question is certified.

“Richard Boivin”

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Judge



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

**DOCKET:** IMM-12625-12

**STYLE OF CAUSE:** NIREKAN SIVANATHAN v  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 12, 2014

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BOIVIN J.

**DATED:** FEBRUARY 26, 2014

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