

Federal Court



Cour fédérale

Date: 20140310

Docket: IMM-11087-12

Citation: 2014 FC 234

Ottawa, Ontario, March 10, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

KETHESWARAN THEVARASA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Dominique Setton, a member of the Refugee Protection Division of the Immigration and Refugee Protection Board [the Board], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Board dismissed the Applicant's claim for refugee protection, concluding that he was not a convention refugee or person in need of protection under sections 96 and 97 of the Act.

II. Issue

[2] Was the Board's decision unreasonable in finding that the Applicant is not a Convention refugee or a person in need of protection?

[3] The Applicant is Tamil citizen of Sri Lanka, originally from Kanagarayankulam, in the Northern region. He has a wife and three children who remain in Sri Lanka.

[4] The Applicant alleges a series of problems that began in 1997, when the Liberation Tigers of Tamil Elam [LTTE] and the Sri Lankan Army [SLA] fought in the Northern region and he was displaced. His brother was arrested by the SLA and detained in Colombo until 2009.

[5] In 2000, the SLA withdrew from the area, and the LTTE re-occupied his village and the Applicant returned.

[6] The Applicant claims his father was killed in cross-fire between the SLA and the LTTE on October 12, 1995, and his mother's cousin was shot by the SLA in 2005.

[7] His village was bombed beginning in mid-2008 and the Applicant was displaced a total of 19 times as a result of these bombings.

[8] On March 27, 2009, the Applicant and his family arrived in the Cheddikulam Arunachelvam internal refugee camp. During his time in the camp he was questioned repeatedly and threatened by

some pro-government groups who were working with the government. On one occasion a member of these groups put a gun to the Applicant's chest and accused him of being a member of the LTTE.

[9] On December 5, 2009, he was released from the camp and sent back to Kanagarayankulam. Harassment from the SLA and the police continued. In particular, they asked him questions about his brother.

[10] The Applicant took his wife and children to Vavuniya, a town near Kanagarayankulam. He then travelled to Colombo alone on January 29, 2010. On May 23, 2010, he left for Canada as one of nearly 500 Tamils aboard the MV Sun Sea cargo ship. He arrived in Canada in August, 2010, and subsequently sought refugee protection.

[11] The Board denied the Applicant's claims under sections 96 and 97 of the Act. The Board did not find the Applicant's claims of persecution as someone suspected of having links to the LTTE to be credible, nor did they find that he had a basis for a claim as a *sur place* refugee based on the media attention resulting from his passage to Canada on the Sun Sea.

[12] First, the Board noted that the Applicant alleged that he was questioned in the Cheddikulam Arunchelvam camp on the basis that his family was suspected to be a "Tiger Family," or a family predominantly composed of LTTE members. Despite this, there is no evidence that other family members were questioned. The Board found it implausible that he would be suspected of being part of a "Tiger Family" but that other family members would not be questioned.

[13] Second, the Board found an inconsistency as to whether he was detained and arrested at any point. In his initial Personal Information Form [PIF], he answers “no,” to question nine, which asks whether he has ever been “sought, arrested or detained by the police or military or any other authorities in any country, including Canada.” In his amended PIF, he answers “yes.” There was no other evidence provided, in his testimony or otherwise, to suggest he was ever detained. The Board drew a negative credibility inference from this inconsistency.

[14] Third, the Board noted that the Applicant’s family remains in Sri Lanka. The Board found it implausible that he would have left his family in Sri Lanka if he had a genuine fear as a result of the SLA suspecting his family to be a “Tiger Family.”

[15] Fourth, during his testimony the Applicant noted that he also feared that the SLA suspected he was a member of the LTTE, rather than only an individual with links to the LTTE. This fear was based on the SLA, in questioning the Applicant, referring to a photograph of him which apparently was evidence that he was an LTTE member. The Board found it suspect that this photograph was not referred to in either PIF, given that it changed the nature of his fear.

[16] Fifth, the Applicant’s wife was telephoned and asked why the Applicant’s father died. She replied that “He was drinking too much, and he had a conflict with my mother, and he took poison and died.” This was confirmed by the Applicant’s mother. This version of his father’s death is inconsistent with the Applicant’s version: that he died in crossfire between the LTTE and the SLA. The Board drew a negative credibility inference as a result.

[17] Finally, the Board noted that the Applicant's wife was telephoned and asked why the Applicant left Sri Lanka, and she stated "because he lost all his properties, and there is no proper way to survive, so that is why he left." The Applicant was confronted with this inconsistency during the hearing before the Board. He suggested his wife was lying because she was afraid of being monitored by the police. The Board did not accept this explanation as reasonable.

[18] On account of the above, the Board did not believe the Applicant's claims and did not find him a convention refugee or a person in need of protection as a result of events that occurred before he left Sri Lanka.

[19] The Board also did not believe the Applicant had a valid claim to being a *sur place* refugee, on the basis that he might be perceived as having links to the LTTE having regard to the media attention that the landing of the Sun Sea received internationally. The Board notes that the definition of a *sur place* refugee according to the United Nations High Commissioner for Refugees [UNHCR] is:

A person becomes a refugee *sur place* due to circumstances arising in his country of origin during his absence.

[20] The Board found that there have only been four cases of returnees being detained upon return to Sri Lanka, and those individuals had outstanding criminal charges – something that the Applicant does not profess to have. The documentary evidence also shows that the British High Commission has noted that returnees are able to pass through routine checks in the airport. The Board further notes that the Applicant has provided no evidence of similarly situated individuals to himself, such as other passengers on the Sun Sea or the Ocean Lady.

[21] The Board accepted a statement from the RCMP which indicates that no personal information about Sun Sea passengers was shared with the Sri Lankan government. Based on this statement, the Board concluded that the Applicant would not be at risk due to the Canadian government's interactions with Sri Lanka.

[22] The Board noted other documentary evidence which suggests ambiguity regarding whether the Sri Lankan government views the Sun Sea passengers as LTTE-connected. While noting that some sources, such as the Sri Lankan High Commission in Ottawa, are of the view that the passengers are predominantly "LTTE people," the Board found that the Sri Lankan government's general view is that the passengers of the Sun Sea are victims of human smuggling.

III. Standard of Review

[23] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Dunsmuir v New Brunswick*, 2008 SCC 9).

IV. Analysis

[24] The Applicant argues that having a gun held to one's chest during an interrogation is torture, persecutory and cruel and unusual treatment, citing the United Nations Convention Against torture. Further, the Federal Court of Appeal has stated that detention and mistreatment based on ethnicity constitutes persecution (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1172, at para 22).

[25] Moreover, the Applicant argues that the Board erred in rejecting the Applicant's evidence that the SLA suspected he was part of a "Tiger Family" because the rest of his family was part of a tiger family. To require the Applicant to prove the actions of the SLA were rational and justifiable is an error (*Yoosuff v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1116, at paras 8-9).

[26] The Applicant also argues that the Board erred in selectively referring to the evidence to discredit the Applicant. In particular, the Applicant notes that many of his family members state that he was questioned repeatedly and harassed by the SLA.

[27] Further, the Board failed to consider what would happen to the Applicant if he admitted the steps he took to leave Sri Lanka on the Sun Sea, including paying money to the LTTE. By assuming that a failed refugee claimant can successfully lie to his own government, it is alleged that the Board erred (*Donboli v Canada (Minister of Citizenship and Immigration)*, 2003 FC 883, at para 8).

[28] Finally, it is alleged the Board erred in selectively referencing the documentary evidence. For example, with regard to returnees, the Board references the Request for Information Report 103815, which states that only four persons returning to Sri Lanka have been detained to the knowledge of Canadian officials. However, the Applicant notes that later in that report it is stated that individual returnees have been very vulnerable, and that all asylum seekers have been detained.

[29] I do find some of the Board's findings questionable. I agree with the Applicant that to require the Applicant to prove the actions of the SLA were rational and justifiable is an error (*Yoosuff* at paras 8-9). As such, the fact that the SLA did not question the rest of the Applicant's

family is not a basis to undermine his credibility. Likewise, the fact that the Applicant did not take his family with him on the Sun Sea does not impact his credibility, given the difficulties in illegally leaving a country experiencing conflict.

[30] However, the Board found inconsistencies as to whether the Applicant was detained, the existence of a photograph which changed the nature of his fear, how his father died, and why he left Sri Lanka. These findings are based in concrete inconsistencies, and given the deference accorded to the Board on the standard of reasonableness, should not be interfered with (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319, at para 22).

[31] The Applicant does note that his mother supports his testimony regarding the reason he left Sri Lanka and the Board neglected to mention this. This is true. However, it does not undermine the fact that the Applicant's wife gave another reason for him leaving, and this was the inconsistency noted by the Board. It was reasonable on the evidence for the Board to draw a negative credibility inference based on this.

[32] Moreover, while the Applicant does not address the potential that he is a *sur place* refugee, the decision of Justice Richard Boivin in *Sivanathan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 184, at para 12, states that "...merely being on board the Sun Sea was not sufficient, in and of itself, to establish a *sur place* claim". This decision should be read in light of Justice Russell Zinn's decision in *Pillay v Canada (Minister of Citizenship and Immigration)*, 2014 FC 160, at paras 14-16:

[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.

[33] The Board did turn its mind to the possibility that the Applicant may face persecution, at paragraphs 43 and 45 to 49 of the decision. Accordingly, I find that the Board was reasonable to conclude that the Applicant did not have a valid basis for a *sur place* refugee claim.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11087-12

STYLE OF CAUSE: Thevarasa v MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 6, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** MANSON J.

DATED: March 10, 2014

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