Federal Court  Cour fédérale

Date: 20140530

Docket: IMM-1366-13

Citation: 2014 FC 524

Ottawa, Ontario, May 30, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

A76

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration [Minister] seeks judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated February 5, 2013, whereby it determined that the respondent, a Sri Lankan Tamil refugee who arrived in Canada aboard the *Ocean Lady*, was not excluded from refugee protection under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The Board

allowed the applicant's *sur place* refugee claim and so found that he qualified as a *Convention* refugee within the meaning of its section 96.

[2] In recent months, this Court has rendered several decisions involving refugee claims made by Sri Lankan Tamil passengers aboard the *Ocean Lady and Sun Sea* ships that landed on our shores in late 2009 and mid-2010 (see Justice Gleason's decision in *Canada (Minister of Citizenship and Immigration) v A068*, 2013 FC 1119 for an overview of recent jurisprudence (as of November 2013) on the matter).

[3] While the Minister had originally sought to also challenge the Board's inclusion determination, he has since desisted from that argument. The Minister now exclusively seeks to challenge the Board's exclusion determination, arguing that there are serious reasons to believe that the respondent is complicit in a crime against humanity pursuant to Article 1F(*a*) of the *Convention*, as he has links with the Liberation Tigers of Tamil Eelam [LTTE]. As a matter of reference, Article 1F(*a*) of the *Convention* is incorporated into the Act - the Board's enabling statute - by its section 98. Since the Board's decision, the Supreme Court of Canada has refined the test for complicity, barring its application to instances of "mere association" or "passive acquiescence" (*Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*]).

[4] For the reasons discussed below, this application for judicial review will be dismissed.

Background

[5] The respondent's refugee claim was based on his alleged fear of persecution and risk of torture at the hands of the Sri Lankan authorities due to his possible involvement and association with the LTTE.

[6] The respondent and his family allegedly had been arrested and interrogated on various occasions by Sri Lankan authorities regarding their possible involvement and knowledge of the LTTE. In April 2008, the respondent moved to Colombo hoping to eventually travel to Saudi Arabia to find a job as a carpenter. While in Colombo, he claimed to have lent his cell phone to a man with whom he shared a room and about whom he knew very little. This man allegedly used his cell phone during the period from April to September 2008. According to his landlady at the time, in early September 2008, the police came looking for the respondent in Colombo while he was away. He managed to avoid the police, and moved to another house briefly before leaving for Singapore on September 11, 2008.

[7] The respondent remained in Singapore for 11 days before leaving for Malaysia. He then remained in Malaysia until August 2009.

[8] While in Malaysia, the respondent learned from his mother that his photograph had appeared in a newspaper along with ten others for suspicion of importing electronic communications equipment for the LTTE. It was alleged that his twin brother was, as a result of his photograph being published, arrested, tortured and questioned about his whereabouts.

[9] In January 2009, the respondent applied for refugee status with the United Nations' office in Malaysia, and was accepted in July 2009. Without permanent resident status or permission to work, the respondent made arrangements to travel to Canada aboard the ship *Ocean Lady*. He boarded it on September 5, 2009 and arrived in Canada in October 2009.

[10] At the hearing of the respondent's refugee claim, the Minister of Public Safety and Emergency Preparedness [MPSEP] intervened and made submissions relating to the exclusion of the respondent under Article 1F(*a*) of the *Convention*. He maintained that the respondent was complicit in war crimes or crimes against humanity because of his association with the LTTE, an organization which the Canadian government has identified as being involved in terrorism. The MPSEP based his submissions on the following evidence:

1. A warrant of arrest, dated May 19, 2009, against the respondent for "aiding and abetting the LTTE organization";

2. An Interpol red notice indicated that the respondent is wanted for "aiding and abetting the LTTE organization";

3. A photograph of the respondent with the listing of "terrorism" under the heading "offenses";

4. A copy of Sri Lankan state regulations describing a ban on the import of certain goods, specifically explosive detection equipment, with these items circled in text;

5. A transcribed statement made by one Anthony Pullay Tony Gerai [Gerai], following his arrival in Colombo with banned equipment, namely high tech telecommunication equipment. It is this statement that led the Sri Lankan police to seek the arrest of the respondent;

6. A Sri Lankan Criminal Investigation Department Final Report;

7. The respondent's identification of his own cell phone number which was identical to that of a certain "Karthik," Gerai's contact;

8. Alleged similarities between the respondent's name and Karthik, which the applicant contends are one and the same individual, and;

9. The overall credibility of the respondent's account with respect to the use of his cell phone by his roommate, to his description of his roommate, and more generally, to the overall account of his stay in Colombo.

[11] The applicant conceded at the hearing before the Board that if the respondent was not excluded from refugee protection, then the evidence was sufficient to establish risk upon return to Sri Lanka.

[12] One of the articles included in the Minister's disclosure before the Board specifically referred to the fact that Sri Lankan authorities were aware that the respondent was in Canada,

had travelled aboard the *Ocean Lady*, and had made a refugee claim in Canada. It further noted that he was "being hunted down" by the Sri Lankan authorities. Documentary evidence also made clear that those perceived by Sri Lankan authorities to have links with the LTTE are at risk of persecution in Sri Lanka.

The Impugned Decision

[13] The Board determined that the Minister had not met its burden of proof within the meaning of Article 1F(*a*) of the *Convention*, and found that the claimant was not excluded from refugee protection. The Minister had to prove that "there [were] serious reasons for considering" that the claimant had committed a crime described at Article 1F(*a*) of the *Convention*. However, there was insufficient trustworthy evidence to conclude that the claimant himself has been involved with the LTTE.

[14] Notably, the Board found that there were substantial differences between the name "Karthik" and the claimant's name such that the Minister's conclusion that Karthik and the respondent were one and the same person was not supported by the evidence. There was also no evidence to indicate that Karthik was either a code name or an alias for the claimant.

[15] Meanwhile, the charges against the claimant had been laid pursuant to the Emergency Regulations, which were repealed in August 2011. As such, the offense alleged is null and void.

[16] Moreover, the Board assigned little weight to Gerai's statutory declaration since there was no signature or date, and there were numerous discrepancies in dates and spelling found

therein (for example, there were three different spellings of the name of the officer who allegedly prepared the notes), and this, "especially in light of available evidence that Sri Lankan forces are known to use torture during interrogation."

[17] The Board did have certain concerns with the claimant's credibility, especially with respect to his contention that he did not communicate with his roommate, considering they shared a one room dwelling for months. Nonetheless, the Board further concluded, notably based on the Minister's concessions, that if the claimant was not excluded from refugee protection, then the evidence was sufficient to establish risk upon return to Sri Lanka. Accordingly, the claimant was deemed to be a refugee *sur place* as described by the *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* on the basis of having travelled to Canada aboard the ship *Ocean Lady* and the associated media coverage.

Issues and Standard of Review

[18] As discussed, the applicant has abandoned his argument with respect to inclusion. Accordingly, this application raises the following issues:

1. Did the Board reasonably conclude that the Minister had not met the requisite onus regarding exclusion with credible and trustworthy evidence?
2. Did the Board provide adequate reasons?
3. Are there special reasons for the Court to order costs against the applicant?

[19] The issue of the adequacy of reasons can be subsumed under question 1.

[20] The parties agree that the applicable standard of review for issue 1 is reasonableness. The Court has held that findings of complicity in crimes against humanity is a question of mixed law and fact and so is owed "substantial deference" (*Watudura Bandanage v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1340 at para 18; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47, *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

Analysis

Did the Board reasonably conclude that the Minister had not met the requisite onus regarding exclusion with credible and trustworthy evidence?

[21] The applicant argues that the Board was presented with sufficient evidence linking the respondent with the LTTE for exclusion under Article 1F(*a*) of the *Convention*, even if one were to apply the new test laid out by the Supreme Court of Canada in *Ezokola*. There, the Court reframed the test for complicity such that mere association or passive acquiescence is no longer sufficient to warrant exclusion (*Ezokola* at para 29).

[22] The MPSEP had submitted several key pieces of evidence to support an exclusion finding. Of particular note, the applicant argues that the respondent was personally named and identified in an Interpol Red Notice as well as a Sri Lankan arrest warrant, both of which indicated that he was sought for "aiding and abetting the LTTE organization." This Court has acknowledged that, in some cases, proof of a valid warrant issued by a foreign country may be persuasive that the threshold for "serious reasons for considering" has been met. In those cases,

where evidence of a warrant is the sole evidence relied upon, the Board must go further and determine whether the claimant is credible. Considering the issues the Board had with the respondent's credibility, the applicant is thus of the view that it erred when not determining the applicant excluded (*Gurajena v Canada (Minister of Citizenship and Immigration)*, 2008 FC 724 at para 1).

[23] The applicant further states that the Board failed to provide reasons for dismissing the Interpol Red Notice.

[24] Finally, the applicant maintains that Gerai's reference to his contact "Karthik" was in fact to the respondent, based on the fact that the respondent recognizes Karthik's cell phone number as his own.

[25] As for the respondent, he submits that the Board carefully assessed the Minister's evidence regarding exclusion and reasonably concluded that the Minister had not met the requisite onus with credible and trustworthy evidence, and provided adequate reasons in doing so. He adds that the applicant is asking this Court to re-weigh evidence. For instance, the Board's decision to give Gerai's statement little weight was entirely reasonable given its dubious provenance and the Court's guidance regarding affidavits and statutory declarations (*Toma v Canada (Minister of Citizenship and Immigration)*, 2006 FC 779). He concludes that the Minister's allegations against the respondent lacked a credible, trustworthy evidentiary basis and reminds the Court that the Federal Court of Appeal stated in *Chiau v Canada (Minister of*

Citizenship and Immigration), [2001] 2 FC 297 at para 60 that reasonable grounds to believe require a "serious possibility based on credible evidence."

[26] On the whole, I find the Board's decision to be reasonable. It carefully pondered all of the evidence before it, and its decision "falls within a range of possible, acceptable outcomes which are defensible in light of the facts and law" (*Dunsmuir*, at para 47). Serious concerns were raised with respect to the trustworthiness of the evidence submitted by the MPSEP at the hearing before the Board, and so it was open to the Board not to exclude the respondent, despite his credibility issues.

[27] The documentary evidence shows that the Interpol Red Notice emanates from its National Central Bureau for Sri Lanka and was issued at the sole request of the Sri Lankan Criminal Investigation Department. Meanwhile, the Sri Lankan authorities issued their own arrest warrant after having obtained a statutory declaration made by Gerai. Not only was that declaration undated and unsigned, but it contained a certain number of inconsistencies as well as sufficient information to support the finding that the respondent and the person referred to by Gerai as Karthik, are two different individuals. For example, Karthik had travelled to India and eventually migrated to France. However, the MPSEP's verifications with the authorities of these countries revealed that the respondent has never visited either country. This seriously weakens the MPSEP's evidence.

[28] A finding that a claimant is excluded from the possibility of presenting an asylum claim based on Article 1F(*a*) of the *Convention* is a severe one. It has to be based on a serious and convincing finding of fact.

[29] Having applied the proper pre-*Ezokola* test, it was open to the Board to find that the Minister had not adduced sufficient evidence to support the exclusion of the respondent. Moreover, the applicant's burden would only become more difficult to meet should this case be sent back to the Board, as the latter would be bound to apply the new test.

Are there special reasons for the Court to order costs against the applicant?

[30] Now that the applicant has withdrawn his challenge of the Board's finding that the respondent, if not excluded, would be considered a *sur place* refugee, the respondent bases his request for costs on the simple fact that the Board's decision was reasonable. According to him, the Minister's decision to challenge it in these particular circumstances was unfair, oppressive and improper.

[31] Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 provides that the Court may only award costs for "special reasons." This threshold is high. Costs may be granted "if one party has unnecessarily or unreasonably prolonged proceedings, or where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith" (*Johnson v Canada* (*Minister of Citizenship and Immigration)*, 2005 FC

1262 at para 26). This application for judicial review raised arguable issues (leave was, after all, granted by this Court), and so does not meet that threshold.

Conclusion

[32] The applicant has not convinced the Court that the Board's decision was unreasonable and so this application for judicial review will be dismissed. No question of general importance was proposed by the parties and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified; and

3. No costs are granted.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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