

Federal Court



Cour fédérale

Date: 20140619

Docket: IMM-1917-13

Citation: 2014 FC 583

Ottawa, Ontario, June 19, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THANUSHAN SUBRAMANIYATHAS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of Kirk Dickenson, 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.

I. Issues

[2] The issues in the present application are as follows:

A. Was the Board's decision unreasonable in making adverse findings of credibility?

B. Did the Board breach its duty of procedural fairness to the Applicant?

II. Background

[3] The Applicant is a citizen of Sri Lanka. He was born on August 5, 1985, in Jaffna, in the Northern Province of Sri Lanka. He is of Tamil ethnicity.

[4] According to the Applicant's Personal Information Form [PIF] narrative, when the Sri Lanka Armed Forces [the Armed Forces] took control of Jaffna from the Liberation Tigers of Tamil Eelam [LTTE] during Operation Sunray 1, the Applicant and his family were displaced to Trincomalee, in the Eastern province of Sri Lanka. The Applicant enrolled in Eastern University but did not complete his studies due to harassment from Sinhalese students and the administration.

[5] The Applicant states that in February, 2010, he started working in a hospital as a laboratory technician in Muttur, near Trincomalee. Around that time he played cricket with other young men from Muttur. One of the individuals with whom he played was named Rex. As subsequently became apparent, the Armed Forces believed that Rex was affiliated with the LTTE.

[6] The Applicant alleges several incidents of persecution as a result of his acquaintance with Rex. On January 31, 2011, the Applicant was arrested by the Armed Forces and the Criminal Investigations Department [CID] of the Sri Lanka police service at the playground where he played cricket. He was accused of supporting the LTTE, beaten, asked to provide information about Rex, and held for two days before being released.

[7] On March 30, 2011, the Applicant was kidnapped by unknown individuals and taken to an Armed Forces camp. He was beaten, questioned about Rex and asked to identify other LTTE members. After one week he was released following an intervention by an assistant medical officer who worked at the hospital where he was employed. After his release the Applicant noticed that he was being followed. He became fearful and asked his employer to transfer him to another town.

[8] In April, 2011, Armed Forces and CID officers arrested the Applicant in his home. He was taken to another army camp, questioned about Rex, and accused of being an LTTE supporter. After three days he was released, but his captors warned him that he must provide information about Rex or he would be shot. Following this incident, the Applicant decided to make arrangements to leave Sri Lanka. This involved obtaining a passport, driving to Colombo and flying out of the Colombo airport, all with the assistance of a paid agent.

[9] The Applicant testified that he continued working until June, 2011, when he drove to Colombo with his father and a driver. He travelled through five or six checkpoints. The officials at the checkpoints did not question him. At the airport in Colombo, he was directed to a

particular counter. He was not questioned regarding his passport and left Sri Lanka without incident on June 11, 2011. The Armed Forces sought him at his parents' residence after he left the country.

[10] After leaving Sri Lanka, he travelled to Canada via Singapore, Chile, Mexico, and the United States. On August 8, 2011, he made a claim for refugee protection in Canada.

[11] On February 6, 2013, the Applicant had a hearing before the Board. In advance of this hearing, the Applicant submitted the results of a psychological examination. This examination found the Applicant to be credible and diagnosed him with Major Depressive Episode and Post Traumatic Stress Disorder resulting from the persecution he allegedly suffered in Sri Lanka.

[12] The Board dismissed the Applicant's claim, citing credibility as the determinative issue. The Board identified five negative credibility findings:

- The Board disbelieved that the Applicant would be able to continue working until June, 2011, given the interest in him by the Armed Forces and the CID;
- The Board disbelieved that the Applicant would have been released repeatedly after being kidnapped if he was truly suspected by being an LTTE member;
- When the Applicant was kidnapped in April, 2011, his captors threatened to kill him if he did not return with information about Rex. As he did not provide the requested information, the Board did not believe that his kidnappers would not have killed him before he left the country;

- The Board did not believe that the Applicant would not have been interrogated at the checkpoints if he were of interest to the authorities; and
- The Board did not believe that the Applicant would have been able to obtain a passport in June, 2011, if he were of interest to the authorities.

[13] The Board acknowledged documentary evidence which shows the Armed Forces treat some citizens poorly. The Human Rights Watch January 2012 Report on Sri Lanka describes treatment which is characterized by a general disregard of citizens' rights and welfare and the norms of international law. This includes harassment from the Armed Forces and lengthy secret detention without trial.

[14] The Board also notes documentary evidence regarding the treatment of suspect LTTE members (LKA13663.E):

The methods for purging the "hidden" LTTE members who the government are still at large consist of "surveillance, arbitrary arrests and random check[s]"...particularly young Tamil men in the north or east, are being arrested and detained on suspicion of LTTE affiliation. ...the government believes that "quite a number of prominent LTTE figures remain at large and so is "very much on the look-out" for them...it is carrying out its screening in "residential areas all over the country"...the government is using "captured LTTE leaders as spotters at both the passport office in Columbo and at the airport...

[15] The Board assigned little weight to the psychological examination on the basis that it disbelieved the Applicant's testimony generally. As such, the examination would not serve to bolster the credibility of the Applicant's testimony (*Danailov v Canada (Minister of Citizenship*

and Immigration), [1993] FCJ No 1019, at para 2; *Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182, at para 16).

[16] The Board did not evaluate whether the Applicant satisfied sections 96 and 97 of the Act, notwithstanding the fact that it found him not to be credible. The Board noted that where a board finds a claimant lacks credibility, that is sufficient to dispose of a claim under section 97 unless a claimant shows there is documentary evidence capable of supporting a positive disposition of the claim (*Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, at para 3).

III. Standard of Review

[17] Questions of credibility and mixed fact and law are reviewable on the standard of reasonableness (*Kastrati v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1141, at paras 9-10 [*Kastrati*]; *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 47-48, 53, 55, 62). The standard of review for issues of procedural fairness is correctness (*Kastrati*, at paras 9-10).

IV. Analysis

A. *Was the Board's decision unreasonable in making adverse findings of credibility?*

[18] As a starting point, the Applicant's claims are presumed to be truthful unless there is a reason to believe otherwise (*Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248, at para 5).

[19] The Board did not find any inconsistencies or contradictions between the Applicant's testimony and his PIF narrative, nor did they find him evasive at the hearing. The sole basis for rejecting the Applicant's claim is that the events he describes are implausible.

[20] The jurisprudence has signalled caution over basing a determinative credibility finding on the plausibility of the Applicant's claim. In contrast to credibility findings based on inconsistencies, contradictions or evasions, credibility findings based on implausibility may only be made in the clearest of cases (*Cao v Canada (Minister of Citizenship and Immigration)*, 2007 FC 819, at para 7; *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, at para 7 [*Valtchev*]).

[21] Justice Catherine Kane's decision in *Giron v Canada (Minister of Citizenship and Immigration)*, 2013 FC 7, at paras 17-18, provides a summary of the law in this area:

17 Justice Noël made a clear distinction between credibility and plausibility findings in *Ansar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1152, [2011] F.C.J. No. 1438:

Initially, an important distinction must be made between the RPD's credibility findings and its conclusion that the threat posed by Mr. Choudhry was "implausible". The panel must be mindful of the use of this term and its implications. Implausibility findings must only be made "in the clearest of cases" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7, [2001] F.C.J. No. 1131). The panel's inferences must be reasonable and its reasons set out in clear and unmistakable terms (*R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 9, [2003] F.C.J. No. 162). As Justice Richard Mosley explains in *Santos v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 937 (F.C.) at para 15, [2004] F.C.J. No. 1149 (F.C.):

[P]lausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings.

Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions

18 In *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653, [2002] F.C.J. No. 875 [*Divsalar*], Justice Blanchard stated:

[22] The jurisprudence of this Court has clearly established that the CRDD [the Refugee Protection Division's predecessor] has complete jurisdiction to determine the plausibility of testimony, so long as the inferences drawn are not so unreasonable as to warrant intervention, its findings are not open to judicial review. [See *Aguebor v. Minister of Employment and Immigration*] (1993), 160 N.R. 315, pp. 316-217 at para. 4.]

[23] There is also authority that would see a Court intervene and set aside a plausibility finding where the reasons that are stated are not supported by the evidence before the panel. In *Yada et al. v. Canada (Minister of Employment and Immigration)* (1998), 140 F.T.R. 264, Mr. Justice MacKay, at page 270 para. 25 wrote:

Where the finding of a lack of credibility is based upon implausibilities identified by the panel, the court may intervene on judicial review and set aside the finding where the reasons that are stated are not supported by the evidence before the panel, and the court is in no worse position than the hearing panel to consider inferences and conclusions based on criteria external to the evidence such as rationality, or common sense.

[22] Justice Kane concluded with respect to the implausibility findings:

51 The Board's implausibility findings were based on speculation and a misunderstanding of the evidence that was before the tribunal. As such, its implausibility findings are not reasonable. The events which the Board found to be implausible were essential to the applicant's claim as they described the risk he faced and would face if he returned to El Salvador. The implausibility findings were central to the Board's negative decision and its other findings were influenced by or bound up with the implausibility findings.

[23] As in *Giron*, the Board's plausibility findings here are based on speculation and an overly simplistic interpretation of the evidence. Whether the Applicant would be re-arrested, able to continue work, or be able to obtain a passport or leave the country is based on speculation. In fact, one of the findings of the Board is identical to a finding rejected by Justice Kane in *Giron* at para 27 and cited above: that the Applicant would have necessarily been killed if his story were true. Moreover, it is not implausible that given the existence of the agent in securing a passport and safe travel within Sri Lanka and at the airport, the Applicant was able to leave Sri Lanka.

[24] Given the speculative nature of these plausibility findings, and the fact that the documentary evidence before me contradicts the Board's view on country conditions, I do not think the determination of the Applicant's credibility is justifiable and falls within a range of possible, acceptable outcomes. This is determinative of this judicial review.

[25] As such, I need not consider the submissions concerning the application of sections 96 and 97 of the Act.

B. *Did the Board breach its duty of procedural fairness to the Applicant?*

[26] While I need not deal with this issue based on my finding above, I will.

[27] The Applicant argues that the Board made a negative credibility finding because the Applicant states he continued to work despite the interest the Armed Forces had with him. The Applicant argues that the Board ought to have raised this concern with the Applicant and given him an opportunity to disabuse the Board of this concern (*Sidhu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 515, at paras 75-77; *Talpur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 25, at para 21).

[28] In his affidavit, the Applicant describes various safety precautions he took after his initial arrest. He states that if asked, he would have explained these precautions to disabuse the Board of his concerns. In his Reply Memorandum, he notes that his affidavit relates to procedural fairness concerns, and is admissible on judicial review (*Chernikov v Canada (Minister of Citizenship and Immigration)*, 2011 FC 885, at para 30).

[29] None of the cases cited by the Applicant were in the context of a refugee hearing. The obligation at issue in this application is more aptly described in *Tekin v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 357, at para 14:

14 In addition, the Board did not err by failing to specifically mention to the Applicant its credibility concerns related to this omission from his PIF. The Board is not obligated by the duty of fairness to put all of its concerns regarding credibility before the Applicant....In this case, the Applicant was represented by counsel, the parties were on notice that credibility was an issue and

the inconsistency between the Applicant's PIF narrative and his oral testimony was readily apparent. As a result, the Board was not required to put this inconsistency to the Applicant and its failure to do so was not a reviewable error...

[30] It is obvious from the transcript of the hearing in the instant application that the Board was concerned about the plausibility of the Applicant's claims in general. Failing to raise one specific plausibility component of the Applicant's claims does not constitute a breach of procedural fairness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The matter is returned for reconsideration by a differently constituted panel of the Immigration and Refugee Protection Board.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Krassina Kostadinov

FOR THE APPLICANT,
THANUSHAN SUBRAMANİYATHAS

Mr. Alex Kam

FOR THE RESPONDENT,
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

SOLICITORS OF RECORD:

LORNE WALDMAN
Barrister & Solicitor
Toronto, Ontario

FOR THE APPLICANT,
THANUSHAN SUBRAMANİYATHAS

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION