Federal Court  Cour fédérale

Date: 20141113

Docket: IMM-2319-13

Citation: 2014 FC 1071

Ottawa, Ontario, November 13, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RAGUNATHAN RAJARATNAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's plea for protection was refused by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). He now seeks judicial review from this Court pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant asks the Court to set aside the decision against him and refer the matter to a different panel of the Board for redetermination.

I. Background

[3] Ragunathan Rajaratnam (the applicant) is a Tamil man from Cheddikulam in the district of Vavuniya, Sri Lanka. He arrived in Canada on November 25, 2011 and asked for protection at that time. He claims that the government suspects him of having connections to the Liberation Tigers of Tamil Eelam [LTTE] and has detained and tortured him several times because of that.

II. Decision under Review

[4] The Board refused the applicant's plea on February 19, 2013.

[5] The Board accepted that the applicant had been detained three times by the Sri Lankan Army or the Criminal Investigation Department. However, the member did not believe that the applicant was tortured since he did not seem distressed when describing this alleged treatment.

[6] Further, the Board was not convinced that the applicant was wanted by government authorities or suspected of having any connection to the LTTE. Every time he was detained, he was released without judicial involvement, which would not have happened if he was genuinely under suspicion. Indeed, neither did he have any trouble getting a passport or leaving the country, even though Sri Lankan security forces use airports to apprehend LTTE sympathizers.

[7] The Board also found that the applicant did not match any other profile that the United Nations High Commissioner for Refugees (UNHCR) has identified as being at risk. As such, there was no serious possibility that the applicant would be persecuted if returned to Sri Lanka.

[8] Indeed, the Board did not even believe that the applicant was subjectively afraid that he would be persecuted. He had spent four to five months detained in the United States and was released once an immigration officer made a positive finding in a credibility interview. Nevertheless, he abandoned his claim and came to Canada instead. The Board did not believe that someone genuinely afraid of persecution in Sri Lanka would forfeit such a good chance of success and risk being deported by coming to Canada in those circumstances.

[9] Next, the Board assessed whether the fact that the applicant would be returning as a failed refugee claimant would change that analysis. The answer was no. The Board said that few people have been detained in such circumstances and those that have been were for outstanding criminal charges. Further, even former LTTE members are being released from detention now and the Board considered it unlikely that the security forces would now detain someone they did not even suspect was connected to the LTTE.

[10] Finally, the Board assessed the risk that the applicant would be extorted or kidnapped. After the war ended, some rogue elements of the security forces and government-allied paramilitaries have turned to crime. They would sometimes target people they perceived to be wealthy, including returnees from Western countries. However, the Board found that this was a generalized risk precluded by subparagraph 97(1)(b)(ii) of the Act.

[11] Consequently, the Board found that the applicant was neither a Convention refugee nor a person in need of protection.

III. Issues

[12] The applicant casts the issue broadly: "Did the Refugee Division err in fact, err in law, breach fairness or exceed jurisdiction?"

[13] The respondent replies that the applicant has not shown that the decision was unreasonable.

[14] Having reviewed the materials, the issues can be restated as follows:

A. What is the standard of review?

B. Did the Board misunderstand any tests under section 97 of the Act?

C. Was the Board's decision unreasonable?

IV. Applicant's Submissions

[15] The applicant protests the decision on seven grounds. First, he emphasizes that he was detained for long periods of time. He states that the detentions themselves were persecutory, but the Board never really considered that.

[16] Second, the applicant says that the Board erred by making a negative credibility finding based only on his demeanour (citing *Lekaj v Canada (Minister of Citizenship and Immigration)*,

2006 FC 909 at paragraphs 16 and 17, [2006] FCJ No 1151 [*Lekaj*]). The applicant was consistent every time he told his story and it should have been presumed to be true. He also submits that this error requires a re-hearing since it is impossible to know what the decision would have been otherwise.

[17] Third, the applicant says that the Board erred by assigning any significance to the manner by which he left Sri Lanka. He submits jurisprudence to the effect that the Board should not do that without any evidence that the army and border control authorities shared information (citing *Yousuff v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1116 at paragraph 9, [2005] FCJ No 1394 [*Yousuff*]). The Board's analysis ignores the fact that he was detained for ten hours on his return from Ecuador and that he had to give them all the money he had with him before he was released.

[18] Fourth, the applicant says that the Board's dismissal of his subjective fear was wrong. He always intended to come to Canada because he had family here and the only reason for his sojourn in the United States was that he was detained. He was not responsible for any delay.

[19] Fifth, the applicant says that the Board failed to consider the cumulative effects of his detentions, the problems for failed asylum seekers and the country's general insecurity.

[20] Sixth, the applicant argues that the danger alleged was torture, so it was wrong for the Board to consider generalized risk.

[21] Seventh, the applicant says that the Board mischaracterized the test under subsection 97(1) when it said that "the danger or risk must be such that it is more likely than not that he or she would be tortured or subjected to other cruel and degrading treatment."

V. Respondent's Submissions

[22] The respondent asserts that the Board's decision was reasonable.

[23] The respondent says that the Board reasonably concluded that the applicant was not on a watch list. That was fully supported by the evidence and relevant to whether he was suspected of LTTE involvement. Further, the Board did not ignore the claim that he was extorted, but rather dealt with it squarely; that was but one finding among many that supported the Board's conclusion.

[24] The respondent also states that the presumption of truth was rebutted by the Board's findings about the applicant's demeanour. The respondent submits that credibility findings should not be dismissed lightly.

[25] Besides, the respondent says that the Board also found that the applicant lacked any subjective fear. In its view, the Board reasonably found that someone truly afraid of persecution would not abandon a favourable chance for refugee protection in the United States.

[26] The respondent then addresses the argument about cumulative effects. The respondent says that the Board reasonably found that no risk of discrimination existed, so there was nothing to be assessed cumulatively. Anyway, this argument was not made to the Board.

[27] Furthermore, the respondent says that the Board did actually consider whether the past detentions were persecutory even without the torture. It observes that the Board referred to a number of cases that confirmed that detentions in and of themselves are not necessarily determinative. It infers from this that the Board was alive to the issue.

[28] With respect to section 97, the respondent defends the Board's analysis. As the Board found that the applicant had never been tortured and there was no risk of that, it came down to paragraph 97(1)(b). The only potential risk there was of extortion and blackmail by criminal enterprises, which was general. Finally, the respondent says that the Board applied the right test and considered both danger and risk on a balance of probabilities.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[29] Where the jurisprudence has satisfactorily resolved the standard of review, that analysis need not be repeated (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 62, [2008] 1 SCR 190 [*Dunsmuir*]).

[30] In two of his issues, the applicant impugns the Board's understanding of the test under subsection 97(1). Generally, where jurisprudence has established a test, the Board must correctly understand the law. However, its application of the law to the facts should be reviewed on the reasonableness standard (see *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 20 to 22, [2013] FCJ No 1009; *Paramanathan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 338 at paragraph 11, [2012] FCJ No 377).

[31] Reasonableness is also the standard for every other issue raised by the applicant. They are all findings of fact or mixed fact and law that attract deference almost automatically (see *Dunsmuir* at paragraph 53; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at paragraph 4, 160 NR 315; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paragraphs 22 to 40, [2012] FCJ No 369).

[32] That standard means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47). Put another way, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the Board misunderstand any tests under section 97 of the Act?*

[33] The applicant states that the Board used generalized risk to excuse the danger of torture. If this were true, I agree that it would be an error since generalized risk applies only to paragraph 97(1)(b) and torture falls under paragraph 97(1)(a).

[34] However, that is not what the Board did. The risk of which it spoke in its generalized risk analysis was the risk of extortion and kidnapping by criminal enterprises formerly affiliated with the government. The applicant has not seriously challenged that finding. That is not torture within the meaning of article 1.1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85. Therefore, this was properly assessed under subparagraph 97(1)(b)(ii), from which risks that are "faced generally by other individuals in or from that country" are excluded.

[35] The applicant also argues that the Board applied too onerous a legal test under subsection 97(1). At paragraph 23 of its decision, the Board set out its test:

> The Federal Court has held that pursuant to *IRPA* section 97(1): (i) there must be persuasive evidence (i.e. on a balance of probabilities) establishing the facts on which a claimant relies to say that he or she faces a substantial danger of being tortured or of having cruel and unusual treatment or punishment inflicted upon his or her return; and (ii) the danger or risk must be such that it is more likely than not that he or she would be tortured or subjected to other cruel and degrading treatments.
>
> [Emphasis added]

[36] The applicant claims that item (ii) misstates the test. He says he only needed to prove that there is probably some risk or danger of unknown degree.

[37] I disagree. In *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at paragraphs 36 and 39, [2005] 3 FCR 239 [*Li (FCA)*], the Federal Court of Appeal was expressly asked what degree of risk was necessary for both paragraphs (a) and (b) of subsection 97(1). Mr. Justice Marshall Rothstein gave the following answers:

> The requisite degree of danger of torture envisaged by the expression "believed on substantial grounds to exist" is that the danger of torture is more likely than not.
>
> […]
>
> The degree of risk under paragraph 97(1)(b) is that the risk is more likely than not.

[38] To the extent that Justice Rothstein's phrasing is ambiguous and could support the applicant's interpretation, it is worth noting that the Court of Appeal affirmed the lower Court's decision because it "agreed with the analysis and conclusion of Gauthier J." (*Li (FCA)* at paragraph 40). Madam Justice Johanne Gauthier had concluded that "the danger or risk must be such that it is more likely than not that he or she would be tortured or subjected to other cruel and other degrading treatments" (see *Li v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1514 at paragraph 50, [2004] 3 FCR 501). Those are almost the exact same words that the Board used.

[39] Therefore, the Board correctly understood the law.

C. *Issue 3 - Was the Board's decision unreasonable?*

[40] Still, I am convinced that the Board's decision was unreasonable. I say this for several reasons.

[41] First, the Board accepted that the applicant was detained. The applicant was first detained for two months, the second time for two weeks (from which he was only released with a bribe of 50,000 rupees) and the third time for one month. He was also detained at the airport once for ten hours. Although detentions are not necessarily determinative (see *Paramanathan* at paragraphs 29 and 30), the Board does need to be attentive to them.

[42] Here, these were long detentions and the applicant's testimony was always that he was asked questions about the 2008 bombing that happened near his house. The Board evidently accepted that at paragraph 7, but said that he must have been cleared of suspicion since otherwise he would not have been released.

[43] I have difficulty understanding that reasoning. For one thing, the Board did not refer to any evidence suggesting that the Sri Lankan authorities permanently detain everyone who it cannot clear of suspicion and my review of the record discloses none. Moreover, it seems to contradict the Board's finding that during each detention, the applicant was questioned about whether he had any involvement in the 2008 claymore explosion. After all, if a release from detention meant that he was cleared of suspicion the first time, then why would the government have detained him twice more for long periods of time? If the first two detentions were not enough to clear him of suspicion, then what was special about the third one that gave the Board this confidence? Alternately, if the government is detaining random Tamil men who it has

cleared of suspicion, then on what basis can the Board conclude that the applicant would be safe from detention in the future? Notably, the 2012 guidelines from the UNHCR say that arbitrary detentions are commonplace (tribunal record at page 188).

[44] Second, the credibility finding was problematic. Generally, I agree with an observation that Madam Justice Mary Gleason made in *Rahal* at paragraph 42:

> [T]he starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility.
>
> [Emphasis added]

[45] However, credibility findings are not immune from review. Here, the Board rejected the applicant's testimony for only one reason: "[h]is demeanor during the hearing was such that the panel did not notice any outward distress relative to his treatment during detentions by Sri Lankan authorities."

[46] Although I accept that the Board is entitled to consider a claimant's demeanour and that such findings are often difficult to describe, it should usually not be the only reason for dismissing a person's claim (see *Rahal* at paragraph 45). There could be many reasons that an applicant may not be as emotional as the Board would expect, including cultural differences, translation issues or a stoic personality. This was a very subjective reason to discard the

applicant's testimony (see *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155 at paragraph 24, 419 FTR 135; *Lekaj* at paragraph 17).

[47] Further, the Board gave no objective reason to cast doubt on the applicant's story. The applicant's statements were always consistent and the Board did not find that there was anything implausible about his story. The applicant even showed his scars to the member (tribunal record page 229):

> COUNSEL: Do you have any scars or marks on your body as a result of the army detention?
>
> CLAIMANT: I have scars on my body, cigarette burns scars.
>
> COUNSEL: All right. Could you just hold up your forearm like this so the Member could see it? I don't know if you can see that or if you want him to [*sic*] closer to you?
>
> PRESIDING MEMBER: I see that, Counsel.
>
> COUNSEL: You see it?
>
> PRESIDING MEMBER: Yeah.
>
> [Emphasis added]

[48] Yet, the member never mentioned these scars or explained why he ignored them. Essentially, the Board jettisoned all the objective evidence in favour of a subjective determination about how emotional the applicant appeared. This makes his credibility finding hard to understand or accept.

[49] Third, the Board's reasoning with respect to the airport issue is problematic. The Board said that "government security forces use the airports as security screening points to apprehend

LTTE suspects, LTTE sympathisers or people with outstanding domestic criminal warrants." From this, it inferred that the applicant could not have left the country as easily as he did if he was still suspected of LTTE involvement.

[50] The applicant argues that *Yousuff* precludes such considerations (citing paragraph 9), but in that case, there was no evidence of any information sharing between the border services and the army. Here, there is some (response to information request LKA103344.E: *Security Controls at the international airport and ports* (28 January 2010)).

[51] However, that evidence does not extend so far as to support the Board's claim. In relevant part, the response to information request said the following: "T hose with a criminal record or LTTE connections would face additional questioning and may be detained." That seems like it would only apply to people who have known connections to the LTTE and exclude people merely suspected.

[52] However, it is only the latter that the applicant claimed to be. In *Sellaththurai v Canada (Minister of Citizenship and Immigration)*, 2014 FC 104 at paragraph 55, [2014] FCJ No 103, I endorsed the following comment from a decision of Mr. Justice Robert Barnes:

> It was not enough to consider whether there was an outstanding arrest warrant. The evidence indicates that there are other persons of more informal interest to the authorities who may not be wanted *per se* but are still viewed with suspicion. Young Tamil males with the kinds of experiences described by Mr. Rayappu might fit such a profile and thereby remain at risk for similar extra-judicial abuse.

[53] In my view, that observation applies with equal force in this case.

[54] Of course, the Board also found that the applicant lacked any subjective fear, which could have alone defeated the section 96 claim (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 723 [*Ward*]). However, it is impossible to tell how the Board's unreasonable credibility determination could have affected this. After all, a finding of credibility is often determinative of subjective fear (*Ward* at 723).

[55] Further, the Board may have overstated the importance of a credible fear interview in the United States. There was nothing in the record disclosing what importance such a finding has in the United States' asylum system. Further, the asylum officer conducting that interview only wrote the following:

> The applicant has established that a significant possibility exists that he could be found credible in a full hearing before an [immigration judge]. The applicant has also established that a significant possibility exists that he could be found eligible for asylum in a full hearing before an [immigration judge].
>
> [Emphasis added]

[56] Given that language, it sounds like the credible fear interview is primarily a screening determination that would not bind the immigration judge. As such, there is no evidence that the applicant would have had a better chance in the United States than he had here.

[57] Admittedly, each of those errors alone would not have been enough to conclude that the decision as a whole was unreasonable. Taken together, however, the decision is unjustifiable and I cannot be confident that the decision would have been the same had all these errors not been made. I would therefore set aside the decision.

[58] Therefore, I allow the application for judicial review and set aside the Board's decision.

[59] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

***Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85**

PART I	PREMIERE PARTIE
Article 1	*Article premier*
1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.	1. Aux fins de la présente Convention, le terme « torture » désigne tout acte par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne aux fins notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soup-çonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne, ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit, lorsqu'une telle douleur ou de telles souffrances sont infligées par un agent de la fonction publique ou toute autre personne agissant à titre officiel ou à son instigation ou avec son consentement exprès ou tacite. Ce terme ne s'étend pas à la douleur ou aux souffrances résultant uniquement de sanctions légitimes, inhérentes à ces sanctions ou occasionnées par elles.

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel

habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Nicholas Dodokin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT