

Federal Court



Cour fédérale

Date: 20150204

Docket: IMM-6783-13

Citation: 2015 FC 145

Toronto, Ontario, February 4, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

NISANTHAN KANAGARASA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision of the Refugee Protection Division [RPD, Board] determining that the Applicant, Nisanthan Kanagarasa, is not a Refugee or a person in need of protection pursuant to ss. 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This case comes to the Court directly from the RPD, as the Applicant was precluded

from applying to the Refugee Appeal Division due to the operation of s. 110(2)(d), since he arrived via the United States, a designated country.

[2] I find the Board's decision to be unreasonable, having made a reviewable error in its failure to assess whether the Applicant faces a substantial risk of torture upon deportation.

II. Facts

[3] Mr. Kanagarasa is a Tamil male and citizen of Sri Lanka. During the Sri Lankan civil war, the Applicant was injured by a shell attack in November 2008 which left him with visible scarring. His brother was forcibly recruited to the Liberation Tigers of Tamil Eelam [LTTE], an anti-government rebel organization, though he deposes that he has never been a member. In April 2009, the Applicant and his mother surrendered to Army authorities, who sent them to an internal displacement camp until February 2010, when he was released.

[4] In May 2010, while endeavouring to obtain a passport to leave the country, he was arrested by Criminal Investigation Division Officers [CID] of the Government, who detained him, questioned him and tortured him by beating him with a plastic pipe and broomstick. After his release, the CID extorted 300,000 Rupees from the Applicant for in October 2010, which he paid with the assistance of his parents. From January 2011 to July 2012, the Applicant went into hiding, alternating between the homes of friends and relatives.

[5] In July 2012, the Applicant returned to his home. CID officers arrived, and demanded 550,000 Rupees for his continued safety, which he was given 5 days to pay. The Applicant fled Sri Lanka in October 2012, with the assistance of a smuggling agent.

[6] Prior to his arrival in Canada, the Applicant travelled through several countries including Peru, Mexico, Panama and Costa Rica, some of which are signatory countries to the *1951 Convention relating to the Status of Refugees*. He reached the United States in March 2013, where he filed a claim for asylum. As Mr. Kanagarasa's brother resides in Canada, he abandoned his claim in the United States and proceeded to Canada on July 3, 2013 to make the claim currently being judicially reviewed.

III. Analysis

[7] The Board found the Applicant not to be credible in several respects. Aside from finding him generally evasive at the hearing, it had particular issues with inconsistencies between the Applicant's testimony and the notes of an American Immigration Official taken during the Refugee claim he made in the United States. These inconsistencies relate to the number of days he was detained by the CID in May 2010, and whether the men who sought to extort the 550,000 Rupees from him in July 2012 were the same men who had detained and tortured him. The RPD also questioned the plausibility of the Applicant's ability to make it through security checkpoints and out of the country while being pursued by the CID.

[8] Furthermore, the Board found that delay in making an asylum claim spoke to the Applicant's lack of subjective fear, and if he were to return to Sri Lanka, any extortion-related activities would be as a result of his wealth, not his ethnicity. As such, the threats he would face would be of a generalized nature, taking him outside the protection of s. 97(1)(b).

[9] It is unclear, however, whether the Board turned its mind to whether the Applicant faced a risk of torture on substantial grounds, pursuant to s. 97(1)(a), upon his return to Sri Lanka.

[10] The possibility of his torture upon deportation had been put to the Board during the hearing, as counsel for the Applicant stated [CTR, p. 795]:

“They are torturing people, they are taking their money. They are beating them. They are detaining them for long periods of time without access to family, without access to lawyers, without access to any rights...”

[11] While the Board relayed several concerns regarding the credibility of portions of the Applicant's narrative, noted above, a significant credibility finding related to Mr. Kanagarasa's assertion of his detention and torture in Sri Lanka by the CID. In paragraph 12 of the decision, the Board stated:

[12] The claimant alleges that he told the US official that he was questioned severely for two days. The panel has considered counsel's statement that the information from the claimant to the US officials was probably not read back to him. However, the panel notes that's the interview with the US officials was made under oath and with the aid of Tamil interpreter (sic) and the claimant is not alleging that he could not understand the interpreter. The panel does not find it credible the claimant would not have identified to US officials that he had been detained for six

days. The panel makes a negative credibility finding in light of this discrepancy.

[12] However, upon reviewing the record, the discrepancy regarding the number of days he was detained in Sri Lanka in May 2010 as noted by the US official (2) and the Basis of Claim form (6) was posited to the Applicant, who proffered [CTR, p. 776]:

CLAIMANT: They stopped beating me up after two days because I showed my injury and I started crying. What I told them was I was detained for six days and questioned for two days serially.

[13] To suggest that this minor discrepancy, for which a reasonable explanation was offered, is sufficient to undermine the entire assertion that the Applicant had been tortured takes an overly microscopic view of the facts. This Court has held that credibility assessments based on trivial inconsistencies are unreasonable (*Jakaj v Canada (Citizenship and Immigration)*, 2012 FC 677 at para 17, *Venegas Beltran v Canada (Citizenship and Immigration)*, 2011 FC 1475 at paras 3-6). It is clear that the two day detention period cited to the US Official could have been the two days of torture the claimant consistently alleged throughout his claims in both countries [CTR, pp. 727, 765].

[14] Furthermore, despite having brought the possibility of torture up at the hearing, the Board failed to address the Applicant's concerns in any substantive manner. While the Board addressed the Applicant's risks of extortion under the framework of s. 97(1)(b)(ii), framing it as generalized risk [CTR, pp. 16-17], no analysis was conducted on whether the Applicant faces a risk on substantial grounds of torture.

[15] The Applicant has visible scarring, which is associated with LTTE activity by Government forces. The Board had no credibility issues with the scarring, for which there was significant medical evidence presented at the hearing, and found that “the evidence only suggests his detention would be as a result of the scarring and other grounds.” However, as pointed out by Applicant’s counsel, the *US Department of State Country Report on Human Rights Practices for Sri Lanka, 2012* notes that detention can be followed by interrogation that sometimes includes mistreatment or torture [AR, p. 145].

[16] No substantive analysis was conducted as to whether there are substantial grounds to conclude that the Applicant, in light of his visible scarring and history of detention, may be subject to torture if returned to Sri Lanka, as is required by s. 97(1)(a). As mentioned above, the Board only looked at the evidence under the aegis of s. 97(1)(b)(ii), framing it as generalized risk issue. It failed to address the matter through the lens of s. 97(1)(a), which requires a discrete analysis. The two sections are not identical, given that s. 97(1)(a) requires the Board to assess whether the Applicant more likely than not faces a *danger* of torture, whereas under s. 97(1)(b), the Board must assess whether the risk to his life or cruel and unusual treatment or punishment is more likely than not to occur (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at paras 29 and 38; *Rajadurai v Canada (Citizenship and Immigration)*, 2013 FC 532 at para 34). As Justice Rennie noted in *Pathmanathan v Canada (Citizenship and Immigration)*, 2013 FC 353 at para 25, describing extortion as a generalized risk does not abdicate the Board from considering s. 97(1)(a) if the extortion can be linked to a possibility of torture:

[25] Finally, on the issue of generalized risk, the Board gave minimal consideration to the fact that the EPDP is closely affiliated

with the government and in fact led by a government Minister. This connection may indicate the state's acquiescence in or even support of torture. This requires the Board to consider paragraph 97(1)(a) of the IRPA. It is insufficient to rely on examples of criminal gangs in other countries. Additionally, the applicant does not only fear extortion; he also claims that the EPDP and Karuna Group may falsely identify him as an LTTE supporter to the Sri Lankan authorities, based on his Tamil ethnicity.

[17] Given my reasons above, I see no need to address the Applicant's arguments regarding the cumulative persecution.

[18] The application for judicial review will be allowed. There are no questions raised for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application will be allowed. No question will be certified.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6783-13

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