

Federal Court



Cour fédérale

Date: 20150522

Docket: IMM-5198-13

Citation: 2015 FC 668

Ottawa, Ontario, May 22, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GOPYNATH THEVATHASAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). He now applies for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27* [the Act].

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicant is a 28 year old Tamil born in Tellippalai and raised in Jaffna, Sri Lanka. He claims to fear persecution from the hands of the army, the Eelam People's Democratic Party [EPDP] and the Liberation Tigers of Tamil Eelam (LTTE) if he were to return to Sri Lanka. He alleges four encounters with the Sri Lankan authorities.

[4] The applicant's father paid extortion demands to the LTTE in order to protect the applicant, his only son. The LTTE tried to recruit the applicant when he began to attend school. While attending college in Jaffna, the applicant was detained on a "number" of occasions and on each occasion, his release was secured.

[5] In 2003, the army stopped him, checked his school bags, questioned him, detained him for 20 minutes and released him when his school principal arrived.

[6] In May 2008 during a bomb attack, the applicant, who was in the area at the time, was arrested, interrogated, detained for four hours and beaten by soldiers. The applicant sustained back injuries from being struck with a gun butt. The soldiers released him on the condition that he would pass on any information he learned about the LTTE to them.

[7] In November 2009, the applicant was stopped by the army, taken to a camp and “severely interrogated.” He was later released after 15 hours on the condition that if he was suspected again, he would be arrested and held indefinitely.

[8] On January 15, 2010, the applicant and three of his friends were taken to an EPDP camp and held for two days. His mother paid 25,000 rupees demanded for his release. He was injured but did not seek medical attention.

[9] Subsequently, the applicant’s parents sent him to Colombo and hired an agent to help him to leave Sri Lanka.

[10] On March 20, 2010, the applicant left Sri Lanka with a Cuban passport. He passed through Dubai, Moscow, Havana, Mexico and the United States. On August 24, 2010, he arrived in Canada and made his refugee claim on the same day.

II. Decision Under Review

[11] The Board’s negative decision was issued on July 17, 2013, ruling that the applicant is not a Convention refugee and is not a person in need of protection.

[12] The Board stated the determinative issue is credibility. It determined that based on a balance of probabilities, the applicant did not have a well-founded fear of returning to Sri Lanka because if the army or the EPDP wanted to harm or kill the applicant, they had many opportunities to do so.

[13] The Board first reviewed the documentary evidence, noting individuals suspected of LTTE association were typically separated into special detention centers. Here, the applicant's four encounters with the authorities did not involve a special detention center. Each time he was released. This led the Board to conclude that he was not identified as an LTTE member.

[14] Then, the Board found the applicant was a victim of extortion. It found on a balance of probabilities, the applicant would face post-war extortions from paramilitary groups. However, the documentary evidence suggest that those post-war extortions are no longer linked to the war but are linked to paramilitary groups seeking to obtain wealth.

[15] It cited multiple Federal Court cases holding that victims of crime, corruption (*Leon v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1253, 58 ACWS (3d) 289) or vendettas (*Marincas v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1254) generally fail to establish a link between their fear of persecution and one of the Convention grounds in the definition of Convention refugee. Here, the applicant's fear for future crime is not linked to persecution from "race, ethnicity, religion, political opinion or any other Convention ground."

[16] It further noted travel within Sri Lanka during the war was "rigidly enforced" and that Tamils travelling to Colombo were targeted and closely monitored. However, the applicant was able to travel to Colombo with his aunt post-war and then passed through three check points with an agent with relative ease. Therefore, given the heightened surveillance of Tamils travelling in

Sri Lanka post-war, the applicant would not have been able to travel to and leave Colombo if he was suspected by the government of being a member or sympathizer of the LTTE.

[17] Next, the Board examined the issue of changing country circumstances, which is a factual determination with no separate legal test (see *Yusuf v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 629, [1995] FCJ No 35). According to country documents, former LTTE-associated child soldiers and some adult detainees who are no longer deemed to present a risk were released from rehabilitation centers from early January 2010 to May 2010. It noted life for the remaining Tamil population has improved. Also, the United Nations High Commissioner for Refugees [UNHCR] changed its position due to this improved country condition and advised that Northern Tamils are no longer presumptively eligible for refugee protection. UNHCR recommended ongoing protection for those people who fit in the following profiles: “persons suspected of having links with the LTTE, journalists and other media professionals, civil society and human rights activists, women and children with certain profiles, and lesbian, gay, bisexual and transgender individuals.” The Board found that on a balance of probabilities, the applicant is not perceived to be linked to LTTE and his profile does not fit that of “persons suspected of having links with the LTTE.”

[18] Therefore, the Board found that there is no serious possibility that the applicant would be persecuted should he return to Sri Lanka and that his fear is not well-founded.

III. Issues

[19] The applicant raises one issue for my consideration: did the Board err in law in finding that the applicant does not have a well-founded fear of persecution in Sri Lanka by reason of race?

[20] The respondent raises one issue in response: the applicant has not shown the Board's decision to be unreasonable.

[21] In my view, there are two issues:

A. What is the standard of review?

B. Was the Board's decision reasonable under section 96 of the Act?

IV. Applicant's Written Submissions

[22] The applicant submits the standard of review for this decision is that of reasonableness under *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] SCJ No 9 [*Dunsmuir*].

[23] First, the applicant submits the Board's decision is unreasonable as it lacks transparency and intelligibility. Although the Board's negative finding is based on credibility, it failed to give any reasons for finding any of his testimony to be untruthful or to lack credibility. He argues the Federal Court has consistently stated that negative credibility findings must be made in clear and unmistakable terms and the Board is required to give clear and cogent reasons for rejecting credibility (see *Wilanowski v Canada (Minister of Employment and Immigration)*, [1993] FCJ

No 371, 154 NR 205 (FCA)). He cites *Rayappu v Canada (Minister of Citizenship and Immigration)* (24 October 2012), IMM-8712-11 (FC) at paragraphs 2 to 7 [*Rayappu*] and *Sinnathamby v Canada (Minister of Citizenship and Immigration)* (21 January 2013), IMM-3828-12 at paragraphs 3 and 4 [*Sinnathamby*] for support. He submits the present case is indistinguishable from *Rayappu*.

[24] Second, the applicant submits the Board erred in law by ignoring evidence in concluding that he does not have a well-founded fear of persecution. The reasons that he was targeted were because he was Tamil and because he was believed to have been assisting the LTTE, which are reasons of race and perceived political opinion. He submits the Board was wrong to dismiss this as simply extortion threats unrelated to his race and perceived political opinion. He cites the following cases which he argues are similar to the case at bar.

[25] In *Mohan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 847 at paragraph 12, [2011] FCJ No 1061 [*Mohan*], this Court found that the Board committed an error by failing to adequately consider the role of the applicants' ethnicity. Similarly in *SBG v Canada (Minister of Citizenship and Immigration)*, 2011 FC 648, [2011] FCJ No 826 [*SBG*], this Court overturned the Board's decision and found that the Board failed to consider the reasons of the applicants being targets might be due to "mixed motives" of both wealth and ethnicity. In *Sinnathamby* at paragraph 6, this Court found "[t]he involvement of the government army and its paramilitary allies in detention and extortion with apparent impunity can be evidence of a form of persecution against an ethnic group, Tamils in northern Sri Lanka."

[26] Referencing the National Documentation Package, on page 3 of a report by International Crisis Group of 18 July 2011, the applicant submits the new government ministers promote extrajudicial killings, abductions and extortions of Tamil civilians. The applicant submits the reason he is targeted for extortion is because he is a Tamil and the Board erred by concluding on the basis of this evidence which it accepted, that he does not have a well-founded fear of persecution by reason of race.

[27] Third, the applicant submits this error is not saved by the Board's discussions regarding a change of circumstances.

V. Respondent's Written Submissions

[28] The respondent submits the standard of review is reasonableness and attracts deference by this Court (*Dunsmuir* at paragraphs 47, 48 and 53).

[29] First, it submits the applicant does not have nexus to Convention grounds. It argues based on this Court's recent decisions, although country condition evidence shows Sri Lankan paramilitaries target individuals for extortion, this does not provide a nexus to the Convention definition (see *Nageem v Canada (Minister of Citizenship and Immigration)*, 2012 FC 867 at paragraphs 9, 16 and 18, [2012] FCJ No 933; *Kuruparan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 745 at paragraphs 128 to 132, [2012] FCJ No 796; and *Marthandan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 628 at paragraph 19, [2012] FCJ No 624).

[30] The respondent argues the applicant's quote stating the EPDP targeting their victims based on ethnicity is selective. It argues the information contained in the referenced chapter "Dealing with the Past" does not state the EPDP target victims based on their Tamil ethnicity.

[31] It submits the applicant's argument surrounding the Board's analysis of the documentary evidence and whether or not he would be at risk as a Tamil male is a request to reweigh the evidence and hence, not this Court's role to determine (see *Jiang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 635 at paragraph 15, [2008] FCJ No 808).

[32] Second, the respondent submits the concepts of credibility and subjective fear are intertwined. It argues an assessment of subjective fear necessitates answering the question: Do I believe the applicant's allegations, and thus his fear arising from said allegations? This question has two components: 1) Do I believe the applicant's allegations that he will be persecuted by the EPDP or Sri Lankan government due to his profile? and 2) Do I believe that the applicant has a fear of this outcome? It submits if the first question is answered in the negative, then logically the second question must also be in the negative (see *Jimenez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 727 at paragraph 4, [2010] FCJ No 879).

[33] It notes that the applicant has not challenged the underlying findings by the Board, such as whether or not the applicant is being targeted for detainment, or whether the Board believed the applicant's claims. It argues the negative credibility findings that were not challenged are determinative *per se*, and the failure to prove that they are unreasonable is sufficient to defeat

this application (see *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraphs 25 and 26, [2009] FCJ No 1591 [*Cienfuegos*]).

[34] Third, the respondent submits the applicant fails to challenge the Board's alternative finding of changed country conditions for the state protection finding (see *Bolanos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 513 at paragraph 77, [2012] FCJ No 543).

VI. Applicant's Further Submissions

[35] The applicant submits his arguments are not based on a request to reweigh the evidence, rather the Board's finding is unreasonable and contrary to the evidence by reason of race and perceived political opinion. Also, the Board did not make any findings of fact in its decision that the applicant's evidence is not credible. A statement that the Board does not believe his fear of persecution is well-founded is not a negative credibility finding.

[36] With respect to the respondent's argument of state protection, the Board only mentioned Sri Lanka's change of circumstance since the war ended, not a state protection finding.

VII. Respondent's Further Submissions

[37] With respect to the issue of change in country conditions, the respondent argues the Board was reasonable to note that the UNHCR advises refugee protection for people within the profile of any of the at-risk groups and that the applicant did not fall under this group. This indicates the applicant's objective fear was undermined.

[38] The respondent submits for a positive finding of well-founded fear, the refugee claimant must meet both requirements of the bipartite test, demonstrating a subjective fear and an objective fear of persecution (see *Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381 at paragraph 3, [2008] FCJ No 1685 [*Sellan*]).

VIII. Analysis and Decision

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

[39] With respect to the reasonability of the Board's decision, both the applicant and the respondent submit the standard of review is reasonableness. I agree.

[40] Here, the issue under review involves a mix of fact and law. It has been established in *Dunsmuir* at paragraph 53, that the standard of reasonableness is applied "where the legal and factual issues are intertwined with and cannot be readily separated" (see also *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 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). This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Was the Board's decision reasonable under section 96 of the Act?*

[41] A Convention refugee is defined in section 96 of the Act as:

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

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) 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;

[42] I will first examine the Board's credibility finding and then the Board's analysis under section 96.

[43] First, the applicant is at issue with the Board's credibility finding. Here, I agree with the applicant that the Board's credibility finding lacks transparency.

[44] The Board started its reasoning by stating the determinative issue is credibility, but it did not explicitly draw any negative inferences from any of the applicant's submissions or evidence. Although the credibility finding does not provide explicit factual references, this alone would not render the entire decision unreasonable. It appears to me that the subsequent parts of the decision

provide a rational basis for a negative finding of subjective fear which explains the Board's finding of a lack of credibility.

[45] Second, the applicant is at issue with the Board's analysis of the applicant's circumstances and the Convention grounds. Here, I find the Board's analysis is reasonable.

[46] Whether or not the applicant faces a serious possibility of persecution as a result of LTTE ties is a factual determination based on the weighing of evidence (*Rayappu* at paragraphs 5 and 6).

[47] I disagree with the applicant's reliance on *Mohan* and *SBG*. In *Mohan*, this Court overturned a Refugee Protection Division decision because the Board failed to explain why "the criminality they faced was not due to their membership in that particular group" (*Mohan* at paragraph 12). In *SBG*, this Court granted the judicial review because the Board failed to adequately examine the racial motive in robberies. This is however, not the case in the case at bar.

[48] Here, in its analysis of the applicant's profile, the Board reviewed a variety of evidence. This evidence includes the circumstances surrounding the four times the applicant was detained, the applicant's ability to move around the country without problem, a number of country documentary evidence, the guidelines from the UNHCR and Sri Lanka's changing circumstances. It appears to me that the Board's analysis related to the applicant's detainment

and the applicant's ability to move within the country without problems amount to a lack of subjective fear.

[49] Further, although the Board found the applicant might face post-war extortion, it determined the applicant's fear for future crime is not "linked to race, ethnicity, religion, political opinion or any other Convention ground." Here, the Board did not only examine the applicant's risk of extortion, but also if the applicant's fear from this risk was linked to any of the Convention grounds, including race and political opinion which could be derived from the LTTE ties if such were established. It appears to me this is a valid determination of the applicant's objective fear.

[50] For there to be a positive finding of well-founded fear, a refugee claimant must meet both requirements of the bipartite test, demonstrating both a subjective fear and an objective fear of persecution (*Sellan* at paragraphs 2 to 4).

2. The Judge also certified a question, namely: where there is relevant objective evidence that may support a claim for protection, but where the Refugee Protection Division does not find the claimant's subjective evidence credible except as to identity, is the Refugee Protection Division required to assess that objective evidence under s. 97 of the Immigration and Refugee Protection Act?

3. In our view, that question should be answered in the following way: where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

4. This leads to the question of whether there was in the record before the Board any evidence capable of supporting a determination in the respondent's favour. In our view, there was

clearly no such evidence in the record. We are satisfied that had the Judge examined the record, as he was bound to, he would no doubt have so concluded. In those circumstances, returning the matter to the Board would serve no useful purpose.

[Emphasis added]

[51] Here, unsubstantiated LTTE ties in the absence of support from independent documentary evidence would undermine the applicant's objective fear, even in light of a credibility finding that lacks explicit factual references. In this case, the Board found that the applicant's fear was not well-founded after a general finding of a lack of credibility which went to the subjective fear component and then noted there is no support from the documentary evidence for a finding of objective fear. Although the Board's reasoning could use some clarification, I can still understand the reasons of its determination.

[52] Lastly, I agree with the applicant that just because the Board examined changing circumstances, this does not mean it has done a separate state protection analysis. This, however, does not impact the reasonableness of the decision.

[53] Therefore, I find the Board's analysis under section 96 was cumulatively reasonable.

[54] For the reasons above, I would deny this application.

[55] 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 dismissed.

"John A. O'Keefe"

Judge

ANNEXRelevant Statutory ProvisionsImmigration 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 themselves 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	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

country or countries of nationality or, if they do not have a country of nationality, their country of former 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 themselves 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.

personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel 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

DOCKET: IMM-5198-13

STYLE OF CAUSE: GOPYNATH THEVATHASAN v
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 25, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'KEEFE J.

DATED: MAY 22, 2015

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