Federal Court Cour fédérale

Date: 20160115

Docket: IMM-1363-15

Citation: 2016 FC 48

Ottawa, Ontario, January 15, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

HARISKANNA THIYAGARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, a citizen of Sri Lanka, challenges a decision of the Refugee Appeal Division of the Immigration and Refugee Board (the RAD), dated February 25, 2015, confirming the finding of the Refugee Protection Division (the RPD) that the Applicant is neither a

Convention refugee nor a person in need of protection within the meaning of sections 96 or 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[1] The Applicant's main contention is that the RAD, as did the RPD before it, applied the wrong legal test or standard of risk to its section 96 analysis.

[2] For the reasons that follow, the Applicant's judicial review application is dismissed.

II. Background

[3] The Applicant is a 24 year-old Tamil male from the north of Sri Lanka. Fearing persecution on account of his Tamil ethnicity and imputed political opinion, he fled Sri Lanka in March 2012. On April 2, 2013, after having travelled through 13 different countries, he entered Canada and filed for refugee protection.

[4] In support of his refugee claim, the Applicant alleged that:

a. In 2006, his father was detained and beaten by the Sri Lankan army for three days on suspicion of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE);

b. Later that year, he was hurt by an explosion during a ceasefire;

c. In 2007, LTTE members visited his tutoring center and tried to recruit him and other students; and

d. In February 2012, while returning home, he was intercepted by two members of the Eelam People's Democratic Party (EPDP) who demanded that he join them and that when he refused to do so, he was molested and threatened that they would find him and force him to join.

[5] In addition, during the hearing before the RPD, the Applicant alleged that if he were to return to Sri Lanka, he would be perceived as an LTTE supporter due to his connection with his aunt and uncle who were involved with the LTTE and died in a bomb blast.

[6] In a decision dated October 3, 2013, the RPD rejected the Applicant's refugee claim on the basis that his alleged fear of being perceived as a LTTE supporter and persecuted upon return to his country of origin was neither credible nor well-founded. In particular, the RPD found that:

a. The only link the Applicant alleged to having with the LTTE is that his aunt and uncle were former members, something the Applicant failed to state in his Basis of Claim Form;

b. The Applicant testified that he had no problems with the security forces prior to leaving Sri Lanka or at any checkpoints when he travelled between Jaffna and Colombo, which tends to show that he is of no concern to the country's security forces;

c. The Applicant testified that he did not have any difficulties with police when he went to a police station to report a lost passport in 2011 which again tends to show that he is of no interest to the police and therefore not perceived to be connected to the LTTE;

d. If the Applicant's profile was of interest to the authorities or if the Applicant was on a security alert list with the government, on a balance of probabilities, the Applicant would not have been able to exit Sri Lanka twice or return to Sri Lanka using his genuine passport without being detained/arrested; and

e. No direct or indirect evidence was submitted to indicate that the Applicant was, or is, on the government's security alert list.

[7] The RPD's decision was confirmed by the RAD on December 18, 2013. However, on September 23, 2014, the matter was referred back to the RAD, on consent of the parties, for reconsideration by a different RAD panel. The new panel up-held the RPD's decision on February 25, 2015.

[8] Based on this Court's decision rendered in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, 4 FCR 811 [*Huruglica*], the new RAD panel determined that its role was to "review all aspects of the RPD's decision and come to an independent assessment of the Appellant's refugee claim, deferring to the RPD only where the lower tribunal enjoys a particular advantage in reaching a conclusion."

[9] In reviewing the RPD's decision, the new RAD panel determined that the RPD made no error of law in assessing whether the Applicant faced a well-founded fear of persecution if he were to return to Sri-Lanka. It found that further to its review of the RPD's reasons as a whole, it was clear that "the RPD applied the correct test throughout its analysis" and that "the RPD's reasons clearly state that there was nothing about the Appellant's profile that would bring him to the attention of Sri Lankan authorities in a way that he would face a serious possibility of persecution."

[10] The RAD then concluded its analysis by finding that "in the context of its review and assessment of all of the evidence in the RPD record, and the findings and documentary evidence and case law cited above, that there is no more than a mere possibility that the Appellant would face persecution if he were to return to Sri Lanka."

[11] As mentioned previously, the Applicant submits that the RPD applied the wrong test in its analysis on at least two occasions and therefore committed an error of law which should have led the new RAD panel to overturn the RPD's decision. The two instances in dispute are found in paragraphs 33 and 56 of the RPD's decision and read as follows:

> [33] The panel acknowledge that the claimant lived in fear caused by the longstanding war in his country, Tamils from the North and East of Sri Lanka endured numerous human rights abuses during the conflict. The panel examined the changing conditions in Sri Lanka since the end of the war in May 2009 to determine whether or not the claimant's identity and profile as a male Tamil from northern Sri Lanka puts him at *personal heightened risk* in Sri Lanka today.
>
> [56] In the claimant's case the panel once again does not find that he has a personal profile that *would cause* him to be of a person of interest to the security forces in Sri Lanka.
>
> [**Emphasis added**]

[12] In particular, the Applicant claims that when deciding whether a refugee claimant faces a risk within the meaning of section 96 of the Act, the appropriate test is to determine whether the claimant faces "more than a serious possibility of persecution" upon their return. The Applicant submits the RPD erred in its decision by applying a different test, namely, by examining whether the Applicant's identity and profile as a male Tamil from northern Sri Lanka put him at a "personal heightened risk." The Applicant further submits that the RPD committed an error of

law when analysing the fear of failed Tamil asylum seekers from Sri Lanka since the use of the words "would cause" in the RPD's decision indicates that it assessed the risk on a balance of probabilities, which is higher than the standard of "more than a mere possibility."

[13] The Applicant contends that the new RAD panel erred in its determination that the RPD applied the correct test since from reading the RPD's decision, it is not clear which test was used.

III. Issue and Standard of Review

[14] The issue to be determined in this case is whether the RAD, in concluding in its February 25, 2015 decision that the RPD had applied the correct test to its analysis under section 96 of the Act, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7.

[15] The parties disagree on the appropriate standard of review. The Applicant relies on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] and *Huruglica* to argue that the standard of correctness applies since the RPD applied the wrong legal test. The Respondent relies on *Akuffo v Canada (Citizenship and Immigration),* 2014 FC 1063 [*Akuffo*] to argue that the reasonableness standard should be applied by the Court when reviewing the RAD's interpretation of the Act and its application to the facts of the case.

[16] Here, I am of the view that the RPD's section 96 analysis, when read together with the whole of the RPD's decision, was conducted in accordance with the proper legal test and that the RAD was correct in finding that no error had been committed by the RPD in this respect.

Therefore, whichever standard of review is applicable in the present instance, I see no reason to interfere with the RAD's decision.

IV. Analysis

[17] The Applicant places great emphasis on the fact that the impugned decision is for all intents and purposes identical to the RAD's previous decision, dated December 13, 2013, which was overturned on consent. It claims, therefore, that the impugned decision replicates the same errors than those that led to the December 2013 decision being set aside and that it should, as a result, for the same reasons, be overturned. The difficulty with this argument is that I have no evidence before me setting out the reasons why the Respondent consented to set aside the December 2013 decision. Claiming that those reasons have to do with the RAD failing to overturn the RPD's decision because it did not apply the correct test to its section 96 analysis is, in this context, purely speculative.

[18] What rather stands out from the record is that the setting aside of the December 2013 decision coincides with the issuance, in the preceding few months, of a number of decisions from this Court, including *Huruglica*, where the Court systematically rejected the position taken by the RAD up to that point on the question of the type of review it ought to conduct when reviewing an RPD decision (see also: *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494, 455 FTR 201; *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702; *Eng v Canada (Citizenship and Immigration)*, 2014 FC 711; *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858, 463 FTR 128). The RAD was then of the view that the appropriate standard applicable to such

instances was the reasonableness standard of review, as defined in *Dunsmuir*, a view held by this Court to be incompatible with the RAD's appellate function. This is exactly the position taken by the panel who issued the December 2013 decision.

[19] As indicated previously, the panel that issued the impugned decision adopted a wholly different approach in this regard – the one stemming out of *Huruglica* – in determining that its role was to "review all aspects of the RPD's decision and come to an independent assessment of the Appellant's refugee claim, deferring to the RPD only where the lower tribunal enjoys a particular advantage in reaching a conclusion."

[20] Although, again, there is no evidence to that effect on record, it is wholly plausible that what might have led the Respondent to consent to setting aside the December 2013 decision is the position taken by the RAD at the time regarding its role in reviewing RPD decisions. In any event, as I just mentioned, there is nothing on record that would allow me to say that the Respondent's consent in this respect was prompted by the fact that the RAD, in its December 2013 decision, failed to recognise that the RPD had not applied the correct section 96 test.

[21] Turning now to the main – and sole – issue to be resolved in this case, it is well-established that under section 96, an applicant must establish, on a balance of probabilities, that there is a reasonable chance or serious possibility of a risk of future persecution *(Adjei v Canada (Minister of Employment & Immigration)*, [1989] 2 FC 680, at para 5, 14 ACWS (3d) 82; *Florea v Canada (Minister of Citizenship and Immigration),* 2005 FC 1472, at paras 23-24, 283 FTR 118 [*Florea*]).

[22] As explained by Justice Mandamin in *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*] at paragraph 8 of the decision:

> [8] The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context. Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a risk of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance", "more than a mere possibility" or "good grounds for believing" that they will face persecution.

[23] This Court has recognized that various expressions of the standard of proof are acceptable so long as the tribunal's reasons taken as a whole indicate that the applicant was not put to an unduly onerous burden of proof (*Florea*, above at para 23; *Alam*, above at para 9; *Pararajasingham v Canada (Citizenship and Immigration)*, 2012 FC 1416, at paras 46-47).

[24] In my view, after conducting its own assessment of the matter, the RAD reasonably found that the RPD applied the correct test. One cannot become fixated on the words or engage in semantics without considering the whole of the decision and the context in which those words appear (*Mutangadura v Canada (Citizenship and Immigration)*, 2007 FC 298, at para 9; see also *Sivagurunathan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 432, at paras 4-5 [*Sivagurunathan*]**).** In my view, when the decision is read as a whole, the use of the words "personal heightened risk" and "would cause" do not indicate that the RPD used the incorrect legal test or lead to confusion as to which legal test is used, since it is evident from the remainder of the decision that the RPD understood and applied the correct test when it stated that "the

claimant has not established that there is a serious possibility of persecution on a Convention ground" and then later stated "the claimant has not satisfied the burden of establishing a serious possibility of persecution on a Convention ground" (see *Paramanathan v Canada (Citizenship and Immigration)*, 2012 FC 338, at paras 23-24).

[25] The RPD found that the United Nations High Commissioner for Refugees (UNHCR) changed position in July 2010 and no longer maintained, as a result of the stabilized security situation in Sri Lanka, that Tamil asylum seekers from the north should benefit from a presumption of eligibility to international protection. In applying the new UNHCR December 2012 guidelines, the RPD held that the Applicant did not meet any of the profiles that might require refugee protection, namely, he did not establish that he was suspected of having certain links with the LTTE, that he was a political activist, journalist, media professional, human rights activist, had witnessed human rights violations or had sought justice for human rights violations.

[26] The RPD was satisfied that the Applicant was not of concern to the country's security forces or on the government's security alert list as he testified having had no problems with the security forces prior to leaving Sri Lanka, at any checkpoints when he travelled between Jaffna and Colombo or in reporting his lost passport to the police in 2011.

[27] As the RPD pointed out, if the Applicant's profile was of interest to the authorities or if the Applicant was on a security alert list with the government, on a balance of probabilities, the Applicant would not have been able to exit Sri Lanka twice or return to Sri Lanka using his genuine passport without being arrested or detained.

[28] For these reasons, I find that by concluding that the Applicant has not satisfied the burden of establishing a serious possibility of persecution on a Convention ground, not only did the RPD apply the correct test but it reached a conclusion which falls within a range of possible, acceptable outcomes which is defensible in respect of the facts and the law (*Dunsmuir*, above at para 47). Therefore, I see no reason to interfere with the new RAD panel's finding that the RPD applied the correct test to its section 96 analysis or to interfere with its overall conclusion, upon its own assessment of the evidence that was before the RPD, that there is no more than a mere possibility that the Applicant would face persecution if he were to return to Sri Lanka.

[29] The application for judicial review is therefore dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;
2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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