

Federal Court



Cour fédérale

Date: 20171108

Docket: IMM-860-17

Citation: 2017 FC 1013

Ottawa, Ontario, November 8, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ARAVINTH KANDASAMY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Kandasamy, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of a Senior Immigration Officer [the Officer] made on December 20, 2016. The Officer refused Mr. Kandasamy's Pre-Removal Risk Assessment [PRRA] and found that he was not a Convention refugee or a person in need of protection pursuant to sections 96 or 97 of the Act.

[2] For the reasons that follow, the application is allowed.

I. Background

[3] Mr. Kandasamy is a 33 year-old Tamil citizen of Sri Lanka. He left Sri Lanka and travelled to Thailand in February 2010. He then travelled to Canada along with 492 other passengers and crew on the MV Sun Sea [the Sun Sea] and arrived on August 13, 2010. His claim for refugee protection was rejected by the Immigration Division [the ID] of the Immigration and Refugee Board in October 2012.

[4] The ID assessed the risks claimed by Mr. Kandasamy and found that his account of the events he experienced in Sri Lanka was not credible. For example, some of the events he claimed to have experienced in Sri Lanka occurred while he was working in Qatar.

[5] The ID also assessed his *sur place* claim, including his allegations that the Canadian media's coverage of the Sun Sea and characterisation of it as a Liberation Tigers of Tamil Eelam [LTTE] ship engaged in human smuggling would be known to Sri Lankan authorities. The ID found that the Sri Lankan authorities would not be interested in these opinions, adding that Mr. Kandasamy was not named in any media coverage. The ID concluded that there was no evidence that the government considered Mr. Kandasamy to be a sympathizer or otherwise linked to the LTTE and that there was no evidence that the government of Sri Lanka would be interested in him upon his return, despite his passage to Canada on the Sun Sea.

[6] Mr. Kandasamy's application for leave and for judicial review of the ID decision was refused in April 2013. In June 2016, he applied for a PRRA.

II. The PRRA Decision

[7] In his PRRA, Mr. Kandasamy claimed that if he is returned to Sri Lanka he would face a risk of persecution by reason of race, nationality, membership in a particular social group and political opinion. He claimed that because he is a Tamil from the North of Sri Lanka and a failed asylum seeker who travelled on the Sun Sea he would be viewed as linked to the LTTE as a supporter or sympathizer. In support of his claims, he submitted a letter from his father recounting that the authorities were aware of his activities in Canada.

[8] The Officer found that the objective evidence, in particular a 2011 Response to Information Request from the Immigration and Refugee Board, did not support Mr. Kandasamy's claim that he would be at risk of harm because he was a failed asylum seeker. The Officer noted that there were only four cases reported of persons being detained upon arrival and all of those persons had outstanding criminal charges, unlike Mr. Kandasamy. The Officer noted that returnees are screened upon arrival, but that the evidence suggests that returnees with no affiliation to the LTTE are not mistreated. The Officer noted that Mr. Kandasamy had returned without incident in the past, he had testified that he was not a LTTE supporter and that there was no evidence he had been mistreated while in Sri Lanka.

[9] The Officer found that Mr. Kandasamy had restated the same risks that had been considered by the ID and found that the information in the letter from his father was not evidence

that arose after the rejection of his claim; rather it updated evidence presented to and considered by the ID. Therefore, it did not meet the requirements for new evidence in accordance with paragraph 113(a) of the Act. In addition or alternatively, the Officer gave the letter low weight, noting that it came from a close family member who is not impartial to the outcome.

[10] The Officer found that Mr. Kandasamy had presented insufficient objective evidence to support his allegations, in particular regarding his claim that he is being actively sought by Sri Lankan authorities. The Officer concluded, based on all the evidence, including Mr. Kandasamy's personal circumstances and the current country conditions, that, on a balance of probabilities, Mr. Kandasamy is unlikely to face a risk as described in section 96 or 97 upon his return.

III. The Issues

[11] Mr. Kandasamy submits that the Officer erred by: finding that the letter from his father describing recent inquiries made by army intelligence was not new evidence; attaching low weight to the letter only because it originated from a family member; and, assessing the risk he would face based on his profile only as a young Tamil male, without considering that his profile changed due to his passage on the Sun Sea, his rejection as a refugee claimant, the publication of his claims and court proceedings and the recent inquiries made by army intelligence.

[12] Mr. Kandasamy also submits that the Officer's treatment of the letter from his father amounts to a credibility finding which goes to the heart of his *sur place* claim. He submits that an oral hearing should have been held in accordance with paragraph 113(b) of the Act and

section 167 of the *Immigration and Refugee Protection Regulations*, SOR-2002/227, to permit him to address the Officer's credibility concerns.

IV. The Standard of Review

[13] The standard of review for the Board's assessment of risk, which is a question of mixed fact and law, is reasonableness.

[14] Similarly, the standard of reasonableness applies to the ID's assessment of the *sur place* claim; *Thanabalasingam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 397 at para 9, [2015] FCJ No 361; *B381 v Canada (Minister of Citizenship and Immigration)*, 2014 FC 608 at para 27, 457 FTR 137; *B198 v Canada (Minister of Citizenship and Immigration)* 2013 FC 1106 at para 24, 441 FTR 259.

[15] The role of the Court on judicial review, where the standard of reasonableness applies, is to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). There may be several reasonable outcomes and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339). Deference is owed to the decision maker.

V. The Officer erred in his assessment of the letter from Mr. Kandasamy's father

[16] Mr. Kandasamy submits that the Officer erred: first, by finding that the letter was not new evidence; and, second, by giving the letter low weight because it was provided by a family member who is not impartial. The Respondent's position is that the letter reiterated and updated the same risk assessed by the ID and was not new evidence. The Respondent also submits that the Officer reasonably attached low weight to the letter due to its source, relying on *Ferguson v Canada (Minister of Citizenship and Immigration)* 2008 FC 1067 at para 27, 74 Imm LR (3d) 306 [*Ferguson*].

[17] As summarized above, the ID had found that Mr. Kandasamy's account of his encounters with the army, including that he was stopped and questioned several times because he came from the north, was not credible, noting among other things, that he had travelled within Sri Lanka and had left to work in Qatar and returned without incident, which belied his claim that he was wanted by the police or army. The ID also found that some of the incidents he described occurred while he was out of the country in Qatar.

[18] The ID assessed his *sur place* claim and concluded that there was no evidence that the government considered Mr. Kandasamy to be a sympathizer or otherwise linked to the LTTE and that his return would not be of any interest, "other than the routine questioning".

[19] Although the ID found that Mr. Kandasamy's account of the events he described in Sri Lanka was not credible, the issue for the PRRA is with respect to his current *sur place* claim and

whether he would face a risk upon return now, four years after the ID findings. As noted by Justice Russel Zinn in *Pillay v Canada (Minister of Citizenship and Immigration)*, 2014 FC 160 at para 7, 23 Imm LR (4th) 132 [*Pillay*]:

This Court has held that despite adverse credibility findings, and despite a lack of history of prior association with the LTTE, the combination of being Tamil and having been aboard the MV Sun Sea may be sufficient to show a serious possibility of persecution as a result of a Convention ground. This is known as the “mixed motives” doctrine.

[20] The letter from Mr. Kandasamy’s father, dated July 21, 2016, describes two incidents when “army intelligence” attended at Mr. Kandasamy’s family home. The letter states that in June 2013, “army intelligence” asked about Mr. Kandasamy’s work and his activities and accused Mr. Kandasamy of being involved in the Tamil Diaspora political activities and participating in demonstrations against the Sri Lankan army and government. The letter also states that in June 2016, army intelligence returned to Mr. Kandasamy’s family home and alleged that Mr. Kandasamy had been living in Canada for five years and still maintains contact with the remnants of the LTTE in Sri Lanka.

[21] The Officer’s finding that the letter is not new evidence is based on the Officer’s conclusion that the risks alleged in the PRRA were the same risks as those considered by the ID, and that the letter simply updates Mr. Kandasamy’s previous claim about questioning by the Army, which the ID found to be “routine”. This conclusion is based on a misapprehension of the evidence on the record. The letter from Mr. Kandasamy’s father does not describe routine questioning; rather it describes allegations by “army intelligence” that Mr. Kandasamy continues to participate in LTTE activities. The letter also asserts that “army intelligence” is aware that

Mr. Kandasamy has been living in Canada. The letter describes events which occurred after the ID decision and which relate to the *sur place* claim based on his time in Canada and his evolving risk profile as a Sun Sea passenger and failed asylum seeker. The letter did not reiterate the same risks previously assessed. The Officer's reasons for finding that it was not new evidence are not justified based on the record.

VI. The Officer erred by not assessing the sur place claim based on Mr. Kandasamy's current and complete risk profile

[22] Mr. Kandasamy argues that his claim was assessed under the wrong profile; he is not simply a young Tamil male. He argues that his profile changed upon his arrival in Canada, as a passenger on the notorious Sun Sea which was thought to be associated with the LTTE.

[23] The Respondent submits that the evidence submitted by Mr. Kandasamy was insufficient to support his contention that Sri Lankan authorities would know or be interested in the fact that he had been a Sun Sea passenger or that this would place him at risk. The Respondent notes that the jurisprudence has found that mere presence on the Sun Sea is insufficient to establish risk.

[24] Mr. Kandasamy had made extensive submissions about his status as a Sun Sea passenger in his PRRA and the Officer referred to these submissions. The Officer was, therefore, aware that Mr. Kandasamy was a passenger on the Sun Sea and that this may be a matter of public record. However, the Officer assessed Mr. Kandasamy's risk upon return based only on his profile as a failed asylum seeker, noting that he had not been of interest to the Sri Lankan authorities in the past, nor was there sufficient evidence to find that he would be of interest now.

[25] The country condition documents relied on by the Officer described the situation in Sri Lanka in 2012 and 2013. The Officer did not address the more recent documents or the more recent jurisprudence relied on by Mr. Kandasamy, which has found, in very similar circumstances, that the combination of being a Tamil who travelled on the Sun Sea *may* change the risk profile and raise a possibility of persecution.

[26] As noted by Justice Zinn in *Pillay* at para 9:

[9] Therefore, while neither being a passenger on the MV Sun Sea ship nor being Tamil alone is sufficient on the evidence to show a nexus to a Convention ground, when combined, there may be a serious possibility of persecution.

[27] Justice Zinn explained at para 16, “[t]hat is not to say that all Tamils who were aboard the MV Sun Sea will automatically succeed on a *sur place* claim under section 96”, noting that the applicant did not have any prior association with the LTTE and it appeared that the government had not previously suspected him of any connection to the LTTE. Justice Zinn concluded, however, that “the RPD had to at least turn its mind to the possibility that the Applicant would face a serious possibility of persecution on a combination of his race and the fact that he was on the MV Sun Sea, and directly address the evidence that spoke to that possibility.”

[28] Similarly, in the present case, the Officer correctly noted that the RPD had found that Mr. Kandasamy had no prior association or suspected association with the LTTE, but nonetheless, the Officer should have considered Mr. Kandasamy’s current and complete risk profile as a Tamil male from the North who travelled to Canada on the Sun Sea and who would

be returning as a failed asylum seeker. The Officer should have also considered the recent country condition documents relevant to this risk profile.

[29] It may be that, even with the risk profile of a passenger on the Sun Sea, a failed asylum seeker and a male Tamil from the North, there would not be a serious risk of persecution for Mr. Kandasamy. However, the error is that the Officer did not assess the risk profile presented.

[30] In conclusion, the PRRA must be reconsidered by a different Officer to determine whether the letter from Mr. Kandasamy's father should be accepted as new evidence and if so, what weight should be attached to it. In addition, Mr. Kandasamy's complete risk profile should be assessed.

JUDGMENT in IMM-860-17

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed.
2. No question is proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-860-17

STYLE OF CAUSE: ARAVINTH KANDASAMY v THE MINISTER OF
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