Federal Court Cour fédérale

Date: 20190205

Docket: IMM-2373-18

Citation: 2019 FC 149

Toronto, Ontario, February 5, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SHARMILA VARATHARAJAH

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This application judicially reviews a decision of the Refugee Protection Division [Board] which concluded that the Applicant is neither a Convention refugee nor a person in need of protection. There are two problems with the Board's analysis and conclusion. First, the Board erred in its treatment of a key piece of documentary evidence. Second, the Board did not address the Applicant's stated fear of persecution as a returning failed refugee claimant, thus failing to address a central component of the risk allegation. As a result, I find that the Board

erred and the claim must be redetermined, as explained in more depth after a brief overview of its background.

I. Background

[2] The Applicant is a Sri Lankan woman of Tamil ethnicity from the northern Jaffna district, who alleges persecution as a perceived supporter of the Liberation Tigers of Tamil Eelam [LTTE]. She first left Sri Lanka in 1991 when she fled to India by boat, residing there with temporary status for 12 years. Suspicious of Tamils, the Indian authorities detained and returned her to Sri Lanka in 2003. While in India, the Applicant learned how to sew, a skill that she says drew the attention of the LTTE upon her return to Sri Lanka. When she refused to sew their uniforms, the Applicant claims that the LTTE took her to a camp, where she was forced to work and beaten.

[3] After the LTTE was defeated by the Sri Lankan army in 2009, the Applicant states that she continued to face harassment, violence, intimidation, and humiliation by security forces and those working with them. She alleges the following three incidents took place:

- in December 2011, she was arrested by the army, held for one day, interrogated due to suspected LTTE ties, and released after her father paid a bribe;
- in June 2012, she was rounded up by security forces and taken to a camp where she was interrogated, groped, and sexually assaulted;
- later in June 2012, three soldiers came to her house, where they beat and sexually abused her and her cousin, after which the Eelam People's Democratic Party, who

knew of the incident, extorted money from her and threatened to report her as having helped the LTTE in the past.

II. The Board's Decision

[4] In its Decision, the Board found inconsistencies between the Applicant's oral testimony and her Personal Information Form [PIF]. In her PIF, the Applicant provided details that she and her cousin were sexually assaulted in June 2012 by three army members who came to her house. However, the Board found that, in her oral testimony, the Applicant said that they beat her, but she did not refer to any sexual assault. The Board held that the Applicant had no explanation for the inconsistency, and that her father, who was called as a witness at the hearing, "admitted on the record that his daughter was not sexually abused, contrary to her PIF allegation".

[5] As a result, the Board determined that the Applicant was not a credible or trustworthy witness, and did not proceed with state protection, internal flight alternative or section 97 analyses.

III. Issues and Standard of Review

[6] The Applicant challenges the Decision first on the basis of the Board's assessment of the documentary evidence, and second on the failure to properly consider the Applicant's risk profile. The standard of review for these issues is reasonableness (*Ifeanyi v Canada (Citizenship and Immigration)*, 2018 FC 419 at para 11).

IV. Parties' Positions

A. *Was the Board's assessment of the documentary evidence reasonable?*

[7] First, the Applicant submits that the Board misapprehended the evidence by heavily relying on a report [Report] entitled "*National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Sri Lanka*". The Board ascribed the authorship of this report to the United Nations Human Rights Council. However, the Applicant observes that it was in fact authored by the Government of Sri Lanka.

[8] In addition, the Applicant contends that the Report was not actually contained in the March 2017 National Documentation Package [NDP] that was in evidence on the record before the Board (and indeed, the only NDP cited in the Decision). Rather, the Report is found in the updated April 2018 NDP, which was not before the Board at the hearing; the April 2018 NDP only became available between the hearing date and the Decision's publication some six weeks later. The Applicant further submits that the Board concluded that she is not a person in need of protection based on a selective review of the documentary evidence in that April 2018 NDP, without addressing the contradictory evidence contained therein.

[9] The Respondent counters that the Applicant fails to show a reviewable error, contending that the Board's findings were reasonable, and open to it. The Respondent reminded the Court that its role is not to reweigh the evidence.

B. *Did the Board fail to properly consider the Applicant's risk profile?*

[10] The Applicant further contends that the Board failed to properly consider her risk profile as a failed refugee claimant under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which this Court has found to be a reviewable error in other cases involving Sri Lankan refugee claimants, including *Suntharalingam v Canada (Citizenship and Immigration)*, 2014 FC 987 at paragraphs 49, 51 and *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 244 at paragraph 11.

[11] The Respondent counters that the Board considered whether the country conditions posed any risk to the Applicant based on her profile as a Sri Lankan female Tamil, and reasonably found that they did not, thus coming to a reasonable conclusion on the section 97 risk analysis component of the claim.

V. Analysis

[12] Before analysing the two issues noted above, based on my reading of the transcript, there appeared to be significant confusion at the Board hearing arising from the interpretation. Nonetheless, the Applicant, who had raised an issue of procedural fairness in her written submissions arising from the interpretation, decided to no longer pursue that issue before the Court, and as a result I will not further comment on the translation issue. Nonetheless, I find the Board made errors on the other two issues which she did address.

A. *Was the Board's assessment of the documentary evidence reasonable?*

[13] I find that the Board erred on both the source and the authorship of the Report. The Board appears to have relied solely on the Report to assess the Applicant's risk as a woman in Sri Lanka, as it is the only source cited. As the Applicant argues, the Report was not before the Board at the hearing, appearing only in the April 2018 NDP index. Furthermore, the author of the Report is listed as being "Sri Lanka". The first page of the Report contains a note stating "[t]he present document has been reproduced as received. Its content does not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations".

[14] I find the Board's reliance on this document to have been unreasonable for three reasons. First, the Report was authored by the Government of Sri Lanka, not the United Nations Human Rights Council [UN Council] as the Board intimated. The distinction is made clear by other documents listed in the April 2018 NDP, which were indeed written by the UN Council.

[15] Further, the note contained on the first page of the Report clearly indicates that it does not imply the expression of any opinion on the part of the United Nations. Rather, this Report contains the Sri Lankan government's initiatives reported to the UN Council by the Government of Sri Lanka itself. The fact that the Government of Sri Lanka is the source of the Report raises questions regarding its objectivity.

[16] Second, the April 2018 NDP which actually contains the Report, did not exist at the time of the hearing. Rather, the latest NDP before the Board was the March 2017 NDP, which did not contain this Report.

[17] The tribunal's website includes a page entitled "National Documentation Package additional information" (https://irb-cisr.gc.ca/en/country-information/ndp/Pages/ndp-additional-info.aspx). That page states as follows:

> • Additional information
>
> Prior to the hearing, individuals with claims before the Immigration and Refugee Board (IRB) of Canada are responsible for reviewing documents <u>in the latest NDP for their home country. The Refugee Protection Division (RPD) may consider the NDP when deciding the claim</u>. The NDP do not contain all the information on a specific country's conditions. [Emphasis added]

[18] The IRB website goes on to state:

> **Documents not in the NDP**
>
> The RPD may decide to use other documents as well. For example,
> - Reports produced by the IRB Research Directorate,
> - Media articles, or
> - Reports from human rights organizations.
>
> <u>Copies of any additional documents which the RPD finds useful are sent to the parties before the hearing</u>. [Emphasis added]

[19] As noted above, the Applicant's hearing was held on March 12, 2018. The Decision was dated April 25, 2018, and the Board's Notice of Decision, May 2, 2018. A Board's reliance on country evidence that was not in the record at the time of the hearing, and which was only published in an NDP post-hearing, raises concerns.

[20] Indeed, there is jurisprudence on the subject. For instance, in *Kirichenko v Canada (Citizenship and Immigration)*, 2011 FC 12 at para 28, the applicant argued that the RPD erred by relying upon a document that was not part of the NDP, and by failing to indicate where it obtained this document. In that case, the document in question was an IRB Response to Information Request. Justice Russell found this to be a breach of procedural fairness since the Response to Information Request was not before the RPD, and had never been made available to the applicant, who was not given an opportunity to respond to the document that addressed a critical issue in the decision. (See also *Jeyaratnam v Canada (Citizenship and Immigration)*, 2018 FC 1244 at paras 48–49).

[21] In a more recent case, *Ding v Canada (Citizenship and Immigration)*, 2014 FC 820, the RPD relied on a document that was no longer found in its NDP, which Justice Mactavish found was unfair in itself, but in the end was immaterial to the outcome given the content of that document. She wrote:

> [12] I agree with Ms. Ding that it was unfair for the Board to have relied on the document in question. The whole purpose of a National Documentation Package is to ensure that everyone involved has access to the relevant country condition information, and that refugee claimants are aware of the documents that will be relied upon by the Board. While it was open to the Board member to have had regard to the document in question, fairness required that the Board first put Ms. Ding on notice of its intention to do so and afford her an opportunity to address the document, if she deemed it necessary.
>
> [13] That said, Ms. Ding has not identified any material differences between the 2004 document cited by the Board and the document that replaced it in the current National Documentation Package for China. Accordingly, once again, any breach of procedural fairness that occurred was not material to the result in this case.

[22] Here, like in *Kirichenko* – but unlike in *Ding* – the document was (a) not known to the Applicant, (b) central to the Decision, and (c) material to the outcome. When I asked Applicant's counsel about whether the Board's reliance on the Report raised procedural fairness issues, she responded in the negative; while being pleased the Board considered the most up-to-date country information, she contended that it treated the Report unreasonably. Respondent's counsel never made submissions on the fairness question, which was not surprising in light of the Applicant's position.

[23] As a result, I will not delve into the type of error made by the Board in any depth – and whether it was incorrect or unreasonable. However, I will note that at minimum, if the Board is going to use an NDP, or a document therefrom, that was not available at the hearing, it should advise the applicant and provide a chance for s/he to respond. In the result, I find the Decision is flawed under either standard of review due to the lack of notice regarding key country evidence relied on by the Board. I will also note that my findings in this matter are made specifically in the context of proceedings before the RPD.

[24] Furthermore, and quite apart from the two errors outlined above vis-à-vis the Board's reference to the Report – namely its (i) misattribution and (ii) lack of notice – there was also a third fundamental flaw in the Board's reliance on the evidence. The updated April 2018 NDP, in which the Report was found, contained contradictory evidence to the Report's. For example, an *Amnesty International Report 2017/2018* from the April 2018 NDP contains information stating that "[l]aw enforcement officials continued to subject members of the Tamil minority, particularly former members of the LTTE, to ethnic profiling, surveillance and harassment", and

that "impunity persisted for various forms of violence against women and girls, including child marriage, domestic violence, human trafficking, rapes by military and law enforcement officers".

[25] When directly relevant evidence is not considered or analyzed by a decision-maker, the door is opened to an inference that the decision-maker made an erroneous finding of fact without regard to the evidence or ignored contradictory evidence (*Cezair v Canada (Citizenship and Immigration)*, 2018 FC 886 at para 27). Of course, it is trite law that while the Board need not address all evidence, it must be alive to contradictory evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)). Silence on evidence pointing to the opposite conclusion supports an inference that such evidence was overlooked (*Jalili v Canada (Citizenship and Immigration)*, 2018 FC 1267 at para 11).

[26] In sum, I find the Board's use of the Report unreasonable, being (i) wrongly attributed, (ii) unavailable at the time of the hearing, and later relied on without notice or any chance for the Applicant to respond, and (iii) deficient in addressing contradictory evidence.

B. *Did the Board fail to properly consider the Applicant's risk profile?*

[27] In its analysis, the Board did not assess the risk that the Applicant faces as a failed refugee claimant, finding that her negative credibility was determinative of the claim. Indeed, the Board is correct that it need not look at section 97 risk when credibility rules out the basis of the risk. However, that general proposition is subject to the exception pointed out by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paragraph 3:

> […] 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 [Emphasis added].

[28] Here, the Applicant pointed to her personal risk as a failed refugee claimant, and provided documentary evidence on this point. The Board referred to none of it.

[29] The Board has a duty to consider whether the Applicant will face a serious possibility of persecution specifically as a failed refugee claimant in spite of credibility concerns (*Thevarajah v Canada (Citizenship and Immigration)*, 2018 FC 458 at para 11). Her status as a failed refugee claimant is an immutable aspect of her profile, and as such, is not impacted by the credibility issues that were raised and discussed above. Like in *Navaratnam* and *Suntharalingam*, the Board failed to mention this reality at any point in its decision, or assess the implications of returning to the north of Sri Lanka with the profile, notwithstanding evidence on the point.

[30] In *Thevarajah*, *Navaratnam* and *Suntharalingam*, the Board's failure to assess the applicants' risk as failed refugee claimants resulted in unreasonable decisions. Similarly, in this case, the Board was obliged to analyse – even if briefly – the section 97 ground, and address the evidence provided by counsel on the point. While the ultimate decision may be that the Applicant is not at risk on section 97 grounds, that does not obviate the Board's duty to do its work.

VI. Conclusion

[31] Given the two flaws in the Board's analysis explained above, the Decision is unreasonable and cannot be upheld. The application for judicial review is accordingly granted. The Decision is set aside and remitted for reconsideration by a different panel. Neither party raised a question for certification, and I agree that none arises.

JUDGMENT in IMM-2373-18

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted.
2. The Decision is set aside and the matter remitted for redetermination by a different panel.
3. No questions for certification were argued and none arise.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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