

Date: 20080408

Docket: IMM-185-07

Citation: 2008 FC 434

Ottawa, Ontario, April 8, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

RUDOLPH FIXGERA LAPPEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Rudolph Fixgera Lappen (the “Applicant”) is a Tamil male from Sri Lanka who lived in India from 1990 until 2004 when he came to Canada and claimed refugee protection. That claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) in a written decision dated December 13, 2006. The Applicant applies for a judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “IRPA”), of the Board’s decision.

[2] For reasons that follow, the application is allowed and the decision of the Board is set aside.

BACKGROUND

[3] The Applicant is a 39 year old citizen of Sri Lanka. He is from Trincomalee in eastern Sri Lanka. He left Sri Lanka in 1990 for India where he stayed in a refugee camp in Erode in the state of Tamil Nadu. He left India on October 2, 2004 and arrived in Canada on October 3, 2004. He made his claim for refugee protection on October 4, 2004.

[4] The Applicant claimed that as a youth in Sri Lanka he had been detained for two days by the Sri Lankan army for being a supporter of the Liberation Tigers of Tamil Eelam (the "LTTE"). As a result of this detention the Applicant's father sent him to Jaffna, northern Sri Lanka, in 1984. In 1990, the LTTE approached the Applicant to persuade him to join their cause. The Applicant claims he was forced to do manual labour for the LTTE. In September 1990, to avoid further pressure from the LTTE, the Applicant's relatives sent him to India. The Applicant lived in the Erode refugee camp from September 1990 until June 2001. While at the camp he married and had three children.

[5] The Applicant claims that beginning in 1999, the Q Branch of India's Security Service began to question him suspecting his involvement with LTTE. The Applicant says he went into hiding and eventually left India for Canada in October 2004.

DECISION UNDER REVIEW

[6] The Applicant based his refugee claim on a fear of persecution at the hands of the LTTE and the Sri Lankan army as a result of being a member of a particular social group, that is a Tamil male from eastern Sri Lanka. The Board determined that the claimant is not a Convention refugee and is not a person in need of protection and that his claim does not have a credible basis. Accordingly, the Applicant's claim was rejected.

[7] The Board accepted the Applicant's identity documents.

[8] The Board stated that credibility was the determinative issue in this claim. It concluded its written reasons with the following:

Based on all the above, the claimant was found not to be credible. He failed to establish the well-foundedness of his fear with credible evidence.

The panel therefore has determined the claimant, Mr. Rudolph Fixgera LAPPEN (a.k.a. Sathiyamoorthy Rudolph Fitzgerald Lappen), not to be a "Convention refugee"¹⁰ "and nor a "person in need of protection"¹¹. Hence, it rejects his claim for refugee protection.

The panel has further determined the claimant has no credible basis to his claim as defined under Section 107(2) of the *Immigration and Refugee Protection Act (IRPA)* [citations omitted].

ISSUE

[9] Given the Board's finding that the Applicant did not have a well-founded fear of persecution under section 96 of the IRPA, did it have regard to the evidence submitted with respect to its determination that the Applicant was not a person in need of protection under section 97 of the IRPA?

STANDARD OF REVIEW

[10] Having accepted the identity of the Applicant, the Board's decision that the Applicant was not a person in need of protection is necessarily based on assessing the Applicant's profile against the country evidence documentation. This is a question of fact.

[11] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 34, the Supreme Court of Canada determined that there are now only two standards of review in judicial review proceedings: correctness and reasonableness.

[12] The Supreme Court stated that if prior jurisprudence has determined, in a satisfactory manner, the degree of deference to be afforded to the question at hand, no further standard of review analysis is required (*Dunsmuir*, above, at para. 62).

[13] Prior jurisprudence has concluded that the standard of review for questions of fact was patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315). In *Wa Kabongo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 348, Justice Mosley concluded that the effect of *Dunsmuir*, above, was to establish a standard of review for a Pre-Removal Risk Assessment Officer's findings of fact as one of reasonableness. I see no reason why Justice Mosley's reasoning should not also apply to findings of fact made by members of the Refugee Protection Division.

[14] In *Dunsmuir*, above, at para. 47, the Court gave useful instruction on applying the reasonableness standard. Reasonableness is concerned with the existence of justification,

transparency and intelligibility within the decision-making process. It is also concerned with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. Justification requires that a decision be made with regard to the evidence before the decision-maker. A decision cannot be a reasonable one if it is made without regard to the evidence submitted. I find support for this rationale in Justice Teitelbaum’s decision in *Katwaru v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 612 at paras. 18, 22.

ANALYSIS

[15] In its decision, the Board chose to focus heavily on the question of credibility. In its reasons, 15 of the 25 paragraphs begin or end with a statement to the effect that the Applicant was not believable or credible.

[16] The question for the Board, underlying any scrutiny of whether or not an applicant is credible, is whether the refugee claimant has a well-founded fear of persecution as set out in section 96 of IRPA or whether the claimant faces, on return, a risk of torture or risk of life as set under section 97.

[17] When the identity of an applicant is accepted, the Board is obligated to address the question of risk set out under section 97 of the IRPA; this is so even where the board does not accept the applicant’s allegations and finds him not to be credible. Justice Snider discussed this very point in *Balasubramaniam v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1137 at para. 10:

This Court has held that, where the identity of a young Tamil is accepted, the Board is under an obligation to assess the risk to the claimant if returned to Sri Lanka, even if the claimant’s personal account of what happened to him is found not credible (*Seevaratnam v. Canada (Minister of Citizenship and Immigration)*, [199] F.C.J. No. 694 (T.D.) (QL); *Kamalanathan*

v. Canada (Minister of Citizenship and Immigration), 2001 FCT 553, [2001] F.C.J. No. 826(T.D.) (QL); Jeyaseelan v. Canada (Minister of Citizenship and Immigration), 2002 FCT 356, [2002] F.C.J. No. 458 (T.D.) (QL); Mylvaganam v. Canada (Minister of Citizenship and Immigration, [2000] F.C.J. No. 1195 (T.D.) (QL)).

[18] The Board focussed much of its discussion in its reasons, 12 paragraphs out of 25, on issues of credibility arising from the Applicant's account of his sojourn in India. It seems that this analysis was done at the expense of considering the fear the Applicant alleged should he be returned to Sri Lanka, his country of citizenship. The remaining discussion by the Board focus on the Applicant's account of events before leaving Sri Lanka and his report of the treatment of family members there.

[19] The Applicant submits that the Board accepted the Applicant's identity which, together with the country documents, provides evidence that the Applicant faces a risk to his life, as set out under section 97 of the IRPA, if returned to Sri Lanka. The Applicant relies on *Baranyi v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 664 at para. 14, where Justice O'Keefe references this Court's earlier decision in *Seevaratnam v. Canada (Minister of Citizenship and Immigration)* (1999), 167 F.T.R. 130:

Even in situations where the CRDD finds an applicant not to be credible it still must consider the documentary evidence. This Court in *Seevaratnam v. Canada (Minister of Citizenship and Immigration)* (1999), 167 F.T.R. 130 (F.C.T.D.) stated at page 132:

Clearly, where the only evidence linking the claimant to the persecution emanates from his or her testimony, rejecting the testimony means there is no longer a link to the persecution. It becomes impossible to establish a link between the person's claim and the documentary evidence.

This is obviously different from the present case, where there was evidence, including her NIC, emanating from sources other than the applicant's testimony, which can link her claim to the ongoing persecution of young Tamil women in Sri Lanka.

The documentary evidence may have established a well-founded fear of persecution on the applicant's behalf or it may not have. The CRDD should have assessed this evidence to determine whether or not it established a well-founded fear of persecution...

[20] The Respondent argues that the Applicant has failed to produce any credible evidence that violations of human rights that may be established by the documentary evidence threaten him personally if he is returned to Sri Lanka. The Respondent asserts that refugee claimants must establish a link between themselves and the persecution on a Convention ground (*Mohamud v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 65).

[21] The Applicant had submitted three packages of country documentation to the Board describing human rights violations in Sri Lanka. The Applicant maintains that the country documentation is evidence that a person with the Applicant's profile would face a risk of persecution if returned to Sri Lanka.

[22] The Applicant is a 39 year-old Tamil from eastern Sri Lanka who spent some 14 years as a refugee in India and who faces the prospect of being returned to Sri Lanka.

[23] A review of the country documentation discloses that the LTTE have been targeting civilians, conscripting young people into militia and fighting groups while also compelling civilians to provide forced labour or pay extortion monies to finance LTTE operations. A review of the country documentation discloses, among other matters, that:

- The situation in the east and also the north of Sri Lanka has deteriorated and civilians are increasingly targeted and caught up in the violence. (Sri Lanka: A Climate of Fear in the East – Amnesty International, Tribunal Record p. 0486)

- The present ceasefire has helped the LTTE to “collect with penalties” from those Tamils who have “escaped” paying their contributions in the recent past. (Financial Fodder – Internal Sources of LTTE Funds, Institute of Peace and Conflict Studies, 16 October 2004, Tribunal Record p. 0162)
- A 54 year old Tamil engineer who returned from Australia and refused to pay LTTE protection money was killed in Columbo (Proof of LTTE Taxes, The Island, 24 September 2002, Tribunal Record p. 0165)
- A 39 year old driver and mechanic was allegedly abducted by LTTE on 21 June 2003. He was reportedly taken from his home by a man who told him that LTTE wanted his assistance in acquiring a vehicle. He never returned. (Sri Lanka: A Climate of Fear in the East – Amnesty International, Tribunal Record p. 0487)

[24] I accept the Applicant’s argument that there is some evidence before the Board that may show that the Applicant may be a person in need of protection, as set out under section 97 of the IRPA, if returned to Sri Lanka. This is notwithstanding his long absence in India. It is the Applicant’s identity, as accepted by the Board, which may form the basis for his need for protection.

[25] A review of the Board’s reasons discloses that the Board never considered the Applicant’s profile in conjunction with the country condition evidence. Instead, the Board remained fixated on its credibility finding exercise. In my view, this is a reviewable error committed by the Board.

[26] In *Maimba v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 226 at para. 22, Justice Kelen described the error as follows:

Having reviewed the evidence and the applicant's submissions in this regard, the Court concludes that the Board erred in its assessment of the documentary evidence. The case law is clear that when assessing an applicant's objective risk of harm in returning to their country of origin, there may be instances where, having accepted the applicant's identity, the objective documentary evidence is such that the claimant's particular circumstances make him a person in need of protection despite the fact that the Board has found the claimant lacks credibility: see *Kandiah v. Canada (Minister of Citizenship and Immigration)*, [2005 FC 181](#), [\[2005\] F.C.J. No. 275](#) (QL) per Martineau J. However, Mr. Justice Martineau also states that such assessments are to be made on a case-by-case basis depending on the nature of the evidence presented in the particular case (emphasis added).

[27] This Court has held previously that there may be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the “country conditions are such that the claimant’s particular circumstances make him/her a person in need of protection.” (*Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para. 41; see also *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1008).

[28] I find that the Board failed to consider the Applicant’s identity evidence, which it accepted, and the relevant documentary evidence submitted before deciding whether or not the Applicant would be a person in need of protection if returned to Sri Lanka. I find that the Board’s decision is unreasonable.

CONCLUSION

[29] The application for judicial review succeeds. The decision of the Board is quashed and the matter is referred back for reconsideration by a differently constituted panel. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. That the decision is quashed and the matter is referred back to a differently constituted panel for reconsideration.
2. No question of importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE: RUDOLPH FIXGERA LAPPEN
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MCI

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**REASONS FOR JUDGMENT
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