Federal Court  Cour fédérale

Date: 20100823

Docket: IMM-6640-09

Citation: 2010 FC 834

Ottawa, Ontario, August 23, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PACKINATHAN, LINDAN LORANCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, a Tamil male, is a citizen of Sri Lanka. He arrived in Canada in March 2009 and claimed protection, under s. 96 and 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), on the basis of his fears of the Sri Lankan Army, police, paramilitaries and the Liberation Tigers of Tamil Eelam (LTTE).

[2] In a decision dated December 2, 2009, a panel of the Immigration and Refugee Protection Board, Refugee Protection Division (the Board) determined that the Applicant was neither a

Convention refugee nor a person in need of protection. The Applicant seeks judicial review of the Board's decision.

[3] The Board's decision rests on three key findings.

- The Applicant, who was originally from the north of Sri Lanka, lived in Colombo, in the south of Sri Lanka, for two periods of time – from 1997 to 2002 and from 2006 until he left the country in 2009. The Board noted that the Applicant, while in Colombo, experienced only a few problems (such as the occasional police check) and had not been physically abused. Further, the Board noted that the Applicant's wife and children remain in Colombo. On this basis, the Board concluded that the Applicant's fear was not "well founded particularly with respect to living in Colombo".

- The Board concluded that the Applicant failed to demonstrate the existence of a subjective fear, on the basis that he did not, during a two-hour stopover, make a refugee claim in Switzerland.

- The Board determined that the Applicant had a viable internal flight alternative (IFA) in Colombo.

[4] I have difficulties with all three of these conclusions and will allow this application for judicial review.

[5] The issues raised by this application for judicial review are as follows:

1. Did the Board err by finding that there was a lack of subjective fear on the basis of the Applicant's failure to claim refugee protection in Switzerland?

2. Did the Board err by failing to have regard to the evidence?

[6] The decision of the Board is reviewable on the standard of reasonableness. On this standard, the Court should not intervene where the 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, [2008] 1 S.C.R. 190 at para. 47). In addition, the Court may grant relief if it is satisfied that the tribunal made its decision without regard for the material before it (*Federal Courts Act* R.S.C. 1985, c. F-7, s. 18.1(4)(d)).

[7] To establish a successful claim to refugee status, a claimant must demonstrate the existence of both a subjective and objectively well-founded fear of persecution. It is quite proper for the Board to take the claimant's actions into account when assessing the presence or absence of subjective fear. A failure to make a refugee claim in a third country may raise doubt that a refugee claimant has a subjective fear (see, for example, *Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 403, [2005] F.C.J. No. 501 (QL)). However, where a claimant had always planned to come to Canada, and merely was in transit during a stopover in a third country, the Court has held that such a situation does not undermine the subjective fear of persecution (*Ilunga v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 569, [2006] F.C.J. No. 748 (QL)).

[8] In this case, the Board's finding of a lack of subjective fear appears to have been based solely on the fact that the Applicant had not claimed refugee protection during a two-hour stopover in Switzerland. Indeed, it would be impossible to come by air, from Sri Lanka to Canada, without a stopover in another country. On the facts before me, it is evident that the Applicant was, at all times, in transit to Canada, where he intended to claim refugee protection. In my view, the Board's conclusion on this evidence was unreasonable.

[9] The Board must have regard for all of the evidence before it. That does not mean that every piece of evidence must be separately and explicitly referenced (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317, [1992] F.C.J. No. 946 (F.C.A.) (QL). In many cases, a general statement that the Board has considered all of the evidence will suffice. However, the more important the evidence to the Applicant's case that is not mentioned in the Board's reasons, the more willing a court may be to infer that the Board made its findings without regard to the evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL) at para. 17 (*Cepeda-Gutierrez)*).

[10] The Board's reasons – both in respect of well-founded fear and the possible IFA – rest on the situation for a Tamil male in Colombo. In coming to its conclusions on both issues, the Board has not referred to the extensive evidence regarding widespread, arbitrary arrests, detention and mistreatment of Tamil men originating from the north of Sri Lanka. In particular, there is no reference to the July 2009 UNHCR report beyond a one-line comment that cannot be said to accurately reflect the entirety of that document. A report of the UNHCR in April 2009 and a US DOS Report were not cited at all. Each of these documents contains extensive references to human

rights violations and the actions of the security forces and paramilitary groups throughout Sri Lanka. Further, in final submissions to the Board, counsel for the Applicant highlighted these documents as being directly relevant to his client's situation in Colombo. Yet, the Board failed to mention this evidence, other than one part-sentence from one report. This evidence has a direct bearing on both the well-foundedness of the Applicant's fear, and on the IFA determination. It was open to the Board to consider and reject this evidence. However, the failure to even mention this contradictory evidence raises the inference that it was ignored (*Cepeda-Gutierrez,* para. 17). As a result, the decision is not defensible.

[11] The situation before me is very similar to the Board decision considered by Justice de Montigny in *Sinnasamy v. Canada (Minister of Citizenship and Immigration),* 2008 FC 67, [2008] F.C.J. No. 77 (QL). In that case, as here, the Board did not address most of the findings of the UNHCR with respect to the treatment of Tamils in Colombo. Justice de Montigny found that the Board erred in so doing.

[12] For these reasons, I will allow this application for judicial review. Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, the decision of the Board is quashed and the matter is sent back to the Board for re-determination by a newly-constituted panel of the Board; and

2. No question of general importance is certified

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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