Federal Court Cour fédérale

Date: 20110811

Docket: IMM-7652-10

Citation: 2011 FC 990

Ottawa, Ontario, August 11, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BASKARAN GURUSAMY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 15 November 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Sri Lanka. Prior to coming to Canada, he lived in Colombo with his spouse and their daughter. The Applicant and his spouse married in May 2006. He is Tamil and his spouse is Sinhalese. He claims in his Personal Information Form (PIF) that "many people" disapproved of and harassed both him and his wife for marrying outside their ethnic groups. He also testified at the hearing that, even prior to the events described herein, he was targeted by the authorities for questioning, as were many other Tamils.

[3] In May 2007, the police, having received information from an undisclosed source that he was helping the Liberation Tigers of Tamil Eelam (LTTE), arrested the Applicant and questioned him. They pulled him by the shirt but did not harm him physically. Two days later, they released him. As a result of this experience, the Applicant started looking for work outside of Sri Lanka.

[4] In August 2008, he relocated to Papua New Guinea as part of his employment. His spouse and daughter joined him later that year. While there, the family obtained visas to travel to the US for a family wedding in 2009 which, ultimately, they did not attend.

[5] In 2009 there was an outbreak of cholera and malaria in Papua New Guinea. The Applicant and his wife, believing that things were safer in Sri Lanka because the war was over, decided that the spouse and daughter should return to live in Sri Lanka, and they did so in June 2009. On 19 September 2009, the Applicant visited them for a month and a half. Upon his re-entry, the

authorities questioned him regarding his job, his earnings and his place of residence. Later, the Applicant requested and was granted permission by his employer to extend his visit.

[6] On 7 October 2009, the police again arrested the Applicant, based on an accusation that he was working with the LTTE. Over the course of three days, the police questioned and beat him. They released him after his spouse paid a bribe, but they also warned him that the next time that he was arrested he would not be released.

[7] The Applicant claims that, on 2 November 2009, members of the paramilitary group, Karuna (the Karuna group), came to his house, identified themselves as members of the Karuna group and threatened to accuse him falsely of assisting the LTTE if he did not give them two million rupees. The Applicant promised to pay. However, on 7 November 2009, after seeing to the safety of his spouse and daughter, he fled Sri Lanka, traveling via the United Kingdom and the US to Canada, where he made a refugee claim on 24 November 2009.

[8] The Applicant appeared before the RPD on 15 September 2010. He was represented by counsel and an interpreter was present. His section 96 claim was based on his race, nationality and perceived political opinion as a Tamil. The RPD rejected both the section 96 claim and the section 97 claim. The determinative issues, as stated, were lack of credibility, absence of subjective fear and absence of serious harm amounting to persecution. This is the Decision under review.

DECISION UNDER REVIEW

The Section 96 Claim

[9] With respect to the police arrest of the Applicant in 2007, the RPD noted that "while being arrested is certainly not a pleasant experience," the Applicant was not treated in a way that constitutes persecution. Persecution requires "'serious harm' that is repetitive and persistent, in a systemic way and caused for a reason that is related to the Convention." The RPD noted that the police had a lawful right to detain and question the Applicant, and the shirt pulling incident does not constitute serious harm.

[10] With respect to the police arrest of the Applicant in 2009, the RPD reviewed documentary evidence demonstrating that the country was experiencing "enforced disappearances of persons suspected of LTTE links, arrest and detention … on limited evidence and often for extended periods … and use of informal places of detention." The RPD observed that the Applicant's detention lasted only for three days, it was not in an informal place and his treatment did not constitute "serious harm." On this basis, the RPD concluded that the Applicant was not persecuted.

[11] With respect to the Applicant's claim that his spouse then had to pay a bribe to secure his release, the RPD rejected this evidence in favour of the documentary evidence. According to the 2007 Human Rights Watch Report, it was only in the northern and eastern provinces of the country that the Karuna group and Sri Lankan security forces worked "in tandem" to carry out extortions and abductions; no such cooperation was evident in Colombo. The RPD found that the Applicant

had “embellished the gravity of the treatment he endured, and merely alluded to other situations [of persecution] without presenting any evidence.”

[12] The RPD also found that the Applicant lacked subjective fear. He and his family never used their US visitors’ visas to escape from Sri Lanka. The Applicant was “casual” about allowing his spouse and daughter to return to Sri Lanka from Papua New Guinea. Although he had a good job outside his home country, he re-availed for a visit in 2009 and then requested permission to extend that visit. The RPD found that a “person who is truly in fear for his life would not have returned, especially to a country with a long history of conflict involving Tamil people ….” Moreover, when he did decide to leave Sri Lanka, he chose not to reactivate his visa to Papua New Guinea but instead to seek asylum in Canada. En route to Canada, he passed through the United Kingdom and the US but made a claim in neither country. The RPD concluded that his fear could not have been “so serious” if he had the option of “shopping for where he want[ed] to go.”

The Section 97 Claim

[13] With respect to the section 97 claim, the RPD stated that, “[d]ue to [his] lack of credibility, and the lack of serious harm, and lack of subjective fear,” the Applicant is not a person in need of protection in that his removal would not subject him personally to a risk to life or to cruel or unusual treatment or punishment or to a danger of torture.

[14] With respect to the Applicant’s 19 September 2009 return to Sri Lanka and the police questioning at that time, the RPD noted that, according to the documentary evidence, airport

officials are responsible, *inter alia*, for enforcing custom laws and collecting tariffs, investigating and laying charges in criminal matters, and investigating document malfeasance, human smuggling and trafficking. In light of this, it is "natural, and within their mandate" to question in detail persons returning from abroad.

ISSUES

[15] The Applicant formally raises the following issue:

Did the RPD err in fact, err in law, breach procedural fairness or exceed its jurisdiction in determining that the Applicant was not a Convention refugee?

[16] Based on the Applicant's arguments, I have restated the issues as follows:

a. Whether the RPD erred by ignoring material evidence;

b. Whether the RPD's Decision, overall, was reasonable; and

c. Whether the RPD deprived the Applicant of procedural fairness by failing to conduct a separate analysis under section 97.

STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être

religion, nationality, membership in a particular social group or political opinion,

persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or,

(i) elle ne peut ou, de ce fait,

because of that risk, unwilling to avail themself of the protection of that country,	ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the

reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] The first and second issues concern the RPD's treatment of the evidence and its expertise as a decision-maker in immigration matters. These issues are reviewable on a standard of reasonableness. See *Dunsmuir*, above, at paragraphs 51 and 53; and *Ched v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1338 at paragraph 11.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir,* above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[21] The third issue, procedural fairness, is reviewable on the correctness standard. See *Khosa*, above, at paragraph 43. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process. Rather, it will undertake its own analysis of the question.

ARGUMENTS

The Applicant

[22] The Applicant claims that the RPD's "overarching error" is its failure to deal properly with the claim based on the Karuna group. The RPD refers to it briefly in paragraph 23 of the Decision but never indicates why the Applicant's claim that he fears the Karuna group is rejected. This is a reviewable error. See *Miguel v Canada (Minister of Citizenship and Immigration)*, 2004 FC 94 at paragraph 18.

[23] However, the Applicant also asserts that the RPD's section 97 analysis is deficient. According to the US DOS Report for 2009, the Karuna group is responsible for human rights violations. The Applicant adduced such evidence to support his section 97 risks, and the RPD has a duty to evaluate it and provide an appropriate analysis. See *Anthonimuthu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 141 at paragraphs 51-52. The RPD commented that it would be lawful for airport authorities to question the Applicant should he return to Sri Lanka but, in the Applicant's view, the section 97 analysis must extend beyond what would happen to the Applicant at the airport.

[24] The Applicant's section 97 claim should have been assessed separately from his section 96 claim. Even if the Applicant was found to lack subjective fear, his specific circumstances must be assessed in light of the objective documentary evidence, including the country's human rights record. See *Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 at paragraphs 16-18.

[25] The Applicant also claims that the RPD erred in finding that, although he was beaten by the police during his 2009 detention, he did not suffer "serious harm." The Applicant argues that the RPD must consider his particular circumstances and that, if it had done so, it would have appreciated that it was clear from the record that he was arbitrarily arrested because he is a Tamil. As Justice Yves de Montigny observed in *Thavam Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at paragraph 27, "police forces are never entitled to arrest people in a discriminatory way even during a state of emergency."

[26] With respect to the Applicant's subjective fear of persecution, the RPD ignored important evidence in its assessment of why he made no claim for asylum until he arrived in Canada. First, he was in the UK in transit and for less than one day. It is unreasonable for the RPD to fault him for not claiming there. Second, the Applicant offered a reasonable explanation for why he made no claim in the US: he had been told by friends who had previously been employed at the Sri Lankan embassy that, if he did so, he would be deported back to Sri Lanka. The Applicant argues that, if it is unreasonable to expect him to approach his own government for protection when doing do is futile, then it follows that it is unreasonable to expect him to approach a foreign government when he believes it to be futile. The RPD offers no explanation for why it rejects the Applicant's genuine belief on this point.

[27] Finally, the Applicant contends that the RPD's findings regarding re-availment are unreasonable, given that his escape from Sri Lanka was precipitated by incidents that happened after he returned to Sri Lanka from Papua New Guinea and not before then.

The Respondent

[28] The Respondent argues that the RPD acted reasonably in factoring into its analysis of subjective fear the Applicant's failure to claim refugee protection at the earliest opportunity, his 2009 voluntary reavailment following his two-day detention by Sri Lankan police in 2007 and his subsequent choice to extend that 2009 visit. These actions evidence a lack of genuine fear for his safety.

[29] The Respondent challenges the Applicant's argument that the RPD failed to deal thoroughly with his alleged fear of the Karuna group. The RPD acknowledged the Applicant's allegation that the group threatened him and attempted to extort money from him, but it found that the allegation was inconsistent with documentary evidence indicating that the Karuna group and the Sri Lankan police act "in tandem" to carry out such crimes in the eastern and northern provinces but not in the Applicant's city of residence, Colombo. The RPD simply found the allegation to be not credible.

[30] With respect to the Applicant's claim that he is a person in need of protection, the Respondent submits that there is no absolute obligation on the tribunal to conduct a separate analysis where the section 96 analysis demonstrates that there is no evidence to support the section 97 claim. See *Mahadeva v Canada (Minister of Citizenship and Immigration)*, 2006 FC 415 at paragraph 15. Such was the case here. The RPD found that there was insufficient credible evidence to show that the Karuna group was cooperating with the police and that the Applicant suffered "serious harm" at the hands of the police. In short, in the absence of evidence of personalized risk, a section 97 analysis is unnecessary.

[31] The Applicant claims that the police arrested him because he is of Tamil ethnicity. There is no evidence of this. The evidence suggests, rather, that the police arrested him because they had received reports that he was assisting the LTTE, and his arrest was consistent with the Emergency Regulations. Moreover, the determination as to whether discrimination amounts to persecution is properly left to the RPD. See *Ahmad v Canada (Solicitor General)* (1995), 93 FTR 227, [1995] FCJ No 397 (QL) at paragraphs 3-8, 19-21.

The Applicant's Reply

[32] The Applicant contends that the Decision, while it mentions his fear of the Karuna group, fails to "come to grips" with it. Also, the RPD's credibility findings are not expressed in clear terms. Although the RPD does not find that the Applicant is lying about being targeted by the Karuna group, it dismisses his fear of them as evidence supporting his claim. Similarly, the RPD does not find that the Applicant was not mistreated when he was detained in 2009; rather, it concludes that the Applicant embellished and exaggerated the details of his treatment. These examples demonstrate that the RPD failed to provide clear and unmistakable reasons for rejecting the Applicant's evidence. If the RPD preferred the documentary evidence to the Applicant's evidence, it was duty-bound to state its reasons for so doing. See *Ndoci v Canada (Minister of Citizenship and Immigration)*, 2010 FC 698 at paragraph 26. As it did not, it committed a reviewable error.

The Respondent's Further Memorandum

[33] The RPD found that the Applicant's evidence—particularly with respect to his claim of extortion by the Karuna group—was "vague" and embellished and, in short, insufficient to establish that he suffered "serious harm." The Respondent submits that the RPD was under no obligation to ask him to provide clarifying details; the onus was on the Applicant to adduce all evidence material to his claim. The RPD's expectation that the Applicant would provide some corroboration to support his testimony was reasonable. As Justice Michael Phelan stated in *Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288 at paragraph 7: "The requirement for corroboration is only a matter of common sense."

[34] Further, the RPD's reasons were adequate in that they informed the Applicant of the basis for the Decision and enabled him to decide whether to seek leave for judicial review. The adequacy of the reasons in no way prejudiced the Applicant in either respect.

ANALYSIS

[35] Because of the way this Decision is written it is not easy to assess. Findings and comments are made out of context and necessary connections are not clarified. This leaves the Court to read the Decision as a whole to try and determine if a reviewable error has occurred.

[36] I have considerable difficulty following the logic of some aspects of the Decision. For example, the RPD says, in relation to the Applicant's transit through the UK and the US before

making his claim in Canada, that "if he was really and truly fearful, he would have wanted to seek protection at the first opportunity." Protection from what? I would assume protection from what the Applicant fears in Sri Lanka, which means that being sent back there is something he would want to avoid. The Applicant simply transited the UK on 7 November 2009 and arrived in the US on the same day. He did not seek protection in the US because he was advised that he would be detained and deported back to Sri Lanka. If this is true, or if the Applicant truly believed this (and the RPD does not bother to consider his explanation), then the US is not where he would want to seek protection. No one in their right mind would seek protection in a country that will not, or which they believe will not, protect them. To do so would defeat the whole purpose of the Applicant's leaving Sri Lanka. In fact, if the Applicant believed he would be detained by the US and deported back to Sri Lanka, then his failure to claim in the US supports his subjective fear. The RPD considers none of this. The Applicant's brief transit through the UK and the US is simply held against him in a formulaic and thoughtless way.

[37] In the end, my review of the Decision leads me to conclude that there are reviewable errors on important points and that it should be returned for reconsideration.

[38] It is not possible to tell from the Decision whether the RPD has truly addressed the Applicant's fears regarding the Karuna group. The documentary evidence referred to in paragraph 15 is about collusion between the security forces and the Karuna group. But there was other documentary evidence that was drawn to the RPD's attention by counsel that the Karuna group is kidnapping young Tamil males in Colombo for purposes of extortion and that the Karuna faction are "now a de-facto extension of Sri Lanka's intelligence services…." This evidence supports the

Applicant's narrative and is contrary to the RPD's conclusions based upon documents that were given preference because "the claimant embellished the gravity of the treatment he endured, and merely alluded to other situations without presenting any evidence." It is not possible to comprehend what the RPD means here when it refers to embellishment.

[39] Counsel for the Respondent has ably suggested that the RPD does deal with the Karuna group because, in paragraph 15 of the Decision, it finds that the group does collude with security forces. For reasons given, however, I find that, if the RPD intended to address the Karuna group in this way, then it should have been much clearer on point, it should have addressed the contradictory evidence that was brought to its attention, and it should have explained what it meant by "embellishment" which is relied upon to prefer the documents cited to the Applicant's evidence. See *Canada (Minister of Citizenship and Immigration) v Wahab*, 2006 FC 1554; and *Canada (Minister of Citizenship and Immigration) v Zhang*, 2008 FC 686.

[40] Also, the finding of re-availment on September 19, 2001 fails to take into account that the Applicant fled Sri Lanka as a result of two precipitating incidents that occurred after that date. Subsequent persecution after re-availment does not preclude a person from making a claim for refugee status without being faced with the re-availment argument. See *Prapahavan v Canada (Minister of Citizenship and Immigration)* 2001 FCT 272 at paragraph 17.

[41] Because the RPD failed to clearly address the Karuna issue as set above, it also neglected to conduct a proper section 97 analysis. The RPD's section 97 analysis, in effect, stops at the airport. It does not assess section 97 risks from the perspective of whether the Applicant faces death or torture

from the Karuna faction after he leaves the airport. This means that there is no clear finding that the Karuna group can be left out of account and a fundamental aspect of the claim is not assessed. See *Gebremaskel v Canada (Minister of Citizenship and Immigration)*, 2007 FC 341 at paragraph 8.

[42] As pointed out above, I find the RPD's use of the Applicant's brief transit through the UK and the US unreasonable. There is no acknowledgment or assessment of the reasons the Applicant gave for his belief that if he tried to claim in the US he would simply be detained and deported back to Sri Lanka. The source of this information means that the Applicant's belief had a reasonable basis. See *Gurung v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1097.

[43] There are other aspects of the Decision that are problematic but I think these major points are sufficient to render it unreasonable.

[44] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"
Judge

<u>**FEDERAL COURT**</u>

<u>**SOLICITORS OF RECORD**</u>

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<u>APPEARANCES</u>:

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