

Federal Court



Cour fédérale

Date: 20120113

Docket: IMM-7518-10

Citation: 2012 FC 47

Ottawa, Ontario, January 13, 2012

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

JANAKAN SIVALINGAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Janakan Sivalingam [the Applicant] is a young Tamil male from Sri Lanka who seeks judicial review pursuant to subsection 72((1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated November 19, 2010, wherein the Board determined that the Applicant is not a Convention refugee or person in need of protection [the Decision].

[2] For the reasons given below, this application for judicial review has been dismissed.

BACKGROUND

[3] The Applicant fears persecution because, on May 31, 2006, he was detained and interrogated by the Sri Lankan Army [SLA]. He was asked about the Liberation Tigers of Tamil Eelam [LTTE] but was never suspected of involvement with that organization. However, during questioning, he was stripped, hit in the stomach and pushed against a wall. He was released later the same day after his parents came to the camp but the SLA kept his identity card. When he asked for the return of his card, he was slapped. However, the card was returned one week later.

[4] At the end of 2006, the Applicant, his family and many others in his community were taken from their homes to the local temple where they were photographed by the SLA and released.

[5] The Applicant's family lived near a SLA camp and moved their home to another location in Jaffna to avoid the SLA. The Applicant moved to Columbo in March 2007 accompanied by a friend [the Friend].

[6] In August 2007, the Applicant was robbed by a Tamil speaking man and in September of that year his Friend was shot by government troops in Columbo. However, the Applicant did not witness the shooting. He fled to Malaysia in November 2007 and stayed there for almost two years. He did not make a refugee claim there because he overstayed his visitor's visa and feared deportation. He came to Canada on April 18, 2009 and claimed on arrival.

[7] One month later, in May 2009, the LTTE was defeated in Sri Lanka.

THE PREHEARING NOTICE

[8] The Applicant's hearing before the Board was scheduled for September 13, 2010. Six days before the hearing, the Board notified the Applicant's counsel that, in addition to the issues which had been identified one year earlier, it would also be considering changed circumstances and compelling reasons [the Short Notice].

THE DECISION

[9] The Board determined that the Applicant's fear of persecution was no longer well-founded because of the changed conditions in Sri Lanka.

[10] The Board began by summarizing the recent history. It described the prolonged civil war and the persecution of young Tamil men. The Board then turned to the evidence in the National Documentation Package about conditions in Sri Lanka since the end of the civil war. The Board acknowledged that there is still risk to persons suspected of having links to the LTTE, but found that conditions have improved for the rest of the Tamil population. The Board also noted that, although the human rights situation is improving, there is still much room for improvement in Sri Lanka's treatment of the Tamil minority. The Board noted that the United Nations High Commissioner for Refugees [UNHCR] had amended its guidelines [the Guidelines] so that they no longer recommend

that all Sri Lankan Tamils be presumed to be refugees. As well, the Guidelines do not list young male Tamils as one of the groups which the UNHCR recommends for ongoing protection.

[11] The Board noted that the Applicant never claimed that he was ever suspected of having links to the LTTE and found, based on his quick release from detention, that there was no such suspicion. As well, based on the evidence in the National Documentation Package, the Board rejected the Applicant's argument that there had not been any durable change to the conditions in Sri Lanka.

[12] The Board also concluded that the Applicant was not a person in need of protection because any risk of extortion or other harm was generalized and not personalized.

[13] Finally, the Board considered whether there were compelling reasons not to return him to Sri Lanka even though he no longer has a well-founded fear of persecution and reached a negative conclusion noting that "[a]ll persecution by definition involves physical or mental harm or other penalties. What the claimant suffered is not extraordinary or so exceptional that in the wake of changed circumstances, it would be wrong to return him to Sri Lanka".

THE ISSUES

[14] The Applicant says that:

1. The Board failed to proceed fairly when it gave the Short Notice.
2. The Board erred in law when it undertook a selective review of the evidence about changes in country conditions and failed to mention crucial evidence.

3. The Board erred when it failed to conclude that there were compelling reasons.
4. His counsel was so incompetent that there was a failure of natural justice because he was effectively denied representation.
5. The Board's decision to treat this as a persuasive decision should be set aside as a breach of procedural fairness because he was not given prior notice of the Board's intention to make the designation.

Issue 1 – The Short Notice

[15] The Board is the master of its own procedure and, in my view, it is entitled to give late notice of issues as long as such notice does not cause prejudice. I assume, given the Short Notice, that the Board would have granted the Applicant an adjournment had one been requested. However, no such request was made. In my view, this is not surprising since the LTTE's defeat had been well publicized. I think it is reasonable to infer that counsel knew that changed country conditions would be an important issue long before the Board sent the Short Notice.

Issue 2 – Was Crucial Evidence Overlooked?

[16] In July 2009, the UNHCR issued a document entitled "Note on the Applicability of the 2009 Sri Lanka Guidelines" [the Note]. Those guidelines were issued in April 2009 just before the defeat of the LTTE in May of that year. The Note said that notwithstanding the end of hostilities, Tamil men and women of all ages from northern Sri Lanka should be recognized as refugees absent clear

evidence that they do not meet the criteria. The Note, which was part of the certified Tribunal record, concluded with the following statement:

Future Revisions

When it can be determined that substantial and durable changes have clearly emerged in the country, UNHCR will undertake a thorough review of the situation in Sri Lanka, and will update the Guidelines. Until such time, the April 2009 Guidelines will continue to be considered valid and applicable.

[17] Further to the Note, the guidelines were updated and issued on July 5, 2010 [the New Guidelines]. This meant that the UNHCR had decided that substantial and durable changes had taken place.

[18] In reaching its Decision, the Board relied primarily on the New Guidelines which removed the presumption of eligibility for refugee status for all Tamils from the North, including young Tamil males, and profiled five categories of Tamils who were still at risk. The Applicant did not fall within any of the categories.

[19] The New Guidelines showed that the Applicant - who in fact had no links to the LTTE and who had never been perceived to have such links - was not a person who, at the time of the hearing before the Board, was presumed to be at risk.

[20] In my view, the Board was entitled to rely on this document and was only obliged to refer to other materials if they (i) presented a timely and reliable alternative view of the risks faced by young Tamil males in 2010 or (ii) presented cogent evidence that hostilities or systemic human rights

abuses would resume in the near term. The following review of the documents at issue shows that, contrary to the Applicant's submission, they do not meet this test.

[21] The first such document is entitled "Sri Lanka – a bitter peace" and was issued by the International Crisis Group on January 11, 2010. It showed that by the end of 2009, most of the Tamils who had been displaced and interned had returned home and those that remained in camps had greater freedom. The article expressed the view that at the end of 2009, the victory over the Tamils and the resulting peace was fragile and would remain so until reforms of the kind it recommended addressed the many grievances of the Tamil people and other Sri Lankans. However, the report concluded that it was "unlikely" that any successor to the LTTE as a Tamil militant group would emerge in the near term.

[22] This, in my view, meant that there was no risk of renewed civil war. Since this did not contradict the UNHCR's New Guidelines it was not, in my view, necessary for the Board to refer to it on the issue of changed country conditions.

[23] The Applicant also said that, although it mentioned the document, the Board ignored important information in the US Department of State Report on Human Rights practices in 2009 in Sri Lanka. It was dated March 11, 2010 but it spoke of the situation during the conflict both inside and beyond the conflict zone and confirmed that young male Tamils were at particular risk. However, in my view, the findings in this report were out of date by the time the Board heard the Applicant's refugee claim. In those circumstances, the Board was not required to refer to it in detail.

[24] The United Kingdom's Home Office Country of Origin Information Report on Sri Lanka dated February 18, 2010 was also cited by the Board. It spoke of serious human rights violations, and general lawlessness in the form of extortion and widespread theft. However, it did not address the durability of the peace or the risk faced by young Tamil males. In these circumstances, the Board's failure to refer to it was not unreasonable.

[25] An earlier report prepared by the United Kingdom Home Office in August 2009 noted that young Tamil males from the north faced discrimination and profiling and were often suspected of being members of the LTTE. However, in my view, this report was also out of date by the time of the Applicant's refugee hearing. Accordingly, it was reasonable that it was not mentioned in the Decision.

[26] A final report cited was a BBC article dated February 1, 2010 entitled "Fear and Anxiety in Battered Tamil City" which noted that approximately 80,000 Tamils were still displaced and in camps in the north and that 40,000 troops were still present on the Jaffna peninsula. However, it did not suggest that human rights abuses were occurring or that there was a risk of renewed civil war. In these circumstances, it was reasonable for the Board not to mention it in the Decision.

Issue 3 – Compelling Circumstances

[27] It is very unfortunate that the Applicant was abused during his brief detention and it is also very sad that his Friend was killed in Colombo but, in my view, this evidence was not sufficient to

support a conclusion by the Board that there were compelling reasons why the Applicant should not be returned to Sri Lanka even if his applications for refugee status and protection were dismissed.

Issue 4 – Competence of Counsel

[28] The Applicant submits that his counsel at the hearing was incompetent because he:

- (i) Failed to seek an adjournment when he received the Short Notice;
- (ii) Failed to file documents on current country conditions to update the Board's National Document Package which was current to August 13, 2010;
- (iii) Failed to submit translations of the documents his client provided showing extortion of Tamils in Jaffna;
- (iv) Failed to have a psychological report prepared in an effort to support submissions on compelling reasons;
- (v) Failed to prepare his client to testify about changed country conditions and compelling reasons and failed to explain the significance of those issues.

[29] The Applicant cites the decision of the Supreme Court in *R v B (GD)*, 2000 SCC 22, [2000] 1 SCR 520, which set out a two-step test for determining whether counsel is competent. First, the party must demonstrate that the service provided fell short of what he or she could reasonably expect from competent counsel. Second, the party must demonstrate a miscarriage of justice as a result of this incompetence.

[30] This Court is not in a position to reach a detailed conclusion about the adequacy of the service provided by the Applicant's counsel. However, I have no reason to conclude that there was a miscarriage of justice. The Decision appears to have been based on the following facts:

- (i) The Applicant was never actually or perceived to be involved with the LTTE;
- (ii) The evidence did not support a finding of compelling circumstances; and
- (iii) There was compelling and timely evidence in the form of the New Guidelines which showed that a durable change had occurred in country conditions.

[31] The Applicant has not shown that the Board erred or that there was material evidence on these issues which his counsel failed to adduce. Accordingly, the incompetence of counsel is not a basis for granting this application.

Issue 5 – Procedural Fairness

[32] It is my view that the Applicant has no standing to question the Board's decision to designate the Decision in this case as one that is persuasive for its own internal administrative purposes. Accordingly, the Applicant was not entitled to receive notice of the Board's intention to make the designation.

CERTIFIED QUESTION

[33] No question was posed for certification under section 74 of the Act.

JUDGMENT

THIS COURT’S JUDGMENT is that, for the reasons given above, this application for judicial review is hereby dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7518-10

STYLE OF CAUSE: JANAKAN SIVALINGAM v MCI

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR JUDGMENT: SIMPSON J.

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APPEARANCES:

Jacqueline Swaisland

FOR THE APPLICANT

Jaime Todd

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman
Toronto, Ontario

FOR THE APPLICANT

Myles J, Kirvan
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT