Federal Court  Cour fédérale

Date: 20120222

Docket: IMM-4203-11

Citation: 2012 FC 241

Ottawa, Ontario, February 22, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

SELVARATNAM VEERASINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated May 20, 2011. The Board determined that the Applicant, Selvaratnam Veerasingam, was not a Convention refugee or person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons set out below, this application is dismissed.

I. Facts

[3] The Applicant is a Tamil citizen of Sri Lanka. He brought a refugee claim in Canada based on a fear of the Sri Lankan army and Tamil militant groups. He alleged having been detained on many occasions between 1980 and 2009.

[4] More specifically, he claimed that Sri Lankan soldiers detained him for one and a half months in October 2008 until he was released as a result of a friend paying a bribe. He also alleged that he was told to leave the country as the soldiers reported that he had escaped.

[5] He left Sri Lanka in April 2009 and traveled through Malaysia, Africa and Europe (notably Switzerland) before arriving in Canada in May of the same year. He was 59 years old at the time of his refugee hearing.

II. Decision Under Review

[6] The Board found that the Applicant was not a Convention refugee due in part to a lack of credible testimony and failure to provide proof corroborating the alleged incidents.

[7] Commenting on the credibility of the Applicant's testimony, the decision states:

> The Tribunal found the claimant's testimony throughout the hearing to be protracted and evasive. It was extremely difficult to extract

> information. He was asked but never made it clear how, when and/or how many times exactly he was arrested or detained, over the thirty year time frame. Nor did he credibly convey that he was in fear for his life, nor why it was that he allegedly feared all of those years, yet only chose to leave Sri Lanka at the age of 59.
>
> The claimant would frequently answer questions that were not what was being asked. The Tribunal checked at the outset and the claimant confirmed that he fully understood the interpreter. During the hearing the Tribunal reconfirmed with the claimant and the interpreter to ensure that there were no communication issues.

[8] The Board found that the Applicant had failed to credibly demonstrate that anyone from a militant group was after him or that he had suffered injuries. Surprise documents produced in the middle of the hearing were found to be of questionable probative value.

[9] The Applicant was also faulted for the delay in leaving Sri Lanka and making a refugee claim. It was noted that despite claims he was "in fear for his life for many years and alleged detention, he indicated that following payment of a bribe to secure his release in December 2008, he was told to simply leave the country" but had provided "no explanation as to why."

[10] Given his lack of credibility and change in circumstances in Sri Lanka, the Board did not believe he was persecuted. It also concluded that no one was looking for him. He had not established that it was not more likely than not that he was at risk if returned to his country of origin.

III. Issues

[11] The issue raised by the Applicant is whether the Board committed a reviewable error in assessing his claim.

IV. Standard of Review

[12] The Board's findings of fact and credibility are to be reviewed on a standard of reasonableness (see *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] FCJ no 732 at para 14). This is consistent with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2009] 1 SCR 190 at para 53 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 45.

[13] Applying the reasonableness standard as prescribed by *Dunsmuir*, above at para 47, this Court must be "concerned mostly with the existence of justification, transparency and intelligibility with in the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[14] By contrast, questions of law demand the correctness standard (*Dunsmuir*, above at para 50).

V. Analysis

[15] While the Applicant acknowledges that the Board's findings are reasonable for the most part, he submits that an error resulted in failing to discuss why he would not be at risk as a returning, failed refugee claimant. He points to evidence submitted and referred to at paragraph 19 of the Board's decision of "articles submitted by the claimant's counsel regarding the treatment of Tamils in Sri Lanka, specifically returned asylum seekers." According to the Applicant, failed refugee claimants who are targeted would be a member of a particular social group and this should have been addressed by the Board.

[16] The Respondent contends that the Board addresses this matter when its reasons are read in context. Given the reference to related material submitted by counsel, it cannot be said that the Board ignored this evidence. In that same paragraph, the Board also concluded that "[f]urther still, the claimant failed to credibly, convey to the Tribunal, that subsequent to his release, he was, is or would be sought after by anyone for any reason in Sri Lanka." This can be seen as a finding on the issue and the Applicant is simply challenging the weighing of the evidence.

[17] The Applicant refers the Court to the decision of *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519, [2011] FCJ no 650 at para 104 where it was acknowledged that "in general, a negative credibility finding (if reasonable and made with regard to the evidence) will mean that the decision maker does not have to look further into the claim" but "if the claimant puts forward facts that raise an additional ground of persecution, that part of the

claim still needs to be assessed, unless the visa officer clearly finds that part of the claim to also lack credibility."

[18] The error arose in *Ghirmatsion*, above because the Board never considered the additional ground of persecution. However, I am not convinced that this also occurred in the present case.

[19] As the Respondent highlights, the Board stated in its reasons that it considered the Applicant's evidence regarding the treatment of Tamils who were returned asylum seekers in Sri Lanka and based on this evidence the Board found that the Applicant would not be "sought after by anyone for any reason"

[20] In his reply, the Applicant appears to characterize the issue as one of adequacy of reasons on the risk associated with him returning as a failed refugee claimant. He relies on the decision of *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, [2010] FCJ no 809 to suggest that the Board did not explain the basis for its decision.

[21] Referring to the Supreme Court's recent elaboration on the requirement of reasons in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ no 62 at para 18, the respondent notes the quoted passage that "[r]easons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process." Considering that the determinative issue was credibility and a failure to establish a personal risk of harm, it was not unreasonable to consider the evidence of risk

to failed asylum seekers and determine that the Applicant would not be sought after by anyone for any reason in Sri Lanka.

[22] I am prepared to agree with the Respondent's position. In light of serious credibility concerns, the Board's decision accords with the principles of justification, transparency and intelligibility. Although the evidence on this issue was dealt with briefly, it was considered.

[23] The Board reasonably weighed that evidence and reached a broader conclusion that the Applicant had failed to establish risks he would face if returned to Sri Lanka.

[24] As a secondary argument, the Applicant suggests that the Board erred in referring to the burden of proof under subsection 97(1)(b). He takes issue with the wording at paragraph 26 of the decision that the Board "does not believe that it is more likely than not that the claimant would be personally targeted for any reason were he to return to Sri Lanka" when the burden is to show a risk of mistreatment on a balance of probabilities.

[25] With respect, there is no merit to this distinction. The Federal Court of Appeal clarified in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] FCJ no 1 at paras 29 that the term "balance of probabilities" was equivalent to "more likely than not", but with two distinct steps involved as to the burden of proof and legal test. In assessing risk specifically under subsection 97(1)(b), the question, as discussed at para 38 of *Li*, is whether "it is more likely than not that the individual would be subjected, personally, to a risk to his life or to a risk of cruel and unusual treatment or punishment if the person was returned to his country of nationality."

[26] In my view, the wording referred to by the Applicant and the Board's overall assessment of risk is consistent with that approach. Even the Applicant recognizes that the correct test is referred to at other points in the decision.

[27] Indeed, the Board made clear that one of the determinative issues was the "personal risk of harm for the claimant were he to return to Sri Lanka today." There would need to be persuasive evidence of that risk "on a balance of probabilities" or to show that it was "more likely than not." The Board uses this terminology throughout its decision.

[28] The Applicant's reliance on *Kedelashvili v Canada (Minister of Citizenship and Immigration)*, 2010 FC 465, [2010] FCJ no 547 at paras 8-9 is misplaced. In that instance, Justice Judith Snider's concern was not in relation to the burden of proof on a "balance of probabilities" per se but that the Board only considered whether the applicant would not face any torture or cruel and unusual treatment. She found the Board erred by failing to instead refer to the "risk of" torture or cruel and unusual treatment as consistent with its mandate under section 97.

[29] Similar concerns do not arise in the present case. As demonstrated, the Board was mindful of its role in considering the evidence of "risk" to the Applicant on a balance of probabilities. I must therefore agree with the Respondent that there was no error in referring to the Applicant's burden of proof under subsection 97(1)(b) throughout the decision and making reference to the test that risk be "more likely than not."

VI. Conclusion

[30] The Applicant has failed to demonstrate that the Board erred in its assessment of his claim of the risk facing a failed refugee claimant and the burden of proof under subsection 97(1)(b) to justify the intervention of this Court. As a consequence, I must dismiss his application for judicial review

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-4203-11**
STYLE OF CAUSE:	**VEERASINGAM v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**JANUARY 26, 2012**
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APPEARANCES:

Michael Crane	FOR THE APPLICANT
Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Crane Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT