

Federal Court



Cour fédérale

**Date: 20120614**

**Docket: IMM-6072-11**

**Citation: 2012 FC 752**

**Ottawa, Ontario, June 14, 2012**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**THINESH NADARASA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] The Applicant, a citizen of Sri Lanka, claimed under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. His claim was based on a fear of persecution due to his ethnicity as a Tamil male from the north and perceived support of the Liberation Tigers of Tamil Eelam [LTTE]. The Immigration and Refugee Board [Board] denied his

claim on grounds of credibility and changed circumstances. This is the judicial review of that Board decision.

[2] The Court, in granting this judicial review, is concerned that a part of the claim that was briefly asserted, namely, that the Applicant also feared persecution as a failed refugee claimant, was not addressed by the Board. While the issue of failed refugee claimant touches both the credibility finding and the conclusion on changed circumstances, the treatment of it stands on a separate legal basis.

## II. BACKGROUND

[3] The Applicant cited numerous examples occurring over the period 2004-2010 where he was stopped by the army, harassed and threatened. He also claimed to have been detained and to have been beaten at various times. Many of the instances of detention were solved by the payment of bribes.

[4] On January 7, 2010, the Applicant left Sri Lanka and after a four-month detention in the US, where at least legal assistance was available to him if he wanted to seek asylum, he arrived in Canada at the beginning of October 2010. He never claimed asylum in the US.

[5] The Board reached its conclusions on the merits of the claim because of negative credibility findings. The Board did not accept that the detentions were anything more than brief and noted that the Applicant was released either with a warning to stay away from the LTTE or upon the payment

of a bribe. The fact that the Applicant was released in all instances led the Board to conclude that there was no warrant for his arrest and that he was not on any government security watch list.

[6] The Board did not believe the Applicant's story that members of a Tamil paramilitary group went to his parents' home looking for him after he had left the country. The conclusion was grounded on the basis that this group had access to police data bases which would have recorded his departure from Sri Lanka. Therefore, so the reasoning went, the paramilitary group would have known that the Applicant had left the country. The Board viewed this story as an attempt by the Applicant to embellish his claim.

[7] With respect to the failure to claim in the US, the Board concluded that if the Applicant had a genuine fear about returning to Sri Lanka, he would have taken the opportunity to claim in the US where he was in immigration custody with resources available to him. This failure spoke to the well-foundedness of his fear.

[8] The Board further held that even if credibility was not the determinative issue, the changed circumstances in Sri Lanka would be. The Board reviewed the legislation and jurisprudence governing changed circumstances in the refugee claims context.

[9] The Board relied heavily on the November 11, 2010 UK Border Agency Report because it is the most recent report, by an independent body, and based on a vast number of external sources. While recognizing some recent negative reports related to Tamils, the Board held that on the balance of probabilities, the situation for Tamils in Sri Lanka had improved significantly in the last

two years. The Board concluded that there was less than a serious chance of persecution based on the Applicant's ethnicity.

[10] The Board held that if there was risk of extortion and robbery of people viewed as wealthy (which category could include the Applicant), this was a generalized and prevalent risk faced by the population at large. As such, it was a risk which was excluded by paragraph 97(1)(b).

[11] The Board did not address the Applicant's claim that he faced a risk of persecution because he was a failed refugee claimant. His counsel had submitted documents, referred to two of them and had briefly argued the point.

### III. ANALYSIS

#### A. *Issues*

[12] The issues in this judicial review are:

- 1) Did the Board err in its negative credibility determination?
- 2) Did the Board err in failing to consider the "failed refugee claimant grounds of persecution"?

[13] The Applicant did not challenge the Board's finding of "changed circumstances". In the normal course, the changed circumstances finding would be dispositive; however, in this case, the Board failed to address the failed refugee claimant issue.

#### B. *Standard of Review*

[14] It is well settled law that the decisions of the Board on credibility and implausibility are largely factual in nature and deserving of a significant amount of deference. The standard of review is reasonableness (see, for example, *Cekim v Canada (Minister of Citizenship and Immigration)*, 2011 FC 177 at para 6 (available on CanLII)).

[15] With respect to the second issue, the failure to consider relevant grounds of persecution is a question of law and must be assessed on the standard of correctness (*Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at para 49, 389 FTR 165; *Solodovnikov v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1225 at para 10, 41 Imm LR (3d) 259; *Singh v Canada (Secretary of State)* (1994), 80 FTR 132, [1994] FCJ No 931 (QL) at para 14).

### C. *Credibility*

[16] Given the result in this judicial review, the Court will refrain from a complete analysis of the first issue regarding credibility. It does not affect the Court's conclusion on the second issue which issue is a matter of law.

[17] It is sufficient to say that where credibility is based on implausibility, as is the case here, the implausibility findings must be reasonably drawn and must be set out in "clear and unmistakable terms" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 (available on CanLII)). In *Gjelaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 37 at para 4 (available on CanLII), the requirement was described as the Board providing "a reliable and verifiable evidentiary base against which the plausibility of the Applicant's evidence might be judged".

[18] It is of concern that the Board cited no evidentiary references for the finding that the paramilitary group had access to police data bases or for whether such data bases, if viewed by the paramilitary group, had information about who had left the country or for whether such paramilitary groups would, in fact, check the police data bases.

[19] Even if the Applicant failed in the credibility challenge which was based on his fear of persecution due to ethnicity, the failure to address the question of his fear based on being a failed refugee claimant remained open.

D. *Failed Refugee Claimant*

[20] The legal issue of the right to have one's grounds for refugee/protection considered transcends the unchallenged finding of changed circumstances. The finding of changed circumstances does not dispose of or render moot the claim of fear based on being a failed refugee claimant.

[21] In the present case, while this issue was not the primary ground of the Applicant's claim for protection, the issue was raised by counsel in brief submissions:

There are several articles that I will refer to in my package at C-2; the first one is at page one where it talks about the fact that returning asylum seekers going back to Sri Lanka are all handed over to the CID and Sri Lankan police and many of them are detained and are abused during these detentions. The fact that these people coming from abroad are arrested and abused by the authorities was also confirmed by an Amnesty article at page six which refers to several of the people that have been returned from Australia and how they have been badly abused upon their return.

[22] While counsel said that he would refer to several articles, he notes two in particular which refer to the situation of returning failed asylum seekers and the mistreatment they experienced.

[23] This evidence must also be considered in the context of the finding of changed circumstances and in particular, the finding that there are still problems affecting Tamils.

[24] While Courts are not to engage in microscopic examinations of the Board's record and the reasonableness of a decision should be based on the whole of the decision, every applicant has a legal right to have the asserted grounds for a claim considered, if sufficiently raised.

[25] As held by Justice Snider in *Ghirmatsion*, above, even the failure to explain why a ground of persecution was not assessed constitutes a reviewable error. Whether this was because it made the decision unreasonable or whether it was an error of law was immaterial in that case.

[26] I conclude that it is an error of law as both a denial of natural justice/breach of fairness as well as one of jurisdiction as in not exercising jurisdiction, to fail to address an issue of persecution that was reasonably clearly raised.

[27] With respect, I would distinguish the decision in *Paramanathan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 338 (available on CanLII), on the basis that there the secondary grounds of risk were not sufficiently raised to establish the obligation on the Board to address the issue. In the present case, that further ground was sufficiently raised to trigger the obligation on the Board to address it.

[28] The Board, having failed to address the failed refugee claimant issue, erred in law and the decision cannot stand.

IV. CONCLUSION

[29] Therefore, this judicial review will be granted and the matter returned to the Board for a new determination by a differently constituted panel.



**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is granted and the matter is returned to the Board for a new determination by a differently constituted panel.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6072-11

**STYLE OF CAUSE:** THINESH NADARASA

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 19, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Phelan J.

**DATED:** June 14, 2012

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