

Federal Court



Cour fédérale

Date: 20120710

Docket: IMM-8259-11

Citation: 2012 FC 867

Ottawa, Ontario, July 9, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MOHAMED BISMIL NAGEEM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated October 19, 2011, which found that the applicant was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow the application is dismissed.

Facts

[2] The applicant, Mohamed Bilsim Nageen, is a citizen of Sri Lanka, who worked at a bank in Colombo. He stated that he is a Tamil Muslim: his father is a Muslim and his mother and most of his relatives Tamil. He states that his was the only Tamil house in the area and when Tamil family members visited the army would question the applicant's parents about providing accommodation to family members. Sometimes, the police would take them to the police station to be questioned.

[3] On April 28, 2007, the army from the nearby camp came to the applicant's home to question him and his family about the Liberation Tigers of Tamil Eelam (LTTE) air force bombing of an oil storage tank near their home. Soldiers took the applicant to their camp and questioned him about his connections to the LTTE and beat him. He was released with a warning.

[4] The army and the police came to the applicant's home many times after this incident to question him. He was taken to the army camp again for questioning and they threatened that he would suffer severe consequences if they came across any information that he supported the LTTE.

[5] On February 21, 2009, the LTTE air force bombed Colombo. The applicant states that he was arrested, beaten and accused of collecting information for the LTTE in Colombo. The applicant's father paid the authorities for his release.

[6] In late February 2009, members of the Karuna group, a para-military group which worked with the police and the army, came to the applicant's father's restaurant and questioned the applicant about who were the richest Tamil and Muslim bank clients and asked him to provide

details of their accounts. The applicant refused and they left. In April 2009, the Karuna group returned and demanded bank information from the applicant again. He refused and they threatened him and told him they knew how to get such information.

[7] The applicant arranged for an agent to help him leave Sri Lanka on May 29, 2009. He arrived in Canada on June 21, 2010 after traveling through several other countries and he made a claim for refugee protection, claiming fear of the army, the police and the Karuna group.

Decision under Review

[8] The Board noted that the applicant identified his race as Tamil, but his birth certificate lists the race of his mother and father as Sri Lankan Moors. The Board therefore found that he was a Tamil-speaking Moor, and also found that credibility was an issue because of the inconsistent evidence about his race and personal background.

[9] The Board found that the applicant's fear of the Karuna had no nexus to a Convention ground as the applicant's evidence was that the individuals that approached him to obtain bank information were criminals seeking to enrich themselves, and did not target him for reasons of any Convention ground. The Board further found that the risk feared by the applicant from the Karuna was generalized and therefore he was not a person in need of protection under section 97(1) of the *IRPA*. The Board found that while some individuals may be targeted more frequently for their wealth, business ownership or some other reason, the risk of crime or extortion in Sri Lanka is generalized.

[10] The Board found it implausible that the authorities would only visit the applicant's family's home following the LTTE bombings. The Board also found that, if the applicant returned, the Karuna would no longer have an interest in him because he was no longer employed with the bank. The applicant testified that his family is not harassed by the Karuna, the police or the army, though questions are posed about the applicant. The applicant also failed to explain why he did not alert the bank about the Karuna's attempts at extorting confidential information from him. The Board also found that the applicant's ability to leave Sri Lanka easily with the help of alleged bribes showed that he was not a person of interest to the government at that time and would not be one in the future.

[11] The Board noted several credibility problems in addition to the issue regarding the applicant's race. The applicant stated in his Personal Information Form (PIF) that he was detained *following* the bombing on April 28, 2007, while the Immigration notes state that he was detained because the army *expected* an attack in that area. His explanation for this inconsistency is that he provided this information when he was detained in the United States. The Board rejected this explanation.

[12] Also, the applicant stated in his PIF that his Tamil relatives often visited the family home, but he testified that his family lost connection with their relatives for many years due to his mother marrying a Muslim, although he was still invited to a Tamil relative's wedding in Singapore in 2007. Furthermore, the applicant used his own genuine passport to leave Sri Lanka, but was no longer in possession of it when he reached Canada. He allegedly requested a photocopy of his

passport, but threw it away because it only consisted of the first page. The applicant failed to provide a satisfactory explanation for not keeping the copy.

[13] The applicant's refugee claim was therefore refused.

Standard of Review/Issue

[14] There are three discrete grounds on which it is said that this application should succeed. The first arises from the Board's appreciation of the evidence, for which the standard of review is reasonableness. The second and third issues, whether the Board applied the correct evidentiary and legal burdens applicable to claims under section 96 and section 97 of the *IRPA*, and whether it gave notice to the applicant that his ethnicity could be an issue, are assessed against the correctness standard.

Analysis

[15] I find that the Board's conclusion that the applicant is neither a Convention refugee nor a person in need of protection is reasonable and the application must be dismissed. The applicant's arguments are contrary to the instruction of the Court of Appeal not to read decisions overly microscopically; *Medina v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 926 (CA). When read as a whole, the decision is justified and intelligible and should be upheld. I also am satisfied that the Board identified the correct legal test and applied it appropriately.

[16] The applicant alleged that he was at risk of persecution by the Karuna, the police and the Sri Lankan army. The Board's decision considered and rejected these allegations, based on the following findings:

1. The applicant was not a person of interest to the Sri Lankan authorities, since he was released without conditions after being questioned about the 2007 bombing, and he was able to leave the country using his own passport at a crucial time during the civil war;
2. The applicant had several credibility problems, undermining his claim that he was suspected of having LTTE links by the authorities; and
3. The risk the applicant feared from the Karuna had no nexus to a Convention ground and was a generalized risk of crime and extortion. The Board found that the Karuna would not target the applicant in the future because he no longer had the position at the bank and therefore any prospective risk he faced was the same risk faced generally by citizens in Sri Lanka.

[17] The applicant takes issue with the Board's failure to specifically mention a February 2009 incident in which the applicant was detained, beaten by police and accused of helping the LTTE. However, in my view, the applicant's testimony about the risk he faced due to perceived LTTE links was rejected by the Board due to the several credibility concerns raised, and therefore the omission of this particular allegation does not render the conclusion unreasonable.

[18] The applicant also argues the Board made erroneous findings of fact: specifically, that the applicant was not Tamil and that the Karuna are "common criminals" or ex-paramilitaries. The applicant submits there was no evidence to support these findings. However, these findings were reasonably open to the Board and, in any event, in light of the credibility concerns, not dispositive or material to the ultimate legal analysis.

[19] The second issue to be assessed against a correctness standard is whether the applicant had notice that his ethnicity as a Tamil Moor was in issue and, in particular, that the Board could make credibility findings in respect of his evidence in this regard.

[20] This argument is not supported by the evidence. The record of proceeding indicates that the question of his ethnicity was raised on at least three occasions; in discussing the applicant's PIF, his parents' marriage certificate and his birth certificate.

[21] The applicant further contends that there was in fact evidence before the Board which conflicted with its finding as to the applicant's ethnicity. The applicant notes that on entry into the United States he told American immigration officials that he was a Tamil. This evidence was not considered by the Board.

[22] The fact that the applicant may have repeated the same evidence on a prior occasion does not make it corroborative, or true. It may be consistent evidence, but it does not explain the inconsistent evidence. Nor could the Board reasonably be expected to insulate this issue from its concerns arising from the explanation proffered to explain the disappearance of his passport. In sum, notwithstanding the fact that the Board did not address this specific point in the applicant's testimony, the conclusion as to the applicant's credibility was reasonably open to it having regard to the evidence before it.

[23] The applicant also submits that the Board applied the wrong legal tests under section 96 and section 97.

[24] The standard of proof, or the evidentiary burden as it is sometimes referred to, in assessing the danger and risk described in paragraphs 96 and 97(1)(a) and (b) is proof on a balance of probabilities. This is the standard of proof to be applied by the Board in assessing the evidence before it. That evidence, once established on a balance of probabilities, is then assessed against the applicable legal tests for persecution under section 96 and torture under section 97.

[25] In so far as section 96 and a claim of persecution is concerned, the Board assessed the evidence against the correct standard, namely, whether it establishes a reasonable chance, or more than a mere possibility, that the applicant faces a prospective risk of persecution; *Florea v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1472 at para 24.

[26] With respect to section 97(1)(a), the point is neatly made by Rothstein JA in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 29:

It is immediately apparent that the words used to describe the standard of proof - balance of probabilities - are equivalent to the words used to describe the legal test to be met in order to be entitled to protection under paragraph 97(1)(a) - more likely than not. Although the words are equivalent, there are two distinct steps involved. Proof on a balance of probabilities is the standard of proof the panel will apply in assessing the evidence adduced before it for purposes of making its factual findings. The test for determining the danger of torture is whether, on the facts found by the panel, the panel is satisfied that it is more likely than not that the individual would personally be subjected to a danger of torture.

[27] The Board identified and correctly applied these tests. The Board considered the evidence against a balance of probabilities and held it up against the legal test of whether there was more than a “mere possibility” of persecution. With respect to the section 97 claim it concluded that there was

insufficient credible or trustworthy evidence that *it was more likely than not* that he could be subject to cruel and unusual punishment or a danger of torture. The use of the word “would” to describe the risk does not indicate a misunderstanding of the appropriate legal test, conditioned as it was by the reference to the correct statement of the test in the same, and adjacent, sentences: *Sivagurunathan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 432 at paras 4-5.

[28] I cannot find any error in the decision to warrant setting it aside therefore, the judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8259-11

STYLE OF CAUSE: **MOHAMED BISMIL NAGEEM v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION**

PLACE OF HEARING: Toronto

DATE OF HEARING: July 3, 2012

REASONS FOR JUDGMENT: RENNIE J.

DATED: July 10, 2012

APPEARANCES:

Mr. Michael Crane FOR THE APPLICANT

Ms. Nicole Paduraru FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Crane FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Myles J. Kirvan, FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario