Federal Court  Cour fédérale

Date: 20120704

Docket: IMM-8703-11

Citation: 2012 FC 844

Ottawa, Ontario, July 4, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MANIVANNAN SABARATNAM

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 of Canada (the Board), dated November 9, 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 granted.

Facts

[2] The applicant, Manivannan Sabaratnam, is a Tamil citizen of Sri Lanka. He states that he was detained by security forces on two occasions. The first occurred in November 2007, after his neighbour was killed allegedly because he was suspected of recruiting young men for the Liberation Tigers of Tamil Eelam (LTTE). At that time, the applicant was taken into custody and interrogated. The applicant fled to Colombo in December 2007, fearing he would meet the same fate as his neighbour.

[3] On January 7, 2009, the applicant states that he and 12 other youths were arrested in connection with a railway bombing. He was detained for six months in a maximum security prison in Colombo, during which time he was beaten. After six months he and the other youths were ordered released by a magistrate because there was no evidence connecting them with the bombing.

[4] The applicant alleges that in June or July 2010, a group of Tamil militants tried to extort him and then attempted to abduct him when he told them he had no money. He states he also evaded a subsequent attempted kidnapping by men who tried to pull him into a van. The applicant states that his uncle assisted him in obtaining a passport and travel papers and hired an agent to help him flee Sri Lanka. After travelling through other countries he arrived in Canada on February 5, 2011.

Decision Under Review

[5] After reviewing the applicant's allegations the Board found that the applicant's fear of persecution was not well-founded, based on credibility concerns. The Board found in the

alternative that there was a change in circumstances in Sri Lanka and further found that the risk alleged by the applicant was a generalized risk.

Credibility

[6] The Board noted that the applicant admitted he had no problem obtaining a police clearance to get his passport in 2008. The Board found that if the applicant had been on the government's "security watch list", he would not have been given a police clearance and would have been arrested. The Board also noted that the applicant was not arrested and had no problems while under regular checks from Colombo police, and therefore found there was no warrant out for his arrest and the police were not looking for him.

[7] The Board further found that the applicant's ability to leave the country (albeit with the assistance of an agent) shows that he was not a wanted person and thus does not face arrest upon return to Sri Lanka. The Board thus found that the applicant's fear of persecution was not well-founded.

Change of Circumstances

[8] The Board found, in the alternative, that if credibility was not determinative, the change of circumstances would nevertheless be dispositive. The Board cited section 108(1)(e) of the *IRPA*, which states that a refugee claim will be rejected if "the reasons for which the person sought refugee protection have ceased to exist." The Board noted that whether there is a change of circumstances is a factual determination and the durability, effectiveness and substantiality of the change are relevant. The Board also noted the Court of Appeal's decision in *Fernandopulle v Canada*

(Minister of Citizenship and Immigration), 2005 FCA 91, which found that past persecution does not create a legal presumption of future persecution.

[9] The Board acknowledged that many young Tamils faced persecution by the LTTE, Sri Lankan security forces and paramilitary groups. The Board found that, based on the applicant's circumstances and the evidence of the current situation in Sri Lanka, the applicant faces less than a serious chance of persecution based on his ethnicity, and that it is less than likely that he will be harmed pursuant to section 97 of the *IRPA*.

[10] The Board noted the evidence that, due to the significant improvements in the security of Sri Lanka, there is no longer the need for group-based protection for Tamils, but rather claims should be assessed based on certain risk profiles, such as those with suspected LTTE links. Since the applicant did not fit the profile of those at risk based on the most recent information, the Board found that the change of circumstances were such that the applicant was not at risk.

Standard of Review and Issue

[11] The issue raised by this application is whether the Board's decision is reasonable: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. While there has been some disagreement on the appropriate standard of review for this question, the Court of Appeal's reasoning in *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457 (CA) suggests a correctness standard. The Board is obligated to consider section 108(4) in every case in which it finds changed circumstances under section 108(1)(e). Thus, while any conclusion reached under section 108(4)

would be reviewed on a standard of reasonableness, there is no deference in whether to consider section 108(4).

Analysis

[12] While many issues have been advanced by the applicant, in my view the application can be determined solely based on the Board's analysis of whether there are changed circumstances in Sri Lanka such that the reasons for protection have ceased to exist, pursuant to section 108(1)(e) of the *IRPA*.

[13] The respondent argues that credibility was determinative of the application. However, the Board's credibility finding was that it did not believe the applicant was currently on a security watch list or wanted by the authorities. As the applicant submits, he did not allege that he was currently wanted by police; rather, he feared persecution based on his past experiences of persecution by security forces and militant groups. Nowhere in its reasons did the Board state that it disbelieved the applicant's testimony about his detention which was corroborated by documentary evidence. Therefore, the Board's finding that the applicant was not wanted cannot have been determinative without the accompanying finding that individuals with his profile are no longer at risk due to changed circumstances.

[14] The applicant argues that the Board applied the wrong test for whether there were changed circumstances pursuant to section 108(1)(e) of the *IRPA*, and that its analysis of the current circumstances was insufficient. I find that it is not necessary to consider these arguments because the Board erred when, having found changed circumstances under section 108(1)(e), it failed to

consider the compelling reasons exception under section 108(4) of the *IRPA*. The relevant portions of section 108 state:

Rejection	Rejet
108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
[…]	[…]
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.
[…]	[…]
Exception	Exception
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[15] The Board clearly found that the reasons the applicant sought refugee protection have ceased to exist pursuant to section 108(1)(e). Therefore, as mandated by the Court of Appeal in *Yamba***,** the Board was obligated pursuant to section 108(4) (or section 2(3) in the previous *IRPA*) to consider whether there were "compelling reasons" not to apply section 108(1)(e), due to the past persecution and torture of the applicant. The Court of Appeal stated in *Yamba* at paragraph 6:

> In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a

> change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

[16] Thus, the obligation to consider the "compelling reasons" exception arises in every case in which a claimant is found to have suffered past persecution, as the Board accepted in this case, not having made any clear finding disbelieving the applicant's testimony about his detention and torture. The Board therefore erred by failing to consider section 108(4) of the *IRPA*.

[17] I note that there are some cases of this Court that have held that it will only be an error to fail to consider section 108(4) if there is *prima facie* evidence of "appalling" or "atrocious" past persecution, since that exception is only intended to arise in extraordinary circumstances: *Alfaka Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044, para 49. However, the reasoning in this line of cases was not followed in *Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 290.

[18] I find that the apparent tension between the decision in *Yamba* and *Alfaka Alharazim* does not affect the outcome of this application, however. The applicant testified to experiencing torture while in detention for six months and the Board made no adverse credibility finding in respect of that testimony. Thus, even if *prima facie* evidence of appalling or atrocious past persecution is required the applicant satisfies that standard and the Board therefore erred by failing to consider section 108(4) of the *IRPA*. The application is therefore granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**MANIVANNAN SABARATNAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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