Federal Court  Cour fédérale

Date: 20130606

Docket: IMM-11021-12

Citation: 2013 FC 580

Ottawa, Ontario, June 6, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

A011

Respondent

PUBLIC REASONS FOR ORDER AND ORDER
(Confidential reasons for order issued 30 May 2013)

[1] When A011, a Tamil male, left Sri Lanka, he did not face a serious risk of persecution. However, because he came to Canada on the Ocean Lady, a precursor to the Sun Sea, he was found by the Refugee Protection Division [RPD], of the Immigration and Refugee Board of Canada [IRB], to be a refugee sur place. The Minister seeks judicial review of that decision.

[2] As far as I am aware, this is the sixth decision of Lucinda Bruin, RPD Member, in which the Minister has obtained leave to seek judicial review of her findings that Tamil passengers on the

Ocean Lady or the Sun Sea became refugees sur place. In all six, her analyses were identical. In two, the Minister succeeded. In three, he did not.

[3] In *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151, [2013] FCJ No 192 (QL), I was of the opinion that refugee status was granted on the basis of the applicant facing persecution as a member of a "particular social group" within the meaning of s. 96 of the *Immigration and Refugee Protection Act* [IRPA]. I held that the standard of review was correctness, and that the decision was incorrect. I certified the standard of review as a serious question of general importance which would support an appeal to the Federal Court of Appeal. No appeal was taken.

[4] I came to the same conclusion in *Canada (Minister of Citizenship and Immigration) v B323*, 2013 FC 190, [2013] FCJ No 193 (QL). I certified the same question, but again no appeal was launched.

[5] However, in *The Minister of Citizenship and Immigration v B134, B130, B133, B131 and B132*, IMM-8010-12, by order dated 8 April 2013 Madam Justice Hansen dismissed the Minister's application. She held that the standard of review was reasonableness and found that the decision that the applicants were members of a particular social group was reasonable.

[6] In *Canada (Minister of Citizenship and Immigration) v B377*, 2013 FC 320, [2013] FCJ No 522, again based on the same analysis, Mr. Justice Blanchard held that the passenger was not a member of a particular social group. However, he upheld the refugee determination based on mixed motives, particularly ethnicity, one of the nexus which brings s. 96 of IRPA into application.

[7] In *Canada (Minister of Citizenship and Immigration) v B344*, 2013 FC 447, [2013] FCJ No 547 (QL), Mr. Justice Simon Noël, again based on the same analysis, concluded that the respondent's Tamil ethnicity was a prime contributing factor and held, based on the mixed motives doctrine, that the decision was reasonable, and so dismissed the Minister's application.

[8] No question was certified in B134, B377 or B344.

[9] I am now faced with the very same analysis by Ms. Bruin. The only difference is that A011 was a passenger on the Ocean Lady, rather than the Sun Sea.

[10] All I can say is that we have come to a very sad state of affairs. Depending on the member of the RPD who decides the case, a passenger may or may not be found to be a refugee sur place. Even if found to be a refugee sur place, the Minister's application for judicial review may or may not be granted. For instance, in *Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334, [2012] FCJ No 1657 (QL), Chief Justice Crampton concluded that the decision of the member in question, whose reasons were not as fulsome as Ms. Bruin's, was unreasonable. Mr. Justice Simon Noël came to the same conclusion in *Canada (Minister of Citizenship and Immigration) v B451*, 2013 FC 441.

[11] In my view, it is a great injustice that passengers on these two ships should be treated so differently. There is no sound basis for predicting who will be welcomed here as a refugee and who will be thrown out.

ISSUES

[12] This judicial review turns on the following four issues:

a. What was the basis for the decision that A011 is a refugee sur place?

b. What is a "particular social group" within the meaning of s. 96 of IRPA?

c. Was the decision reasonable?

d. What is the standard of review?

Why is A011 a refugee sur place?

[13] In *B472*, I said that the Member's decision was to be found in the "**DETERMINATION**" section of her reasons where she wrote:

> I find the claimant is a Convention refugee because he has a well-founded fear of persecution based on his particular social group, pursuant to s. 96 of the *Act*.

[14] Basing myself on the detailed analysis carried out by Chief Justice Crampton in *B380*, above, I agreed that male Tamil passengers on board the Sun Sea did not constitute a particular social group protected by the United Nations Convention and by s. 96 of the *Immigration and Refugee Protection Act*. The only difference is that while Chief Justice Crampton found the decision to be unreasonable, I found it to be incorrect in law.

[15] In *B134 et al*, on the same analysis by Ms. Bruin, Madame Justice Hansen found the decision to be reasonable, and held that the standard of review was reasonableness. She referred to

the recent decision of the Federal Court of Appeal in *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, [2013] FCJ No 322 (QL).

[16] In *B377*, Mr. Justice Blanchard also held that the applicable standard of review was reasonableness. It is implicit in his reasons that a finding that B377 was a member of a "particular social group" would be unreasonable. However, his interpretation of the set of reasons was that the RPD conducted a detailed mixed motives analysis, and that the fear of persecution was based, at least in part, on Tamil ethnicity or race. Therefore, there was sufficient evidence to support a motive based on a United Nations Convention ground (*Gonsalves v Canada (Attorney General)*, 2011 FC 648 and *Veeravagu v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 468 (QL) (CA). He added that the RPD's conclusion with respect to political opinion was problematic. Imputed knowledge, in this case knowledge of the Liberation Tigers of Tamil Elam [LTTE] because they had organized the voyage of the Sun Sea, did not necessarily lead to a finding of imputed political opinion.

[17] In *B344*, Mr. Justice Simon Noël, again on the same RPD analysis, basically came to the same conclusion as Mr. Justice Blanchard. He also applied the mixed motives approach. If at least one of the motives can be related to a United Nations Convention ground, nexus to s. 96 may be established. He found the RPD's Tamil ethnicity nexus to be reasonable. He may have been a little more ambivalent on the other nexus asserted, that of perceived political opinion.

[18] In the case before me, the Minister submits that Justices Blanchard and Simon Noël have rewritten the RPD's decision. All agree that the decision was extremely well thought out and

extremely well written. Consequently, this is not a case where the reviewing court may look at the record to determine whether the conclusion reached was reasonable, even if the rationale was wanting (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, [2011] SCJ No 62 (QL)). I agree.

[19] In all cases, the cover sheet on the IRB, RPD, letterhead is "Reasons and Decision – Motifs et décision". There are a number of headings within the reasons. One heading, in all cases, is this:

> **DETERMINATION**
>
> […] I find the claimant is a Convention refugee because he has a well-founded fear of persecution based on his particular social group, pursuant to s. 96 of the *Act*.

[20] At paragraph 13, she found a heightened risk for A011:

> […] as a Tamil and as a person who travelled to Canada on the *Ocean Lady*. The government of Sri Lanka has accused the travellers of being linked to the LTTE, and has demonstrated its willingness to use torture to secure information […]

[21] Paragraphs 14-22 deal with ongoing human rights abuses by the government of Sri Lanka.

[22] In her "***Nexus***" section, paragraphs 23 and following, she agreed that simply having been a passenger on the Ocean Lady did not by itself constitute the basis for membership in a particular social group, as defined in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74 (QL). She then went on to consider the "possibility of mixed motives", and found that A011's Tamil ethnicity was a contributing factor to his risk.

[23] However, at paragraph 26 she conceded that: "Tamil ethnicity does not provide the sole basis for well-foundedness of fear".

[24] At paragraph 27, she went on to say:

> I therefore find that there is nexus to a Convention ground, in which the claimant's Tamil race, along with perceived political opinion as a passenger on the *Ocean Lady*, are combined elements of the grounds on which he may face persecution in Sri Lanka, and that there may be mixed motives on the part of potential persecutors.
>
> [My emphasis.]

[25] Therefore, she analyzed the case under s. 96 of IRPA, the standard being a serious possibility of persecution, rather than under s. 97 which is based on the balance of probabilities.

[26] In *B472*, at paragraph 28, I said:

> In this case, the reasons given by the member are much more fulsome than in B380. It may well be that B472 faces a serious risk of persecution were he to be returned to Sri Lanka, but not because of his membership in a particular social group, the Tamil passengers on the ship. Counsel made a valiant effort to point out that there are passages in the member's reasons which could support a finding based on a combination of section 96 risks. This may be so, but I am not prepared to rewrite the reasons.

[27] With the greatest respect to those who disagree, I remain of the view that A011 was granted refugee status sur place on the basis of membership in a particular social group, and not on mixed motives, including race. To my mind, the "**DETERMINATION**" clause is a clause paramount. Although the comparison is far from perfect, many statutes have preambles, marginal notes and headings. The *Interpretation Act* deals with preambles and marginal notes as rules of construction, but not headings. However, headings are an essential structural feature of a statute, and in this case

of the reasons for the RPD's decision (*Law Society of Upper Canada v Skapinker,* [1984] 1 SCR 357, [1984] SCJ No 18 (QL) and *Charlebois v Saint John (City),* 2005 SCC 74, [2005] 3 SCR 563, [2005] SCJ No 77 (QL)).

[28] As Ruth Sullivan noted in *Sullivan on the Construction of Statutes*, 5d Ed (Markham: LexisNexis Canada, 2008), at page 394: "These cases make it clear that headings are a valid indicator of legislative meaning and should be taken into account in interpretation."

MEMBERS OF A PARTICULAR SOCIAL GROUP

[29] Membership in a particular social group is one of five grounds upon which one may be determined to be a refugee within the meaning of the United Nations *Convention Relating to the Status of Refugees*. The other four Convention grounds are race, religion, nationality and political opinion. These five grounds are repeated in s. 96 of IRPA. An applicant must establish a serious possibility of persecution to himself, or to a similarly situated person, based on a well-founded subjective and objective fear (see *Ward*, above, and *Rezk v Canada (Minister of Citizenship and Immigration)*, 2005 FC 151, 149 ACWS (3d) 286, [2005] FCJ No 221 (QL) at paragraph 9, citing *Rajudeen v Canada (Minister of Employment and Immigration)*, (1984), 55 NR 129 (FCA), [1984] FCJ No 601 (QL)).

[30] Section 96 must be contrasted with s. 97 through which Canada will offer protection on non-United Nations Convention grounds based on a danger, believed on substantial grounds to exist, of torture, or a risk to life or a risk of cruel and unusual treatment or punishment. The risk must be personal, and the burden which falls upon the claimant is on the balance of probabilities, a higher

standard than a serious possibility (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 FCR 239, [2005] FCJ No 1 (QL)).

[31] The leading Canadian case on the United Nations Convention in general, and more specifically the meaning of membership in a particular social group, is *Ward*, above.

[32] Mr. Ward, a resident of Northern Ireland, joined the Irish National Liberation Army (INLA), a paramilitary terrorist group dedicated to the union of Ulster and the Irish Republic. He was detailed to guard innocent hostages. Upon learning that they were to be executed, he secured their escape. The INLA tortured him and sentenced him to death. He managed to escape, and after serving a prison sentence, came to Canada where he sought refugee protection.

[33] Mr. Justice La Forest, speaking for the Court, dealt at some length with the treatment of a "particular social group" in Canadian jurisprudence and elsewhere. Some definitions were very wide and others narrower.

[34] It would appear that the category of "particular social group" had been suggested at the last minute to the drafters of the Convention. He concluded at page 739:

> The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in Mayers, supra, Cheung, supra, and Matter of Acosta, supra, provide a good working rule to achieve this result. They identify three possible categories:
>
> (1) groups defined by an innate or unchangeable characteristic;

> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

[35] *Mayers* is a reference to the decision of the Federal Court of Appeal in *Mayers v Canada (Minister of Employment and Immigration)* (1992), 97 DLR (4th) 729, [1992] FCJ No 1007 (QL), *Cheung* is another decision of the Federal Court of Appeal, *Cheung v Minister of Employment and Immigration* (1993), 102 DLR (4th) 214, [1993] FCJ No 309 (QL), and *Acosta* is the *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (BIA), an interim decision of the United States Board of Immigration Appeals in 1985.

[36] In *Mayers*, it was found there was some evidence upon which the applicant could be considered to be a refugee because she feared persecution on the basis of membership in the particular social group of "Trinidadian women subject to wife abuse". At issue in *Cheung* was the Chinese policy that women who had more than one child were faced with forced sterilization. Mr. Justice Linden, speaking for the Court of Appeal, considered that such women were members of a particular social group. He found that these women were united or identified by a purpose fundamental to their human dignity. They should not be required to alter it simply because their government held a different interest.

[37] *Acosta* was a claim for refugee status by an El Salvadorian taxi driver, a member of a cooperative that had been targeted by anti-government guerrillas for having refused to comply with demands for work stoppages. It was found that members of the cooperative were not part of a particular social group. The *ejusdem generis* doctrine was invoked so that the membership should be an immutable characteristic just as race, religion, nationality and political opinion, that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.

[38] Mr. Ward was not found to be a member of a particular social group. At page 754, Mr. Justice La Forest added:

> The group of INLA members is not a "particular social group". To review, the test given above includes:
>
> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

[39] However, it was determined that he was covered by the Convention ground of political opinion. Nevertheless, his case was referred back to the IRB for evaluation because it had not dealt with protection by his second state of citizenship, Great Britain.

[40] In A011's case, given the structure of the decision, references to race and perceived political opinion were part and parcel of why he was found to be a member of a particular social group, Tamils who came to Canada on the Ocean Lady. Those passengers did not voluntarily associate

themselves for reasons fundamental to their human dignity. The common desire of coming to Canada does not make the passengers members of a particular social group within the meaning of the Convention and s. 96 of IRPA. As I said at paragraph 27 of *B472*:

> The "Sun Sea"'s passengers had a myriad of motives to come to Canada. Some were human smugglers. Some may well have been terrorists. Some were garden-variety criminals who wanted to escape justice. Some had serious reason to fear persecution in Sri Lanka and some, like Mr. 472, were economic migrants. There is no cohesion or connection to the other refugee grounds set out in section 96 of IRPA.

[41] It must also be kept in mind that when *Ward* was handed down, there was no equivalent in the *Immigration Act*, as it was, to the current s. 97 of IRPA. A refugee claimant such as Acosta would likely be assessed in Canada today under s. 97, which carries with it a much higher standard of proof. The RPD member was clearly aware of this distinction. To repeat what she said at paragraph 27:

> I will therefore analyze the claim pursuant to section 96 of the *Act*, and the standard in this case is that of a serious possibility, rather than that of balance of probabilities, if the claim were analyzed pursuant to Section 97 of the Act.

[42] Furthermore, I cannot agree with her suggestion that political opinion might be a mixed motive. The reason passengers, who were not previously members of the LTTE, might be at risk if returned to Sri Lanka is because they might have information with respect to the LTTE. Having information is not political opinion. Therefore, the assessment would have to be under s. 97, *i.e.* on the balance of probabilities.

WAS THE DECISION REASONABLE?

[43] Given that *Ward* was decided by four members of the Supreme Court, as the fifth justice who heard the case, Mr. Justice Stephenson, did not participate in the deliberations; given that *Ward* was decided before s. 97 of IRPA was enacted in 2001, and given that *Ward* did not purport to set out closed immutable categories of particular social groups, I am not prepared to find that the decision was unreasonable. I find, just as in the case of *B472*, that the decision was incorrect.

WHAT IS THE STANDARD OF REVIEW?

[44] In determining in *B472* that the standard of review was correctness, I relied upon *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL), in which the Court concluded at paragraph 62:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[45] I was of the view that the existing jurisprudence had already determined, in a satisfactory manner, the degree of deference to be accorded to the RPD as to the definition of a refugee. No deference was owed. I referred to the recent decision of *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325, [2012] FCJ No 1610 (QL), wherein Mr. Justice Evans, with the concurrence of Madam Justice Sharlow, applied the correctness standard. Mr. Justice Stratas was of the view that for the purposes of that case it was not necessary to rule on the standard of review.

[46] Since then, in *B010*, above, Madam Justice Dawson, with whom Justices Evans and Stratas concurred, had to deal with the definition of "people smuggling" within the meaning of s. 37(1)(*b*) of IRPA. The serious question of general importance certified by Mr. Justice Simon Noël was:

> For the purposes of paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, is it appropriate to define the term "people smuggling" by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?

[47] The Court came to the view that there was no basis for ousting the presumption that deference should be afforded to the Board's interpretation of its home statute.

[48] Madam Justice Dawson distinguished *Febles*, above. She said at paragraph 71:

> In reaching this conclusion, I am mindful that this Court has previously applied the correctness standard of review to the Refugee Protection Division's interpretation of international conventions (see, for example, *Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, [2012] F.C.J. No. 1609, at paragraphs 22 to 25). There, the presumption of reasonableness review was rebutted by the majority of the Court in view of the need to interpret international conventions uniformly. In my view, cases such as *Febles* are distinguishable on the basis that here, the Board was interpreting sections 37 and 117 of the Act. Further, unlike the Refugee Convention, the Protocol anticipates individual states will enact different measures to fulfil the Protocol's objectives (see: article 6, section 4). The uniformity concerns in *Febles* do not apply to the Protocol.

[49] In this case, the meaning of "membership in a particular social group" mirrors the United Nations Convention. As such, I am of the view that *Febles* applies, rather than *B010*. I remain of the view that the standard of review is correctness.

[50] In addition to the earlier Supreme Court cases to which I referred in *B472*, *Ward* itself is instructive. The Board simply assumed that Mr. Ward was a member of a particular social group. This is how Mr. Justice La Forest began his set of reasons:

> This case raises, for the first time in this Court, several fundamental issues respecting the definition of a "Convention refugee" in s. 2(1) of the *Immigration Act*, 1976, S.C. 1976-77, c. 52, which reads:
>
> > 2. . . .
> >
> > "Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion […]

[51] He did not say that notwithstanding he was of the opinion that Mr. Ward was not a member of a particular social group he would let the Board's decision stand because it was reasonable. Alternatively, he did not say that the decision could not stand because it was unreasonable. In fact, and in law, he did not consider deferring to the Board's opinion at all.

CONCLUSION

[52] The concept of "mixed motives" considered by both Mr. Justice Blanchard and Mr. Justice Simon Noël is well known. In granting judicial review, I shall refer the matter back to the RPD Member who decided the case, Ms. Bruin, for reconsideration. If she thinks A011 is a refugee because of mixed motives, rather than because of membership in a particular social group, then let her say so.

[53] Counsel for A011 shall have 10 days herefrom to pose a serious question of general importance (obviously relating to the standard of review) and to suggest redactions, if any, to the public version of these reasons. Thereafter, counsel for the Minister shall have seven days to reply on both points.

POST SCRIPT

[54] The foregoing 53 paragraphs comprise the confidential reasons for order issued on 30 May 2013. No changes have been made thereto. At the time of the original hearing, the parties were aware that the public versions of *B377* and *B344* were soon to be issued. Consequently, it was agreed to continue the hearing once those reasons became available. The second hearing took place by teleconference.

[55] As to possible redactions in this public version, counsel for A011 suggested that the names of the ships be deleted. Counsel for the Minister pointed out that this went beyond the Confidentiality Order in place. I have decided not to redact the names of the two ships, the Ocean Lady and the Sun Sea, as otherwise there would be no context to these reasons.

[56] In accordance with the *Immigration and Refugee Protection Act*, an appeal of decisions of this Court may be made only if a serious question of general importance is certified. Since the Minister succeeded, only A011 is in position to file an appeal if such a question is certified.

[57] Unfortunately, counsel for A011 did not propose a serious question of general importance to certify. Nevertheless, I shall certify the following question:

> Is review by this Court of the meaning of "membership in a particular social group" in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

[58] If this matter is not taken to the Court of Appeal, we will find ourselves in a situation akin to the meaning of "residence" in the *Citizenship Act*. There are currently three schools of thought, so that the outcome is often a matter of pure chance. While no appeal lies from a decision of this Court under the *Citizenship Act*, an appeal does lie under the *Immigration and Refugee Protection Act*.

[59] I consider this question to be of fundamental importance and encourage A011 to appeal. The appeal is on a narrow issue and would not take up much time. Perhaps the Legal Aid Society can be persuaded to support him.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.

2. The matter is referred back to Ms. Lucinda Bruin, or failing her, another member of the Refugee Protection Division, of the Immigration and Refugee Board, for reconsideration.

3. The Confidentiality Order of Prothonotary Lafrenière, dated 19 November 2012, remains in place.

4. The following serious question of general importance is certified:

   Is review by this Court of the meaning of "membership in a particular social group" in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the *Immigration and Refugee Protection Act*, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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CONFIDENTIAL REASONS FOR ORDER:	HARRINGTON J.
DATED:	MAY 30, 2013
PUBLIC REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	JUNE 6, 2013

APPEARANCES:

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