

Federal Court



Cour fédérale

Date: 20130729

Docket: IMM-10063-12

Citation: 2013 FC 830

Ottawa, Ontario, July 29, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KENGESWARAN THANAPALASINGAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the judicial review of a decision by a member [Member] of the Refugee Protection Division [Division] dismissing the claim for refugee status and/or protection of the Applicant, a passenger on the MV Sun Sea. The particular focus of this judicial review is on the *sur place* claim.

II. BACKGROUND

[2] The Applicant is a 30 year old male Tamil from the Jaffna district of Sri Lanka. The Applicant's narrative outlines continuing troubles from the mid-1980s with the Libertarian Tigers of Tamil Eelam [LTTE] – largely attempts to recruit him in one way or another.

[3] In April 2009 the Applicant fled the area in his fishing boat, was stopped by the Navy and placed in an Internally Displaced Persons [IDP] camp. He claimed that he had to pay a bribe and was beaten by authorities so he fled the camp. After being questioned by the Karuna Group twice, he fled to Thailand and eventually boarded the MV Sun Sea for Canada.

[4] The Member found a number of credibility concerns, none of which are attacked in this judicial review and need not be canvassed here.

The Member did find that the Applicant was from Sri Lanka and that he had arrived on the MV Sun Sea. The issue was whether the Applicant is at risk should he be returned to Sri Lanka because of his profile, including travel on the MV Sun Sea.

[5] The Member found insufficient evidence of a nexus to Convention grounds. The Member further found that the Applicant did not fit the UNHCR's list of groups of persons who are at risk in Sri Lanka. Most specifically, the Member found that the Applicant was not linked to the LTTE nor was there persuasive evidence that the Applicant was viewed in Sri Lanka as a LTTE sympathizer and on a balance of probabilities would not be viewed as an LTTE supporter should he be returned to Sri Lanka today.

[6] The Member then does a detailed analysis of the changed conditions in Sri Lanka. While recognizing some problems with the changes in Sri Lanka, the Member concludes that Tamils are not being targeted solely on ethnic grounds.

[7] With respect to the *sur place* claim, the Member considered the conflicting evidence about the RCMP assisting the Sri Lankan authorities and preferred a declaration by a RCMP officer to that of press reports.

[8] The Member's principal conclusion is that the Sri Lankan government would not perceive the Applicant to be a member or supporter of the LTTE based exclusively on his travel on the MV Sun Sea. That conclusion is based on the Sri Lankan government's acknowledgement that not all passengers on the MV Sun Sea had ties to the LTTE.

[9] Finally, the Member concluded the decision by summarizing that, on a balance of probabilities, there is not a serious possibility that the Applicant will be personally subject to persecution, or have a risk to his life or of cruel and unusual treatment or punishment or torture by any authority in Sri Lanka. Therefore, the *sur place* claim was dismissed.

[10] The Applicant argues that 1) the Member asked the wrong question and failed to consider evidence, and 2) the Member applied the wrong legal standard. The issues are essentially intertwined.

III. ANALYSIS

A. *Standard of Review*

[11] The issue of asking the wrong question or applying the wrong standard is a legal one which is subject to the correctness standard of review (*Canada (Minister of Citizenship and Immigration) v B377*, 2013 FC 320, 2013 CarswellNat 1338).

The issue of the adequacy of evidence to sustain the decision is subject to the reasonableness standard of review (*SK v Canada (Minister of Citizenship and Immigration)*, 2013 FC 78, 2013 CarswellNat 207).

B. *Relevant Question*

[12] The Applicant argues that the Member asked the wrong question in considering whether all members of the MV Sun Sea would be seen as LTTE supporters rather than asking whether this individual would be at risk of being suspected as a LTTE supporter.

[13] With respect, this is an unfair characterization of what the Member did. In the analysis of the individual's circumstance, the Member had to deal with the broader question of whether all passengers on the MV Sun Sea were viewed by Sri Lankan authorities as tainted by association with the LTTE. On this point the Member noted conflicting evidence but accepted more recent statements and events as persuasive that those authorities did not view all passengers in the same light.

[14] Having concluded that there was no blanket view concerning the passengers' association with the LTTE, the Member went on to consider the Applicant's particular circumstances.

[15] In so doing the Member had regard to the Applicant's profile earlier described where the Member concluded that in Sri Lanka, prior to the MV Sun Sea trip, the Applicant was not viewed as an LTTE supporter.

[16] One cannot and should not divorce the Member's conclusions on the Applicant's profile for purposes of the *sur place* claim from the conclusions about profile prior to the Applicant leaving Sri Lanka.

C. *Legal Standard*

[17] The Applicant complains that the Member did not refer to a statement by the Sri Lanka High Commission to the effect that most passengers on the MV Sun Sea are hardcore LTTE.

It is trite law that the RPD does not have to refer to each piece of evidence. Here the statement was made before the MV Sun Sea arrived in Canada. The Member in fact refers to it. A fair reading of the decision is that the Member considered more recent statements and actions of Sri Lankan authorities. No evidence was ignored and there was a reasonable basis for the Member's decision.

[18] On the issue of the legal standard applied, the Applicant says that the Member imposed a requirement by using the word "would". The allegedly offending paragraphs are:

113 I have considered how the claimant's travel on the Sun Sea ship would be viewed by Sri Lankan authorities should it come to their attention in the future, and I find, on a balance of probabilities, that the Sri Lankan government would not perceive the claimant to be a member or supporter of the LTTE on the basis of his travel on the Sun Sea ship alone.

114 He was not perceived by the Sri Lankan government to have ties to the LTTE prior to his departure from Sri Lanka, and given the acknowledgement by the Sri Lankan government and an expert in the field of terrorism, that not all persons on the Sun Sea ship have ties to the LTTE and therefore although the claimant may be questioned in regard to his travel on the Sun Sea ship, the claimant will not face an increased risk simply because of his mode of travel. Therefore, there is no reasonable expectation that the claimant would automatically be presumed to have ties to the LTTE by the Sri Lankan government upon his return to Sri Lanka.

[...]

116 I have insufficient evidence that the claimant would face a serious possibility of persecution, or would likely be subjected personally to a risk to his life, or a risk of cruel and unusual treatment or punishment or to a danger of torture (section 97) by authorities in Sri Lanka.

[Emphasis added by Court]

[19] I cannot find any merit in the Applicant's proposition. The words used must be viewed in context – the word “would” has both a degree of certainty in some contexts and a degree of likelihood in other contexts. In the present circumstances the Member was speaking in terms of the reasonable likelihood, not the absolute certainty.

[20] The conclusion reached by the Member is nothing more than that on a balance of probabilities, there is not a serious possibility of risk. The analytical framework requires a member to go from one conclusion of fact based on balance of probability to another and so forth before reaching the final test of possibility of risk established on the normal civil standard.

[21] I can find nothing wrong in the Member's approach, analysis or legal standard.

IV. CONCLUSION

[22] Therefore, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10063-12

STYLE OF CAUSE: KENGESWARAN THANAPALASINGAM v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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

DATED: JULY 29, 2013

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