Federal Court  Cour fédérale

Date: 20131114

Docket: IMM-4170-12

Citation: 2013 FC 1157

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 14, 2013

PRESENT: The Honourable Mr. Justice Annis

Docket: IMM-4170-12

BETWEEN:

TISHARAN NAGENDRAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), relating to a decision of the Immigration and Refugee Board (IRB), Refugee Protection Division (RPD), rendered on November 23, 2012, finding that the applicant is not a Convention refugee or a person in need of protection.

[2] For the reasons that follow, I am dismissing this application.

Facts

[3] The applicant is a citizen of Sri Lanka of Tamil ethnicity, born in 1986. He does not know his father, who left his mother before his birth. As a child, he lived in Jaffna, in the north, with his mother. On October 23, 1997, when he was 11 years old, someone threw a grenade into his house, causing injury to the applicant, his mother and a neighbour. The applicant still has some metal in his skull as a result of the incident. His mother brought him to Colombo to have him treated by the Red Cross and they stayed in that city. The applicant speaks little Sinhalese and getting by in Tamil in Colombo. His mother opened a tailor shop. In 2004, the applicant finished school and started to work. On November 1, 2006, two unknown men drove by on a motorcycle and shot his mother, killing her. The applicant was arrested and questioned. He lost his job and his housing. Everyone was afraid of being close to him, even the members of his family.

[4] Three weeks later, having sold everything he had, he tried unsuccessfully to obtain a visa for Norway. During 2007, he was interrogated on several occasions, perhaps 10 times. The army and a special police unit asked questions about the Liberation Tigers of Tamil Eelam (LTTE) and asked why he was living in Colombo instead of Jaffna. He again tried to leave Sri Lanka at least twice in 2008, getting all the way to Brazil, but was turned away by the authorities. Finally, in March 6, 2009, he left again, apparently using the services of a smuggler. During a long trip, he stopped in Singapore, South Africa, Brazil, Chile and Peru before arriving in Trinidad, where the authorities detained him for a month. Then he went to Venezuela, Ecuador, Panama, Haiti and the Turks and

Caicos Islands, where he was again detained, this time for three or four months. After that, he travelled to the Bahamas and then to Miami, the location where he was again detained for four to five months. From there, he travelled to Canada (where he has an aunt who is a permanent resident), arriving on October 6, 2010.

Impugned decision

[5] The panel described the refugee claim as relating to the persecution carried out by military and paramilitary groups and to the risk of persecution from the fact of being a young Tamil man from the north of Sri Lanka who could be seen as being associated with the LTTE. The panel accepted the events described by the applicant as being truthful, but did not agree with all of his testimony, including the fact that he had succeeded in leaving Sri Lanka several times without having his identity checked.

[6] The panel found that the events described did not indicate that the police or the army was interested in the applicant, or that he was facing a serious possibility of persecution. He left the country several times before leaving in 2009 without experiencing reprisals from the authorities after his returns.

[7] Since the end of the war, in 2009, there had been no terrorist attacks in the country and most of the former leaders of the LTTE were no longer being detained. The applicant left the country a few months before the United Nations withdrew their warning regarding the citizens of northern Sri Lanka, but the situation had indeed changed. A number of people are now returning to the country.

[8] The panel found that the applicant was not a refugee or a person in need of protection.

Issues

[9] The following issues arise in this matter:

a. Did the panel err by not considering the documentary evidence filed in the record indicating the problems of young Tamils in Sri Lanka?

b. Did the panel err by not assessing the applicant's fear, which his counsel argued in respect to the applicable compelling reasons in this record?

Standard of Review

[10] The standard of review for both issues has already identified from case law as the reasonableness standard. See, for example, *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486, at para 12-14, [2012] FCJ No 511 (QL) :

> [12] The applicant challenges the legality of the RPD's decision on two main grounds. Although not pleaded in this order at the oral hearing, logically speaking, the questions raised by the applicant can be summarized as follows:
>
> * Is the RPD's conclusion that there is durable change of circumstances in Sri Lanka made without due regard to the evidence in its entirety, and therefore unreasonable?
>
> * Did the RPD err in failing to determine whether the applicant had compelling reasons arising out of previous persecution for refusing to avail himself to the protection of his country?
>
> [13] It is not disputed that since *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, questions of fact or of mixed fact and law are normally to be reviewed against the standard of reasonableness. It follows that the Court must consider the justification, transparency and intelligibility of the decision making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: Dunsmuir, above, at para 47; *Canada* (*Citizenship and Immigration*) *v Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12 at para 59.

> [14] The standard of correctness may have been applied in pre-Dunsmuir case law: *Decka v Canada* (*Minister of Citizenship and Immigration*), 2005 FC 822 (CanLII), 2005 FC 822; *Nagaratnam v Canada* (*Minister of Citizenship and Immigration*), 2007 FC 1208 (CanLII), 2007 FC 1208 at para 17). However, most recent jurisprudence of this Court considers that the question of whether the RPD erred in failing to conduct an assessment of the compelling reasons exception under subsection 108(4) of the IRPA involves a question of mixed fact and law and is to be evaluated on a standard of reasonableness (*Alharazim v Canada* (*Minister of Citizenship and Immigration*), 2010 FC 1044 (CanLII), 2010 FC 1044 at para 25; *SA v Canada* (*Minister of Citizenship and Immigration*), 2010 FC 344 (CanLII), 2010 FC 344 at para 22). Be that as it may, whatever standard applies here, the Court must intervene as a result of the following analysis.

Analysis

1. *Did the panel err by not considering the documentary evidence filed in the record indicating the problems of young Tamils in Sri Lanka?*

[11] The applicant had established that he was a young Tamil man from northern Sri Lanka, but the panel, basing himself on the July 2010 United Nations document, found that his fear of persecution was no longer reasonable given the changes that took place after he left. Further, the applicant noted that several other documents demonstrating that the Tamils in Sri Lanka continue to experience problems even after the end of the war had been presented to the panel and some had been expressly cited by his counsel; among others, the Country Report submitted at the applicant's affidavit, the UK Border Agency report, and the Amnesty International report. The panel had not mentioned this credible and contradictory evidence.

[12] It is well established that the panel must give reasons to ignore documentary evidence: see for example *Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403, at para 20,

[2011] FCJ No 525 (QL). It is all the more important in this case given that the applicant was considered credible and that the panel recognized the truth of the incidents that he experienced.

[13] The respondent noted that the fact of being a young man of Tamil ethnicity originally from northern Sri Lanka is no longer sufficient for being granted refugee status, given the defeat of the LTTEs in 2009 and the end of the war. The applicant cited documentary evidence stating that when certain Tamils who were mistreated were suspected of having links with the LTTE, but he had to show a link between that and his personal situation. Besides the fact that the RPD is presumed to have considered all of the evidence and is not required to mention each document, the applicant failed to establish that the authorities suspected him personally of having ties with the LTTE. The panel noted that the police carried out a relatively diligent investigation of his mother's murder, that the occasions when the applicant was questioned took place by chance in the street and that he was released at the latest the next day without being mistreated except once when he was slapped. The applicant was able to leave Sri Lanka with his own passport, even during the period of heightened vigilance in 2008-2009.

[14] Contrary to the applicant's allegations, the respondent argued, the panel noted the contradictory evidence regarding the treatment reserved for persons who return to Sri Lanka, but he found that the applicant would not be targeted for mistreatment; he did not show that he was suspected of having links to the LTTE, he had no criminal record and he did not have any significant scars, another usual criterion. The fact of already leaving the country several times without incident on his returns suggests that he is not a person of interest to the authorities.

Considering all of the evidence, it was reasonable for the RPD to conclude that there was no more than a mere possibility of persecution.

[15] I find that the evidence presented does not demonstrate that the applicant was being sought by the authorities for his links to the LTTE or that he was persecuted before leaving Sri Lanka. The panel considered that "there is a [*sic*] some conflicting evidence as to . . . prospects on return" and analyzed the applicant's characteristics. The panel was not required to specifically refer to each document of contradictory evidence so that its analysis is transparent and intelligible (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16, [2011] 3 SCR 708). The RPD's finding that the applicant did not show that he was a refugee or a person in need of protection under the IRPA falling within the range of possible, acceptable outcomes.

2. Did the panel err by not assess the applicant's fear and that his counsel argued with respect to the compelling reasons that apply in this record?

[16] The relevant section of the *Immigration and Refugee Protection Act* is subsection 108(4):

Cessation of Refugee Protection	Perte de l'asile
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 the applicant 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 the applicant 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.

[17] The applicant filed a very detailed psychological report. It is clear that he experienced trauma and that a return to Sri Lanka would cause him significant difficulties. He submitted that it was an error on the part of the panel not to have considered the compelling reasons when it found that the circumstances in Sri Lanka had changed.

[18] However, the respondent explained that, to raise compelling reasons, an applicant must first be considered to be a refugee; it is an essential precondition. Section 108 does not apply in this case. See, for example *Martinez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 343, at para 21, [2006] FCJ No 421 (QL):

> [21] It is clear from the wording of sub. 108(4) that it is not aimed at creating a broad obligation for the RPD to assess the existence of

> "compelling reasons" in every refugee claim. If a refugee claimant is neither a refugee nor a person in need of protection because the conditions of the general definition of section 96 and 97 of the IRPA are not met, then no "compelling reasons" assessment need be performed by the RPD. It is only necessary where the rejection of the claim is based on 108(1)(*e*).

[19] In my view, subsection 108(4) does not apply to this case and the RPD had no obligation to conduct an analysis of the compelling reasons. The panel would have had to first consider the applicant to be a refugee or a person in need of protection.

Conclusion

[20] For these reasons, I dismiss the application for judicial review.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Peter Annis"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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