Federal Court  Cour fédérale

Date: 20131119

Docket: IMM-8485-12

Citation: 2013 FC 1119

Ottawa, Ontario, November 19, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

A068

Respondent

PUBLIC VERSION OF REASONS FOR JUDGMENT AND JUDGMENT

[1] This file is another in the series of judicial review applications involving refugee claims made by passengers who arrived in Canada on one of the two ships bearing Tamil asylum-seekers that landed on our shores in late 2009 and mid-2010. The claimant in this case was a passenger on the *M/V Ocean Lady* and was found to not be a member of the Liberation Tigers of Tamil Elam [the LTTE].

[2] Over the past thirteen months, this Court has decided several judicial review applications in respect of similarly-situated claimants who were aboard the *M/V Ocean Lady* or the other ship, the *M/V Sun Sea* (see e.g. *Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334, Crampton CJ [*B380*]; *Canada (Minister of Citizenship and Immigration) v B342*, IMM-914-12 (unreported), Hughes J; *PM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77, Snider J [*PM*]; *SK v Canada (Minister of Citizenship and Immigration)*, 2013 FC 78, Snider J [*SK*]; *Ganeshan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 841, Snider J; *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151, Harrington J [*B472*], *Canada (Minister of Citizenship and Immigration) v B323*, 2013 FC 190, Harrington J [*B323*], *B027 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 485, Harrington J; *B223 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 511, Harrington J; *Canada (Minister of Citizenship and Immigration) v A011*, 2013 FC 580, Harrington J [*A011*]; *B135 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 871, Harrington J; *Canada (Minister of Citizenship and Immigration) v B399*, 2013 FC 260, O'Reilly J [*B399*]; *Canada (Minister of Citizenship and Immigration) v B377*, 2013 FC 320, Blanchard J *[B377*]; *Canada (Minister of Citizenship and Immigration) v B420*, 2013 FC 321, Blanchard J [*B420*]; *Canada (Minister of Citizenship and Immigration) v A032*, 2013 FC 322, Blanchard J [*A032*]; *Canada (Minister of Citizenship and Immigration) v B134*, IMM-8010-12 (unreported), Hansen J [*B134*]; *Canada (Minister of Citizenship and Immigration) v B451*, 2013 FC 441, Noël J [*B451*]; *Canada (Minister of Citizenship and Immigration) v B344*, 2013 FC 447, Noël J [*B344*]; *Canada (Minister of Citizenship and Immigration) v B459*, 2013 FC 740, Mosley J [*B459*]; *Canada (Minister of Citizenship and Immigration) v B171*, 2013 FC 741, Mosley J [*B171*]; *Thanapalasingam v Canada (Minister of Citizenship and Immigration)*, 2013 FC 830, Phelan J; *Canada (Minister of Citizenship and*

Immigration) v B272, 2013 FC 870, de Montigny J [*B272*]; *PK v Canada (Minister of Citizenship and Immigration)*, 2013 FC 969, Kane J [*PK*]; and *Balakrishnan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 944, Shore J.

[3] In this case, the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board] determined that the claimant was a refugee due to the risk he faced as a result of his presence on the *M/V Ocean Lady*. The Board held in this regard that his presence on the ship, along with his background, subjected him to the risk of possible torture by the Sri Lankan authorities if he were to return to that country because the authorities would either suspect him of being a member or supporter of the LTTE or would wish to obtain information from him about the LTTE members or sympathizers who were with him aboard the *M/V Ocean Lady*. In the present application for judicial review, the Minster of Citizenship and Immigration seeks to have the Court set aside the Board's decision.

[4] The Minister argues that the Board premised its decision on an unreasonable or incorrect interpretation of the *Convention relating to the Status of Refugees*, 22 April 1954, 189 UNTS 150 [the *Refugee Convention*], which is incorporated into section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act]. More specifically, the Minister argues that the Board committed a reviewable error in finding that the claimant's presence on the *M/V Ocean Lady* brought him within the purview of a "particular social group" within the meaning of the *Refugee Convention* so as to warrant refugee protection. The Minister submits that this determination is erroneous as mere presence on the *M/V Ocean Lady* does not make someone a member of a "particular social group" within the meaning of the Refugee Convention. The Minster further asserts

that the RPD unreasonably determined that the claimant might be at risk of torture if returned to Sri Lanka, arguing that the Board's interpretation of the evidence with respect to the alleged risk was unreasonable as it does not demonstrate any such risk. Finally, the Minister submits that the Board premised its decision solely on the ground of the claimant's belonging to a particular social group and that it would be erroneous for this Court to uphold the decision on grounds not considered by the RPD, namely the combination of the applicant's ethnicity and perceived political opinion of being a suspected member or supporter of the LTTE.

[5] The claimant, on the other hand, argues that the Board's determination that he was a member of a "particular social group" due to his presence on the *M/V Ocean Lady* was reasonable, as was the determination that he would face more than a mere possibility of persecution if returned to Sri Lanka. In the alternative, the claimant argues that, in addition to relying on the ground of particular social group as a ground for refugee protection, the Board should also be considered to have premised its refugee determination on other protected grounds within the scope of the *Refugee Convention*, namely the claimant's Tamil ethnicity and the likelihood that the Sri Lankan authorities would consider him to be a member or supporter of the LTTE due to his background and presence on the *M/V Ocean Lady*. The claimant argues that this would entitle him to refugee protection under the mixed grounds of race or nationality and perceived political opinion and that this alternative provides a further basis for upholding the Board's decision as being reasonable.

[6] For the reasons set out below, I have determined that the Board's decision should be upheld and this application for judicial review dismissed. To understand why this is so and to place the parties' arguments in their appropriate context, it is useful to review both the relevant legislative

backdrop to the Board's decision and the various decisions rendered to date by this Court in cases of this nature.

Background

[7] Under the IRPA, there are two principal provisions under which an asylum claimant may receive protection, namely sections 96 and 97 of the Act.

[8] Section 96 incorporates the *Refugee Convention* and, to paraphrase its key points, provides in relevant part that those who have a well-founded fear of persecution by reason of race, religion, nationality, membership in a particular social group or political opinion will be granted refugee protection if they are unable or, if due to their well-founded fear, they are unwilling to obtain protection in their country of nationality or habitual residence. The case law recognizes that in order to establish entitlement to protection under section 96 of the IRPA, a claimant must prove on the balance of probabilities that there is more than a mere possibility – or a reasonable chance – that the claimant will face persecution if returned to his or her country of origin (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at 683, 57 DLR (4th) 153 (FCA); *Németh v Canada (Justice)*, 2010 SCC 56 at para 98, [2010] 3 SCR 281; and *Mugadza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 122 at para 20, 164 ACWS (3d) 841).

[9] Section 97 of the IRPA, on the other hand, incorporates the protections enshrined in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987, 1465 UNTS 85 [the *Convention Against Torture*] and, indeed, provides somewhat broader protection than required by that Convention. To once again paraphrase the portions of the

Act that are relevant in this case, section 97 of the IRPA provides that protected person status will be granted to those who would be subjected to a danger of torture, within the meaning of the *Convention Against Torture*, or to a risk to their life or to cruel and unusual treatment or punishment if returned to their country of nationality or habitual residence. There are a number of exceptions to this general protection that are contained in paragraph 97(1)(b) of the IRPA but none of them is relevant in this case. What is relevant is the standard of proof required in respect of a claim under section 97, which is higher than that required for a refugee claim under section 96 of the Act. The case law recognizes in this regard that to be entitled to protection under section 97 of the IRPA, a claimant must establish the likelihood of risk on the balance of probabilities *(Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 14, 249 DLR (4th) 306).

[10] Given the difference in the standard of proof, the cases involving passengers on the *M/V Ocean Lady* and *M/V Sun Sea* have been cast under section 96 as opposed to section 97 of the IRPA. And the issue of whether there is a legitimate basis for a claim – or nexus to a ground in the Refugee Convention – has been the focus of much of the case law.

[11] More specifically, four principal issues have been canvassed in the jurisprudence of this Court in cases involving passengers on the *M/V Ocean Lady* and *M/V Sun Sea*, namely:

1. What is the applicable standard to be applied by this Court to review the Board's interpretation of the requirements of the *Refugee Convention* enshrined in section 96 of the IRPA and to its application of those requirements to the facts of a particular claimant's case?

2. What meaning is to be ascribed to the ground of "particular social group" and is it broad enough to encompass those who face risk flowing from being a passenger on the *M/V Ocean Lady* or *M/V Sun Sea*?
3. Under the reasonableness standard of review, should this Court uphold an RPD decision if, in addition to analyzing whether a passenger on the *M/V Ocean Lady* or *M/V Sun Sea* is entitled to refugee protection as a member of a "particular social group", the RPD also comments on risk flowing from the claimant's ethnicity and perception that he or she might be a member or supporter of or have information about the LTTE? and
4. Should the Court intervene and set aside factual determinations made regarding the degree of risk that the RPD finds a claimant who was a passenger on the *M/V Ocean Lady* or *M/V Sun Sea* might face if returned to Sri Lanka?

(a) Case law on Standard of Review

[12] In terms of the first issue, the case law of this Court is divided. While the cases uniformly recognize that the reasonableness standard applies to the review of the RPD's application of the requirements of the *Refugee Convention* to the facts of a particular claimant's case, there is division in the jurisprudence on whether the reasonableness standard should also be applied to the RPD's interpretation of the *Refugee Convention* as incorporated into section 96 of the IRPA.

[13] On one hand, Justice Harrington held in *B472* at para 22, *B323*, and *A011* at para 44-49 that the correctness standard of review applies to the RPD's interpretation of section 96 of the IRPA and the *Refugee Convention* as these are issues of general importance to the legal system as a whole,

reflecting Canada's human rights obligations flowing from international treaty. In reaching this decision, Justice Harrington relied on the decisions of the Federal Court of Appeal in *Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, 357 DLR (4th) 343 [*Febles*] and *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325, 353 DLR (4th) 536 [*Feimi*]. In *Febles*, the majority of the judges who heard the case held that the correctness standard applies to the interpretation of section 98 of the IRPA, which incorporates into domestic law the exclusions from refugee protection contained in the *Refugee Convention*. In reaching this conclusion, Justice Evans, writing for the majority on this point, held that the correctness standard should apply because the *Refugee Convention* "…should be interpreted as uniformly as possible … [and] [c]orrectness review is more likely than reasonableness review to achieve this goal" (at para 24). In *Feimi*, the same conclusion was reached, this time by a unanimous bench (at para 14).

[14] There is further support for the view that the correctness standard applies to the RPD's interpretation of the *Refugee Convention* in the subsequent decisions of the Federal Court of Appeal in *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, 359 DLR (4th) 730 [*B010*] and of the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, 361 DLR (4th) 1 [*Ezokola*].

[15] In *B010*, Justice Dawson, writing for the Court, held that the reasonableness standard is to be applied to the Immigration Division's interpretation of sections 37 and 117 of the IRPA, which are not identical to the prohibitions contained in the *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air*, 28 January 2004, 40 ILM 384 (2001) [the *Protocol*]. In so deciding, she noted at para 71 that she was "… mindful that the [Federal Court of Appeal had]

previously applied the correctness standard of review to the [Immigration Division's] interpretation of international conventions … in view of the need to interpret international conventions uniformly". She went on to distinguish the holding in *Febles* on the basis that in the case before her the Immigration Division had interpreted the anti-people smuggling provisions in the IRPA as opposed to an international convention and noted that the *Protocol* at issue in her case, unlike the *Refugee Convention*, contemplated that individual states would enact different measures to fulfill the objectives of the *Protocol*. She thus concluded that "the uniformity concerns in *Febles*" did not apply to the *Protocol* (also at para 71). Because the provisions in the IRPA were not identical to those in the *Protocol*, Justice Dawson held that the reasonableness standard of review was applicable as the Division was interpreting its constituent statute and the issue fell within the particular expertise of the Division.

[16] In *Ezokola*, the Supreme Court was faced with another decision of the RPD applying section 98 of the IRPA, which, as already noted, incorporates into domestic law the exclusions from refugee protection enshrined in the *Refugee Convention*. Although the Court did not squarely address the standard of review issue, it applied a correctness review to the Board's decision and overturned it because the Court found that the RPD had applied a flawed definition of complicity for purposes of determining whether the claimant should be excluded from refugee protection due to his complicity in international crimes.

[17] While there is therefore support in the case law for the application of the correctness standard of review to the RPD's interpretation of the *Refugee Convention*, several judges of this Court have reached the opposite conclusion and have held that the Board's determination of what

associations may constitute a "particular social group" is reviewable on the reasonableness standard of review (see e.g. the decisions of the Chief Justice in *B380* at para 13; of Justice O'Reilly in *B399* at para 18; of Justice Blanchard in *B420* at para 13, *A032* at para 14, and *B377* at para 8; of Justice Hansen in *B134*; of Justice Noël in *B451* at para 26 and *B344* at para 28; of Justice Mosley in *B459* at para 4 and *B171* at para 6; and of Justice de Montigny in *B272* at para 60). While the Chief Justice held in *B380* that the interpretation of "particular social group" as a question of law should be reviewed on the standard of reasonableness, my other colleagues elected reasonableness on the basis that the relevant question at issue was the application of the claimant's situation to the *Convention* ground and hence a matter of mixed fact and law. For example, in *B272*, Justice de Montigny held that the reasonableness standard applied because "the arguments turn[ed] not so much on the interpretation of the Convention grounds *per se*, but rather on mixed questions of fact and law… the question does not focus on the definition of a "particular social group", but whether the Respondent falls within such a group" (at para 59).

(b) Case law on the meaning to be ascribed to "Particular Social Group"

[18] Turning to the second issue that is canvassed in the jurisprudence, several of the decided cases hold that the mere fact of having been aboard the *M/V Ocean Lady* or *M/V Sun Sea* is not enough to make passengers members of a "particular social group" within the meaning of the *Refugee Convention* and section 96 of the IRPA. Justices O'Reilly, Blanchard, Noël, Mosley and de Montigny as well as the Chief Justice have all indicated that a finding by the RPD to the opposite effect is unreasonable (see e.g. *B380* at paras 23-27; *B399* at paras 16-18; *B420* at para 17; *B451* at para 27; *B459* at paras 8-11, *B171* at paras 11-13; and *B272* at para 75), whereas Justice Harrington has indicated that while such a finding might be reasonable, it is incorrect (see *B472* at paras 26-28;

B323; *A011* at para 43). Justice Snider, on the other hand, has applied the reasonableness standard of review to these sorts of determinations and has indicated, albeit in *obiter dicta* or non-binding comments, that an RPD determination that being a passenger on one of the ships would make one a member of a "particular social group" could be a reasonable determination (see *PM* at para 17; *SK* at para 25).

[19] The seminal case determining the meaning to be ascribed to the term "particular social group" is *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 [*Ward*], where Justice La Forest, writing for the Court, stated as follows at 739 (cited to SCR):

> 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*, *Cheung*, and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories:
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> > (1) groups defined by an innate or unchangeable characteristic;
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> > (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
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> > (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
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> 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 antidiscrimination influences, in that one's past is an immutable part of the person.

[20] In *B380*, Chief Justice Crampton set aside as unreasonable a determination of the RPD that the claimant – a passenger on the *M/V Sun Sea* – was a member of a "particular social group" comprised of the passengers on the ship. The Chief Justice held that to come within a "particular social group" within the meaning of section 96 of the IRPA, "…there must be something about a group which is related to discrimination or human rights … [and that] that something should relate to what the members are, in an immutable or fundamental way, as opposed to what they do" (at para 24).

[21] Importantly, the very brief RPD decision that the Chief Justice reviewed in *B380* found that the claimant in that case was a member of a "particular social group" based solely on the bare fact that he had been aboard the *M/V Sun Sea*. In that case, unlike the present, the RPD did not comment on the fact that the claimant's presence on the ship might have led the Sri Lankan authorities to view him as an LTTE member or supporter or to wish to interrogate him for his knowledge about the LTTE that he might have gained while on board the ship.

(c) Case law regarding "Mixed Motives" and Perceived Political Opinion

[22] Turning to the third issue canvassed in the case law, several cases have upheld RPD findings in situations like the present case where the RPD premised its decision in large part on the claimants being members of a "particular social group" comprised of Tamils who were at risk as a result of their presence on one of the vessels but also commented at one place or another in the decision that the risk in question was tied to the claimants' ethnicity and the possibility that they might be viewed as supporters of the LTTE. In *B399*, *B420*, *B377*, *B344* and *B272*, Justices O'Reilly, Blanchard, Noël and de Montigny upheld the decisions reached by the RPD on the basis of there being a

confluence of grounds related to race and perceived political opinion, which they found to be sufficient to establish a nexus to one of the grounds in the *Refugee Convention*. To a greater or lesser extent, in each of these decisions, my colleagues have read into the Board's reasons to reach their conclusions. For example, Justice O'Reilly noted at para 19 of *B399*:

> Unfortunately, the Board's findings are not as clear as they could have been; yet, the following passage in its reasons supports B399's contention that the Board did not rest its conclusion solely on membership in a particular social group as a passenger on the MV Sun Sea:
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> > … the claimant will most likely be detained and questioned … upon his return to Sri Lanka…The panel finds that the authorities will suspect the claimant has links to the LTTE. The country documents establish that Tamils suspected of having links to the LTTE continue to be subject to serious abuses, including torture, by the authorities in Sri Lanka.

[23] In *B399*, *B420*, *A032*, *B377*, *B344* and *B272*, Justices O'Reilly, Blanchard, Noël and de Montigny determined that decisions much like the one in this case were reasonable as there was evidence to support the conclusion that the claimants might be at risk of torture if returned to Sri Lanka and that such torture was based on the confluence of their ethnicity, suspected complicity with the LTTE and possession of knowledge about the LTTE, the first two of which would invoke the grounds of race and perceived political opinion.

[24] Conversely, in *B472* at para 28, *B323*, *A011* at paras 40-42, *B459* at para 7, and *B171* at para 10, Justices Harrington and Mosley refused to engage in a similar reading-in exercise and decided the cases based solely on the reasonableness or correctness of the Board's analysis of the "particular social group" ground for refugee protection. In *B472* and *A011*, Justice Harrington set aside RPD

decisions as incorrect where the Board found the claimants to be members of a "particular social group" comprised of passengers at risk due to their presence on one of the vessels, and in *B459* and *B171*, Justice Mosley set a similar finding aside as unreasonable. In all four cases, they certified a question regarding the appropriate standard of review and held that it was inappropriate to consider whether the RPD's decision could be upheld under the grounds of race or perceived political opinion as neither of these grounds was specifically addressed by the RPD as a reason for granting refugee status.

(d) Case law regarding the challenges to the Board's factual determinations

[25] Turning, finally, to the treatment of the Board's factual findings in these cases, in all but two they were not interfered with. The first exception is *B380*, where the Chief Justice set aside the Board's determination that the claimant in that case might be at risk of torture if returned to Sri Lanka. It appears from the decision that the Board's determination in that case was based on a single piece of evidence, namely a newspaper article, which distinguishes it from the present case, as is discussed below. In the second exception, *PK*, Justice Kane set aside the RPD's decision because she found the Board had failed to consider the claimant's particular personal circumstances. No such issue arises in this case.

Analysis

[26] With this background in mind, it is now possible to turn to the present case and the positions advanced by the parties.

[27] I do not find it necessary to address the "particular social group" issue (or the standard of review that applies to the Board's determination regarding the applicant's belonging to a "particular social group") because I have determined that the Board's decision should be maintained on the basis of an analysis similar to that applied by my colleagues Justices O'Reilly, Blanchard, Noël and de Montigny in *B399, B420, A032, B377, B344* and *B272*.

[28] In focusing on whether the Board erred in premising its decision on the risk the claimant would face due to his background and the belief of the Sri Lankan authorities that he might be an LTTE supporter (as opposed to consideration of what the "particular social group" ground encompasses as a matter of law), the standard of review to be applied is reasonableness as the issue is one of mixed fact and law as opposed to a pure legal issue (see e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190, B420 at para 13; *A032* at para 14; *B377* at para 8). In other words, what is at issue is not what the grounds of "nationality", "race" or "political opinion" may mean under the *Refugee Convention*, but, rather, whether the Board's explicit or implicit finding of a nexus to these grounds on the facts of this case should be disturbed. This question requires application of the deferential reasonableness standard of review.

[29] In the decision in this case, as in *B399, B420, A032, B377*, and *B344*, there are several places in the RPD's decision where the Board comments on the risk that the claimant would face by reason of being a young Tamil male from the north of Sri Lanka who would be perceived by the Sri Lankan authorities as being an LTTE member or sympathizer (and as having information about the LTTE) due to his background and presence on the *M/V Ocean Lady*.

[30] For example, in the determination section of the reasons, the RPD wrote as follows:

> The claimant is a Convention refugee, in that he has a well-founded fear of persecution for a Convention refugee ground in Sri Lanka by reason of his nationality and membership in a particular social group of young Tamil males who would be suspected of links to the LTTE because of their travel to Canada on the *Ocean Lady*.

[31] At several other points in the decision, the RPD commented on the risk of torture the claimant might well face upon his return to Sri Lanka by reason of the fact that the authorities would perceive him as having links to the LTTE. For example, the Board wrote:

> [23] … I find … that the claimant's profile changed when he chose to board the *Ocean Lady*, a ship that has been suspected of carrying LTTE members into Canada. The government of Sri Lanka has shown itself to have a clear interest in tracking down and often persecuting persons with LTTE links.
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> …
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> [27] … Even if an immigration officer or any other representative of the Sri Lankan government did not know for certain if he is or was an LTTE member, the claimant would certainly be viewed by the government as a person of interest and at least with possible ties to the Tamil Tigers. They would also be interested in any information he could provide about his fellow passengers, the ship and the journey.
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> …
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> [29] Under these circumstances, I find that if the claimant were to return to Sri Lanka, he would be immediately detained for some period of time so that the Sri Lankan government can ascertain whether he is an LTTE member, whether he has organized for the Tamil Tigers abroad, whether he possesses LTTE intelligence since he apparently traveled with LTTE members on the ship, whether he participated in the trafficking of weapons and ammunition, and so forth.
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> …

[31] The *UNHCR Guidelines*, unchanged since their issuance two years ago in 2010, specifically recommend ongoing protection for those persons with the following profiles: **persons suspected of having links with the LTTE** [emphasis in the original] … As I have found that this claimant would be suspected of having links with the LTTE on return to Sri Lanka, I have paid particular attention to the risks he might face.

…

[39] … I find that as soon as an SIS officer were to query him about his travel pattern and means of transportation to Canada, the claimant would be immediately identified as having a link to the LTTE.

…

[41] … I find that there is more than a mere possibility that the claimant would be stopped, detained, interrogated, tortured and possibly disappeared or even killed since he was on a ship suspected of being owned by and having LTTE members on it … The Sri Lankan authorities will take these steps to ascertain whether the claimant is a LTTE member and whether he has knowledge about others on board who are LTTE members. He will also be interrogated about his possible connections with the LTTE prior to leaving the country and afterwards, his knowledge about whether the *Ocean Lady* was a LTTE ship, whether the claimant was involved with human trafficking and smuggling, which members of the ship were LTTE members, and whether the claimant has made any linkage with the LTTE while outside the country.

…

[43] … In face of the body of evidence that I had before me, the evidence put forth by the Minister does not impact my finding that this claimant will be perceived as having LTTE links on return to Sri Lanka.

[44] The claimant's nexus to a Convention ground changed from the particular social group of "young Tamil males from Sri Lanka not suspected of being an LTTE member or supporter" to "a young Tamil male from [deleted from the public record under a confidentiality order] suspected of being a LTTE member or having information about LTTE members on board the *Ocean Lady*."

[32] Although the Board does not use the words "political opinion" or "perceived political opinion" in the foregoing passages, it clearly delineates that the risk the claimant would face is tied in part to the fact that the Sri Lankan authorities would perceive he had links to the LTTE.

[33] In *B420, A032*, and *B377*, Justice Blanchard held that such reasoning is sufficient to establish a nexus to the protected ground of political opinion; he noted as follows at para 21 of *B420*:

> The RPD's findings are not as clear as they could have been and in some cases arguably deficient. For instance, the RPD could not rely upon imputed knowledge of LTTE activities to support its finding of imputed political opinion. I am nevertheless satisfied that the evidence referred to by the Tribunal in its reasons supports a finding that the Respondent, as a young, Tamil male from northern Sri Lanka, has a well-founded fear of persecution by reasons of his race and his imputed political opinion by reason of his perceived association with the LTTE. I am satisfied that the RPD's conclusion is reasonable.

[34] Justices de Montigny and O'Reilly reached a similar conclusion in *B272* and *B399*.

[35] Although the Board in the decisions reviewed by Justices Blanchard, de Montigny and O'Reilly explicitly used the words "perceived political opinion" as part of the basis for the finding that there was a nexus to a ground in the *Refugee Convention*, this express enunciation of perceived political opinion appears to have been absent from the Board decision in *B344*, where Justice Noël upheld the decision based on a so-called "mixed motives" analysis. He focused in particular on the connection to the claimant's Tamil ethnicity, which when coupled with the other factors, he found led to a nexus to the protected ground of "race". He concluded that the claimant's ethnicity was a key factor, along with others, which led to his being at risk of persecution and, therefore, that there

was a sufficient nexus to a ground in the *Refugee Convention* to warrant protection under section 96 of the IRPA. He held in this regard that a narrow interpretation of "mixed motive" contravenes the spirit of the *Refugee Convention*, stating as follows at paras 37 and 45:

> … Section 96 of the IRPA has one objective which is to prevent people from being subjected to persecution as long as it is linked to a Convention ground. If one of the motivations of the agent of persecution is race but only in combination with another factor, how could that not be sufficient to meet the requirements of section 96 of the IRPA? After all, section 96 of the IRPA as written, is not to be interpreted in a narrow restrictive fashion: its purpose, as outlined, is to address fear of persecution and to protect any person who suffers from persecution based on race, religion, nationality, membership in a particular social group or political opinion. Moreover, section 3(2)(d) of the IRPA clearly states that one of the main purposes of Canada's refugee system is to "offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment." Section 96 of the IRPA needs to be interpreted in light of this objective.
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> …
>
> …the Respondent's Tamil ethnicity was a prime contributing factor to the possibility of risk of persecution upon arrival in Sri Lanka. When considered individually, the motivations, which are based on the Respondent's Tamil ethnicity as well as his status as a former passenger on the *MV Sun Sea*, which is perceived by the government as a LTTE-driven operation, were not sufficient to establish a nexus to the Convention ground of race on their own, however, when taken together they cumulatively established a serious possibility of risk of persecution upon return. Without one of the contributing factors, the Convention ground would not be satisfactorily established but taken together, these motivations form the basis of the ground of race. Therefore, the nexus to race was essential to the RPD's conclusion that the risk of persecution upon return was a serious scenario to be envisaged.

[36] I find the reasoning of Justices de Montigny, O'Reilly, Blanchard and Noël to be persuasive and believe that the Board in this case should be viewed as having tied its nexus finding to race or nationality and perceived political opinion. In this regard, it must be recalled that under the reasonableness standard of review, reasons need not be perfect or follow any particular form as long as they allow the parties and the reviewing court to understand why a decision was made (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). Here, as the above quotations demonstrate, it is clear that it was the combination of the claimant's race or nationality and perceived political opinion, acquired as a result of his background and presence on the *M/V Ocean Lady*, that led the Board to find him to be a Convention refugee.

[37] Upholding the Board's decision on this basis is in line with the decision of the Supreme Court in *Ward*. There, the Supreme Court dismissed the argument that the claimant was a refugee on the basis of membership in a particular social group, namely, for being a former member of the Irish National Liberation Army. However, the Court found the claimant to have a well-founded fear of persecution based on political opinion, even though this ground had not been raised either before the Board or the Federal Court of Appeal (at 745, cited to SCR). Therefore, *Ward* establishes that where the facts support a well-founded fear of persecution based on political opinion, a reviewing court is free to consider that ground even if the parties had framed the issue in the context of membership in a particular social group.

[38] Thus, the Board's determination that there was a nexus to a ground in the *Refugee Convention* is reasonable.

[39] Tuning, next, to the Board's factual findings regarding the likelihood of risk for the claimant, there were multiple pieces of evidence before the Board upon which it premised its risk determination. These included:

- Articles from various media outlets covering the arrival of the *M/V Ocean Lady* to Canadian shores (at pp 924-27 of the Certified Tribunal Record [CTR]), which commented on how the RCMP was receiving "good co-operation from Sri Lankan officials" (at p 924 of the CTR) and reported that one of the 76 migrants aboard was suspected to be involved with the LTTE (at p 927 of the CTR);
- Articles from various media outlets linking the *M/V Sun Sea* and *M/V Ocean Lady* to the LTTE (CTR at pp 928, 933-39), including an article in the Toronto Star where the then Minister of Public Safety and Emergency Preparedness was quoted as having stated that the LTTE "are behind operations to smuggle people into Canada" (CTR at p 936);
- Articles from various media outlets indicating that Canadian officials had communicated with Sri Lankan authorities about the *M/V Sun Sea* and *M/V Ocean Lady* (CTR at pp 924, 926, 941);
- An expert report opining that the widespread media coverage branding the passengers of the *M/V Sun Sea* and *M/V Ocean Lady* as terror threats, the Canadian government's communication with the Sri Lankan authorities and the work of Tamil groups outside of Sri Lanka have put the passengers at risk should they be returned to Sri Lanka (CTR at pp 173-82); and
- Reports from the United Nations High Commissioner for Refugees, the United Kingdom Border Agency, the Canada Border Services Agency and Amnesty

> International indicating that people suspected of having links to the LTTE who return to Sri Lanka risk abuse and torture at the hands of the Sri Lankan authorities (CTR at pp 296-98, 594, 621, 789).

[40] This case is therefore fundamentally different from *B380*, decided by the Chief Justice, as here, unlike there, the RPD had before it multiple pieces of evidence that support its factual findings, which, accordingly, are reasonable.

[41] As the Board's decision in this case was based on a reasonable determination of there being a nexus to a ground enumerated in the *Refugee Convention* and as its factual findings related to there being a reasonable chance that the claimant would be persecuted if returned to Sri Lanka are reasonable, the decision in this case must be upheld. This application for judicial review will accordingly be dismissed.

[42] No question for certification under section 74 of the IRPA was proposed by the parties and none arises in this case as my determination is tied to the evidence before the RPD and to the way in which the decision in this case was drafted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No question of general importance is certified;

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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