Federal Court Cour fédérale

Date: 20140123

Docket: IMM-11142-12

Citation: 2014 FC 78

Ottawa, Ontario, January 23, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

K.K.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] In this proceeding, K.K. sought judicial review of an October 11, 2012 decision by the Immigration and Refugee Board, Refugee Protection Division [the RPD or the Board], refusing to grant either Convention refugee status or protected person status. For the reasons which follow, the application is dismissed.

2. Background

[2] The applicant, a Sri Lankan citizen, arrived in Canada on October 17, 2009 on board the MV *Ocean Lady*. K.K. moved to Colombo in June 2000 to escape paramilitary killings and kidnappings. K.K. secured a job there and ran a side business buying and selling calling cards.

[3] In 2004, K.K. was injured in a motorcycle accident. This resulted in significant scarring to the leg which often aroused suspicion in officials at security checkpoints. K.K. took to carrying medical documentation attesting that the injury was not sustained as a result of fighting for the Liberation Tigets of Tamil Eelam [LTTE].

[4] For his work, K.K. was required to pass through a high security zone. Being a Tamil male, he was questioned almost daily as to why he was in Colombo. During one of these times, K.K. was questioned in Sinhalese by army personnel. Unable to understand them, K.K. did not reply and was detained for over eight hours.

[5] In July 2007, K.K. was arrested by the Colombo Police, the Army, and the Criminal Investigations Division [CID] in a general combined raid and was accused of selling cards to raise funds for the LTTE. Five months in detention in the Boosa Army Camp followed. Daily beatings and abuse occurred, which K.K. reported to visiting United Nations officials. K.K. was released in December 2007 after appearing for a hearing and not being convicted.

[6] In the latter part of 2008, while waiting at a bus stop the applicant was arrested by the Dehiwala police on suspicion of being a member of the LTTE. After being questioned, K.K. was released the following day.

[7] Fearing for the applicant's safety, K.K.'s father made arrangements for travel to Malaysia. K.K. left Sri Lanka on July 5, 2009 and proceeded to Singapore, then from there to Malaysia, arriving on July 19, 2009. While K.K. waited in Malaysia, the father made arrangements with another agent who helped K.K. travel to Canada on the ship *Ocean Lady*. The vessel arrived in Canada on October 17, 2009.

[8] In addition K.K. testified at the Board hearing that paramilitaries had come to family members' homes in June 2010 and provided affidavits from his mother and a lawyer in Sri Lanka with a police report documenting his mother's complaint to the police to support this.

[9] Since arriving in Canada in 2009, K.K. has learned that Canadian investigators have been in contact with the government of Sri Lanka to determine the identities of the passengers on the *Ocean Lady*. The applicant believes that his identity has been shared with Sri Lankan authorities and that because a great deal of publicity has been given to the illegal arrival in Canada of Tamil refugees from Sri Lanka that if he were to return to Sri Lanka he would be arrested, tortured and detained indefinitely.

3. Contested decision

[10] The Board reviewed the claimant's background. It found on a balance of probabilities that K.K. was a citizen of Sri Lanka. The determinative issue was whether the claimant had a well-founded fear of persecution if returned to Sri Lanka.

[11] The Board noted that on July 5, 2010, the United Nations High Commissioner for Refugees [UNHCR] had released *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* [the UNHCR Guidelines] which it relied upon.

[12] The Guidelines identified five potential risk profiles:

1. Persons suspected of having links with the LTTE;
2. Journalists and other media professionals
3. Civil society and human rights activists;
4. Women and children with certain profiles; and
5. Lesbian, gay, bisexual, and transgender individuals.

[13] The Board noted that no evidence had been presented to indicate that K.K. fitted within, or would be perceived to fit within, profiles 2, 3, 4, or 5. K.K. alleged that the first profile applied. The Board reviewed the evidence for this.

[14] K.K. reported being arrested by the Colombo police, the army, and the Criminal Investigations Division [CID] in July 2007 after a search of the house revealed large numbers of calling cards. During CBSA interviews and at the Board hearing, the claimant said that it was the

Terrorist Investigation Department [TID] who conducted the arrest. The Board noted that no explanation was provided for this inconsistency.

[15] The Board next noted that the PIF indicated that K.K. was released without being charged in December 2007, but that at the hearing, K.K. had testified to having been charged and released after appearing in court. Nonetheless, the Board accepted that the arrest had occurred, but it noted that this was not based on personal targeting but on a general search of the area and the large number of calling cards found at the house. The Board also noted that after release, K.K. was allowed to return to work in Colombo, and that despite harsh treatment while in detention, K.K. was never convicted of any crime.

[16] The Board further noted that after K.K. gave up the calling card business, no further significant problems occurred. The PIF did not indicate that the arrest and one-day detention in 2008 were due to suspicion of LTTE membership but rather that they happened because K.K. was not carrying the required police card.

[17] The Board found that there was insufficient evidence to conclude that the claimant fitted the profile of a person suspected of membership in, or links to, the LTTE.

[18] The Board then examined the changing circumstances of Sri Lanka. The UNHCR Guidelines of 2010 advised that there was no longer a presumption that Sri Lankans of Tamil ethnicity originating from the north of the country were eligible for refugee protection, and that claims from all asylum seekers should be considered on their individual merits.

[19] The Board commented that the claimant had left Sri Lanka in 2009. At the time of the July 2012 hearing, it was five years since K.K. had encountered any significant difficulties in Sri Lanka. K.K. had been able to renew a passport and residence permit and leave the country without hindrance. The Board therefore found that there was not a serious possibility of persecution based on K.K.'s identity as a Tamil male from northern Sri Lanka.

[20] Furthermore, the evidence showed that conditions had improved for many Tamils, with the exception of those suspected of LTTE connections, who continued to be subject to arrest, questioning, and sometimes torture. Even those previously identified as having LTTE ties had seen some improvement. Some known former members and supporters had been released from detention and rehabilitation programs, and while some reported enhanced monitoring by the Sri Lankan army, others did not. The UNHCR had advised that while there had been a noticeable increase in assassinations and abductions of civilians in 2008 and 2009, since 2010 the region was calm. In August 2011, the Sri Lankan government had lifted the state of emergency.

[21] The Board did however note that the Sri Lankan government, while relaxing some emergency legislation, had issued parallel regulations under the *Prevention of Terrorism Act* No 48 of 1970. These provided for the continuance of militarized high-security zones and the detention of thousands of LTTE suspects, most of whom had been held beyond the stipulated two-year maximum. They also provided for confessions made while in policy custody, and possibly subject to inducements, threats, or promises, to be legally admissible. Amnesty International had voiced concern at the routine use of prolonged administrative detention to circumvent ordinary procedures.

There was also evidence that the Sri Lankan government was reluctant to accept responsibility for human rights violations committed during the war, although it was finally willing to acknowledge that these had occurred, and the LTTE was also responsible for violations. The Board commented that the post-war issues were complex and that they did not suggest that Sri Lanka was not safe for the claimant to return to now.

[22] The Board next considered whether K.K.'s profile as a failed asylum seeker would attract negative attention from the authorities and result in persecution. It noted that the UK had returned 26 asylum seekers in June 2011; all were questioned, then all were allowed to return to their homes. The UNHCR had assisted 1,493 refugees from India, Malaysia, Georgia, and St Lucia to return in October 2011, joining approximately 7,500 other returnees from India since 2006. This suggested UNHCR confidence that it was safe to return. During a fact-finding trip in 2011, Canada Border Services Agency [CBSA], Australian, UK, and UNHCR delegates interviewed voluntary and non-voluntary returnees and all said that they no longer had fears for their personal safety. In January 2012, the Canadian government signed an agreement with the International Organization for Migration [IOM] in which the IOM would facilitate voluntary returns from Africa. Sixty-six returnees were interviewed at the airport and released without any difficulties.

[23] Documentary sources stated that all returning Tamils, whether voluntary returnees or failed asylum seekers, were subject to the same screening process of interviews at the airport and criminal background checks. They are detained for generally a few hours but sometimes 24 to 48 hours. On occasion detention may last up to some months while the checks are completed. The Canadian High Commission had noted that it was only aware of four cases of persons being detained upon

arrival, all four involving outstanding criminal charges. Nonetheless, the Board had considered reports suggesting that returnees with actual or perceived associations with the LTTE or a history of having opposed the government were at a heightened risk of detention and torture. It noted, however, that the claimant did not have any actual associations with the LTTE nor a history of having opposed the government.

[24] The Board commented that K.K. had never been specifically targeted by the government as an LTTE supporter or member, having been arrested only once and released after five months without being convicted. K.K. had never even been suspected or detained for LTTE connections except for the one detention.

[25] Having considered all of the evidence, the Board found that Tamils in Sri Lanka were not being targeted solely on the basis of their ethnicity, although this did not necessarily apply equally to all Tamils, and there were ongoing challenges particularly regarding Tamils perceived to have links to the LTTE.

[26] The Board then examined the *sur place* claim. Because the claimant had arrived on the *Ocean Lady*, it was acknowledged that K.K.'s profile had changed since leaving Sri Lanka. The Board reviewed the criteria for *sur place* claims in the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status*, and particularly Article 96:

> A person may become a refugee "*sur place*" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such

> actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

[27] Having considered the documentary evidence, it found that the claimant had not been personally identified in any evidence presented in relation to media coverage of the arrival of the *Ocean Lady* and that there was no evidence to indicate that the Sri Lankan authorities were aware of the claimant's identity.

[28] The Board also considered an article submitted by the Minister which indicated that Canadian authorities, through the RCMP, were working with Sri Lankan officials to identify the *Ocean Lady*'s passengers. This article identified Sergeant Duncan Pound of the RCMP as having made statements about cooperation with Sri Lanka. In a declaration dated January 11, 2012, Sergeant Pound stated that at the time he was interviewed, he was not a member of the investigative team and did not have any specific knowledge with respect to the investigation, and that some of his comments had been taken out of context by the media. He declared that at no time had he stated that the personal information of any of the migrants was being provided to the Sri Lankan authorities.

[29] The Board assigned great weight to Sergeant Pound's declaration, made in his official capacity as an official of the RCMP. It concluded that despite the allegation put forward by K.K.'s counsel, no persuasive evidence had been put forward to suggest that the declaration was not trustworthy. The Board therefore assigned little evidentiary value to the media reports suggesting that information on the personal identities of the *Ocean Lady* passengers was shared with Sri Lanka.

[30] In another Canadian news article, the Sri Lankan High Commissioner was quoted as warning Canadian officials of LTTE rebels "washing up on the shore". The High Commissioner identified the captain of the *Ocean Lady* by name, but no other passengers, and stated that "a considerable number" of the passengers had links to the LTTE. Of the alleged Canadian authorities' alleged investigations, the High Commissioner stated: "These are secret operations." She stated that the Sri Lankan government was working closely with the Canadian government and that Sri Lanka hoped that this would serve as a "wake up call" to Canada. This suggested to the Board that the High Commissioner did not consider that all of the passengers had links to the LTTE and that the Sri Lankan government was not aware of the identities of all of the passengers. The Board found it reasonable to assume that she would have identified others by name in the news article had she been aware of their identities.

[31] In another article, a terrorism expert, the head of Singapore's International Centre for Political Violence and Terrorism Research, stated that "a few dozen" *Ocean Lady* passengers were suspected to have ties to the LTTE. It would appear that his opinion was that not every passenger had such ties. The Board found it reasonable to assume that the Sri Lankan government would be aware of this expert's opinion.

[32] In a Canadian article posted on the Sri Lankan Ministry of Defence website, it was suggested that one-third of the *Ocean Lady*'s passengers had LTTE ties. This again suggested that the Sri Lankan government would not believe that the majority of the passengers had such ties.

[33] The Sri Lankan Ministry of Defence also posted an article which stated that "Contrary to reports, none of the Sri Lankan Tamils who paid $40,000 to $50,000 each for passage to Canada are ex-LTTE combatants involved in the Eelam war."

[34] The Board found that the contents of these news articles did not provide persuasive evidence that Canada had disclosed the identities of the *Ocean Lady* passengers to Sri Lanka; any such allegation remained speculative at best. The Board found on a balance of probabilities that the personal identity of K.K. and his passage on the *Ocean Lady* had not come to the attention of the Sri Lankan authorities.

[35] The Board also considered how K.K.'s passage on the *Ocean Lady* would be viewed by Sri Lanka if it came to light in the future. It noted that Sri Lankan authorities would be aware that the claimant had been released by Canadian authorities after extensive investigation, which would not have happened if significant ties to the LTTE had been found. The Board found on a balance of probabilities that the Sri Lankan government would not conclude that the claimant was a member or supporter of the LTTE based on passage on the *Ocean Lady*, in light of previous events in Sri Lanka and events while in Canada. It found that a *sur place* claim had therefore not been established.

[36] The Board then conducted a section 97 analysis. K.K. had testified to fearing the Eelam People's Democratic Party [EPDP] and Karuna Group paramilitaries, who might pose a risk of abduction or extortion due to the calling card sales business. The Board acknowledged the evidence that these groups engaged in extortion but found that this was a generalized risk faced by all members of Tamil communities in Sri Lanka, not a personalized risk.

[37] The Board rejected the claim for asylum.

4. Issues

[38] The applicant proposes the following issues:

a. Did the Board breach the principles of natural justice by selectively reviewing the evidence before it?

b. Did the Board err by unreasonably considering the risk as a passenger on the *Ocean Lady*?

c. Was the Board's decision unreasonable because it relied on unreasonable credibility findings, failed to consider the applicant's profile as a whole and in context, and relied on unreasonable findings of fact?

d. Did the Board err in finding that the risk the applicant might face would constitute a generalized risk?

[39] I find that the issue is whether the Board's decision as a whole was unreasonable in light of the facts before it.

5. Standard of review

[40] The applicant submits that the appropriate standard of review for the issue of natural justice is correctness (*Kastrati v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1141 at paras 9-10), while the appropriate standard for the other issues is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48; *Newfoundland and Labrador Nurses' Union v*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62 [*Newfoundland Nurses*] at paras 16-17; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 51-55; *Pathmanathan v Canada (MCI)*, 2013 FC 353 at para 28; *Komolafe v Canada (MCI)*, 2013 FC 431 at para 11; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 [*Construction Labour Relations*] at para 3).

[41] The respondent submits that the disputed issues are the Board's findings of fact, which call for a standard of review of reasonableness (*Ren v Canada (MCI)*, 2009 FC 973 at paras 12-13; *Chen v Canada (MCI)*, 2002 FCT 1194 at para 5; *Gan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1329 [*Gan*] at para 4).

[42] I agree with the respondent. The standard of review is reasonableness.

6. Analysis

[43] By and large I am in agreement with the respondent that what it describes as the "foundational" facts are sufficient to conclude that the decision was reasonable and within the range of acceptable outcomes based upon facts and the law. I cite the following foundational findings:

(a) The applicant's detention in 2007 was as a result of a general search as opposed to being targeted.

(b) The applicant was suspected as an LTTE fundraiser as he was found with a large number of calling cards in his possession during the search.

(c) This matter was investigated and after appearing in court the applicant was found to be innocent. He had permission allowing him to have the calling cards in his possession.

(d) The applicant was never convicted of any crime.

(e) After his release the applicant was allowed to return to his former place of work in Colombo.

(f) After giving up his calling card business the applicant did not experience any significant problems.

(g) The applicant was detained a second time but it was for a very short period, one day. This detention was due to a communication problem as he did not understand the Sinhala-speaking soldier.

(h) After his arrest, the applicant had applied for and renewed both his residence permit and passport without difficulties.

(i) The applicant was able to leave Sri Lanka without any problems.

(j) There was no evidence that the applicant had actual connections with the LTTE or a history of being opposed to the Sri Lankan Government.

[44] These facts in combination with the detailed review carried out by the board over 20 pages of its reasons responded adequately to the issues raised by the applicant. I find that the applicant is asking the court to reweigh and reconsider the case as a whole, which obviously it is not entitled to do.

Assessment of Risk

[45] The applicant argues that the Board incorrectly assessed the risk for three reasons: it held that he had not been identified as an LTTE supporter before leaving Sri Lanka, when the relevant period was upon return to Sri Lanka; it ignored the impact of the Canadian government's

investigation of him for LTTE links; and it failed to consider the risk of torture by Sri Lankan authorities during screening for LTTE connections. As described above, the Board considered all three issues and on balance it concluded that the applicant did not face a serious risk upon returning to Sri Lanka. Moreover, the issue falls squarely within the expertise of the Board and the decision must be treated with deference when within the range of possible outcomes based on the fact and law.

[46] The applicant submits that the Board relied on evidence from the UK Border Agency dated June 17, 2011 which showed that 26 asylum seekers had returned home safely, when the record included evidence from Human Rights Watch dated February 2, 2012 and the UK Home Office dated February 24, 2012 which showed that returned Tamil asylum seekers had been subject to arbitrary arrest and torture upon their return. Human Rights Watch has called on the UK to halt deportations of Tamils to Sri Lanka. In addition, Amnesty International specifically commented in a June 2012 report that passengers on the *Ocean Lady* and Sun Sea would be exposed to a serious risk of detention, torture, and mistreatment on return should the authorities suspect that they had been on board those vessels. The Board made reference to all the reports in question. It was within its discretion to prefer the evidence from United Nations and government sources.

Factors Not Considered

[47] The applicant submits correctly that the Board did not mention the letters from family members or the applicant's Sri Lankan lawyer's letter and police report about an incident when armed unidentified persons came to his mother's home in July 2010 looking for him. In this regard, I am in agreement with the applicant's submission that the more important the evidence that was not

mentioned, the more willing a court may be to find that a Board made an erroneous finding of fact without regard to that evidence (*Cepeda-Gutierrez v Canada (MCI)*, [1998] FCJ No 1425 at paras 15, 17). However, I do not find this particular evidence important due to its lack of weight particularly when measured against the large body of evidence considered by the Board and found to support its conclusion that the applicant was not at risk on return to Sri Lanka. A decision maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. See *Newfoundland Nurses*, *supra*, at para 16.

[48] Moreover, I agree with the respondent that this evidence is so vague as to not require mention, particularly because the applicant acknowledged in his testimony that he may have been targeted because he was perceived as a person of some wealth. This obviously has no connection with having sympathies for the LTTE. Similarly, the fact that the Board did not deal with his visible scarring is understandable given the inadequacy of the evidence. The applicant offers no explanation as to how he had lost his medical documents and why he would not be able to obtain similar information that served him to overcome any negative perceptions as an LTTE member in the past.

Disjunctive Review of Evidence

[49] The applicant argues that the Board should have considered the applicant's cumulative profile of risk factors (*Yener v Canada (MCI)*, 2008 FC 372 at paras 56-57; *Boroumand v Canada (MCI)*, 2007 FC 1219 at para 63). These were: Tamil ethnicity, suspected affiliation with the LTTE, previous detention and torture, presence of injuries, failed asylum seeker, *Ocean Lady* passenger. He argues that cumulatively, these interconnected factors established that the applicant

would be perceived as affiliated with the LTTE and would be at risk of persecution. Instead he says that the Board performed a disjunctive analysis, looking at each risk factor only in isolation from the others.

[50] The Board examined the factors cited in the applicant's profile and generally discounted all, in particular his suspected affiliation with the LTTE. Considering all of the factors of the profile together does not improve a situation where the Board has rejected or diminished the probative value of each in turn. In addition, the Board clearly indicated in its conclusory paragraph that it had taken careful consideration of all of the applicant's evidence, including the claimant's testimony and the final submissions made by his counsel. I find no basis to suggest that the Board carried out its analysis in a disjunctive fashion.

[51] I also have some difficulty seeing how a decision can be set aside on the basis that the Board considered all of the evidence but did not take consideration of its cumulative impact, unless there is a clear statement or grounds to that effect, which would be highly unlikely. It is one thing to criticize a decision for not having considered an important relevant factor or having considered an irrelevant factor, because these situations can be determined from a review of the decision. It is quite another I would think to conclude that despite having considered a factor, a decision maker did not consider that factor along with all the other factors. It is not evident how one can demonstrate such a conclusion other than by the decision itself, and that would just mean the Court substituting its opinion for that of the Board. Such an intervention by the court would also appear to contradict the Supreme Court's direction in *Newfoundland Nurses*, which provides a considerable degree of latitude to an administrative tribunal as to the manner in which it arrives at its decisions.

Generalized Risk

[52] The applicant submits that the RPD erred in its assessment of generalized risk, firstly by making a finding that "all members of the Tamil communities in Sri Lanka" faced risk, thereby acquiescing to the fact that the risks that the applicant would face were limited to a certain sub-section of the population (that being the Tamil minority among the Sri Lankan population, rather than the population as a whole).

[53] I agree with the respondent that these remarks are inadvertent and do not reflect the full reasons on this issue. The determinative issue in the matter was whether the applicant would be targeted because of his past detention etc. as under suspicion of supporting the LTTE. Furthermore the Board was referred to documentary evidence indicating that "no particular group of people is targeted for these activities" and that "the activities have a more generalized target".

Credibility Relating to Inconsistencies in Testimony

[54] The applicant also submits that the board's credibility finding was unreasonable in reference to two inconsistencies described by the Board but not brought during the hearing; namely, whether the police as opposed to a terrorist investigation department arrested him in 2007, and whether he was released after a hearing or not. I am in agreement with the applicant that it is procedurally unfair to make a credibility finding on a point without providing an opportunity to the disadvantaged party to respond. If the panel determines after the hearing that there is a significant inconsistency, the member is duty-bound to bring it to the attention of the disadvantaged party and invite further

comment. Therefore, had these findings played any role in the final decision, I would have had to seriously consider whether the decision should be set aside.

[55] However, I am in agreement with the respondent that any issues of the applicant's credibility played no role in the Board's decision. The decision was based upon circumstances unrelated to the applicant's credibility as described in the list of foundational facts, in regard of which the described inconsistencies are incidental at best.

Plausibility Finding

[56] The applicant claims that the Board made adverse credibility findings which he describes as "plausibility" findings. He argues that such conclusions can only be made by the Board in the clearest of cases and that the Board is owed minimal deference by this court, citing jurisprudence in support of these propositions. Because I disagree with the applicant's characterization of the Board's plausibility findings and respectfully have concerns about the applicability of the jurisprudence cited in support of the applicant's propositions which predates *Dunsmuir*, I propose to deal with this issue in some detail.

[57] The essentials of the applicant's submissions are contained at paragraphs 59 to 61 of his further memorandum of fact and law and are reproduced below along with my underlining and numbering in square brackets of issues that are raised in the analysis that follows:

> 59. The remaining adverse [1] credibility findings were actually adverse plausibility findings that are [2] owed minimal deference by this Court. Federal Court jurisprudence has established two types of credibility findings. The [3] core of the Immigration and Refugee Board's expertise is in determining credibility based on internal contradictions, inconsistencies, and evasions. The second

> type of credibility finding involves the drawing of inferences and is one based on extrinsic criteria, such as rationality, common sense, and judicial knowledge. With regards to this second type of credibility finding the Court has found that [4] "triers of fact are in little, if any, better position than others to draw [these conclusions]." Consequently, less deference is owed to this kind of determination. *Giron v. Canada (M.E.I.)*, 143 N.R. 238 (F.C.A.) para. 1.
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> 60. This Court has held that plausibility findings can only be made in the [5] clearest of cases and that the Court can intervene where the evidence before the panel does not support the plausibility findings. Furthermore, judges reviewing the decision are just as well positioned as tribunal members at determining whether a particular scenario or series of events described by a claimant might reasonably have occurred. *Divsalar v. Canada (M.C.I.)*, 2002 FCT 653 at paras. 23-24; *Cao v. Canada (M.C.I.)*, 2007 FC 819 at para. 7.
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> 61. The RPD's [6] key plausibility finding in the case at bar is that the Applicant does not have a well-founded fear because he is not suspected by the Sri Lankan Government of having connections with the LTTE. […]
>
> [Emphasis added]

Plausibility Findings

[58] A plausibility finding as a legal concept has the same meaning as an inference. Inferences appear in every guise in legal reasoning, arising in relatively simple factual situations or as part of a complex reasoning process involving inferences built upon inferences. The cases cited by the applicant provide two examples of different uses of plausibility findings. In *Divsalar v Canada (MCI)*, 2002 FCT 653 [*Divsalar*], inferences were used to challenge the credibility of the applicant, while in *Cao v Canada (MCI)*, 2007 FC 819 [*Cao*] the inference that the applicant sought to prove was rejected by the Board as not reasonably probable, but without any adverse credibility findings against the applicant. The situation in the present matter resembles that in *Cao*.

[59] I comment on both cases, but for different reasons. With respect to *Divsalar*, I think it important to limit the principle that inferences should only be made in the clearest of cases under circumstances where they are used to denigrate a witness' credibility. With respect to *Cao*, I find that *Dunsmuir* has placed restrictions upon a reviewing court's authority to substitute its opinion on the reasonableness of an inference where the inference represents the Board's decision as it did in that matter.

General Principles Governing Inferences

[60] The late Justice Ducharme, as he then was, provided a comprehensive summary of the essentials of an inference in *R v Munoz*, 2006 CanLII 3269; 86 OR (3d) 134; 205 CCC (3d) 70; 38 CR (6th) 376 (ON SC). Although the comments are made in the context of criminal law, the principles apply equally to inferences in whatever context they are found. I cite paragraphs 23 *et seq*. from his reasons (with citations removed), with my underlining for emphasis:

> B. The drawing of inferences
>
> [23] While the jurisprudence is replete with references to the drawing of "reasonable inferences", there is comparatively little discussion about the process involved in drawing inferences from accepted facts. An inference is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that may, not must, be drawn in the circumstances. It must be emphasized that this does not involve deductive reasoning which, assuming the premises are accepted, necessarily results in a valid conclusion. Rather, the process of inference drawing involves inductive reasoning which derives conclusions based on the uniformity of prior human experience. The conclusion is not inherent in the offered evidence, or premises, but flows from an interpretation of that evidence derived from experience. Consequently, an inductive conclusion necessarily lacks the same degree of inescapable validity as a deductive conclusion. Therefore, if the premises, or the primary facts, are accepted, the inductive conclusion follows with some degree of probability, but not of necessity. Also, unlike deductive

reasoning, inductive reasoning is ampliative as it gives more information than what was contained in the premises themselves.

[24] […] Equally important is Justice Watt's admonition that, "The boundary which separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate."

[25] The process of inference drawing was described by Doherty J.A. in *R. v. Morrissey* as follows:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. […]

[26] The first step in inference drawing is that the primary facts, i.e., the facts that are said to provide the basis for the inference, must be established by the evidence. If the primary facts are not established, then any inferences purportedly drawn from them will be the product of impermissible speculation.

[…]

[28] The second way in which inference drawing can become impermissible speculation occurs where the proposed inference cannot be reasonably and logically drawn from the established primary facts. This possibility stems precisely from the fact that an inductive conclusion is not necessarily valid. […]

[29] The courts have repeatedly cautioned against confusing a reasonable inference with mere speculation. Where an inferential gap exists, it can only be properly overcome by evidence. This point was powerfully made by Doherty J.A. in *United States of America v. Huynh*. […] In rejecting the Crown's contention, Doherty J.A. reasoned as follows [at para. 7]:

> The material identified by the respondent certainly permits the inference that the cash was the proceeds of some illicit activity. Drug trafficking comes readily to mind as one possible source. The process of drawing inferences from evidence is

> not, however, the same as speculating even where the circumstances permit an educated guess. The gap between the inference that the cash was the proceeds of illicit activity and the further inference that the illicit activity was trafficking in a controlled substance can only be bridged by evidence. The trier of fact will assess that evidence in the light of common sense and human experience, but neither are a substitute for evidence. The requesting state has not offered any evidence as to the source of the funds even though its material indicates that one of the parties to this conspiracy is cooperating with the police. . . . I do not think there is anything in the material that would reasonably permit a trier of fact to infer that the cash was the proceeds of drug trafficking and not some other illicit activity.

[30] It is difficult, if not impossible, to define with any precision a bright line distinction between the drawing of reasonable inferences and mere speculation. […]

[31] However, it must be emphasized that this requirement of "logical probability" or "reasonable probability" does not mean that the only "reasonable" inferences that can be drawn are the most obvious or the most easily drawn. [See Note 12 below] This was explicitly rejected in *R. v. Katwaru*, supra, note 5, per Moldaver J.A. at C.C.C. pp. 329-330, O.R. p. 444:

> [I]n the course of his instructions on the law relating to circumstantial evidence, the trial judge told the jury on numerous occasions that they could infer a fact from established facts but only if the inference flowed "easily and logically from [the] other established facts".
>
> The appellant submits, correctly in my view, that the trial judge erred by inserting the word "easily" into the equation. In order to infer a fact from established facts, all that is required is that the inference be reasonable and logical. The fact that an inference may flow less than easily does not mean that it cannot be drawn. To hold otherwise would lead to the untenable conclusion that a difficult inference could never be reasonable and logical.

> Rather, the requirement of reasonable or logical probability is meant to underscore that the drawing of inferences is not a process of subjective imagination, but rather is one of rational explication. Supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference. Therefore, it is not enough simply to create a hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or inferences sought to be drawn. As Fairgrieve J. noted in *R. v. Ruiz*, [2000] O.J. No. 2713 (C.J.), at para. 3, "Simply because a possibility cannot be excluded does not necessarily mean that a reasonable trier could be justified in reaching such a conclusion on the evidence." […]

[61] I would summarize the foregoing statement of principles on inferences as follows:

- An inference is a conclusion that follows logically and reasonably to a sufficient degree of probability from accepted facts by the application of an inductive reasoning process that utilizes the uniformity of prior human experience as its benchmark.

- The facts that are said to provide the basis for the inference must be established by the evidence and cannot be substituted for by speculation.

- Because there is no bright line, drawing a distinction in degrees of probability between permissible reasonable inferences and impermissible speculation is often a very difficult task.

- Drawing inferences is not about possibilities, nor is it a process of creating a hypothetical narrative, or applying subjective imagination even where the circumstances permit an educated guess.

- Inferences need not be the most obvious or the most easily drawn; all that is required is that the inference be reasonable and logical.

Plausibility Findings Involving Credibility

[62] A distinction needs to be made between the result of a tribunal rejecting an inference because it disagrees with the applicant that there is a sufficient degree of probability to support the conclusion and the situation where the tribunal takes the further step of concluding that the applicant was not telling the truth when he or she offered the conclusion for the tribunal to consider. It is only when there is some moral reflection on the act of proposing the inference, as opposed to simply rejecting it as not probable, that a credibility finding results from the rejection of the inference.

[63] In this matter, the applicant submits that the Board made an adverse credibility finding when it rejected the inference that he did have a well-founded fear of persecution were he to be returned to Sri Lanka. I agree with the respondent's submission that the rejection of the inference of a well-founded fear was a decision not intended to reflect on the applicant's credibility, but rather simply on the fact that the whole of the evidence before the Board was insufficient to meet the objective test that the applicant had a well-founded fear.

[64] The Board arrived at its conclusion in reliance upon all of the evidence before it, including that relating to such factors as the applicant's past treatment in Sri Lanka, the UNHCR profile guidelines, improving country conditions etc. Based on this evidence, it concluded that the applicant had not discharged his onus on a balance of probabilities that the underlying facts would sustain the inference of a well-founded fear of persecution by a reasonable person in the applicant's situation. There was no comment on the truthfulness of the applicant's fear which appears to have been accepted, but nevertheless was found not to be well-founded in his particular situation.

The Board Should Only Make Plausibility Findings Regarding Credibility in the Clearest of Cases

[65] The applicant argued that the Board should only make plausibility findings in the clearest of cases. In my view this principle requires some explanation and it must be limited to situations involving negative credibility findings and not stated as generally applying to inferences outside of those special circumstances.

[66] The applicant relies upon a passage in a text on immigration law and practice cited with approval in *Divsalar*. The relevant passage from *Divsalar* at paragraph 24 is set out:

> 24 Further, it is accepted that a tribunal rendering a decision based on a lack of plausibility must proceed with caution. I find it useful to reproduce the following passage from L. Waldman, Immigration Law and Practice, (Markham: Butterworths Canada Ltd. 1992) at page 8.10, paragraph s. 8.22 which deals with plausibility findings and the impact of documentary evidence that may be before the tribunal:
>
> > 8.22 Plausibility findings should only be made in the clearest of cases - where the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant. Plausibility findings should therefore be "nourished" by reference to the documentary evidence. Moreover, a tribunal rendering a decision based on lack of plausibility must proceed cautiously, especially when one considers that refugee claimants come from diverse cultures, so that actions which might appear implausible if judged by Canadian standards might be plausible when considered within the context of the claimant's background. [Emphasis added]

[67] The decision in *Divsalar* turned on credibility findings, such that the comment requiring clear cases would be *obiter dictum*, if extended to inferences not involving credibility. Moreover, the Board's plausibility findings were set aside primarily due to a lack of evidence supporting the underlying factors. For the one credibility finding where the Court disagreed on the rationality of the Board's finding, the conclusion was clearly unreasonable. *Divsalar* therefore, does not purport to stand for a requirement that plausibility findings of the Board can only be made in the clearest of cases.

[68] With respect to negative credibility assessments based on inferences, it is understandable that an administrative tribunal should show some restraint in this regard. As noted in the general principles governing inferences, drawing the line between speculation and a valid inference is a matter of degree and not always an easy task. Credibility assessments however, require a greater degree of probability inasmuch as they tend to reflect on the character or the faculties of the witness. If the Board intends to draw a negative inference related to the credibility of a witness, it should only do so where the gap between the underlying premises and the inference that contradicts the witness is so significant as to be clearly speculative or untrue. However, outside of credibility challenges based upon the tribunal's drawing of a contradictory inference, the general test regarding the reasonableness of an inference applies, being based upon the Board's determination as to whether the conclusion is more likely than not to rationally flow from the underlying facts on a balance of probabilities.

[69] Moreover, the passage quoted above from the Waldman text, cited in *Divsalar, supra*, goes too far in the imposition of a severely restricted standard of decision-making on the Board regarding

adverse credibility conclusions based on plausibility findings. Suggesting that the negative credibility assessments based on inferences can only be made when the underlying facts make them "so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened" is an untenable standard and itself unreasonable. It is sufficient that the Board's adverse credibility findings be limited to situations where the underlying facts clearly support an inference that the witness was not truthful in his or her statement such that it would be highly unlikely that a reasonable person would disagree with the conclusion.

The Standard of Review of a Plausibility Finding that Determines or is the Decision

[70] Finally, and probably more importantly, the question arises as to the appropriate standard of review by this Court, or at least how it should be applied to plausibility findings of a specialized administrative tribunal, such as the RPD. It is common ground that the standard of review is reasonableness as opposed to correctness with regard to the Board's factual determinations; this standard would extend to plausibility conclusions. Reasonableness means that even when the reviewing court considers a decision to be one that it would not necessarily reach, i.e. not correct, deference must be owed the specialized tribunal and restraint shown in the application of what reasonableness entails.

[71] The duty to owe deference to the decisions of the decision-maker stems from the specialized nature of the tribunal. In this case it entails recognition that the RPD has more expertise than a generalized court in dealing with the evidence, the findings of fact and the application of its own statutory materials to determine refugee claims. This point is implicit from the passage quoted above when the author speaks of the need to proceed with caution because refugee claimants come

from diverse cultures. It is just because the RPD deals with these issues on a daily basis and has acquired a specialized knowledge of the factors underlying claims by parties from diverse cultures, that courts are directed to apply a modified reasonableness test (a range of reasonable acceptable outcomes) in reviewing their decisions.

[72] Moreover if one circles back to the foundation of reasonableness of an inference being an interpretation of evidence derived from experience, the possession of a specialized and applied experience in matters relating to refugees is an indication that the RPD is better positioned than the reviewing court to apply inductive reasoning based on experience to assess the reasonability of the inference in so far as it springs from the circumstances involving refugees.

[73] It is also useful to compare a reviewing court's ability to set aside a decision that relates to issues about what the tribunal takes into consideration in its decision-making process involving a plausibility finding where no challenges are made to underlying factors. The court is generally comfortable when it concludes that a tribunal has relied on significant irrelevant factors, or conversely has not considered relevant ones that would affect the outcome. It is similarly a relatively straightforward matter to determine whether there is any underlying evidence or grounds to support a significant factor. There is no issue that an inference based on unsupported factors is conjecture; see *Yada v Canada (MCI),* [1998] FCJ No 37 (QL)**,** 140 FTR 264 (TD) at para 25.

[74] However, in situations where all of the relevant factors are established on the facts and properly considered by the tribunal, the reviewing court is left only with the outcome in terms of the conclusion to consider. Ultimately this tends to come down to the degree that a factor can

reasonably support an inference. If the conclusion involves more than one factor, then both the degree and the weight given to the different factors that rationally support the conclusion must be considered. Obviously the more factors supporting the plausibility finding and the more determinative the plausibility finding on the outcome, the more complicated it will be for a court to intervene. That is why I characterize the plausibility finding that the applicant did not have a well-founded fear of persecution as a conclusory inference determinative of the outcome and frankly largely not subject to challenge when it comes down to considering the degree and weight attributed to the factors underlying the inference.

[75] Apart from this, it is important to recognize that *Dunsmuir* has changed the landscape to some extent with its emphasis on a range of decisional outcomes. Cases predating *Dunsmuir* may have to be reconsidered if the methodology of review based on a range of outcomes has not been employed. The important change I find is the need to consider the decision from the perspective of the decision maker. That is why I am particularly concerned by the decision in *Cao, supra,* although I have no quarrel with the results, just the manner in which the decision was expressed which I believe reflects the fact that it predated *Dunsmuir*. The case is also relevant because it is relied upon by the applicant since it bears some factual similarity to this matter. The Court overturned the plausibility finding and thereby the decision of the Board that the applicant had not shown a well-founded fear of persecution. I refer to paragraphs 5 and 7 from the decision for the purpose of my comments:

> [5] Further, the Board did not believe Ms. Cao had shown a well-founded fear of family planning authorities in China. It gave three reasons:
>
> • It was unlikely that authorities would have learned about Ms. Cao's pregnancy in March 2005, as she had claimed, because she was only one month into her term at that point.

> • Ms. Cao stated in her PIF that authorities visited her home once while, in her oral testimony, she said that they visited once a month.
>
> • Documentary evidence suggested that Ms. Cao may be fined when she returns to China, not that she is liable to be sterilized. The amount of the fine would likely be less than what she had paid to come to Canada.
>
> [. . .]
>
> [7] However, on the issue of Ms. Cao's fear of family planning authorities, I have come to the opposite conclusion. First, unlike the Board, I do not find it implausible that authorities might have learned of Ms. Cao's pregnancy soon after she disclosed it to her family, boyfriend and fellow parishioners. With respect to a finding of implausibility, the Court is often just as capable as the Board at deciding whether a particular scenario or series of events described by the claimant might reasonably have occurred: *Divsalar v.Canada (Minister of Citizenship and Immigration)* 2002 FCT 653 (CanLII), 2002 FCT 653, [2002] F.C.J. No. 875 (QL)(T.D.) (at para. 6).
>
> [Emphasis added]

[76] The Court set aside the Board's decision because it did not find it implausible that the authorities might have learned of the applicant's pregnancy after she disclosed it to her family, boyfriend and fellow parishioners. It concluded that this was a situation where the Court was as capable as the Board in deciding whether a particular scenario described by the claimant might reasonably have occurred. It in effect, I find that it took the same approach as a court of appeal by substituting its opinion on the reasonableness of the inference for that of the Board.

[77] I would respectfully suggest that when the test is based upon a range of possible acceptable outcomes, the court misdirects itself by asking whether an inference advanced by the applicant based upon a particular scenario or series of events might reasonably have occurred. This test

reverses the onus by providing the applicant with the benefit of a range of outcomes. By *Dunsmuir*, that benefit must be afforded the tribunal, not the applicant.

[78] I believe the proper question that conforms to the *Dunsmuir* standard of review when the inference has been rejected by the tribunal as speculative is whether a particular scenario or series of events might reasonably be found to be speculative. This is because the phrase "might reasonably" connotes a range of reasonable outcomes, which is the basis upon which the reviewing court is required to consider the Board's decision.

[79] I point out that were the test one of correctness, such for an appellate court that simply decides whether the inference is reasonable or not on a balance of probability test, the proper question would be whether the conclusion said to logically result from the underlying facts is more likely or more probable than not to occur. A reviewing court however, must ask whether the tribunal's decision on the inference is within a range of reasonable decisions which gets it into the exercise of considering whether there exists a range of inferences that might reasonably occur. The perspective is from that of the tribunal, not the claimant and it posits a range of reasonable inferences that might (i.e. possibly) acceptably occur.

[80] With respect, in light of the restrictions imposed on reviewing courts by the Supreme Court in *Dunsmuir*, I am of the view that this reasoning cannot apply to inferences challenged in a reviewing court, if it ever did. I understand *Dunsmuir* to stand for the proposition that deference must be shown to specialized tribunals when acting within their area of competence. This entails review of their decisions measured against a range of reasonable acceptable outcomes. This reasoning applies

to all of the tribunal's decisions, including those based upon a determinative inference, which must be held up to the same standard. Otherwise, the *Dunsmuir* standard of review is obviated.

[81] I believe that the approach that the reviewing court must adopt resembles somewhat that of a trial judge determining whether the evidence is reasonably capable of supporting the inference such that the conclusion may be referred to the jury for determination. As McLachlin C.J.C. put it in *R v Arcuri*, 2001 SCC 54, [2001 SCJ No 52 (QL) at para 23:

> [W]ith circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established -- that is, an inferential gap beyond the question of whether the evidence should be believed. . . The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw.
>
> [Emphasis added]

[82] Thus, unlike other evidence as regards inferences there is a form of reweighing the underlying facts and their logical connection with the alleged inference. But it is really a sufficiency test to determine the capability of the underlying factors to support the tribunal's inference or rejection of an inference. The process requires a focus on the "gap" between the underlying facts, which may themselves be inferences, and the alleged inferential conclusion. The Supreme Court stressed that this gap can only be bridged by evidence.

[83] Thus the reviewing court should carry out the same exercise as the trier of fact in assessing the "gap-closing" evidence in the light of common sense and human experience, reminding itself that filling the gap is not about possibilities, nor a process of creating a hypothetical narrative, or applying subjective imagination even where the circumstances permit an educated guess.

[84] Where the reviewing court and trier of fact part ways however, is on the ultimate test applied. The reviewing court's task is much more difficult because it does not ask whether the underlying facts are more likely than not to support the inference, thereby determining the outcome on the basis of its own sense of reasonableness. The question the reviewing court must ask is whether there exists a range of reasonable inferences that may be drawn which would include that drawn by the Board. Is the underlying evidence capable of supporting alternate inference, and if so, does the Board's decision lie within that range? If the gap between the underlying facts and the proposed inference based on them is too wide, the outcome may be considered to be reasonably speculative.

[85] This assessment requires bearing down on the evidence bridging the gap, which usually entails a consideration of what other additional evidence would have rendered the conclusion less speculative. If satisfied that some or all of the additional evidence is necessary to close the gap, then without it the inference is speculative. If the evidence does not remove that sense of some degree of reasonable speculation, then the decision finding the claimant's fear not to be well-founded, i.e. speculative, is probably within the range of reasonable outcomes.

[86] In this matter, I do not face a difficult decision because of the number of factors alluded to by the Board upon which it based its inferential conclusion. Even if one of the factors by itself would not be sufficient, their cumulative nature and the inability to reweigh the factors and apply them in relation to each other, largely takes the exercise out of the hands of the reviewing court.

[87] I am satisfied for instance that the findings of fact by the Board concerning the applicant's treatment when living in Sri Lanka are reasonably capable of supporting a conclusion that the applicant does not have a well-founded fear. When combined with the other factors such as his profile or the other evidence relating to his belonging to a group of returning refugees or his *sur place* concerns, the logical capability of supporting the inferential conclusion is sustained. Moreover, casting doubt on one of the underlying factors would not necessarily be fatal, unless it appeared too significant to ignore.

[88] Based on my review of the decision I am satisfied that the Board's finding that the applicant would not be at risk due to being suspected of being an LTTE supporter falls within a range of possible outcomes based on the facts and law. Given that this is the determinative issue at play, there is no basis to set aside the decision.

7. Conclusion

[89] For all of the foregoing reasons, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11142-12
STYLE OF CAUSE:	K.K. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 4, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ANNIS J.
DATED:	JANUARY 23, 2014

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