

Federal Court



Cour fédérale

Date: 20140818

Docket: IMM-3578-13

Citation: 2014 FC 800

Ottawa, Ontario, August 18, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MURALIKANTH BALACHANDRAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada, dated April 18, 2013 in which it concluded that the Applicant was not a Convention refugee nor a person in need of protection pursuant to sections 96 or 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

This application is brought pursuant to section 72 of the IRPA.

Background

[2] The Applicant is from the north of Sri Lanka and is of Tamil ethnicity. He claims that after the Liberation Tigers of Tamil Eelam (LTTE) took control of Jaffna in 1990 they extorted money from his father who worked for the electricity board. In 1996 the army came to his home, questioned his parents and took his father away to be questioned on several occasions. After the defeat of the LTTE in 2009, the Eelam People's Democratic Party (EPDP) and the army came to the Applicant's family home and questioned him on three occasions. They threatened him with severe punishment if they learned that he had connections to the LTTE. In September 2009 the EPDP asked him for money which he did not have. He was kidnapped for two days during which time he was blindfolded, tied to a chair and tortured. The EPDP demanded that he call his father to arrange payment and he was released after his father complied. In June 2010, the EPDP again attempted to extort money but the family refused. The EPDP reminded them of what had happened the last time and threatened that it might happen again. Fearing that he would again be kidnapped or forced to join the EPDP, the Applicant left Sri Lanka and came to Canada with the assistance of an agent.

[3] The Applicant claims that he fled Sri Lanka due to his fear of the army, police and the EPDP. In his Personal Information Form (PIF) he indicated race, membership in a particular social group and political opinion as grounds of persecution.

Decision Under Review

[4] The RPD found that the determinative issues were credibility, persecution or discrimination and harassment and agent of persecution. It found that the Applicant was not a credible witness.

[5] On the issue of credibility, the RPD found that the EPDP's interest in the Applicant was primarily to extort money from his father. It was implausible and not credible that the EPDP would have contacted the Applicant, rather than his father, in this regard. The RPD found on a balance of probabilities that the Applicant 'personalized' both the demands for money and potential forced membership in the EPDP which were likely widespread among members of his family and Tamils in Jaffna. Further, there was no evidence that he was treated differently than other Tamils nor was there evidence that he was personally accused of being an LTTE supporter by the Sri Lankan authorities. The RPD found that it was unlikely that he would have reached the airport if he had been identified as an LTTE supporter. The Applicant's use of his Colombo residence was a way to personalize the EPDP's interest in him and lacked credibility. The RPD found that the EPDP's continued interest in the Applicant was only as a means to pressure his father to pay them money.

[6] As to the country conditions evidence, the RPD found that the United Nations High Commissioner for Refugees (UNHCR) revised its guidelines concerning international protection needs of asylum seekers from Sri Lanka and that each is considered on their own merits. While the Applicant claimed that he feared that he had been identified as an LTTE supporter by the

EPDP, and was therefore at risk of persecution by the Sri Lankan authorities, he did not fall within the profile of persons at possible risk.

Issues

[7] I would frame the issues as follows:

1. Was the RPD's credibility finding reasonable?
2. Was the RPD's section 97 analysis reasonable?

Standard of Review

[8] The RPD's credibility findings are reviewable on a standard of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*(1993), 160 NR 315, [1993] FCJ No 732 (FCA) [*Aguebor*]; *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773 at para 21; *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155 at para 9).

The RPD's assessment of the exclusion of generalized risk of violence pursuant to section 97(1)(b) of the IRPA is a question of law and fact which also attracts the reasonableness standard (*Roberts v Canada (Minister of Citizenship and Immigration)*, 2013 FC 298 at para 13 [*Roberts*]). Its assessment of nexus and generalized risk is also reviewable on a reasonableness standard (*Pararasasingam v Canada (Minister of Citizenship and Immigration)*, 2013 FC 805 at para 5; *Kulasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 543 at para 25).

Analysis

Issue 1: Was the RPD's credibility finding reasonable?

[9] The Applicant takes the position that the RPD accepted most of his allegations but rejected that the threat from the EPDP was personalized, that the EPDP was present at the airport or that the Applicant was identified as an LTTE supporter. He appears to be of the view that the RPD did not make an adverse credibility finding.

[10] The Respondent takes the view that the RPD found that the Applicant had failed to provide credible or trustworthy testimony to support his claim and that he had failed to establish a well-founded fear of persecution. The RPD set out multiple specific findings related to the credibility of the Applicant's testimony and the documentary evidence, which findings the Respondent listed in its submissions.

[11] The stark difference in the parties' interpretation of the RPD's credibility findings foreshadow the flaw with its decision.

[12] The RPD clearly stated that it found, on a balance of probabilities, that the claimant is not a credible witness. However, it makes few explicit credibility findings. Further, it appears that much of the Applicant's testimony and evidence was disregarded mainly because of the RPD's plausibility findings or inferences. The RPD did not cite any inconsistencies or contradictions between the Applicant's testimony and his PIF narrative nor does it find him to be evasive at the hearing.

[13] It is, of course, acceptable to draw inferences with respect to the plausibility of a claimant's story as long as the inferences are reasonable, based on the evidence and are clearly described (*Moualek v Canada (Minister of Citizenship and Immigration)*, 2009 FC 539 at para 1, [2009] FCJ No 631; *Aguebor*, above). However, caution is to be exercised in making a determinative credibility finding based on the plausibility of an applicant's claim (*Subramaniyathas v Canada (Minister of Citizenship and Immigration)*, 2014 FC 583).

[14] Here, for example, the RPD found that the EPDP would have contacted the Applicant's father directly in regard to their extortion demand and found the Applicant's evidence that the EPDP contacted him lacked plausibility and credibility. It does not, however, state why it reaches this conclusion nor does it refer to evidence upon which it bases this implausibility or credibility finding (*Ansar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1152 at para 17). The Applicant's evidence was that he was kidnapped, tortured and forced to ask his father to pay money to obtain his release. The second extortion threat was directed to him. While it is true that it was his father who had the means by which to satisfy the extortion demand, I see no reason why the EPDP could not have directed the second demand to the Applicant. If his evidence was true that he was tortured during the first kidnapping, he would be very motivated to relay the second extortion demand to his father and his father would be motivated to pay it to avoid harm to his son. This plausibility finding also seems to have weighed heavily in the RPD's credibility consideration.

[15] This leads to another concern, being that the RPD at no point in its analysis directly addressed the credibility of the Applicant's allegation that he had been kidnapped and tortured by

the EPDP. In its decision the RPD refers only to the EPDP having taken the Applicant away for two nights “and pressured him to call his father and ask for the money.” Indeed, when counsel for the Respondent appeared before me it was initially asserted that the Applicant had not claimed to have been tortured. The evidence is clear that the Applicant did make this assertion. The RPD acknowledged that the EPDP had relations with the army but noted that there was no evidence that it had arrest powers and discounted the Applicant’s fear on that basis. While the RPD reasonably found that there was no evidence to support a fear of arrest by the EPDP at the airport as it lacked arrest powers, that risk was in connection to the EPDP’s threat that it would falsely accuse the Applicant of having ties to the LTTE if the extortion demand was not paid. Were they to do so, then the risk was of arrest by the army at the airport. However, this does not address the threat set out in the Applicant’s PIF that the EPDP told his family that what happened to him the first time, kidnapping and torture, could happen again. As noted in the RPD’s recitation of the facts, having not complied with the second extortion attempt, his parents feared that he would be kidnapped again and, therefore, it was decided to send him away.

[16] In this regard the Applicant submits that the RPD erred in failing to consider the risk from the EPDP, which is a paramilitary group with ties to the government, under section 97(1)(a). He was detained in September 2009 and tortured, however, the RPD found that this was related to money. The Applicant submits that it is irrelevant if extortion is a generalized risk if it concerns torture. Further, if agents of the state are involved then the *Convention against Torture* is engaged.

[17] The Respondent submits that there is no merit to the Applicant's suggestion that the RPD erred in failing to consider the risk he alleged from the EPDP under section 97. It clearly found that the Applicant was neither a Convention refugee nor a person in need of protection and, therefore, did not fall under section 96 or section 97. Further, that he did not have a well-founded fear of being targeted by the EPDP or government agents due to any perceived affiliation with the LTTE as he did not fit the profile of those targeted. This finding applies equally to section 96 and section 97.

[18] In my view, the evidence supported the RPD's finding that, on a balance of probabilities, the EPDP's interest in the Applicant was primarily to extort money from his father. At the hearing the Applicant was asked if he agreed that the EPDP pressured all sorts of people, particularly Tamils, to give them money. He stated that he mostly knew what was happening in his District and that a large number of the people there had faced such demands. I would note that in his declaration made to Canada Border Services Agency (CBSA) he was asked why the EPDP came to him and asked for money, his reply was that he did not know "but the [sic] have bothered many families like this."

[19] However, my concerns are that while the RPD found that the Applicant was not credible its reasons for that finding were not made in clear and unmistakable terms (*Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (CA); *Caicedo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 749 at paras 23-24) and, as noted above, are primarily based on plausibility findings. Further, while the RPD correctly found that the risk of

extortion is generalized, it did not address the Applicant's allegations of torture nor assess future risk in that regard as required by section 97(1)(b)(ii) of the IRPA.

[20] As stated by Justice Gleason in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at para 40, the starting point of the required analysis under section 97 is to first appropriately determine the nature of the risk faced by the claimant which requires an assessment of whether the claimant faces an ongoing or future risk (a continued personal risk), what the risk is, whether such risk is one of cruel and usual treatment or punishment and the basis of the risk. Next is a comparison of the correctly described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree, if the risk is not the same then the claimant may be afforded protection under section 97.

[21] In this case the RPD failed in conducting both steps of the analysis. It focused on the question of whether the Applicant was at risk as a result of the EPDP threat to falsely accuse him of having LTTE connections. However, it did not consider the risk to the Applicant again of being kidnapped and tortured by the EPDP because of the failure to pay the second or future ransom demands. Further, and without having made a credibility finding as to the Applicant's allegation of prior torture at the hands of the EPDP, the RPD did not consider whether, in the Applicant's circumstances, he faced a heightened risk of harm as compared to the risk of harm faced by the general population, both in nature and degree. This constitutes a reviewable error (*Roberts*, above).

[22] In *Sivaraththinam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 162,

Justice Annis stated the following about the risk of extortion:

In respect of the applicant's contention that he is subject to a risk of extortion by the EPDP, I recently discussed the nature of extortion for purposes of a personalized versus generalized risk assessment under section 97 of *IRPA* in *Wan c Canada (Citoyenneté et Immigration)*, 2014 CF 124 (CanLII), 2014 CF 124. Extortion is by nature a personalized crime, a fact which gives rise to some confusion in the ensuing risk analysis. When faced with a claim of fear based on extortion, the RPD must determine whether the claimant has provided sufficient evidence to meet his onus that the general crime of extortion in his particular circumstances presents a sufficient risk to his life or a risk of cruel and unusual treatment to take it outside of the risk faced by other similarly situated individuals in the country in question, in this case, Sri Lankans who are perceived as wealthy. This was the analysis carried out by the Member, who pointed out that the allegations of risk raised by the applicant did not differentiate his situation from that of any other Sri Lankan perceived as wealthy.

[emphasis added]

[23] The Applicant asserts that the RPD also failed to address return to torture pursuant to section 97(1)(a) as the EPDP is a paramilitary group with ties to the Sri Lankan government.

While the documentary evidence confirms this, it also points to the fact that the EPDP has increasingly moved towards criminal activities such as kidnapping. It may be that the RPD was of the view that there was no evidence that the EPDP was acting in anything other than a criminal capacity when it extorted and tortured the Applicant, however, it made no finding in that regard.

[24] In the absence of an intelligible credibility finding and analysis of the Applicant's personal circumstances pursuant to section 97(1)(b) the decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the decision is to be remitted back to the RPD for reconsideration; and
2. No question of general importance was proposed or arises for certification.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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