

Federal Court



Cour fédérale

Date: 20141016

Docket: IMM-1834-13

Citation: 2014 FC 987

Ottawa, Ontario, October 16, 2014

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

GEROSEKUMAR SUNTHARALINGAM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] This is an application for a judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division [RPD or the Board], dated January 30, 2013, which concluded that Gorsekumar Suntharalingam [the applicant] was not a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [the IRPA]. The application is brought pursuant to section 72 of the IRPA.

[2] For the following reasons, this application for judicial review is allowed.

II. FACTUAL BACKGROUND

[3] The applicant is a 29 year-old Tamil male from Trincomalee, in the north of Sri Lanka. He claims that his family has suffered significant hardship as a result of the ethnic conflict in Sri Lanka. In 1983, before the applicant was born, the Sri Lankan army looted and set fire to the family home. That same year, his elder brother disappeared and to this day the family does not know what happened to him.

[4] In April 1995, the Liberation Tigers of Tamil Eelam [LTTE] re-ignited the civil war by sinking two Sri Lankan navy ships in the Trincomalee harbour. In the years that followed, the applicant was arrested several times by the Sri Lankan security forces, detained, interrogated and subjected to physical abuse.

[5] In 2002, the army arrested the applicant and his two brothers after a rally protesting the deaths of ten Tamil civilians, who were killed by the Special Task Force [STF] of the Sri Lankan police. The applicant and his brothers were beaten and released after his father bribed the soldiers with money and his mother's jewellery.

[6] On April 20, 2003, the applicant was arrested during a roundup, along with about 50 other students from his former school. He was interrogated, handcuffed and suspended from a cross bar and beaten with clubs. His school principal was able to have him released.

[7] On January 7, 2006, someone detonated a claymore mine in the applicant's neighbourhood and injured members of the Sri Lankan army. In response, the navy attacked innocent civilians. One navy personnel used the butt of his gun to hit the applicant in his left forearm, causing a severe fracture on both sides. The applicant was in the hospital for a week.

[8] On July 3, 2006, the army arrested the applicant during a round-up and detained him for two days. The army interrogated the applicant, stripped him nearly naked and beat him with sand filled plastic pipes. As a condition of his release, they forced the applicant to sign a statement written in Sinhala, which he did not understand. After photographing the applicant, a navy man dashed the back of the applicant's head against the wall, causing him severe pain.

[9] The army arrested the applicant again on August 14, 2008. The Eelam People's Democratic Party [EPDP] was also involved. They questioned the applicant for a night and abused him. The next morning the applicant was taken to the police station where he was also mistreated. Before letting him go, the police photographed him and took his fingerprints.

[10] On December 15, 2009, the Karuna group arrested the applicant and kept him at a camp for three days. They did not physically abuse him, but requested 350,000 rupees for his release.

The applicant's father gave them cash and jewellery to satisfy the ransom. The applicant reported twice as a condition of his release and was beaten one of those times.

[11] One evening in December 2010, the navy stopped the applicant and demanded money from him while pressing a handgun into his chest. He handed over 1,800 rupees and his jewellery. He did not file a complaint with the police because he feared the consequences that might follow.

[12] On March 17, 2011, three men from the Pillayan group stopped the applicant as he was driving. They got into his vehicle and demanded 3,000,000 rupees. One of them stuck the barrel of a gun in the applicant's mouth. They accused the applicant of being an LTTE collaborator and held him for two days. They released the applicant after he agreed to pay the requested sum of money within one month.

[13] The applicant went into hiding after that incident. His uncle accompanied him to Colombo. On the way, the police stopped him in Habarana and detained him briefly. They released him after his uncle paid a bribe.

[14] On May 2, 2011 the applicant left Sri Lanka with the help of an agent. He travelled through Dubai, Panama, Guatemala, Mexico and the United States [US] before arriving in Canada on August 3, 2011. The applicant was arrested and detained when he first reached the US. At the advice of his agent, he made a refugee claim in the US on May 30, 2011. He later

abandoned his claim to come to Canada where three of his brothers live. All three were accepted as refugees in Canada after fleeing Sri Lanka.

III. DECISION UNDER REVIEW

[15] A hearing was held on January 21, 2013. On January 30, 2013 the RPD issued a decision rejecting the applicant's claim under both sections 96 and 97 of the IRPA.

[16] The RPD found that the applicant's credibility was insufficient to support a claim for refugee protection. The RPD noted that "all returnees are subject to criminal checks, and this could entail detention of several days, depending on the day in the week in which a returnee arrives in the country. However, this is indicated to apply equally to all Sri Lankans of all ethnicities. The panel has found that the government would not be concerned about the claimant as an opponent or critic of the government, or as being associated with the LTTE. Thus, the panel finds that this administrative delay in detention, even should it occur to the claimant, would not be persecution" The RPD also found that the applicant "does not require Canada's protection *per se* because he is a Tamil from the north/east of Sri Lanka or because he would be a returning failed refugee claimant."

A. *Credibility*

[17] Overall, the RPD made a general credibility finding against the applicant. It held: "[f]rom the credibility concerns noted above, the Panel finds that the claimant's evidence, overall, is not credible, and insufficient to support the claimant's claim for refugee status."

[18] The RPD accepted that the applicant abandoned his US claim to come to Canada because his three brothers live here. However, it drew a negative credibility inference because it found that the decision to abandon his US claim was inconsistent with the behaviour of someone who has a subjective fear of persecution in Sri Lanka.

[19] After noting that the applicant's family sponsorship application to immigrate to Canada was rejected in 2010, the RPD also found that the applicant's "true intention was and is to come to Canada to live and join his relatives, rather than to flee persecution."

[20] The RPD questioned the applicant's failure to provide certain corroborating documents, such as proof that he was in Sri Lanka during the period the alleged incidents took place. While it mentioned a letter from a Canadian doctor that confirmed the applicant's arm had been broken, it also noted that that letter could not confirm when or how the incident occurred.

[21] The RPD then reviewed the applicant's testimony in relation to each of the alleged incidents set out in his Personal Information Form [PIF] narrative. It noted inconsistencies between the applicant's written description and testimony of several incidents, as well as his explanations for these inconsistencies. Where the RPD found the applicant's explanation to be unsatisfactory, it drew a negative inference.

[22] While the RPD did not draw a negative inference from the applicant's failure to provide corroborating documentation for his 2006 hospital visit, it noted that the applicant was "deprived of an opportunity to buttress his refugee claim" (Reasons at para 22). The RPD drew a "minor

negative inference” from the fact that the applicant omitted from his initial refugee claim that he received medical treatment, in the form of pills, for an injury sustained during his detention in July 2006. It also drew a “minor” negative inference because the applicant referred to his 2006 arrest and detention only in response to Question 37B (arrests) and not in response to Question 37C (detention) of his initial claim. As a result of this omission, the RPD concluded that the applicant’s reference to being detained was an “embellishment” of his initial story (Reasons at para 24). The RPD drew a negative inference from a number of inconsistencies which are more particularly detailed later in these reasons.

B. *Protection as a Tamil from the north/east of Sri Lanka*

[23] The RPD stated that it reviewed the documentary evidence, which is “clear that the government currently prosecutes those individuals they suspect of being associated with the LTTE, and those who oppose the government.” However, for reasons of credibility, it concluded that the applicant “is not such an individual.”

[24] The RPD also found that while the applicant may be subject to a detention for criminal checks if returned to Sri Lanka, such a detention applies equally to Sri Lankans of all ethnicities. Therefore, any such delay would not amount to persecution. Finally, the RPD referred to the *UNHCR Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* [UNHCR Guidelines] and concluded that the applicant does not require refugee protection in Canada *per se* because he is a Tamil from the north/east of Sri Lanka.

IV. ISSUES

[25] The applicant's submissions raise several issues:

1. Whether the RPD erred in law by failing to address and analyze a core ground of the applicant's claim.
2. Whether the RPD erred in law by failing to apply the relevant law to the evidence.
3. Whether the RPD engaged in a microscopic examination of the evidence and made unreasonable credibility inferences and conclusions by:
 - a. Failing to consider the applicant's explanation for abandoning his asylum claim in the US
 - b. Drawing negative credibility inferences from inconsistencies between the applicant's PIF and POE notes
 - c. Drawing negative inferences because the applicant did not provide corroborating written documentations
4. Whether the RPD failed to assess whether detention upon removal constitutes persecution.

[26] The respondent's submissions address the following issues:

1. Whether the Board addressed all the relevant grounds and evidence, including
 - a. Evidence regarding persecution on the basis of family;

- b. The objective basis of the applicant's claim as a Tamil male from the north/east of Sri Lanka; and
 - c. Evidence regarding whether detention amounts to persecution; and
2. Whether the Board's credibility findings were reasonable.

[27] I prefer the respondent's characterization of the issues.

V. STANDARD OF REVIEW

[28] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[29] It is well established that reasonableness is the standard of review applicable to determinations of fact and mixed fact and law by the RPD, such as assessments of credibility (see *Ortiz Garzon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 299 at paras 24-25 (available on CanLII); *Goltsberg v Canada (Minister of Citizenship and Immigration)*, 2010 FC 886 at para 16 (available on CanLII). And see *Salazar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 466 at paras 35-36 (available on CanLII); and *N.A.A.Z. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1156 at para 17 (available on CanLII)).

[30] In *Dunsmuir*, above at para 47, the Supreme Court of Canada explained:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. ANALYSIS

A. *Did the Board consider all the relevant grounds of the applicant's claim and all the relevant evidence?*

(1) Persecution on the basis of family profile

[31] The applicant submits that the RPD erred in not considering a core aspect of the applicant's refugee claim, namely his family profile. The applicant relies on *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 (available on CanLII), where the Supreme Court of Canada stated that the Board has a duty to consider all possible grounds for a refugee claim, including those not raised by the claimant (at para 80). The applicant says that the Board had sufficient evidence to consider whether his family circumstances put him at risk in Sri Lanka, including the fact that his three brothers had been accepted as refugees in Canada.

[32] The respondent submits that "the Board is not required to address potential grounds of persecution where they are not supported by the evidence" (*Casteneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1012 at para 19 (available on CanLII) [*Casteneda*]). The respondent also questions whether the Board had any evidence before it regarding the successful

claims of the applicant's brothers. Even if it did, the respondent submits that the Board was not required to consider these claims because each claim must be determined on its own merits (*Bakary v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1111 at para 10, 155 ACWS (3d) 161).

[33] Thus, the relevant question is whether, in light of the evidentiary record, the RPD's failure to explicitly consider the applicant's family profile was reasonable. The applicant's PIF states that the Sri Lankan army looted and set fire to his family's home during the 1983 anti-Tamil riots. He also mentions that his older brother disappeared following the riots and has never been found. The applicant's PIF also notes that two of his brothers were arrested with him in 2002. He does not make any additional references to his family or the authorities' perception of their relation to the LTTE.

[34] In the Family Information section of the PIF, the applicant wrote the names of his three brothers who were accepted as refugees in Canada. At the hearing, the applicant answered "because my brothers are here" when the Board member asked him why he wanted to come to Canada. The member made no further inquiries.

[35] Based on the evidence that was before the Board, it was reasonable for the RPD to conclude that the applicant does not face persecution on account of his family profile. Aside from the disappearance of his brother and looting of his family home, both of which occurred in 1983, it was reasonable to conclude there was insufficient evidence to establish that the applicant's family continues to be targeted by the Sri Lankan authorities for a perceived

association with the LTTE. In addition the applicant put no evidence before the Board regarding the specific details of his brothers' successful refugee claims.

[36] In addition, in my view and in these circumstances, I am not persuaded by the applicant's argument regarding family profile because the RPD was aware of the fact that the applicant's brothers were already in Canada and were accepted as refugees. This evidence was in the applicant's PIF.

(2) Risk of persecution as Tamil male from the north/east of Sri Lanka

[37] The applicant submitted a significant amount of documentary evidence in support of his claim. This evidence suggests that Tamils who are perceived as having connection to the LTTE, such as through family members, are at risk of being targeted by state actors (*Freedom from Torture Report* at 1, TR at 130, UNHCR Guidelines at 27, TR at 227).

[38] The question is whether the RPD reasonably concluded that the applicant does not face a risk of persecution by reason of his identity as a Tamil male from the north/east of Sri Lanka. The applicant argues that despite the Board's negative credibility findings, it was still required to assess the objective basis of his claim with reference to the remaining evidence.

[39] It is well established that the RPD is presumed to have weighed and considered all the evidence before it, unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)* (1993), [1993] FCJ No 598 (FCA) (QL)). In this case, the RPD's reasons clearly state that it considered the documentary evidence regarding human rights in Sri Lanka. It found

that this evidence demonstrates that “the government currently persecutes individuals they suspect as being associated with the LTTE” as well as failed refugee claimants who are returned. However, for reasons of credibility, the RPD concluded that the applicant did not meet either of these profiles (Reasons at paras 35-36). The RPD also referred to the UNHCR Guidelines and concluded that the applicant’s profile as a Tamil male from the north/east of Sri Lanka is not one of the profiles at risk for persecution. On the record, this was a reasonable conclusion and ought not to be disturbed on judicial review.

(3) Whether detention on return amounts to persecution

[40] On this final issue, I have decided that judicial review must be granted.

[41] The issue of whether short-term security detentions amount to persecution is fact specific and must be determined with regard to the particular circumstances of each case (*Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at para 23, 164 ACWS (3d) 667 [*Sinnasamy*]). Therefore, the applicant argues, the RPD erred by not considering whether the detention he faces upon removal to Sri Lanka, in light of the evidence before the RPD, would amount to persecution.

[42] Referring to the RPD’s information request regarding Sri Lanka, dated August 22, 2011, the RPD found that Sri Lankans of all ethnicities, not just Tamils, face the possibility of detention upon return, saying, “[h]owever, this is indicated to apply equally to all Sri Lankans of all ethnicities.” Because it found the applicant would not be targeted by the government for political reasons or for being associated with the LTTE, the RPD found that any such delay

would not amount to persecution. This finding reasoning appears to be reasonable on its face, because as the RPD noted, the policy of *detaining* returnees generally is not discriminatory.

[43] However, a reading of the document relied on by the Board provides additional information. It refers to sources that say Tamils are subjected to differential treatment upon return to Sri Lanka, and are at particular risk if they left the country illegally because the authorities may automatically suspect these individuals have links to the LTTE. The evidence before the Board also was that failed asylum seekers returnees of Tamil ethnicity have been subjected to torture upon return.

[44] Based on the evidence that *failed asylum seekers* returnees of Tamil ethnicity have been subjected to torture, it was unreasonable for the RPD to simply state that all returnees, regardless of their ethnicity, are treated the same. This is not reflective of the record and failed to address the issue of the applicant's status as a failed refugee claimant returnee. The RPD's decision was reasonable insofar as the issue of *detention* is concerned, but it is not reasonable insofar as the risk that *failed asylum seekers* returnees of Tamil ethnicity would be tortured is concerned. The RPD did not meet the requirement set out in *Sinnasamy*, above, namely that it must consider the applicant's "particular circumstances" when assessing whether his possible detention would amount to persecution as a failed refugee claimant which is a fact specific matter to be determined with regard to the particular circumstances of each case.

[45] The respondent submits that the Board reached a reasonable conclusion on this issue because the documentary evidence showed that the possibility of detention upon return is a

policy that applies equally to all persons returning to Sri Lanka. Furthermore, the respondent says that there was no evidence to establish that the applicant faces a “serious possibility of abuse if he is detained,” because the Board did not find that he is a suspected LTTE member.

[46] I reject this argument because it does not satisfactorily address the risk of persecution faced by the applicant as a failed asylum seeker returning to Sri Lanka.

[47] In addition, the RPD appears to be saying that because it did not believe the applicant was targeted by the authorities for a perceived association to the LTTE, there is no need for it to consider whether he is at risk in relation to the objective documentary evidence.

[48] However this logic does not apply to the RPD’s determination that the applicant does not fit the profile of *failed refugee claimants* returning to Sri Lanka. This is what the RPD stated:

[37] The panel notes item 14.5 of Exhibit R/A-1. This Board publication, dated August 22, 2011, sets out that all returnees are subject to criminal checks, and this could entail detention of several days, depending on the day in the week in which a returnee arrives in the country. However, this is indicated to apply equally to all Sri Lankans of all ethnicities. The panel has found that the government would not be concerned about the claimant as an opponent or critic of the government, or as being associated with the LTTE. Thus, the panel finds that this administrative delay in detention, even should it occur to the claimant would not be persecution.

[49] In my respectful view, the RPD’s credibility concerns cannot determine the issue of whether there is a serious possibility of persecution of the claimant in his capacity as a failed refugee claimant returnee. The applicant’s status in this regard is determined objectively by the

fact that he is a failed refugee applicant by virtue of having his claim rejected by the RPD. It has nothing to do with credibility.

[50] On review of the record before the RPD there was evidence that failed refugee claimants returning to Sri Lanka have been both detained and tortured (*Freedom from Torture Report* at 7; UNHCR Guidelines at 8; *Risk of failed asylum seekers of Tamil ethnicity upon return to Sri Lanka*). The RPD did not refer to this issue not to any specific documents in this regard. Nor does it address the specific concern of a returning failed refugee claimant. In my respectful view, the RPD had a duty to consider whether there is a serious possibility of persecution of the applicant as a failed refugee returnee.

[51] As a result, I find the RPD's conclusion does not meet the *Dunsmuir*, above, requirements of "justification, transparency and intelligibility" (at para 47). Given the seriousness of the potential consequences and the absence of both consideration and reasoning on this point, in my view the RPD's decision is unreasonable and must be set aside.

B. *Are the Board member's credibility findings reasonable?*

[52] Having regard to my determination that the decision must be remitted because regarding the serious possibility of the applicant facing persecution in his capacity as a failed asylum seeker, it is not necessary to decide the many credibility issues raised by the parties.

VII. CONCLUSION

[53] In light of the above, the decision must be set aside and remitted to a different panel of the RPD for redetermination.

[54] The applicant proposed a question only if I were to reject the conclusion of *Viafara v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526, at para 6, 154 ACWS (3d) 455, as discussed in *Casteneda*, above, at para 19. I do not see a question to certify in this case and therefore no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.
2. The matter is remitted to a different panel of the Refugee Protection Division for redetermination.
3. No question is certified.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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