Federal Court  Cour fédérale

Date: 20150617

Docket: IMM-3242-13

Citation: 2015 FC 761

Ottawa, Ontario, June 17, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

B296

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT
(Confidential Reasons for Judgment and Judgment issued May 25, 2015)

[1] The applicant's claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). He now applies for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicant is a male Tamil born in Jaffna, Sri Lanka on […]. In 1999, he and his family moved to Vavuniya and lived there.

[4] In the applicant's amended Personal Information Form (PIF), he alleged that in 2008, he along with others were rounded up for identification of the Liberation Tamil Tigers of Eelam [LTTE]. The applicant was tortured and interrogated about his connection to the LTTE and subsequently released the following day after his parents' intervention and the assistance from the Grama Sevaka and his cricket coach. However, the applicant's original PIF contained no reference to him being arrested, interrogated, tortured, fingerprinted and photographed.

[5] In the applicant's amended PIF, he alleged two days later, his friend Rajan was abducted by the Eelam People's Democratic Party [EPDP] and disappeared. A few hours later, he and his friends were arrested by army intelligence, taken to the Joseph Camp and detained as LTTE supporters. He was tortured and interrogated about his friend Rajan's connections to the LTTE. He was released after a few hours. Upon release, he was fingerprinted, photographed and warned about having any association with the LTTE. Again, however, the applicant's original PIF contained no reference to him being arrested, interrogated, tortured, fingerprinted and photographed.

[6] In 2010, the EPDP asked for support and threatened the students' organization in which the applicant belonged. It assaulted members of student sport clubs and beat the applicant's friend Krishna to death. Later, after the applicant arrived home, his father told him that the EPDP had come to kill him, believing he had interfered in their matters.

[7] Subsequently, the applicant's father sent him to stay with a friend in Colombo. During that time, the applicant's parents told him that the EPDP had come looking for him. His entire family then moved to Colombo.

[8] In the applicant's amended PIF, he alleged in Colombo army intelligence and a member of the EPDP came to his home and ordered his parents to have the applicant report to their camp in Modara. The applicant reported to the camp and he was interrogated, tortured and forced to sign a statement written in Sinhala. He was released the next day after payment of a bribe of 100,000 rupees by his father with the assistance of a Muslim trader. However, the applicant's original PIF made no reference of him having to report to the Modara army camp or that he was interrogated and tortured.

[9] On May 4, 2010, the applicant made arrangements to leave the country for Thailand. In Thailand, he boarded the *Sun Sea* ship headed for Canada and arrived in Canada on August 13, 2010.

II. Decision Under Review

[10] In a written decision dated April 9, 2013, the Board made a negative decision finding that

the applicant is neither a Convention refugee in accordance with section 96 nor is he a person in need of protection in accordance with subsection 97(1) of the Act. The Board made the findings in the following areas: credibility, fear of persecution, risk as a failed asylum seeker, *sur place* claim and compelling reasons under subsection 108(4) of the Act.

[11] Insofar as the applicant's credibility is concerned, the Board made negative inferences from the omissions and discrepancies between the applicant's original PIF and his amended version of the PIF. It found the article "Refugee Status Determinations and the Limits of Memory" to be general and not specific to the applicant. Also, the Board assigned no weight to the applicant's psychological report, finding that although the psychological report concluded that the applicant suffers from chronic post-traumatic stress disorder (PTSD), it lacked persuasive findings to indicate that the applicant was persecuted. Also, it did not accept the credibility finding in the report. The Board noted survivors of civil war typically experience some degree of trauma. It gave little weight on the relationship between the applicant's PTSD and his allegation of causes.

[12] The Board found even in light of the difficulties experienced by the applicant, his rationale for the significant omissions in the original PIF is not satisfactory. It noted three omissions. First, other than being ordered to appear before a masked man, the account of the 2008 events in the original PIF contained no reference to the applicant being arrested and subsequently interrogated and tortured. It noted the amended PIF added the following new information. From the original PIF:

> In 2008, the army rounded the men in the area where I lived and ordered us to gather at the playgrounds where we play cricket. We

> were produced one by one in front of a masked person to be identified as LTTE supporters. Many were taken into custody and most of them who were arrested went missing.

From the amended PIF:

> [. . .] Many were taken into custody including me.
>
> I was severely assaulted and interrogated. They wanted to know my connections with the LTTE, the names of the LTTE supporters in my area, etc. My parents, with the assistance of the Gramasevaga and my cricket coach Illankumaran Attorney at Law, obtained my release the following day.

[13] The Board noted the second and the third omissions are similar to the first one. The second omission concerns the account of events immediately following the abduction of his friend, Rajan. Unlike the amended version, the original version of the event contained no reference to the applicant being arrested, interrogated, tortured, fingerprinted and photographed. The third omission relates to the applicant's experience after moving to Colombo. Unlike the amended version, the original PIF only stated "[i]n Colombo while I had gone out the army along with a member of the EPDP had gone to our home looking for me." It made no reference to the applicant having to report to the Modara army camp, or that he was interrogated and tortured.

[14] The applicant explained that these omissions were because he did not have enough time and his first counsel told him that he could add additional information later. On account of the above omissions, the Board found the explanation unsatisfactory. Therefore, the Board determined the applicant was not credible.

[15] Insofar as the applicant's fear of persecution is concerned, the Board examined his LTTE ties. It first reviewed the United Nations High Commissioner for Refugees (UNHCR) Guidelines and noted the five potential risk profiles. The Board noted the applicant was released after each incident and was never detained longer than a day. He was able to travel within the country using his own identity documents without any problems, obtained a passport without difficulty and left the country without being questioned. It found that there is insufficient trustworthy evidence to conclude that the applicant has a well-founded fear of persecution based on his experiences in Sri Lanka.

[16] Insofar as the risk of a failed asylum seeker is concerned, the Board found the applicant did not establish that he would be perceived to have LTTE ties so as to result in a heightened risk. It noted the findings from a fact-finding trip organized by the International Organization for Migration (IOM) that "[a] key theme with all the persons interviewed was that they all said that they no longer had fears for their personal safety." It noted although the Sri Lankan government was most likely aware of the organized visits by the international delegates, it was not persuaded that this has affected the reliability of the reports.

[17] The Board mentioned a few additional reports in support. Nonetheless, it noted reports that suggest returnees are at a heightened risk of being detained at the airport and at risk of torture should the returnees have connections to the LTTE. The Board noted the applicant has no history of having opposed the government. In light of the particular circumstances of the applicant and the risk profiles in the UNHCR Guidelines, the Board found that the applicant is not, on a balance of probabilities, a person who is perceived to be linked to the LTTE. It thereby

determined the applicant does not have good grounds to fear persecution as a failed asylum seeker.

[18] Insofar as the risk associated with the applicant's manner of arrival is concerned, the Board found on a balance of probabilities, the Sri Lankan government would not perceive the applicant to be a member and supporter of the LTTE simply on the basis of his travel on the *Sun Sea*, given the applicant's history in Sri Lanka before coming to Canada. It first noted the criteria in the determination of a *sur place* claim and quoted Article 96 of the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status*. However, it found that no credible evidence has been proffered that the Sri Lankan government would suspect individuals as having links to the LTTE by virtue of having been smuggled to Canada aboard a ship owned and operated by the LTTE.

[19] It subsequently noted although the arrival of the *Sun Sea* generated significant interest on the part of the public and government authorities in both Sri Lanka and here in Canada, the passengers onboard have been granted refugee protection, afforded a hearing, or will be afforded a hearing in the near future. Here, the applicant had not been rendered inadmissible on criminal grounds by virtue of Article 1(F)(a), indicating that he was deemed to not have affiliation to the LTTE. In specifics, in determining the *sur place* claim, the Board considered i) the applicant's insistence that he has no links to the LTTE; ii) the applicant's lack of profile with Sri Lankan authorities; iii) the applicant was granted a passport and allowed to leave the country; iv) there was no indication that he had been involved with an anti-government organization during his time in Canada; and v) Canadian authorities investigated whether he had links to the LTTE, but

released him and did not pursue inadmissibility proceedings. If the Sri Lankan officials know or suspect that the applicant was aboard the *Sun Sea*, they would also note that the applicant had already been subjected to rigorous scrutiny by Canadian officials and subsequently released which may place him in a better light should he return to Sri Lanka.

[20] Insofar as subsection 108(4) of the Act is concerned, the Board found in light of the credibility concerns, the applicant did not meet the high threshold based on the applicant's experiences and his psychological report.

[21] Therefore, the Board concluded that the applicant is not a Convention refugee or a person in need of protection and rejected his claim.

III. Issues

[22] The applicant raises one issue for my consideration: whether the Board's decision is unreasonable.

[23] The respondent raises one issue in response: the applicant has not raised a serious issue for judicial review.

[24] In my view, there are two issues:

A. What is the standard of review?

B. Was the Board's decision reasonable?

IV. Applicant's Written Submissions

[25] The applicant submits that the applicable standard of review is reasonableness.

[26] First, he argues the Board failed to appreciate that some of the additions on the PIF did not relate to the allegations of persecution. He cites *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at paragraphs 18 and 19, [2007] FCJ No 135, which states the Board should not be concerned about minor or collateral omissions from an applicant's PIF. He argues the amendments in each of the incidents the Board was at issue with were merely expansions on the information provided in the original PIF and were not a valid basis to question the applicant's credibility (see *Puentes v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1335 at paragraphs 18 and 19 [2007] FCJ No 1729).

[27] The failure to report a fact can be a cause for concern, but not always so depending on the circumstances (see *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at paragraph 20, [2003] 4 FC 771). He points out the original PIF was completed while the applicant was still detained in a Vancouver facility and was informed by the immigration consultant that details could be added at a later date.

[28] Also, the applicant disagrees with the Board's treatment of the psychological report. He argues the psychologist noted that he had difficulty discussing his experiences, given that the events in Sri Lanka remain painful memories for him. Here, the Board gave no weight towards the allegations that the applicant was persecuted. He argues the report was not submitted as

support for his allegation of persecution, but rather to prove his state of mind and to provide an explanation as to why more details were not included in the original PIF. He also argues given that the Board had no evidence to support its finding that all Tamils were exposed to civil war and suffer from post-traumatic stress disorder, it was in no position to contradict the psychologist's findings and to afford the report little weight.

[29] Second, the applicant disagrees with the Board's findings with respect to well-founded fear. He summarized his encounters with the Sri Lankan authorities and argued that the Board's simplistic finding that the authorities have no interest in him because he was released following detention is unreasonable (see *B027 v Canada (Minister of Employment and Immigration)*, 2013 FC 485 at paragraph 8, [2013] FCJ No 571 [*B027*]). He further argues that his ability to travel within the country could be due to few checkpoints in existence, instead of no interest from the government.

[30] Third, the applicant disagrees with the Board's assessment of his risk as a failed asylum seeker. He submits it ignored relevant evidence. He notes there is documentary evidence before the Board indicating that violations of human rights remain rampant in Sri Lanka and the small number of returnees interviewed by the delegation could hardly be representative of the hundreds of failed asylum seekers. Also, since the government interfered with the delegation's finding, the report relied on by the Board contains unreliable information.

[31] He argues other reports should be adopted and quotes portions from the *United States Department of State Country Report on Human Rights Practices in Sri Lanka*. He also cites

portions of the *Amnesty International* Report that states "[f]ailed asylum seekers have been tortured and jailed following their forced return to Sri Lanka." The applicant cites multiple sections from the documentary evidence in further support of his position. He argues that individuals of ethnicity and who are failed asylum seekers, are at a heightened risk upon returning to Sri Lanka (see *Veeravagu v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 468 at paragraph 4, 33 ACWS (3d) 1269).

[32] Fourth, the applicant disagrees with the Board's assessment of the *sur place* claim. He submits that he has clearly established a *sur place* claim on the basis that the Sri Lankan government would perceive him as having ties to the LTTE. He argues the government would suspect that the applicant has ties with the LTTE because he travelled on a ship organized by LTTE operatives. He cites *Canada (Citizenship and Immigration) v B420*, 2013 FC 321, [2013] FCJ No 396 [*B420*] and *Canada (Citizenship and Immigration) v A032*, 2013 FC 322, [2013] FCJ No 399 [*A032*]. He argues it was accepted that while the applicant would not qualify for refugee protection as a member of a particular social group, "individuals who travelled on the ship, whether believed to have faced past mistreatment or not, could face persecution on return or a risk to life/risk of torture by virtue of perceived political opinion, arising as a result of potential association with the LTTE on vessels which they travelled, including the Sun Sea."

[33] Further, the applicant submits the Board's conclusion that since the Canadian authorities released him, he could produce a copy of the Board's decision which found him not to have links with the LTTE, so that the Sri Lankan authorities would not suspect him of having ties to the LTTE is completely illogical. He cites *B027* at paragraph 9 that, this approach is "over-

simplistic" and Sri-Lankan authorities would not be so bound. Therefore, the applicant submits the Board failed to properly assess the nexus to the Convention refugee definition.

[34] Fifth, the applicant disagrees with the Board's analysis of compelling reasons. He argues the Board speculated as to the cause of his PTSD diagnosed in the psychological report and this makes the Board's finding unreasonable.

[35] Lastly, the applicant submits that in light of the above cumulatively, the Board's decision was unreasonable.

V. Respondent's Written Submissions

[36] The respondent submits the Board's findings of fact and mixed fact and law are subject to a deferential standard. It agrees with the applicant that the standard of review is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47, 53 and 55, [2008] 1 SCR 190 [*Dunsmuir*]).

[37] First, it argues the Board's findings of major omissions were reasonable. It submits these omissions noted by the Board were not minor or collateral, but rather the applicant wholly omitted from his original PIF three allegations of being detained, interrogated and tortured based on suspected links to the LTTE. The Board also considered the applicant's explanation for these omissions, but was not satisfied.

[38] Second, the respondent argues the Board was not required to mention or defer to psychological reports, or to find that the major inconsistencies in the applicant's story could be explained by his psychological condition (see *Syed v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 597 at paragraphs 19 and 20, 97 ACWS (3d) 305). The report did not and could not establish the credibility of the applicant's refugee claim (see *Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379 at paragraph 33, [2014] 2 FCR 3 [*Kaur*]); and it did not give any indication that the applicant would forget about key persecutory events altogether (*Kaur* at paragraphs 37 and 38). It submits the psychological report did not overcome the significant credibility concerns arising from the major omissions in the PIF.

[39] Third, the respondent argues the Board was reasonable to conclude that there was insufficient evidence to establish that the applicant's fear of persecution was well-founded. It submits the Board reasonably considered the circumstances surrounding the applicant's release and his ability to travel within and out of the country. Here, the applicant's request is to reweigh the evidence in order to find in his favour.

[40] Fourth, the respondent submits the Board's risk findings with respect to the applicant's risk as a failed asylum seeker were reasonable. Here, the applicant's response to the Board's findings is to question the documents relied on, but he has not shown any evidence that the Board's findings were unreasonable. It argues that non-government organizations may have difficulties operating in Sri Lanka in the course of its study, but this does not render the Board's reliance on the report unreasonable.

[41] Also, the Board had no duty to refer to all of the documentary evidence. Absent evidence of LTTE connection, returnees could be detained and questioned, but would not face a serious possibility of persecution or risk of torture (see *Suppaiah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 429 at paragraphs 32 to 34, [2013] FCJ No 460 [*Suppaiah*]). Here, the Board was reasonable to conclude that considering all of the evidence, the applicant did not have good grounds to fear persecution as a failed asylum seeker.

[42] Fifth, the respondent submits the Board was reasonable to find that the applicant is not a *sur place* refugee. Here, the Board began its inquiry by considering the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status*. It accepted that authorities had expressed significant interest in the *Sun Sea* arrival. However, in light of the applicant's circumstances and lack of profile with Sri Lankan authorities, the Board was not persuaded that the applicant had established a *sur place* claim.

[43] The respondent then went on to distinguish the case law cited by the applicant (*A032* and *B420*). In *A032*, Chief Justice Edmond Blanchard held that being a passenger on the *Ocean Lady* was not the sole basis for a positive refugee finding (*A032* at paragraph 18). Also, both of these decisions were rendered in the context of challenges to positive findings. Such findings do not establish that the Board's conclusion here, rendered on a different record, was unreasonable. Also, in *B027*, this Court ruled the clearance from Canadian authorities of an individual's LTTE ties would not bind Sri Lankan authorities. However, in the present case, the lack of LTTE ties was only one of the five points the Board considered in determining that the applicant had not

established a *sur place* claim. Therefore, the applicant's arguments again concern the weight of the evidence.

[44] Sixth, the respondent submits the Board's finding under compelling reasons was reasonable and the applicant's arguments are based on the weight of the evidence.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[45] With respect to the reasonability of the Board's decision, both the applicant and the respondent submit the standard of review is reasonableness. I agree.

[46] Here, the issue under review is a mix of fact and law. It has been established in *Dunsmuir* at paragraph 53, that the standard of reasonableness is applied "where the legal and factual issues are intertwined with and cannot be readily separated" (see also *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at paragraph 4, 160 NR 315; and *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paragraphs 22 to 40, [2012] FCJ No 369). This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339 at paragraph 59 [*Khosa*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Was the Board's decision reasonable?*

[47] The applicant is at issue with each one of the Board's findings: credibility, treatment of psychological report, well-founded fear of persecution, failed asylum seeker, *sur place* and compelling reasons under subsection 108(4) of the Act. I find the Board's decision was reasonable and the reasons for its findings were transparent and intelligible. Below, I am going to deal with each one of the findings individually.

(1) Credibility Finding

[48] Insofar as the Board's credibility finding is concerned, I find the Board's negative inferences were reasonable. It is well established that the Board should not be concerned about minor or collateral omissions from an applicant's PIF (*Feradov* at paragraphs 18 and 19). Therefore, the reasonableness of these negative inferences hinge on whether or not the omissions constitute minor or collateral omissions.

[49] The applicant argues the amendments were merely expansions on the information provided in the original PIF and were not a valid basis to question the applicant's credibility (*Puentes* at paragraphs 18 and 19). The respondent argues the negative inferences are reasonable because the applicant wholly omitted from his original PIF three allegations of being detained, interrogated and tortured based on suspected links to the LTTE.

[50] Here, the three omissions were: i) about the 2008 events, other than being ordered to appear before a masked man, the original PIF contained no reference to the applicant being

arrested and subsequently interrogated and tortured; ii) about the events immediately following the abduction of his friend, Rajan, unlike the amended version, the original version of the event contained no reference of the applicant being arrested, interrogated, tortured, fingerprinted and photographed; and iii) about the applicant's experience after moving to Colombo, unlike the amended version, the original PIF made no reference to the applicant having to report to the Modara army camp and was interrogated and tortured.

[51] In my view, these omissions did expand on the original PIF but they brought in brand new assertions that concern the applicant's allegations regarding the specific impact to his life. Although the applicant explained that he was informed that he could add additional information later, these omissions were essential and went to the root of his claim. I can understand why the Board found it unreasonable that the applicant did not at all mention his role in these events on his original PIF.

[52] Insofar as the Board's treatment of the psychological report is concerned, I find the report did not negate the Board's credibility finding.

[53] The applicant is of the view that since the Board had no evidence to support its finding that all Tamils were exposed to civil war and suffer from post-traumatic stress disorder, it was unreasonable to assign the report little weight based on its assumption. The applicant submits the psychological report was submitted to explain why some details were not included in the original PIF. The respondent argues the psychological report did not overcome the significant credibility concerns arising from the major omissions in the PIF.

[54] A psychological report cannot be used to establish the credibility of the applicant's refugee claim. In *Kaur*, Chief Justice Paul Crampton found a psychological report is not sufficient to justify an applicant's failure to mention an important aspect in the PIF:

> 37 For example, the fact that the report may, as in this case, state that an applicant's PTSD, or other condition, causes the applicant to be fragile, confused, anxious, distressed or emotional during questioning, or to dissociate under stress, **ordinarily would not reasonably explain a failure to mention an important aspect of the applicant's story in his or her PIF**. This is especially so when the PIF was prepared with the assistance of counsel. Having regard to the above-mentioned teachings in Newfoundland Nurses, Alberta Teachers and Halifax, it is also not immediately apparent how such psychological conditions might suffice to deprive an adverse credibility finding that was based on flagrant contradictions or important discrepancies of its rational support or to deprive it of any reasonable basis.
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> 38 In my view, **unless there is something in a psychologist's report which strongly suggests that an adverse credibility finding made by the Board was unreasonable, it would be inconsistent with the Supreme Court's teachings to require the Board to specifically address the report or anything in the report in making such a finding**. That is to say, this would be inconsistent with the Supreme Court's position that reviewing courts should not interfere when there is any reasonable basis in the evidence for the conclusion reached by the Board, or when the decision can be rationally supported. It would also be inconsistent with the emphasis that the Supreme Court has now repeatedly given to the need for reviewing courts to give respectful deference to the findings of administrative tribunals. This is particularly so with respect to matters of credibility, which "are at the very heart of the task Parliament has chose to leave to the [Board]" (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 60 (available on CanLII)).
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> [Original emphasis with underline; my emphasis in bold]

[55] Although I agree with the applicant that the Board should not have speculated that all Tamils were exposed to civil war and suffer from post-traumatic stress disorder without any support from the documentary evidence, this error cannot be said to negate the Board's

credibility finding. Here, I do not find any prevailing details in the psychological report that would strongly suggest that the Board's adverse credibility finding was unreasonable.

[56] Therefore, I am satisfied that with the psychological report, the Board was reasonable in making negative inferences and finding the applicant not credible.

(2) Fear of Persecution

[57] Insofar as the Board's finding regarding the applicant's fear of persecution is concerned, I find the Board's determination was reasonable.

[58] The applicant argues the Board's finding was too simplistic and he provides an alternative explanation for his ability to travel within the country. The respondent is of the view that the Board reasonably considered the circumstances surrounding the applicant's release and his ability to travel within and out of the country. It submits the applicant's arguments hinge on a request to reweigh the evidence.

[59] In my view, the Board's analysis is far from being simplistic. It first looked at the UNHCR Guidelines and noted the five potential risk profiles. It then examined the circumstances surrounding each of the applicant's detainments, his ability to travel within the country and the circumstances surrounding the applicant's departure. It found that there was insufficient trustworthy evidence to conclude that the applicant had a well-founded fear of persecution based on his experiences in Sri Lanka. I find the analysis was thorough and the reasons are transparent to me. Therefore, there is no error.

(3) Failed Asylum Seeker

[60] Insofar as the Board's finding with respect to the applicant's risk as a failed asylum seeker is concerned, I find the Board's determination was reasonable.

[61] The applicant is of the view that the reports relied on by the Board were unreliable and the findings from other reports should be adopted. The respondent submits the applicant's arguments do not show that the Board's finding was unreasonable.

[62] Here, I agree with the respondent that absent evidence of LTTE connections, although returnees could be detained and questioned, they would not face a serious possibility of persecution or risk of torture. Mr. Justice Yves de Montigny set this out in *Suppaiah* at paragraph 34:

> The Applicant submitted to the IRB that he would still be at risk if he returned to Sri Lanka because he could be targeted by way of suspicion of LTTE involvement. Without further details, this is clearly insufficient. As Justice Tremblay-Lamer wrote in *Marthandan v Canada (MCI)*, 2012 FC 628 (at para 20):
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> > To benefit from Canada's protection under section 97 of the IRPA, the applicant must show the probable existence of personal danger, i.e. danger to which other people from or in the country are generally not exposed (see *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] F.C.J. No. 222 (QL) and *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] F.C.J. No. 143 (QL)). The mere fact of being a young Tamil man from the east of Sri Lanka does not constitute personal danger. The panel found that the SLA's acts toward the applicant seemed to have always been instigated by the Pillaiyan group, and that he was able to obtain a Sri Lankan passport and leave the country, despite

> the fact that the Tamils in the north and east are subject to heightened attention from the authorities. By taking these factors into account, and considering that he has never had ties to the LTTE and that the Sri Lanka government released thousands of members of the LTTE, the panel concluded that the interest of the Sri Lankan authorities in the applicant, if there is any, is minimal and that there is only a mere possibility of his being persecuted in Trincomalee or elsewhere in the country. I am of the opinion that the decision of the panel falls within possible, acceptable outcomes.
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> [Emphasis added]

[63] In the present case, since the applicant has not established that he would be perceived to have LTTE ties, the Board found that based on the documentary evidence, the applicant would not be under a heightened risk as a failed asylum seeker. I do not find the Board committed a reviewable error in this determination.

(4) *Sur Place* Claim

[64] Insofar as the Board's finding of the applicant's *sur place* claim is concerned, I find the Board's determination was intelligible and defensible.

[65] The applicant is of the view that he has clearly established a *sur place* claim on the basis that the Sri Lankan government would perceive him as having ties to the LTTE. In support, the applicant relies on *B420* and *A032*. The respondent argues the Board was reasonable to find the applicant failed to establish a *sur place* claim in light of his circumstances and the lack of profile with Sri Lankan authorities. The respondent argues the present case can be distinguished from *B420* and *A032*.

[66] In *B420*, this Court dismissed the Minister's application and confirmed the Board's positive decision. In that case, the Board found the claimant established membership in a particular social group as a passenger on the *MV Sun Sea* and expressly found that the claimant would face persecution on the basis of perceived political opinion and implicitly on the basis of his ethnicity and race.

[67] In *A032*, Chief Justice Blanchard held that being a passenger on the *Ocean Lady* was not the sole basis for a positive finding (*A032* at paragraph 18). However, he confirmed the Board's decision in allowing a *sur place* claim in light of the events relating to the publicity surrounding the voyage of the *Ocean Lady* relating to its ownership by the LTTE, its history and its suspected LTTE passenger. There, the Board in *A032* found the claimant's link to the LTTE was established.

[68] In my view, both of these cases can be distinguished from the present case. In both of the above cases, the judicial review was filed by the Minister to challenge a positive decision made by the Board. The Board in those cases not only found a *sur place* claim was established, but it also partly based this determination of the *sur place* claim on the claimant's perceived LTTE ties and other Convention grounds. Unlike the case at bar, the claimants in these two cases had established their perceived LTTE ties.

[69] Also, in conducting its analysis, the Board was not overly simplistic as alleged by the applicant. The respondent was right to point out that LTTE ties was only one of the five points the Board considered in determining that the applicant had not established a *sur place* claim.

Here, in light of the applicant's circumstances and lack of profile with Sri Lankan authorities, I find it reasonable that the Board was not persuaded of a successful *sur place* claim.

(5) Compelling Reasons

[70] Insofar as the Board's analysis under subsection 108(4) is concerned, I find the Board's determination was reasonable.

[71] The applicant argues since the Board speculated as to the cause of his PTSD despite the information in the psychological report, this makes the Board's finding under subsection 108(4) unreasonable. The respondent argues the applicant's arguments hinge on the weight of the evidence. Here, the Board found, based on the applicant's experiences and his psychological report in light of credibility concerns, he did not meet the high threshold under subsection 108(4).

[72] Subsection 108(1) of the Act provides that if a claimant does not qualify under sections 96 and 97, the refugee claim would be rejected. Subsection 108(4) provides for an exemption under special circumstances.

[73] Here, the Board's speculation with respect to the psychological report did not negate the reasonableness of its overall determination. Its analysis was not solely based on the weight assigned to the psychological report, but it was also based on the applicant's experiences as well as its credibility findings. In light of all the evidence, I find the Board was reasonable to determine the applicant did not meet the threshold under subsection 108(4).

[74] Finally, all the findings when assessed cumulatively also indicate the Board's decision was reasonable. Therefore, I find no reviewable error in the Board's decision.

[75] For the reasons above, I would deny this application for judicial review.

[76] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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