Federal Court  Cour fédérale

Date: 20150610

Docket: IMM-2278-14

Citation: 2015 FC 732

Ottawa, Ontario, June 10, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NIRUJAN SIVARAJA
(A.K.A. NIRUJAN SIVARAJAH)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated February 24, 2014 [Decision], which refused the

Applicant's application to be deemed a Convention refugee or person in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicant is a Tamil man from northern Sri Lanka. He seeks refugee protection based on his fear of the Sri Lankan Army, the police, and paramilitary groups.

[3] The Applicant says that he has been arrested, detained and extorted by the police, the Karuna group, and the Eelam People's Democratic Party [EPDP]. He has also been accused of being a supporter of the Liberation Tigers of Tamil Eelam [LTTE].

[4] The Applicant left Sri Lanka for Thailand in March 2010. He arrived in Canada in August 2010 aboard the *M.V. Sun Sea* ship. He says that the Sri Lankan Army continues to search for him at his mother's home and at his aunt's home.

III. DECISION UNDER REVIEW

[5] On February 24, 2014, the Board determined that the Applicant was neither a Convention refugee nor a person in need of protection.

[6] The Board found that the Applicant was not a credible witness because he testified about events that were not included in his Personal Information Form [PIF] or his amended PIF. His credibility was also undermined due to inconsistencies in his PIF narrative, the fact that his

reason for leaving Sri Lanka was based on speculation, and his lack of supporting documentation.

[7] The Board first addressed a doctor's note that the Applicant submitted three days before the hearing. It was dated six days before the hearing and indicated: "[the Applicant] suffers from memory impairment probably resulted from the stress related to the recently diagnosed serious illness" (CTR at 329). The Board gave the note little weight because it did not say whether the doctor's finding was based upon the Applicant's self-reporting or whether there was any diagnosis to support the finding. The Board acknowledged that the Applicant had received chemotherapy in Canada; however, it found that there was no indication in the documentary evidence that the Applicant had suffered any mental impairment or memory problems as a result of the chemotherapy. In addition, the doctor's note indicated that the Applicant's memory problems began after his cancer diagnosis; this could not account for the discrepancies between the Applicant's original PIF and his interviews with Canada Border Services Agency [CBSA] officers.

[8] The Board also said that the Applicant's difficulties testifying did not appear to be indicative of memory problems. For example, in response to one particular question, the Applicant provided a list of five detailed points. When the Board asked the Applicant how he was able to remember those five points, the Applicant said that he had memorized the list. The Board said this indicated that the Applicant is not experiencing any real memory impairment and that the Applicant only went to the doctor for the purpose of his refugee claim.

[9] The Board addressed a number of inconsistencies in the Applicant's testimony, PIFs and CBSA interviews. The Board first addressed the Applicant's testimony that his problems with the Karuna group and EPDP began before 2005. The Applicant testified that he left Jaffna because his best friend had been shot and another friend seriously injured. The Board asked the Applicant why these details were not in his PIF, and the Applicant said he could not remember everything while he was detained. The Board asked the Applicant why the details were not in his amended PIF, and the Applicant said he did not like to think about certain things. The Board rejected the Applicant's explanations and made a negative credibility finding due to the importance of these omissions to his PIF narrative. The Board also pointed to the fact that the Applicant told the CBSA officer that he left Jaffna because two of his friends had been abducted and he did not know whether they were alive or not. The Applicant failed to provide a credible explanation for this inconsistency; he again said that he had been so affected by the incident that he did not like to talk about it. The Board said that the fact an event had an important effect on someone is an inadequate explanation for an important inconsistency. The Board concluded that there was insufficient credible and trustworthy evidence to find that the events the Applicant said precipitated his departure from Jaffna in 2005 had actually occurred.

[10] The Board also found an inconsistency in the fact that the Applicant testified that when he was released from one of his detentions, he was told to report any newcomers in the area. In his PIF, the Applicant said that when he was released from detention, he was told to immediately leave the area. The Applicant failed to provide an explanation for the inconsistency.

[11] The Applicant also told a CBSA officer that he had never been fingerprinted, but, in his oral testimony and his PIF, the Applicant said he was fingerprinted before he was released from detention. Again, the Applicant's only explanation was that he did not like to think of the past. The Board rejected this explanation because a refugee claim depends on a claimant to think of the past. The Board said the Applicant's explanation may have been acceptable had he failed to remember a particularly traumatic event, but the question simply asked whether the Applicant had ever been fingerprinted.

[12] The Applicant also failed to explain why he had not told the CBSA officer about all of his detentions. The Applicant described only one detention to the CBSA officer. When the CBSA officer asked if the Applicant had been arrested any other time, the Applicant said that he had not.

[13] The Applicant also provided inconsistent evidence regarding another one of his detentions. The Applicant told a CBSA officer that he had been travelling by motorcycle when he was arrested and detained. However, he testified that he had been travelling by bus when he was arrested and detained. The Board rejected the Applicant's explanation that the time he was arrested when travelling by motorcycle was a second arrest during the same trip and that the inconsistencies were due to his forgetfulness. The Board pointed to further inconsistencies regarding the detention: the Applicant's PIF said that a bribe was paid for his release to the police through the Karuna group; however, he testified that this was merely speculation and the bribe had gone to either the Karuna group or EPDP. The Applicant also told the CBSA officer that the bribe was three lahk rupees but testified that it was one lahk rupee. The Board concluded

that there was insufficient credible and trustworthy evidence to find that this detention had actually occurred.

[14] Finally, the Board addressed the inconsistencies in the Applicant's PIF narrative related to his return to Jaffna. The Applicant testified that he returned to Jaffna in 2009 with his father because his father was seriously ill. He also testified that his father died one month after they arrived in Jaffna. However, in his PIF, the Applicant said that he went to Jaffna in May 2008 and that his father died in May 2009. A further piece of paperwork that the Applicant filed with Citizenship and Immigration Canada indicated that his father died in April 2009. The Applicant was unable to explain the discrepancies. The Board said it could not determine which month, or even which year, the Applicant had returned to Jaffna and whether he travelled alone or with his father. The Board said that this was a particularly important area of concern because it was supposed to explain why the Applicant left southern Sri Lanka, where he was living in relative safety, and returned to Jaffna in the midst of the escalation of the civil conflict.

[15] The Board gave little weight to a letter from the Applicant's mother. It discussed events that happened while the Applicant was living in southern Sri Lanka and says that the Sri Lankan Army continues to search for the Applicant in southern Sri Lanka. The Board said that the letter had to be based on things that the Applicant had told his mother because he never claimed that she was present in southern Sri Lanka. The letter also failed to mention the problems that she may have had direct knowledge of; specifically, the problems with the Applicant's friends that he says precipitated his departure from Jaffna.

[16] The Board also gave a letter from the Applicant's aunt little weight because it failed to mention any of the events that the Applicant said she was present at, including the time that she paid a bribe for his release from detention.

[17] The Board also gave little weight to a letter from a physician in Sri Lanka. It simply said that the Applicant had visited a clinic due to chest pains because he was assaulted by security personnel. There was no indication that the Applicant was examined or received any treatment or diagnosis. In addition, the letter says that the Applicant visited the clinic in August 2009, but the Applicant said he was beaten and suffered chest pain in 2006. He also failed to mention that he received medical treatment following the beating in his PIF.

[18] The Board said that the Applicant had failed to provide credible or trustworthy evidence that he was ever detained or had problems in Sri Lanka. It found that the events had not occurred but had been crafted to bolster the Applicant's refugee claim. The Board made a negative credibility finding based on the accumulation of contradictions between the Applicant's testimony, his PIFs, and his CBSA interview. The Board said that its credibility finding extended to the Applicant's supporting documentation including the letters from his mother, his aunt, the physician, and a Sri Lankan Justice of the Peace.

[19] Finally, the Board said that there was no evidence that the Applicant was a person of interest in Sri Lanka. The Applicant left Sri Lanka on his own passport which supported its finding that the Applicant was not a person of interest to the Sri Lankan government. The Applicant testified that he used an agent to leave the country, but the Board said that if the

Applicant had used an agent then it was reasonable to expect that he would have included that in his PIF in light of the fact that his PIF says he used an agent to board the *M.V. Sun Sea*. The Applicant also testified that the only involvement his family ever had with the LTTE was that his father had to give the family jewels to the LTTE during the civil war. As a result, there was insufficient evidence to conclude that the Applicant is suspected of having LTTE links. In light of the lack of credible evidence that the Applicant was mistreated in Sri Lanka, the Board found no serious possibility that he was a person of interest when he left Sri Lanka or that he would be a person of interest when he returned.

[20] The Board also found that the Applicant's fear was not well founded on the documentary evidence. The Applicant does not have the profile of someone who would face risk. The Applicant claimed a risk based on the following factors: he is a young Tamil man from Jaffna; he was detained and beaten by police and paramilitary groups; he is a failed asylum seeker who will be a target for extortion, abduction, or worse; he failed to leave southern Sri Lanka after he was detained; and he travelled on the *M.V. Sun Sea*. The Board said that the documentary evidence indicates that failed asylum seekers are not particularly targeted. The Applicant has no ties to the LTTE and no history of political opposition in Sri Lanka or Canada. If he were suspected of supporting the LTTE, he would have been targeted on his way out of the country. He travelled on his own passport and the evidence indicates that Sri Lanka has a sophisticated tracking system for everyone travelling to or from the country. There is no credible evidence that he was ever arrested. The evidence is clear that the Sri Lankan government did not think everyone aboard the *M.V. Sun Sea* was an LTTE member or supporter.

[21] The Board also considered whether the Applicant had a *sur place* claim. It found that there was no credible, persuasive evidence that the Sri Lankan government suspects people of having LTTE connections simply because they were on the *M.V. Sun Sea*. There is no evidence that would suggest the Applicant has a particular profile as an LTTE supporter; neither he nor his family ever had any connection to the LTTE. The fact that the Applicant is a Tamil man who came to Canada on the *M.V. Sun Sea* does not equate to a particular social group. The Board said that the fact the Canadian government found no evidence to consider inadmissibility proceedings against the Applicant supported its finding that he has no LTTE connections.

[22] The Board also concluded that the Applicant's fear that he would be extorted as a failed asylum seeker was a generalized risk faced by all who are perceived to be wealthy in Sri Lanka.

[23] The Board concluded that the Applicant was neither a Convention refugee nor a person in need of protection.

IV. ISSUES

[24] The Applicant raises two issues in this proceeding: Whether the Board's credibility findings are unreasonable; and whether the Board breached procedural fairness by failing to put its concerns regarding the documentary evidence to the Applicant.

V. STANDARD OF REVIEW

[25] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[26] The parties agree that the Decision is reviewable on a standard of reasonableness: *Dunsmuir*, above, at paras 47-48, 51. The Court concurs: *Mercado v Canada (Citizenship and Immigration)*, 2010 FC 289 at para 22; *De Jesus Aleman Aguilar v Canada (Citizenship and Immigration)*, 2013 FC 809 at para 19. Questions of procedural fairness are reviewable on a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31.

[27] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above,

at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[28] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
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.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in	97. (1) A qualité de personne à protéger la personne qui se

Canada whose removal to their 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

trouve au Canada et serait 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.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons

(2) A également qualité de personne à protéger la

prescribed by the regulations as being in need of protection is also a person in need of protection.	personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. ARGUMENT

A. *Applicant*

[29] The Applicant submits that the Decision is unreasonable because the Board failed to provide any proper basis for its various credibility findings: *Sebahtu v Canada (Citizenship and Immigration)*, 2010 FC 200 at paras 12-13. The Applicant challenges the Board's credibility findings in eight discrete ways.

[30] First, the Board speculated about inconsistencies without any evidentiary foundation: *Armson v Minister of Employment and Immigration* (1989), 101 NR 372 (FCA).

[31] Second, the Board erred in finding that the Applicant does not suffer from any memory impairment. The Board has no memory expertise and the inconsistencies in the Applicant's evidence should have been viewed in light of his documented memory impairment: *Reyes v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 282 (CA); *Sanghera v Minister of Employment and Immigration* (1994), 73 FTR 155; *Nievas v Canada (Minister of Citizenship and Immigration)* (1998), 144 FTR 224. A refugee claim is not a memory test and the Applicant's failure to recall dates should not be the foundation of a credibility finding: *Sheikh v Canada (Minister of Citizenship and Immigration)* (2000), 190 FTR 225 at para 28. The Board

also breached procedural fairness in failing to present its concerns regarding how soon before the hearing the Applicant acquired the doctor's note: *Kegaj v Canada (Citizenship and Immigration)*, 2008 FC 388.

[32] Third, the Board engaged in an improper microscopic examination of peripheral or irrelevant issues: *Chao v Canada (Citizenship and Immigration)*, 2007 FC 1122 at para 6; *Attakora v Minister of Employment and Immigration* (1989), 99 NR 168 (FCA); *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116. For example, the Applicant says that the inconsistencies in his evidence regarding why he left Jaffna are irrelevant because they are unrelated to why he sought protection in Canada.

[33] Fourth, the Board erred in drawing negative inferences because of the discrepancies between the Applicant's testimony and what he told the CBSA officer. A claimant is not required to provide every detail of his claim at his port of entry [POE] interview: *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 51; *Sawyer v Canada (Minister of Citizenship and Immigration)*, 2004 FC 935. The Board also failed to appreciate that his responses were provided through an interpreter which carries a high probability for misunderstandings: *Kanapathipillai v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ no 1110 at para 8 (QL)(TD).

[34] Fifth, the Board erred in assuming that the Applicant's agents of persecution were rational actors: *Yoosuff v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1116 at para 8. The Applicant cannot be expected to explain the inconsistency between the police

ordering the Applicant to leave the city immediately and also ordering him to report any newcomers to the area.

[35] Sixth, the Board erred in making any negative credibility findings due to missing details in his PIF because he made timely amendments: *Gimenez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1114 at para 5.

[36] Seventh, the Board erred in rejecting the Applicant's mother's evidence simply because she was not present at the events she spoke of. The Applicant was in the best position to inform his mother about his experiences. The Board also erred in rejecting the aunt's letter because it did not include the details it would have liked to see: *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ no 729 (QL)(TD) [*Mahmud*].

[37] Eighth, the Board's findings regarding the Applicant's ability to acquire a passport are unreasonable. He acquired the passport in 2005 which is before he was suspected of having LTTE ties. The Federal Court has also held that a claimant's ability to travel on his or her own passport is not determinative of risk: *Canada (Citizenship and Immigration) v Fernando*, 2012 FC 706 at para 13. It also over-simplistic to conclude that the authorities have no interest in the Applicant due to the fact that he was released after he was questioned: *B027 v Canada (Citizenship and Immigration)*, 2013 FC 485 at para 8.

[38] The Applicant also submits that the Board erred in its treatment of the documentary evidence that discusses the risks that failed asylum seekers face. The Board failed to mention the

evidence which directly contradicted its position: *Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17.

[39] The Applicant also submits that the Board's *sur place* analysis is unreasonable because it relies on the improper finding that the Applicant had no profile with the authorities before he left Sri Lanka. The Applicant's evidence is that he was targeted and mistreated. Regardless, past suspicions are not a prerequisite for a *sur place* finding; the question is whether the Applicant's actions after leaving Sri Lanka place him at risk upon his return to Sri Lanka.

[40] Finally, the Board erred in finding that the Applicant faces only a generalized risk. The Applicant fears paramilitary groups whose sole motivation is not extortion.

B. *Respondent*

[41] The Respondent submits that the Court should not interfere with the Board's credibility determination. The Board had the advantage of seeing and hearing the Applicant and the Court is not entitled to reweigh the evidence: *Khosa*, above; *Aguebor v Minister of Employment and Immigration* (1993), 160 NR 315 (FCA); *Ambros v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ no 299 (QL)(TD). The totality of the Board's findings on the contradictions, inconsistencies and implausibilities led to the finding that the Applicant was not credible. The Board did not engage in any speculation but provided detailed reasons regarding why it found the Applicant's account lacked credibility. It was open to the Board to find the Applicant not credible based on his inconsistent testimony: *Sheikh v Canada (Minister of*

Employment and Immigration), [1990] 3 FC 238 at 244 (CA); *Kanagasabapathy v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 78.

[42] The Board reasonably found that the Applicant did not face a serious possibility of risk or persecution. The Board considered the documentary evidence and noted the inconsistencies regarding the security situation in post-war Sri Lanka. The fact that the Applicant is a Tamil man from Jaffna does not automatically qualify him for protection: *B198 v Canada (Citizenship and Immigration)*, 2013 FC 1106 at paras 51, 55.

[43] The Board's *sur place* analysis is reasonable. There is no evidence that the Sri Lankan government perceived all *M.V. Sun Sea* passengers to have LTTE connections, nor is there evidence that the Applicant's identity as a passenger was made known. The Applicant failed to establish that the Sri Lankan government would have any interest in him when they did not before his departure: *Canada (Citizenship and Immigration) v B380*, 2012 FC 1334 at para 38.

[44] The Board also reasonably found that the Applicant faces only a generalized risk on return to Sri Lanka. The potential risk that the Applicant might be perceived as wealthy and targeted for extortion is a risk faced generally by the population: *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 22; *Vickram v Canada (Citizenship and Immigration)*, 2007 FC 457 at para 14; *Prophète v Canada (Citizenship and Immigration)*, 2008 FC 331 at paras 16-17, aff'd 2009 FCA 31.

VIII. ANALYSIS

[45] This is a long and detailed Decision in which the Board examined the Applicant's allegations of past mistreatment and then turned to forward-looking and *sur place* issues, taking into account the Applicant's profile and whether he would be someone of interest to the authorities in Sri Lanka.

[46] In my view, the Board makes significant errors in dealing with the Applicant's evidence of past experiences. The central issue then is whether these errors are material to the forward-looking and *sur place* analysis that takes up the latter part of the Decision.

[47] With regards to the Applicant's past experiences, the Board reaches a general negative credibility finding based upon cumulative inconsistencies and omissions between the POE notes, the original PIF, the amended PIF, and testimony at the hearing. In addition, the Board was unconvinced by the Applicant's explanations concerning these problems and found that he gave evolving testimony in order to cover his mistakes.

[48] The Board was informed by a doctor's letter that the Applicant "suffers from memory impairment" and some of the incidents referred to took place a number of years ago. Hence, a medical diagnosis of memory impairment could have gone a long way to explaining many of the omissions and inconsistencies identified and discussed by the Board. However, the Board discounted the medical evidence of memory impairment so that it was effectively left out of account when the Board addressed the other evidence and the Applicant's explanations for the

discrepancies. In my view, the doctor's letter was improperly and unreasonably discounted by the Board. I say this for a number of reasons.

[49] At paragraphs 28 and 31 of the Decision, the Board has to following to say regarding the doctor's letter (CTR at 9-10):

> [28] However, I find it is of little value, as it does not state whether this is a conclusion reached by the physician based upon simple assertions from the claimant, or whether there was any objective investigation to justify such a bold statement. Furthermore, even if I were to give it much weight, it only suggests that any memory problems probably arose **after** he was diagnosed with serious illness, and because of the shock of such a diagnosis. No other explanation is offered.
>
> […]
>
> [31] I find that the diagnosis of memory problems has limited evidentiary value, as it is unstated whether this is based on one interview or more, when the claimant was interviewed, whether he was interviewed in English or Tamil, the length of time spent with the claimant and whether any interpreter was present or the physician spoke Tamil. The statement of memory problems may be no more than self-reporting of the claimant's situation and symptoms.
>
> [Emphasis in original]

[50] The doctor's letter may be based upon self-reporting, but there was no evidence before the Board that it was; hence the Board's conclusions here are speculative. It would have been a simple matter for the Board to ask the Applicant how his impaired memory diagnosis was arrived at, or the Board could simply have mentioned its concerns and given the Applicant an opportunity to explain. The Board did neither, and then speculated that the doctor's letter could have been based upon self-diagnosis. Bearing in mind the significance of a diagnosis of "memory impairment" for the kinds of detailed questions put to the Applicant as to what

happened when and where some time ago, and the Applicant's explanation in his own testimony that he had always had memory problems (and this is why he provided a medical diagnosis), the Board had an obligation, in my view, to raise its concerns over the doctor's letter rather than saying nothing and then making a significant point of rejecting the letter in the Decision. See *Karadag v Canada (Citizenship and Immigration)*, 2015 FC 353 at para 4; *Angulo v Canada (Citizenship and Immigration)*, 2014 FC 1131 at para 36; *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at paras 32- 42.

[51] In paragraph 30 of the Decision, the Board makes the following reasonable point (CTR at 10):

> The prescription pad note therefore suggests memory problems which "probably" arose after the May 2012 medical consultation. It does not directly account for such prior problems as are evident when one compares the original PIF narrative from November 2010 with any CBSA interview notes from that autumn, or with the CIC Claim form dated September 27, 2010.
>
> [Footnotes omitted]

[52] I see no problem with this observation, but it has to be borne in mind that the general negative credibility finding is cumulative and, as the Decision reveals, a great deal was made of discrepancies between the POE notes and the oral testimony and the two PIFs and the oral testimony. And it is the Board's failure to take the medical diagnosis into account when assessing oral testimony that is the problem.

[53] Instead of asking for an explanation regarding how the diagnosis was arrived at and addressing it objectively, the Board then goes on to appoint itself as an expert on memory loss (CTR at 10-11):

> [32] At the oral hearing, Counsel for the claimant asked him when he first started having any memory problems, and he replied that he had some after his arrest in Negombo, but then had experienced more problems after chemotherapy in this country.
>
> [33] However, I did not discern that his ability to give testimony was indicative of memory problems. For example, towards the end of my questions to him I asked the claimant to explain his current fear in Sri Lanka. In response he said that there were, "five issues." He then said that:
>
> 1. The Sri Lankan government had said that all those on the ship belonged to the LTTE
>
> 2. Twice he had been arrested on suspicion of LTTE links
>
> 3. One person from the ship had returned to Sri Lanka, he was then in and no one knows how he died. This person was named "SATHI."
>
> 4. He read last week that the government of Sri Lanka was allocating large sums of money to the internal security forces.
>
> 5. The Prime Minister of Canada has refused to go to Sri Lanka because of the troubles.
>
> [34] He then alleged that the person he had named, Sathi, had been released through Red Cross intervention but then the government had "set up this accident" in which he has killed. He said that during curfew the government can do anything, so he was afraid, and they were still searching for any members of the LTTE.
>
> [35] I asked the claimant how it was that despite the numerous other problems displayed in his oral testimony (as are referred to below) he had been able to list these five points and repeat them so coherently. He said that he had written them down and then read it over and over.
>
> [36] Clearly, such a demonstration indicates to me that the claimant's memory is not so impaired as to restrict him when he takes the time to review what he wrote down. I note that such a

> display of rote memorisation suggests that he does not have any actual restrictions of memory, per se.
>
> [Footnote omitted]

[54] There was no objective evidence that someone suffering from memory impairment regarding events that occurred some time ago is incapable of recalling something he has recently written down and read over and over. This is a very different matter from having to respond to questions at a hearing for which no preparation is possible. It would require an expert to speak to this issue and the Board's comments here are no more than a personal opinion on a medical issue. The Board is, once again, simply speculating.

[55] The Board then caps off its analysis of the doctor's letter with the following (CTR at 11-12):

> [37] In submissions, the claimants' [*sic*] counsel argued that the claimant's medical problems "likely could have affected his memory" for some time, even before his diagnosis. In my view this is no more than speculation, and I am unable to give it any weight.
>
> [38] Because of my finding that the claimant is not credible in certain aspects of his claim, and because there is no indication of the basis for the family physician's report, I give it little evidentiary weight. As well, I note that the prescription pad note was only dated six days before the scheduled hearing.
>
> [39] I find, on a balance of probabilities, that the claimant only went to the family physician for the purpose of the refugee claim, and not because he needed any medical assistance, because otherwise the claimant would have sought help well before this date. He has been in Canada since August 2010.

[56] There is, in fact, nothing suspicious about the Applicant going to a doctor for evidence of his memory problems with the hearing in mind. If he had merely asserted memory problems

without the doctor's letter, the Board would simply have found that he had failed to provide qualified, objective evidence in a context where it would reasonably be expected. If someone anticipates that their memory may well let them down on a crucial occasion when their whole future is to be decided, it would be foolish not to acquire and produce as evidence medical confirmation of their problems. The Board's inference that this was only done to bolster the refugee claim is pure speculation. Unless the Applicant had confronted a similarly crucial situation in the past (and the Board does not explore this), then there would be no reason for the Applicant to have acquired medical evidence of his memory impairment problems before this.

[57] The Board did not have to accept the doctor's letter as evidence of memory impairment that would affect the Applicant's testimony and explain the discrepancies the Board relied on for a general negative credibility finding. But the Board cannot speculate, and it must provide some kind of real basis for rejecting the letter. See *Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292; *K.K. v Canada (Citizenship and Immigration)*, 2014 FC 78 at paras 60-61. It would have been a simple matter to find out how the diagnosis was made, or to alert the Applicant to the problem and allow him to address it. Instead we have a finding that is both unreasonably speculative and procedurally unfair.

[58] The issue of the Applicant's possible memory impairment comes up at various important points in the Decision. This is because the Board goes to considerable pains to probe the Applicant on the details of past events and then draws a negative inference each time inconsistencies arise, inconsistencies that could well be the result of memory impairment. Memory impairment could also account for what the Board sees as the Applicant's "evolving"

evidence as he struggled to explain inconsistencies in his testimony, and between his testimony and his PIFs or the POE notes. It also significantly comes into play when the Board deals with the letter from the Applicant's mother which the Board discounts because it is based upon what the Applicant has told his mother and the Applicant has been found not to be credible. That letter is also discounted for what it does not say, which is another reviewable error. See *Mahmud*, above, at para 11; *Arslan v Canada (Citizenship and Immigration)*, 2013 FC 252 at para 88; *Durrani v Canada (Citizenship and Immigration)*, 2014 FC 167 at para 7. The doctor's letter also comes into play when the Board discusses the interaction with the agent who got the Applicant out of Sri Lanka. The Board actually concedes the following: "Although the claimant was not asked further about the smuggler, given the numerous and cumulative credibility concerns noted above, it is my view that his written narrative speaks for itself" (CTR at 24).

[59] So the doctor's letter was very important for this Decision, at least as regards past events. The issue for the Court is whether it also infects the Board's forward-looking analysis and the *sur place* findings.

[60] Generally speaking, the Board concludes that there is no forward-looking risk and no *sur place* claim because the Applicant does not have the profile of someone who would be picked up by the Sri Lankan authorities and subjected to mistreatment upon his return. At least part of the reason for this conclusion is the Board's finding that, based upon the Applicant's unconvincing account of past events, the Sri Lanka authorities had no interest in the Applicant when he left the country (CTR at 26):

> [114] The panel finds, on a balance of probabilities, that the claimant is not credible regarding the key and pivotal elements of

> his claim. As a result, the panel gives no probative value to the allegations made regarding the pursuit and potential persecution by authorities should he return Sri Lanka [*sic*], or his fear of return to Sri Lanka because the authorities would pursue, arrest or persecute him. With regard to the issues discussed above, no credible evidence was adduced that would substantiate such a fear.

[61] It is not possible to say whether the Board would have reached a different conclusion without its erroneous treatment of the doctor's letter. The Board may have found the Applicant to be a credible witness and accepted his account of past events. This may have changed the Applicant's profile and convinced the Board that the Applicant would be at risk upon return. In other words, the unreasonable and unfair handling of the "memory impairment" issue infects the whole Decision. The Court cannot say whether the Applicant had a profile that placed him at risk. This is a matter for the Board to decide. See *Khosa*, above, at para 59. Consequently, this matter must be returned for reconsideration

[62] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Board member.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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