

Federal Court



Cour fédérale

Date: 20160215

Docket: IMM-3699-15

Citation: 2016 FC 183

Toronto, Ontario, February 15, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SARMILAN SELVARATNAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated June 19, 2015, determining that the Applicant is not a Convention refugee pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor a person in need of protection pursuant to section 97 of IRPA.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a 22-year-old male from northern Sri Lanka. His ethnicity is Tamil. He alleges that if he were to return to Sri Lanka, he would be tortured at the hands of government forces including the police, army and paramilitary groups such as Eelam People's Democratic Party.

[4] In 2008 or 2009, the Liberation Tigers of Tamil Eelam [LTTE] attempted to recruit the Applicant and his brother. To avoid the forced recruitment, their father gave the LTTE money and the family relocated. In January 2009, the Applicant and his family were victims of a bombing and his brother was seriously injured. In April 2009, the family relocated to the Ramanathan camp. At the end of the war, in May 2009, the brother was arrested, detained, beaten and threatened by the intelligence service [CID]. He was released after his father paid a bribe. The family were able to leave the Ramanathan camp in November 2009, following which they were told that the CID had been to the camp to look for the Applicant's brother. The Applicant's brother then left Sri Lanka for Canada and made a successful claim for refugee protection.

[5] The Applicant alleges that in late 2013, he was approached several times by the Sri Lankan army as part of a Tamil recruitment initiative. In February 2014, the army went to his family home demanding that the Applicant join them. He was forcibly taken to a local camp and detained for 3 days. He was interrogated about his refusal to join and falsely accused of being an LTTE and/or Tamil National Alliance [TNA] supporter. He was also physically abused. He

alleges that he was forced to sign a document written in Sinhalese in order to be released. After his release, the Applicant fled Sri Lanka with the intention of joining his brother in Canada.

II. RPD Decision

[6] The Applicant's refugee claim was heard on April 24, 2015. The determinative issues in the resulting decision were the risk of return and the Applicant's credibility and behaviour, which the RPD found to be inconsistent with the alleged risk.

A. *Inconsistent Behaviour*

[7] The RPD noted that, although the Applicant stated in his Basis of Claim [BOC] form that he left Sri Lanka with the intention of coming to Canada to join his brother and to seek protection, he testified that his intention was to go abroad to find protection. The Applicant travelled through three countries that are signatories to the Convention – Brazil, Guatemala and the United States – prior to arrival in Canada. According to his documents, he claimed asylum in the United States. He stated that while the US authorities had agreed to receive his claim, he decided to come to Canada since he had no family in the United States.

[8] When asked to explain why he abandoned his US claim, given that his intention was to get to a country where he could claim protection, the Applicant replied that that Canada offers fair treatment of which members of his community had benefited. The RPD concluded that the Applicant's explanation was not satisfactory, given the risks he alleged, and considered his credibility undermined as a result.

B. *Incident of February 3, 2014*

[9] The Applicant testified that the incident leading to his arrest was on March 3, 2014, contrary to his BOC form which stated the incident occurred a month earlier. In addition to this inconsistency, the RPD was concerned about the Applicant's answers when questioned about his detention and release. The Applicant stated that he signed a document confessing to be a member of the LTTE and the TNA and that a failure to show up when summoned would lead to arrest. The RPD did not find this credible, as he had earlier stated that he was unaware of the contents of the document, which was written in Sinhalese. The RPD found the Applicant's credibility to be further undermined by what it considered to be vague and evasive testimony and from the fact that he adjusted his testimony.

[10] The RPD also concluded that the Applicant had not demonstrated that refusing to join the army resulted in arbitrary arrests in Sri Lanka, although it accepted that the army does recruit Tamils. The RPD considered the most recent documentary evidence regarding the treatment of Tamils and found that persons targeted for arrest were generally political activists, business people and suspected criminals.

C. *Risk of Return*

[11] The RPD then proceeded to analyze the risk the Applicant might face, as a young Tamil male from northern Sri Lanka, should he return to Sri Lanka.

[12] The RPD referred to reviewing the documentary evidence regarding the treatment of Tamils in Sri Lanka and considered the fact that it did not believe the Applicant regarding the incident that he allegedly experienced in February 2014 or the fact that he was imputed to have links with the LTTE and the TNA. It also considered the Applicant's statement at the hearing that he obtained a passport legally after the incident in February 2014 and his testimony that he left Sri Lanka under his own legal identity and did not encounter any problems. The RPD concluded that the Applicant did not establish that his profile corresponds to a profile outlined in the documentary evidence that would justify Sri Lankan authorities being interested in him should he return to his country.

[13] The RPD also considered evidence that screening is conducted when failed Tamil refugees are returned to Sri Lanka but noted that most sources assert that it is not all Tamils, but rather individuals with particular profiles such as those to whom links with the LTTE have already been imputed, who are targeted. Considering that it did not believe the Sri Lankan authorities would have attributed links with the LTTE or the TNA to the Applicant, the RPD found that the Applicant did not establish a reasonable chance of persecution if he should return.

III. Issues and Standard of Review

[14] The Applicant submits the following issues for the Court's consideration:

- A. Whether the RPD's credibility findings were reasonable; and
- B. Whether the RPD erred in its assessment of the country condition evidence and the Applicant's *sur place* claim.

[15] I agree with the Applicant's articulation of the issues. In the context of the particular issues raised, I consider the standard of review to be applied to the RPD's decision in this matter to be one of reasonableness (see *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9).

IV. Submissions of the Parties

A. *The Applicant's Position*

(1) Whether the RPD's credibility findings were reasonable

[16] The Applicant submits that he provided a reasonable explanation for abandoning his claim in the United States and argues that the RPD ignored or did not give due consideration to his personal circumstance, namely that his brother lived in Canada.

[17] The Applicant also submits that the RPD's conclusions surrounding his testimony with respect to the incident in 2014 were unreasonable. Although the RPD asserted in its decision that the Applicant "sidestepped" the question as to how he knew that the Sinhalese document was a confession, the RPD did not confront him with this concern or try to get clarification through further questioning. This was particularly important since the Applicant was speaking through a translator. The Applicant takes the position that his testimony was consistent throughout, that he did not personally know what the document stated because he could not read Sinhalese, but that he believed the document to be a confession because a Tamil-speaking person, amongst the army personal, told him this.

[18] The Applicant also submits that the issue of the dates was a minor discrepancy and not a determinative issue for the RPD.

- (2) Did the RPD err in its assessment of the country condition evidence and the Applicant's *sur place* claim?

[19] The Applicant submits that the RPD engaged in a selective review of the country condition evidence and erred in its assessment of the *sur place* claim. While it is correct that categories such as human rights defenders and political activists are targeted, the RPD unreasonably ignored supportive evidence that many Tamil civilians face harassment and intimidation as well.

[20] The Applicant argues that the RPD did not properly consider the risk to the Applicant based on his cumulative profile, which included being a young male Tamil who resided in Canada, made a refugee claim, was arbitrarily arrested and detained by security forces with allegations of ties to the LTTE, and has a brother who was perceived to be an LTTE supporter and was accepted as a Convention refugee in Canada.

[21] The Applicant also refers to authority that the fact that he was able to travel on his own passport in leaving Sri Lanka is not indicative of an absence of risk upon return (*Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 244 at paras 15-16).

B. *Respondent's Position*

(1) Whether the RPD's credibility findings were reasonable

[22] The Respondent submits that the Court should not reweigh the evidence.

[23] Regarding the abandoned US claim, the Respondent's position is that the RPD considered the Applicant's explanation, that he decided to come to Canada where he had family, and provided reasons for finding it unsatisfactory, being the risk of torture and risk to his life that the Applicant alleged. The Respondent argues this was a reasonable finding, as the Applicant had a valid claim in the US, which protected him from removal, and still risked going to a country where he had no legal status and therefore faced the risk of being removed. While the Safe Third Country Agreement allows persons with family in Canada to claim protection in Canada, this does not mean that abandoning a claim cannot undermine one's credibility about alleged risk (*Nadesan v MCI*, 2015 FC 104 [*Nadesan*]).

[24] The Respondent also submits that it was reasonable for the Board to find the testimony with respect to the 2014 incident evasive and vague, given that the Applicant initially stated that he was made to sign a document of which he had no knowledge and later described this document in detail with an explanation that a Tamil-speaking person informed him of the content.

- (2) Did the RPD err in its assessment of the country condition evidence and the Applicant's *sur place* claim?

[25] The Respondent argues that the RPD reasonably weighed the country condition evidence and found that the Applicant failed to meet his onus to establish that he would be targeted or had a profile that would be targeted.

[26] With respect to the *sur place* claim, the Respondent submits that the RPD reasonably found that the Applicant did not have a profile that would be of interest to the authorities upon his return. The RPD's assessment was based not only on a lack of credibility, but also on the fact that the Applicant left legally on his passport and encountered no problems. The Respondent's position is that it was open to the RPD to conclude, based on the documentary evidence, that it was not all Tamils, but rather those with particular profiles, who are targeted upon return to Sri Lanka and that the Applicant did not fit these profiles.

V. Analysis

[27] My decision to allow this application turns on the RPD's conclusion that the Applicant's behaviour, in abandoning his claim for asylum in the United States, is inconsistent with the risk he alleges and therefore undermines his credibility.

[28] The RPD's reasoning in support of this conclusion is not sufficiently transparent to be reasonable. After reviewing the Applicant's evidence including the statements in his BOC form

and his testimony, the RPD concludes that the Applicant's explanation for abandoning his US claim, that Canada offers fair treatment from which members of his community have benefited, is not satisfactory. However, other than referring to the risks alleged by the Applicant, the RPD provides no reasoning as to why this explanation is not satisfactory.

[29] I have considered whether the RPD's review of the relevant evidence before reaching its conclusion on this point demonstrates a basis for the conclusion, such as an inconsistency in the evidence. However, no such basis is apparent to me. As noted by the RPD, the Applicant's BOC states he left Sri Lanka to join his brother and seek a safe life in Canada. In his testimony, to which the RPD also refers, the Applicant refers to an intention to go overseas to seek protection. While this testimony does not refer to Canada as the country in which he would seek protection, I do not consider this evidence to give rise to an inconsistency. Nor do the RPD's reasons suggest that it reached this conclusion.

[30] The RPD's reasons then turn to the Applicant's claim for asylum after he arrived in the United States. The RPD notes that the Applicant testified that the US authorities agreed to receive his claim, but he decided to come to Canada since he has no family in the United States. Again, the RPD did not identify an inconsistency in the Applicant's evidence. Nor can I.

[31] The RPD refers to the explanation the Applicant gave for abandoning his US claim, i.e. that Canada offers fair treatment from which members of his community have benefited, which explanation the RPD rejects as unsatisfactory. Again, I find nothing inconsistent in any of the Applicant's evidence on this subject, which is all to the effect that he wishes to seek refugee

protection but that he prefers to do so in Canada, where he has a brother who has successfully asserted a refugee claim.

[32] While not explicit, it may be that the RPD's rationale, in drawing a negative inference from the fact that the Applicant abandoned his US asylum claim, is that he was relinquishing a prospect of protection in the United States in favour of a lesser prospect of protection in Canada. This interpretation of the RPD's reasoning would be consistent with its reference to the Applicant's alleged risk as the basis for rejecting his explanation for abandoning the US claim. However, the RPD refers to no evidence, and provides no analysis, to support the conclusion that the Applicant's prospects for protection were superior in the United States.

[33] The RPD noted that the Applicant testified that the US authorities had agreed to receive his claim. It also referred to documentation from the Canada Border Services Agency [CBSA] which provided some information as to the events in the United States. The CBSA documents indicate that the Applicant was encountered by border patrol agents in Texas on December 10, 2012 and detained and processed for removal pending a credible fear interview. Credible fear was found in January or February of 2012 (the date on the CBSA documentation is unclear), and he was released on bond on February 12, 2015.

[34] At the hearing of this application, the parties expressed somewhat divergent views as to the status conferred upon a claimant by a finding of credible fear. However, the Applicant referred the Court to the decision in *Rajaratnam v Canada (Minister of Citizenship and*

Immigration), 2014 FC 1071 [*Rajaratnam*], in which Justice O’Keefe held as follows at paragraphs 55 to 56:

[55] Further, the Board may have overstated the importance of a credible fear interview in the United States. There was nothing in the record disclosing what importance such a finding has in the United States’ asylum system. Further, the asylum officer conducting that interview only wrote the following:

The applicant has established that a significant possibility exists that he could be found credible in a full hearing before an [immigration judge]. The applicant has also established that a significant possibility exists that he could be found eligible for asylum in a full hearing before an [immigration judge].

[Emphasis added]

[56] Given that language, it sounds like the credible fear interview is primarily a screening determination that would not bind the immigration judge. As such, there is no evidence that the applicant would have had a better chance in the United States than he had here.

[35] In the recent decision in *Gnanasundaram v Canada (Minister of Citizenship and Immigration)*, 2015 FC 804 [*Gnanasundaram*], at paragraphs 17 to 22, Justice Boswell reviewed the decision in *Rajaratnam*, as well as the contrary decision of Justice Hughes in *Nadesan* which is relied upon by the Applicant:

[17] The RPD found it was unreasonable for the Applicant to abandon his claim in the United States since protection was “likely” forthcoming, and one of the reasons the Applicant attacks that finding is because there was no evidence that his asylum claim there would likely be granted. There is limited evidence in the record about the role of a credible fear interview in the United States’ asylum process, but the box that the asylum officer checked off on the worksheet states that: “[t]here is a significant possibility that the assertions underlying the applicant’s claim could be found credible in a full asylum or withholding of removal hearing” (emphasis added).

[18] Mr. Justice John O'Keefe reviewed similar language in *Rajaratnam v Canada (Citizenship and Immigration)*, 2014 FC 1071 [*Rajaratnam*], where he stated:

[55] ...the Board may have overstated the importance of a credible fear interview in the United States. There was nothing in the record disclosing what importance such a finding has in the United States' asylum system. Further, the asylum officer conducting that interview only wrote the following:

The applicant has established that a significant possibility exists that he could be found credible in a full hearing before an [immigration judge]. The applicant has also established that a significant possibility exists that he could be found eligible for asylum in a full hearing before an [immigration judge].

[Emphasis added]

[56] Given that language, it sounds like the credible fear interview is primarily a screening determination that would not bind the immigration judge. As such, there is no evidence that the applicant would have had a better chance in the United States than he had here.

[19] That was not the only basis for setting aside the decision in *Rajaratnam* though; the RPD's reasoning was also deficient in certain aspects and its finding that the applicant lacked credibility was problematic.

[20] A somewhat contrary assessment of the significance of a favourable credible fear interview can be found in *Nadesan v Canada (Citizenship and Immigration)* 2015 FC 104 [*Nadesan*], where Mr. Justice Roger Hughes stated:

[11] The final ground for finding lack of credibility is, as stated by the Member, "the claimant's foregoing an apparently good opportunity to gain asylum in the U.S.". The evidence is that in the US the Applicant's story was accepted as credible and he was to appear at a further hearing at a time to be determined. This is by no means an assurance that he had a "good

opportunity” to gain asylum in the U.S. but is something that a person who had reasonable grounds to fear persecution if returned to his home country should have pursued. He did not. It was reasonable for the Member to take this into consideration.

[21] I agree that it may be reasonable for the RPD to consider that someone who does not pursue a claim after a successful credible fear interview has abandoned the claim. However, that was not the only ground upon which the RPD found the applicant in *Nadesan* lacked credibility; that finding was based upon the applicant's demeanour as well as a number of apparent inconsistencies or improbabilities with respect to his detentions.

[22] Unlike *Nadesan*, the only reason the RPD impugned the Applicant's credibility in this case was because he had abandoned his asylum claim in the United States when that claim would probably have been successful. The RPD's finding that the Applicant was “likely” to obtain protection in the United States was therefore a critical finding of fact insofar as this contributed to its understanding of the risk the Applicant took by abandoning his claim. It was also made “without regard for the material before it” (*Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(d)), since the only evidence in the record implies that a credible fear interview is just a screening mechanism with no effect on the full hearing of the claim. Moreover, the RPD never indicated that it had any specialized knowledge about the United States asylum process (*Refugee Protection Division Rules*, SOR/2012-256, s 22), and it was not reasonable to attribute such significance to the finding at the credible fear interview.

[36] In both *Rajaratnam* and *Gnanasundaram*, while there was some evidence before the RPD as to the significance of a credible fear interview, the Court's conclusion was that it did not support the conclusion that the applicant had superior prospects or likelihood of successfully claiming protection in the United States. In the case at hand, the Court has been referred to no evidence at all as to the significance of a finding of credible fear and therefore no evidence capable of supporting a conclusion that the Applicant's prospects of refugee protection in the US were superior to his prospects in Canada.

[37] I am conscious of the decision in *Nadesan*, and I agree with Justice Boswell's comment on that case that it may be reasonable for the RPD to take into account the fact that a claimant does not pursue a claim in the United States after a successful credible fear interview. However, as is evident from the various authorities relied upon by each of the parties, whether a negative credibility finding based on such a factor is reasonable depends very much on the facts of the individual case.

[38] In the case at hand, my conclusion that the RPD's finding is not reasonable results from its failure to provide transparent reasons for such finding. The Applicant is entitled to pursue his claim in Canada as a result of the Safe Third Country Agreement. His evidence is that he wished to pursue his claim in Canada where his brother has been afforded Convention refugee status, and he asserted that claim on February 26, 2015, two weeks after being released on bond by the US authorities. There is also no evidence that a successful credible fear interview in the United States afforded him status in any way superior to that of a claimant in Canada. Against that backdrop, and considering the RPD's reasons on this point, I can find no reasonable basis for its finding that the Applicant's abandonment of his US claim undermined his credibility.

[39] The case law canvassed above points out that an error of this sort will not invariably result in the RPD's decision being set aside, particularly where it is one of many adverse credibility findings. However, in this case, the RPD's finding that the Applicant's abandonment of his US asylum claim undermined his credibility was one of a small number of adverse credibility findings. The other findings relate to his testimony as to the February 2014 incident and a conclusion that such incident was inconsistent with the typical reasons for arrest identified

by the country condition documents. In that context, the Court cannot know if the RPD would have reached the same conclusion to reject the credibility of the Applicant's claim if it had not erred in its assessment of the Applicant's decision to abandon his US claim.

[40] As such, the RPD's decision must be set aside as unreasonable and outside the range of acceptable outcomes. Having reached this conclusion, it is unnecessary for me to rule on the Applicant's other grounds for judicial review.

[41] The parties confirmed that neither proposes any question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred to the Refugee Protection Division for re-determination by a different panel member. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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