Federal Court  Cour fédérale

Date: 20160413

Docket: IMM-4549-15

Citation: 2016 FC 408

Ottawa, Ontario, April 13, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

AKILAN SATHASIVAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, a Tamil citizen of Sri Lanka, seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board [Board], which found that he is neither a refugee nor a person in need of protection. Although the RPD's decision also dealt with the claim of the applicant's brother, only the applicant's claim is under consideration by the Court today.

[2] The applicant, a 24 year old single Tamil male, is an auto-rickshaw driver from Valvetty, in northern Sri Lanka. He claims to fear persecution at the hands of the Sri Lankan army and police, as well as a pro-government Tamil paramilitary group called the Eelam People's Democratic Party [EPDP], as a result of being perceived to be a member or supporter of the Liberation Tigers of Tamil Eelam [LTTE]. He relies on the following three incidents to support his claim:

- In June 2013, the applicant was detained for two hours and questioned by the army about his connection to the LTTE. He denied having any connection with them and was not physically mistreated at this time;
- Around June 2014, the applicant was questioned by the army again, for about 20 minutes, about his connection to the LTTE;
- In August 2014, the applicant was arrested and taken to an army camp, where he was detained and threatened, but not physically mistreated. The applicant's family paid a bribe to have him released.

[3] The applicant's older brother also had several interactions with the army and/or EPDP between early 2009 and January 2012, when he left the country, but unlike the applicant, he was physically assaulted by these groups while in detention.

[4] In November 2014, the applicant left Valvetty. Over the next months, he travelled through several countries, including the United States. In January 2015, the EPDP came to the applicant's home in Valvetty, asking about his whereabouts. On April 27, 2015, the applicant arrived in Canada. He made a refugee claim shortly thereafter.

[5] The RPD did not really question the veracity of the applicant's story or his subjective fear, so I dismiss any ground of attack that the RPD erred by failing to make credibility findings

in clear and unmistakable terms. The applicant also claims that the RPD failed to consider whether he falls within the compelling reasons exception under subsection 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. However, in order for this exception to apply, it must first be established that the applicant was, but is no longer, a Convention refugee, due to changes in the applicant's home country (*Niyonzima v Canada (Minister of Citizenship and Immigration)*, 2012 FC 299 at para 56). This requirement is not met here.

[6] It is well-accepted that under section 96 of IRPA, a claimant must establish, on a balance of probabilities, that there is a reasonable chance or serious possibility of a risk of future persecution (*Adjei v Canada (Minister of Employment & Immigration)*, [1989] 2 FC 680 at paras 5-6; *Alam v Canada (Minister of Citizenship & Immigration)*, 2005 FC 4 at paras 5-8; *Florea v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1472 at paras 23-24). While the test is correctly stated by the RPD at the beginning and end of its analysis, the applicant submits that two passages elsewhere in the decision suggest that instead of considering whether there was a "serious possibility" of persecution, the RPD applied a higher "balance of probabilities" test. I have closely read the passages invoked by the applicant and I am satisfied that, when read as a whole, the reasons demonstrate that the RPD applied the correct test (*Thiyagarasa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 48 at paras 22-24).

[7] With respect to the claims of the applicant and his brother, the determinative issue was whether, because of their ethnicity and age, they had a well-founded fear of persecution and/or would be subjected personally, on a balance of probabilities, to a risk to life, a risk of cruel and

unusual treatment or punishment, or a danger of torture, upon returning to Sri Lanka. The RPD notably concluded that "[t]he claimants do not have a profile that would raise their risk of harm beyond a level of mere possibility (that is, there is not a reasonable chance that they would suffer persecution)".

[8] More particularly, the RPD found that "[b]ased on the evidence adduced, it does not appear that the government authorities, the SLA [Sri Lanka Army], or any paramilitary group such as the EPDP considers the claimants to be LTTE or LTTE supporters". In particular, the RPD noted that the applicant was released after each of his detentions, that he was not physically harmed, that the detentions themselves were not very long, and that, on one occasion, he was released as the result of a bribe. The RPD inferred from these facts that the army did not believe that the applicant was associated with the LTTE, but instead was targeting him for the purpose of extortion. The RPD also noted that, although the EPDP had inquired as to the applicant's whereabouts after he left Valvetty, it had not taken any further steps since that time. The RPD concluded that the army and EPDP had no real interest in the applicant.

[9] I dismiss the argument made by the applicant that the RPD made a number of speculative findings – notably, that it erred in finding that the applicant was not seriously suspected of having connections with the LTTE, in part because he was released shortly after each of his detentions. The impugned decision has to be read as a whole. The length of the applicant's detention was surely a relevant factor to consider when assessing whether the applicant was seriously suspected of having connections with the LTTE. Besides, it was not the only factor the RPD considered, nor was it unreasonable for the RPD to take it into account. The RPD is also

allowed to draw reasonable inferences flowing from both the documentary evidence and the personal experience the claimants may have had with the agent of persecution, as "[i]t is trite law that the test for persecution and protection is forward-looking" (*Martinez Giron v Canada (Minister of Citizenship and Immigration)*, 2013 FC 7 at para 50).

[10] The RPD also considered the applicant's claim that his attempt to seek asylum in Canada has increased his risk of persecution, because Canada is known to be home to a Tamil diaspora that supports the LTTE. In rejecting this submission, the RPD acknowledged that the applicant would likely be questioned upon his return, and that "Tamils from the north and east are likely to attract greater scrutiny." It was open for the RPD to conclude that, notwithstanding this evidence, the applicant would not face a "serious possibility" of persecution, given the documents in his possession, his lack of a criminal record, his lack of ties (or suspected ties) to the LTTE, and other aspects of his 'profile'. This finding is supported by the evidence. I dismiss the argument made by the applicant that the RPD's conclusion in this respect is unreasonable.

[11] This brings me to the most serious ground of reproach made in this case by the applicant.

[12] The applicant submits that the RPD erred when it found that the extortion faced by the applicant's brother did not warrant relief, in part, because "[t]he risk of extortion is something that all persons are subject to in Sri Lanka as party members engage in criminal activities". This statement is directly preceded by a statement that "[l]ike so many other Tamils, [the applicant's brother] was targeted for easy extortion with threats of allegations that he was involved with the LTTE". First, the applicant claims that this statement is factually incorrect because Tamils are in

fact disproportionately targeted for extortion. Second, the applicant claims that the RPD erred by implying that there is a bright line between "crime," on one hand, and "persecution" on the other. The fact that extortion is a crime that may be committed, in part, for economic reasons does not preclude it from also being an act of persecution committed, in part, based on the applicant's ethnicity. Third, the applicant submits that the issue of generalized risk is irrelevant for the purposes of a section 96 (as opposed to section 97) analysis.

[13] In *Sivaraththinam v Canada (Citizenship and Immigration)*, 2014 FC 162 at para 68, Justice Annis reviewed the nature of extortion for the purposes of a personalized risk versus generalized risk assessment under section 97 of IRPA, stating:

> Extortion is by nature a personalized crime, a fact which gives rise to some confusion in the ensuing risk analysis. When faced with a claim of fear based on extortion, the Board must determine whether the claimant has provided sufficient evidence to meet his onus that the general crime of extortion in his particular circumstances presents a sufficient risk to his life or a risk of cruel and unusual treatment to take it outside of the risk faced by other similarly situated individuals in the country in question, in this case, Sri Lankans who are perceived as wealthy. This was the analysis carried out by the Member, who pointed out that the allegations of risk raised by the applicant did not differentiate his situation from that of any other Sri Lankan perceived as wealthy.
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> [Emphasis added]

[14] In the present case, the applicant does not claim a risk of extortion due to his status as a Sri Lankan who is perceived to be wealthy, but rather as a Sri Lankan who is also a young Tamil male from the north of the country. In *Gunaratnam v Canada (Citizenship and Immigration)*, 2015 FC 358, under similar circumstances, Justice Russell addressed at length the issue of the particularized risk of extortion faced by young Tamil males, based on threats of denunciation as

LTTE supporters, concluding that the Board had made a reviewable error in failing to make an assessment on this basis:

> [53] What is missing from the analysis, in my view, is a consideration of the evidence from the Applicant and the US DOS Report that it is young, Tamil males from the north who are being targeted in this way. There is no discussion by the Board of other groups or races being targeted in this way, and it is clear that both the EPDP and the Karuna group are specifically targeting young, Tamil males because they can threaten them by denouncing them as LTTE supporters to the government.
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> [54] This activity does not strike me as either extortion that is without racial targeting, or a risk that is faced generally by other individuals in Sri Lanka.
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> […]
>
> [58] I do not see how the Board was able to conclude that this is a risk faced generally by others in Sri Lanka. The evidence before the Board indicates that the EPDP and the Karuna group are not targeting the Applicant solely for economic purposes. Rather, they are targeting young, Tamil men from Jaffna because they can use the threat of denunciation to support their extortion demands. This particular risk, extortion with a threat of denunciation as an LTTE supporter, can only be faced by Tamil males. So the Board needs to explain how a group targeted, at least in part, for reasons of race can qualify for the exception under s. 97(1)(b)(ii) of the Act.
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> [59] I think that this alone requires that the matter be sent back for reconsideration. The Applicant has raised several other issues but I do not think I need to consider all of them. The Board reaches a fundamental conclusion that the Applicant does not fit the profile of someone at risk from the government in Sri Lanka if he is sent back. However, I see no full examination and discussion of the Applicant as someone who has been detained three times and accused of LTTE connections, and who the Karuna group has detained, beaten and threatened to report to the government as an LTTE supporter if he does not pay the monies demanded (which he has failed to do) (CTR at 634):
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> > A failure to do that will result you…telling the army that you are a supporter of LTTE and then they said that if I were to get handed over to the army they would torture me and they would continue to detain me.

> [60] I can find nothing in the evidence to suggest this kind of thing does not happen. The Board's own evidence says that those at risk include "persons suspected of having links with the LTTE." If the Karuna group carries through with its threat, then the Applicant will be suspected of having such links.
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> [Emphasis added]

[15] In the present case, the RPD states, at paragraph 16 of its decision, that the applicant's interactions with the EPDP reveal no particularized risk: "Like so many other Tamils, he was targeted for easy extortion with threats of allegations that he was involved with the LTTE. This risk of extortion is something that all persons are subject to in Sri Lanka as party members engage in criminal activities." Nevertheless, in arriving at this conclusion, the RPD failed to engage in any analysis of the applicant's particular profile as a young Tamil male in the north of Sri Lanka in connection with the risk of extortion. While the RPD does goes on to examine the applicant's profile as young Tamil male in the following section of its analysis, it does not link this analysis with its foregoing consideration of the applicant's risk of harm from extortion, despite acknowledging that "Tamils are treated differently" in Sri Lanka, and, as in *Gunaratnam*, that those at particular risk include "persons suspected of having links with the LTTE" – whether "real or perceived". The RPD's conclusion that the applicant did not face a particularized risk of extortion was therefore unreasonable, as it failed to fully take into account the applicant's profile as a young Tamil male (see also: *Pathamanathan v Canada (Citizenship and Immigration)*, 2013 FC 353 at para 25).

[16] For these above reasons, the application for judicial review is allowed. The impugned decision is set aside and the matter is referred back to the Board for redetermination by another panel of the RPD. Counsel did not propose any question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The decision dated September 16, 2015 is set aside and the matter is referred back to the Board for redetermination by another panel of the Refugee Protection Division. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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