Date: 20070706

Docket: IMM-3692-06

Citation: 2007 FC 714

Ottawa, Ontario, July 6, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

PIRIYATHARSAN KENGKARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] On a credibility finding, it is not for an applicant to substitute his interpretation of a credibility determination for that of a specialized tribunal, nor is it for this Court, within its jurisdiction in a judicial review application, to substitute its interpretation of a credibility determination for that of a specialized tribunal unless the determination is perverse, capricious or made without regard to the evidence.

[2] [24] …The tribunal is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence…

(*Siad v. Canada (Secretary of State)* (C.A.), [1997] 1 F.C. 608, [1997] F.C.J. No. 1575 (QL).)

JUDICIAL PROCEDURE

[3] This is an application pursuant to s. 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7, to review and set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated June 16, 2006, wherein the Board determined that the Applicant was neither a convention refugee nor a person in need of protection.

BACKGROUND

[4] The Applicant, Mr. Piriyatharsan Kengkarasa, is a Sri Lankan Tamil born in the Jaffna peninsula. Mr. Kengkarasa claimed Canada's protection, alleging he had been targeted for forced recruitment by the Liberation Tigers of Tamil Eelam (LTTE).

[5] The Board determined that Mr. Kengkarasa's claim of targeting by the LTTE in Sri Lanka was not credible. The Board found that the Applicant gave inconsistent evidence and changed his evidence when challenged. The Board also found that the Applicant gave inconsistent evidence. On the basis of all of the evidence, the Board found that the Applicant had not demonstrated the he was living in the LTTE controlled area he claimed to be, and determined that there was no more than a

mere possibility that the Applicant would suffer persecution or be at risk were he to return to Sri Lanka and live in a government controlled area.

ISSUE

[6] Did the Board err in its credibility finding by which it determined that the Applicant is not a convention refugee or a person in need of protection?

STANDARD OF REVIEW

[7] The Court should not interfere with the findings of fact and the conclusions drawn by the Board unless the Court is satisfied that the Board based its conclusion on irrelevant considerations or that it ignored evidence. Furthermore, where any of the Board's inferences and conclusions are reasonably open to it on the record, this Court should not interfere, whether or not it agrees with the inferences drawn by the Board. (*Miranda v. Canada (Minister of Employment and Immigration)* (F.C.A.), [193] F.C.J. No. 437 (QL).)

[8] In order for any alleged error of fact to be reviewable, the finding of fact must be truly erroneous, the finding must be made capriciously or without regard to the evidence, and the decision must be based on the erroneous finding. (*Rohm and Haas Canada Ltd. v. Canada (Tribunal Antidumping)*, (1978), 22 N.R. 175, 91 D.L.R. (3d) 212 (F.C.A.); *Federal Courts Act*, s. 18.1; *Bhuiyan v. Canada (Minister of Employment and Immigration)*, (1993), 66 F.T.R. 310, [1993] F.C.J. No. 906 (QL).)

ANALYSIS

1) <u>The basis of the finding of credibility</u>

[9] The Board is entitled to decide adversely with respect to an Applicant's credibility on the basis of contradictions and inconsistencies in the Applicant's narrative and between the Applicant's narrative and other evidence before the Board. (*Aguebor v. (Canada) Minister of Employment and Immigration*, [1993] F.C.J. No. 732 (F.C.A.) (QL); *Leung v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 908 (F.C.A.) (QL); *Alizadeh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 11 (F.C.A.) (QL).)

[10] In the present case, the Board found that the Applicant's account did not occur. This is a finding of fact. In *Singh v. Canada (Minister of Citizenship and Immigration) (1999)*, 173 F.T.R. 280, [1999] F.C.J. No. 1283 (QL), it was held that the patent unreasonableness standard of review applies to the Board's finding of fact.

[11] The determination in *Singh*, above, has been consistently followed. (*Conkova. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 300 (F.C.T.D.) (QL); *Chaudhry v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 708 (F.C.T.D.) (QL); *Gnanapragasam v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 786 (F.C.T.D.) (QL); *Chow v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 788 F.C.T.D.) (QL); *Tvauri v. Canada (Minister of Citizenship and Immigration)* (2000), 192 F.T.R. 106, [2000] F.C.J. No. 1188 (F.C.T.D.) (QL); *Moore v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1772 (F.C.T.D. (QL); *Emirbekov v. Canada (Minister of*

Citizenship and Immigration), 2001 FCT 391, [2001] F.C.J. No. 639 (QL); *Ehmann v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 108, [2002] F.C.J. No. 137 (QL); *Geng v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 275, [2002] F.C.J. No. 488 (QL); *Kirac v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 362, [2002] F.C.J. No. 476 (QL); *Dudar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1277, [2002] F.C.J. No. 1733 (QL).)

[12] To satisfy the patent unreasonableness standard of review, the Applicant must demonstrate that (a) it is tainted by an immediately apparent defect that demands intervention, (b) is unreasonable on its face, and (c) unsupported by evidence, or vitiated by failure to consider the proper factors.

[13] The Applicant has failed to meet this test; the Board reasonably arrived at its determination.

2) <u>Contradictions and Omissions in Applicant's Testimony</u>

[14] The Board was entitled to rely on its specialized knowledge that the LTTE recruits young children. Thus, the Applicant's account of not having been approached until he was eighteen was considered not credible. Furthermore, the Board found that the Applicant adjusted his testimony when he was challenged by the Board's specialized knowledge. This provided the Board with a further basis for finding the Applicant not to be credible:

> First, he said the Tigers approached them only when both were 18. It was pointed out to the claimant that it was the panel's specialised knowledge from hundreds of Sri Lankan claims that, after the army took over the Jaffna peninsula… After five years of constant fighting, Tigers were short of manpower. They forcibly recruited

> children as young as nine or ten, and retired people too. Thus, the panel expressed disbelief that the LTTE waited for the claimant and his brother to be eighteen before trying to recruit them… He answered that when he and his brother were very young, they cried when the Tigers asked them to join… whenever on the road, the Tigers wanted to recruit him. He always told them he was younger than his actual age and his brother did likewise…

The Board was of the opinion that the Applicant was adjusting his testimony.

(Certified Tribunal Record (CTR) at p. 5.)

[15] The Board further noted that, even if the Applicant had lied about his age, that would not have had any effect on the LTTE in respect of recruitment. (CTR at p. 2.)

[16] The Board was entitled to find the Applicant's account not to be credible on the basis of the following:

(1) Its variance with the Board's specialized knowledge;

(2) The Board's view that the Applicant adjusted his testimony when challenged by the Board;

(3) The Board's view that the Applicant's adjusted testimony was also not credible; and,

(4) The failure of the Applicant to even mention in his Personal Information Form (PIF), any of the alleged multiple attempts at recruitment by the LTTE.

[17] Another difficulty with the Applicant's testimony was his inconsistency. In testimony before the Board, the Applicant claimed to have left Sri Lanka on January 10, 2005, but in his PIF, he had indicated he remained in his village until February 2005. In regard to this inconsistency, the Applicant offered no explanation to the Board. (CTR at p. 3.)

[18] A third aspect of the Applicant's account upon which the Board relied in finding the Applicant not to be credible was a marked embellishment of his claim. The Applicant failed to specify that the LTTE allegedly sought him after he fled; this was only mentioned for the first time in testimony before the Board. When asked to give more details, the Applicant made mo mention, whatsoever, of the LTTE search for him. (CTR at pp. 160-161.)

[19] Contradictions or inconsistencies in the evidence of an applicant or witness, for that matter, are a well-accepted basis for a finding of a lack of credibility. (*Dan Ash v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 571 (F.C.A.) (QL); *Rajaratnam v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 1271 (F.C.A.) (QL).)

[20] Furthermore, the Applicant stated that in January 2005, he was compelled to join the LTTE and therefore, left for Colombo. This is inconsistent with the information given in his PIF, wherein he stated that he lived in Thiruvyaru until February 2005, and it, also, is inconsistent with his port of entry notes, dated February 28, 2005, in which he stated that he had been detained by the LTTE two months earlier. The Board found that the Applicant would have known the date on which he fled from his village due to imminent danger from the LTTE. (CTR at p. 173.)

[21] The Board was further entitled to find the Applicant's testimony surrounding LTTE recruitment activity at his school, not to be credible. The Applicant testified that the LTTE visited his school more often in 2004 where he was a student "until the time he left". This was also inconsistent with his earlier statement that he had attended college only until April 2004. Although

the Applicant explained that he had stopped attending classes, he was required to take the exams he had missed; the Board was not obliged to accept his explanation. (CTR at pp. 177 and 180.)

[22] At the conclusion of the hearing, the Applicant's counsel conceded that there were inconsistencies, but, nevertheless, there was sufficient evidence that the Applicant had, in fact, recently arrived from the north. The Applicant's counsel, therefore, urged the Board to give the Applicant the benefit of the doubt. No matter what the Board was urged to do, on the face of the evidence, the Board was in a position to arrive at a different view of the evidence than that of the Applicant or his counsel. (CTR at pp. 204 and 208.)

3) Lack of Corroborative Documentary Evidence

[23] In addition to the Applicant's unreliable testimony as assessed by the Board, the Applicant had not submitted any credible documentary evidence to corroborate his claim of having resided in the north. The Board found that the picture on the national identity card was not that of the Applicant; and, therefore, the card was not to be relied upon by the Board. While the Applicant asserts that he appears younger than his age on his national identity card, no error arises from the Board's determination, which, as a first-instance, trier of fact, it is entitled to do, even in a hearing by videoconference, wherein it could zoom in, as it did, on the Applicant to see his face. (CTR at p. 4 and 190.)

[24] On the basis of the lack of documentary corroboration of the Applicant's account, numerous serious credibility concerns, the Board was entitled to dismiss the claim. The Board determined that

there was no objective basis to the Applicant's fears of living in Colombo, although the Applicant asserted that he would be perceived as an LTTE supporter without any identity documents. The Board found that the Applicant could produce his birth certificate and would not necessarily attract greater attention to himself than others in his situation. The Board noted that 400,000 Tamils do live in Colombo.

[25] The Board determined that there was no more than a mere possibility that the Applicant would be persecuted or would be at risk to life or cruel and unusual treatment or punishment, should he be made to return to Sri Lanka and live in a government controlled area.

REBUTTAL OF APPLICANT'S SPECIFC ARGUMENTS

[26] Contrary to the Applicant's submission that there was no assessment of risk by the Board as to his being a young Tamil born in the north, there was, in fact, an assessment; the Board found that the Applicant would not be at risk in Colombo and that the Applicant's fears of being perceived as an LTTE supporter, were unfounded.

[27] There is no merit to the Applicant's claims that the Board made findings without an evidentiary basis.

[28] With respect to the identity card, the Board dismissed its validity on the basis of the member's conclusion that the photograph on the card was not that of the Applicant. Whether a valid identity card issued to the Applicant would have included a "V" is secondary, although that finding

was, nevertheless, open to the Board. The Applicant's claim that it is not implausible that someone who is almost 18 years of age would be issued a card with the "V", indicating voting rights, is dependent on the Board's specialized knowledge for its specific assessment in that regard.

[29] The Applicant asserted that the Board could not have arrived at its conclusion based on the Applicant's appearance as the hearing was conducted by videoconference; this argument is without merit. The Board was of the view that the person on the card did not even resemble the Applicant. This was, however, not its sole finding in respect of the lack of credibility of the Applicant, it was only one of several key factors that had considerably weakened the credibility of the Applicant and not, by any means, the sole factor.

[30] With respect to the lack of travel documentation of the Applicant, the Board stated that there was no corroborative evidence of his journey to Canada. This is a fact, thus, there is no merit to the Applicant's claim that the Board rejected "crucial evidence".

[31] The Board also appears to have correctly construed the Applicant's evidence in regard to the ultimatum to join the LTTE in January 2005. The Applicant's evidence of previous interest by the LTTE appears to be an improvisation which was not advanced other than in testimony in response to more probing questions by the Board; therefore, the Applicant cannot impugn the decision of the Board on that basis.

[32] With respect to the Applicant's explanation that he was "bad with dates", thus, not able to clarify information in his port of entry notes, the Board did not make any credibility findings on the basis of any inconsistency of the Applicant's testimony in regard to those notes; the Board did rely on the Applicant's inconsistent testimony of having left his village immediately after having been recruited by the LTTE on January 10, 2005. It is this testimony that is inconsistent with the allegation made in the Applicant's PIF that he lived in his village until February of 2005. As set out by the Board, the Applicant had no explanation in regard to this actual finding, nor to the period of time in question. (CTR at p. 6.)

[33] The determination in regard to the dates of the Applicant's school attendance, does not point to any reviewable error, but simply demonstrates that the Applicant's evidence and his explanations in respect of attendance do not appear consistent. While the Applicant may believe that the explanation is plausible, the Board was not obliged to agree.

[34] The Applicant's attempt to show an error on the part of the Board in regard to whether the Applicant lived in the Vanni region is of no merit. It should be manifestly clear, that for a first instance-trier of fact, the question of where the Applicant was residing at relevant times is a question of fact and not of law.

[35] The Applicant seeks to have the Court reweigh the evidence. The Board considered the "numerous documents which supported the grave and quickly deteriorating human rights situation" in Sri Lanka. There is a presumption that the tribunal has considered all the evidence on the record.

[36] The post-marking on envelopes from Sri Lanka do not corroborate the Applicant's evidence. The envelopes are not shown to have originated in the north, therefore, do not corroborate the Applicant's most recent residence.

[37] Finally, there was no need for the Board to undertake a separate analysis of the evidence in support of a s. 97 claim of risk to life, or to cruel and unusual treatment or punishment, as the Applicant did not adduce any independent evidence in that regard; the evidence which the Applicant claimed made him a Convention refugee was the same as that adduced to support a claim of a s. 97 risk. The Board did turn its mind to the issue of the s. 97 risk, as seen in the reasons. Subjective fear is not required for a s. 97 claim, but that alone is not relevant, as the Applicant's Convention refugee claim was not denied on the basis of a lack of subjective fear, but rather on the basis of serious credibility concerns.

CONCLUSION

[38] It is trite law that on an application for judicial review, this Court is not to substitute its decision for that of the Board. In any judicial review on a factual determination of a lower tribunal such as the Refugee Division, the primary question to be asked is whether the finding was one that could reasonably have been made on the evidence before the Board. If the finding is reasonable, it must stand. In findings of fact, a judicial review is only in order if the findings of fact are construed as perverse, capricious or made without regard to the material before it. (*Federal Courts Act*, R.S.C. 1985, c. F-7, paragraph 18.1(4)(*d*).)

[39] In this matter, the Refugee Division did not make findings that were perverse in nature and its conclusions were all substantiated by the evidence before it. (*Aguebor*, above.)

[40] For all the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Robert I. Blanshay	FOR THE APPLICANT
Mr. Lorne McClenaghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROBERT I. BLANSHAY Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT