

Date: 20080909

Docket: IMM-600-08

Citation: 2008 FC 1001

Ottawa, Ontario, September 9, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Applicants

and

CHERYNOLD DAVIDTHAMBY CHERY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] This Court should exercise deference when reviewing a decision pursuant to subsection 109(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

[17] ... for the purposes of subsection 109(1), the RPD must assess the evidence relied upon in the first place to justify granting refugee status in light of the evidence presented during the application to vacate; namely, the new evidence presented by the Minister to show that misrepresentations were made and the refugee's own oral testimony, if any, to the contrary. And as such, the nature of the RPD's determination under subsection 109(1) is, at least in part, contingent upon its first-hand assessment of the putative refugee, her candour, general demeanour and overall credibility. This Court has repeatedly underscored that the RPD is in a privileged position in this

regard (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (C.A.)(QL)...

(As noted by Justice Danièle Tremblay-Lamer in *Sethi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178, 142 A.C.W.S. (3d) 310.)

II. Introduction

[2] This is an application for judicial review pursuant to subsection 72(1) of the IRPA, of a decision by the Refugee Protection Division of the Immigration and Refugee Board (IRB), dated January 17, 2008, whereby the Minister's application to vacate the Respondent's refugee protection pursuant to subsection 109(1) of the IRPA was denied.

III. Facts

[3] The Respondent, Mr. Cherynold Davidthamby Chery, is a citizen of Sri Lanka.

[4] In his Personal Information Form (PIF), filed with the IRB, on July 17, 2001, Mr. Davidthamby Chery indicated that he had always lived in Sri Lanka.

[5] He further indicated, in response to question 35, that he had never requested refugee status in any other country or countries.

[6] In his PIF narrative, Mr. Davidthamby Chery described a series of events where he faced hardship from the Sri Lankan army, the police and the rebel Liberation Tigers of Tamil Eelam (LTTE).

[7] More specifically, Mr. Davidthamby Chery indicated that, in March 2001 in Colombo, he was arrested, detained, beaten and tortured by the police. It was after this incident that he allegedly secured an agent and left Sri Lanka to come to Canada.

[8] Mr. Davidthamby Chery was granted refugee status at the end of his hearing before a Commissioner of the IRB, held on April 30, 2003. The decision was rendered on May 7, 2003.

[9] Prior to the IRB hearing, on or about April 30, 2003, Citizenship and Immigration Canada (CIC) received an unsolicited letter indicating that Mr. Davidthamby Chery's story was fabricated and that he had lived in Switzerland for two years.

[10] On or about May 10, 2002, CIC received another letter from the same individual which reiterated that Mr. Davidthamby Chery's story was false.

[11] These letters were not admitted into evidence by the Commissioner, as the author of the letter did not wish to divulge his/her name; however, Mr. Davidthamby Chery was asked if the contents of his PIF, and more specifically, his date of departure from Sri Lanka, were correct. Mr. Davidthamby Chery maintained that his PIF was correct.

[12] In April 2005, CIC requested that the authorities in Switzerland verify if they had a record, as an asylum seeker or resident, of Mr. Davidthamby Chery Richard, born on December 29, 1978. They had no record of a person with that identity.

[13] Upon verification of Mr. Davidthamby Chery's fingerprints, the Swiss authorities indicated, in May 2005, that the fingerprints matched that of SEBASTIANPILLAI, Anton Daniel (DOB April 23, 1982), a refugee claimant and citizen of Sri Lanka. Mr. Davidthamby Chery entered Switzerland on November 29, 2000 and his asylum claim was denied on January 22, 2001. The Swiss authorities do not know Mr. Davidthamby Chery's whereabouts, after February 1, 2001.

[14] On September 20, 2005, Mr. Davidthamby Chery signed a declaration that confirmed the story contained in his PIF, to wit, he came to Canada from Sri Lanka on May 8, 2001 and he was not in any third country before this date. He indicated, during an interview held with an officer on the same date, that he had always lived in Sri Lanka until his departure in May 2001, that he never used other names, that he had never travelled outside Sri Lanka or in Europe and that he never claimed asylum in other countries.

[15] On or about November 8, 2005, the Minister filed an application to vacate Mr. Davidthamby Chery's refugee protection.

[16] As a result of this investigation, Mr. Davidthamby Chery recanted from his statement and his PIF. The following admissions were made as to the falsehoods contained in his PIF:

Q. 2: The Respondent admitted using the name Anton Daniel SEBASTIANPILLAI that he had used to claim asylum in Switzerland in 2000;

- Q. 15: The Respondent's father, mother, sister and one brother all lived in Switzerland, the brother being a Swiss citizen. Another brother lives in Palermo (Italy). In his original PIF, the whole family lived in Kilinochchi, Sri Lanka and were Sri Lankan citizens;
- Q. 16: The Respondent's father, brother and sister all were accepted as refugees in Switzerland between 1992 and 2000;
- Q. 22: The Respondent admits having left Colombo in November 2000 and having lived in Switzerland until May 2001;
- Q. 23: The Respondent admits having left Sri Lanka within the last five years preceding his PIF namely to go to Switzerland, in November 2000;
- Q. 31: The Respondent left Sri Lanka on November 28, 2000, and after a transit in India sojourned in Switzerland from November 29, 2000 to May 9, 2001. On May 9, 2001, the Respondent entered Canada directly from Sri Lanka as set forth in his PIF;
- Q. 35c): The Respondent admits having claimed and having been denied asylum by Switzerland, on November 29, 2000.
- Q. 37 (narrative): The Respondent admits that all events after November 2000 are false.

IV. Issue

[17] Did the IRB commit a reviewable error in rejecting the Minister's application to vacate the decision allowing a claim for refugee protection made by Mr. Davidthamby Chery?

V. Analysis

[18] Section 109 of the IRPA reads as follows:

<p>Vacation of refugee protection</p> <p>109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.</p>	<p>Demande d'annulation</p> <p>109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.</p>
<p>Rejection of application</p> <p>(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.</p>	<p>Rejet de la demande</p> <p>(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.</p>
<p>Allowance of application</p> <p>(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.</p>	<p>Effet de la décision</p> <p>(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.</p>

Standard of Review

[19] The applicable standard of review for decisions rendered pursuant to section 109 of the IRPA was recently discussed by this Court in *(Canada) Minister of Public Safety and Emergency Preparedness v. Gunasingam*, 2008 FC 181, 164 A.C.W.S. (3d) 847. Justice Sean J. Harrington, noted:

[14] If there were no case law on point, I might have leaned to the proposition that the standard of review under both subsections 109(1) and 109(2) is reasonableness *simpliciter*. It has been held, however, in *Sethi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178, [2005] F.C.J. No. 1434 and *Mansoor v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 420, [2007] F.C.J. No. 571, that the standard under subsection 109(1) is patent unreasonableness, while under section 109(2) it is reasonableness *simpliciter*. There is no reason why I should depart from the dictates of judicial comity and apply a different standard. It must be borne in mind, however, that issues of natural justice are not subject to the pragmatic and functional approach to judicial review. *(Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539). In other words, the standard of correctness applies.

[20] In *Sethi*, above, Justice Tremblay-Lamer noted that this Court should exercise deference when reviewing a decision pursuant to subsection 109(1):

[17] ... for the purposes of subsection 109(1), the RPD must assess the evidence relied upon in the first place to justify granting refugee status in light of the evidence presented during the application to vacate; namely, the new evidence presented by the Minister to show that misrepresentations were made and the refugee's own oral testimony, if any, to the contrary. And as such, the nature of the RPD's determination under subsection 109(1) is, at least in part, contingent upon its first-hand assessment of the putative refugee, her candour, general demeanour and overall credibility. This Court has repeatedly underscored that the RPD is in a privileged position in this regard (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (C.A.)(QL)...

[21] The parties had, however, filed their submissions on the appropriate standard of review applicable to section 109 before the Supreme Court of Canada released, on March 7, 2008, its

decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which reformed the law on the standard of review by eliminating the patently unreasonable standard.

[22] Consequently, despite Justice Harrington's recent case law on point and pursuant to *Dunsmuir*, above, the standard of review under subsection 109(1), is reasonableness.

Despite the Respondent's misrepresentations, there was sufficient evidence considered at the time of the first determination to justify refugee protection

[23] When reviewing a Board's decision, pursuant to section 109 of the IRPA, this Court must consider the following principles:

[29] ...

- a) Under s. 109(1), to determine if the original decision was made as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter, the RPD must consider all the new evidence put forward by the Minister and the claimant.
- b) *Mens rea* or the intention of the claimant is not relevant to the finding to be made under s. 109(1).
- c) As the extent and nature of the material misrepresentation or withholding may be relevant to its ability to exercise its discretion pursuant to section 109(2) of *IRPA*, the RPD must give sufficient details in its reasons as to which misrepresented or withheld fact(s) it found material and in respect of what relevant matter. Those detailed findings will enable the RPD to consider if a particular claimant is, for example, excluded under section 98 of *IRPA*. Such determination must be made prior to proceeding to the second step set out in s. 109(2) and involves consideration of all the evidence on file, including the new evidence presented by both parties.
- d) The RPD only needs to proceed to the s. 109(2) analysis (step two) if it is satisfied that a claimant is not excluded under section 98 of *IRPA*.

- e) When carrying out the analysis set out in s. 109(2), the RPD can refer to its findings under section 109(1) but only to identify what "old" evidence remains untainted by the withholding or misrepresentation. The RPD cannot reassess the "old" evidence in light of new evidence adduced by the Minister or the claimant pursuant to section 109(1). The RPD cannot give any weight or even consider the new evidence produced by either party when exercising its discretion pursuant to section 109(2).

(Canada (Minister of Citizenship and Immigration) v. Wahab, 2006 FC 1554, 305 F.T.R. 288.)

[24] The IRB member found that, as a result of misrepresentation, the Colombo arrest and detention of March 2001 did not occur. It was also determined that “[t]he Respondent, through his counsel admitted essentially the allegations as set out in the Minister’s application to vacate. Hence, the Respondent states that he did not give the correct information considering his time spent in Switzerland, nor his refugee application there”. (IRB’s decision at p. 2.)

[25] Nevertheless, the IRB member found:

... while the incidents subsequent to November 29th, 2000 (more particularly, the arrest and detention in Colombo of March 2001) did not occur, there still is a history of allegations of abuse at the hands of both the Sri Lankan Armed Forces, and the LTTE, which the claimant would have testified at the time of his first hearing and in which he would have been found credible by the panel.

In these circumstances the panel determines that there is sufficient evidence available to justify the original decision. The panel does not believe in these circumstances that the Applicant has made his case to justify a Vacation of this Convention refugee determination.

(IRB’s decision at pp. 2-3.)

[26] It is clear that the IRB member considered the misrepresentation, placed it in the context of the whole statement and still found enough material that was considered by the first IRB member to grant refugee protection.

[27] This material is more than simply country background information. It includes (according to the PIF, filed by the Applicant as exhibit "A", pages 30 to 40 of his memorandum):

- a. Identity
- b. Race: Tamil
- c. Religion: Christian
- d. Place of birth: Kilinochi, Jaffna (north of Sri Lanka)
- e. Young age (dob: 29-12-1978)
- f. Gender: male
- g. March 1990 blackmail by IPKF
- h. March 1991, school bombing by Sri Lanka's Air Force
- i. June 1993, forcible work for the LTTE
- j. April 1995, shelling of area
- k. July 1996, taken by LTTE to their camp
- l. 1996 and 1997, forced to work for Hero's Day celebrations
- m. September 1998 shelling of his house by Sri Lankan Army
- n. April 2000, killing of neighbors by Sri Lankan Army
- o. November 2000, taken by LTTE for Hero's day celebration
- p. Country conditions at the time of the refugee determination

[28] The Applicants argue that the November 2000 incident, as described by Mr. Davidthamby Chery in his PIF could not take place. The Applicant argues that if Hero's Day is on November 27, 2000, and if Mr. Davidthamby Chery entered Switzerland on November 29, 2000, the latter could not have been in Jaffna on November 27, 2000.

[29] Mr. Davidthamby Chery, however, testified that he was taken by the LTTE for their Hero's Day celebration preparation. This was about three weeks prior to November 27, 2000 itself. It was never said Mr. Davidthamby Chery was taken by the LTTE on November 27, 2000 itself.

[30] Mr. Davidthamby Chery's testimony during the 18 December 2007 hearing for the application to vacate demonstrates the following exchange:

By Minister's Counsel

But you see sir in your story you say that you were arrested by the LTTE in November of 2000 and you say that – monsieur – you say that this arrest took place while you were in your own village in Kilinochchi. So monsieur you cannot be in Kilinochchi and in Colombo at the same time in October of November of 2000. Did the incident in Kilinochchi occur? Were you in fact - - -

By Claimant

I will tell you now. On the 28 of November, that would be by the end of November only, I take abroad - - I meant abroad. Even now it is in my mind; now personally my mind is very clear. That same month because it is the same month they have their Heroes' Day, I was taken by them. Because often the movement people they take me and ask me, come and join the movement. They were being very serious and like dig bunkers and because of (inaudible), I felt I could not stay anymore. Two, three days they kept me and as soon as I was, I came out of their place, I was brought to Colombo and I was kept in hiding; that's what I'm saying within a month period that - - I don't know exactly. The period that I was taken in by them and the period that I was in Colombo, at that time I was under great stress. I do not know even the day and the night because - - -

...

By Minister's Counsel

So then sir, I think we need to know since you're opening this up how long were you in Colombo.

By Claimant

About three weeks. I did not count the days exactly because I was afraid for my life because we don't know - - today we are here vis-à-vis our life, we are not sure the next day.

...

By Minister's Counsel

You say that you were, therefore, arrested by the LTTE, to work for the Heroes' Day celebrations.

By Claimant

That is true.

By Minister's Counsel

Did you work for the Heroes' Day celebrations?

By Claimant

By October itself, they begin the work for the celebrations.

By Minister's Counsel

When do the celebrations take place?

By Claimant

A month before, they begin their work. They have to consult that and they have to bring - - they have to carry and unload things. They used to take things from here to there, from there to here. A month before itself, they begin to do the work, start the work. But November 27 is their day.

...

By Minister's Counsel

And where were you at the Heroes' Day?

By Claimant

On the day, Heroes' Day, I was in Sri Lanka

By Minister's Counsel

Where in Sri Lanka

By Claimant
Colombo.

(IRB's Transcript of December 18, 2007 Hearing at pp. 40-44, Tribunal Record at pp. 354-358.)

[31] It is evident that the November 2000 incident where Mr. Davidthamby Chery testified he was taken by LTTE for Heroes' Day preparation remains uncontradicted.

[32] Notwithstanding the incidents initially alleged by Mr. Davidthamby Chery subsequent to November 2000 that were ultimately recanted by the latter, the IRB member considered that there was sufficient evidence remaining before the original panel to maintain the determination of refugee status.

[33] In the presence of "other sufficient evidence" at the time of the first determination to justify refugee protection, this Court finds that the IRB's determination to dismiss the application to vacate and to maintain Mr. Davidthamby Chery's status is reasonable.

VI. Conclusion

[34] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

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

DOCKET: IMM-600-08

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP
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v. CHERYNOLD DAVIDTHAMBY CHERY

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: September 2, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: September 9, 2008

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