

Federal Court



Cour fédérale

Date: 20120531

Docket: IMM-6748-11

Citation: 2012 FC 670

Ottawa, Ontario, May 31, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

KARTHIKAN NADARAJAH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board (the Board), rendered on September 1, 2011, wherein the Board determined that Mr. Karthikan Nadarajah (Mr. Nadarajah) is neither a Convention refugee nor a person in need of protection as per sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the following reasons, this application for judicial review is allowed.

II. Facts

[3] Mr. Nadarajah is a 26 year old Tamil farmer from the North of Sri Lanka.

[4] In May 2006, Mr. Nadarajah was arrested by the Sri Lankan army. He was detained, interrogated and physically abused by the army. He was released on the same day.

[5] Mr. Nadarajah's uncle complained about that unlawful detention and was subsequently murdered.

[6] Mr. Nadarajah's father arranged for his son to stay with friends in Colombo for about a year until November of 2009. Upon his return from Colombo, Mr. Nadarajah's family found out that the Eelam People Democratic Party [EPDP] was looking for him. As a result, his father decided to hire an agent to help his son leave the country. Mr. Nadarajah left Sri Lanka through the Katunayake airport on May 29, 2010. He filed his refugee claim on June 15, 2010.

[7] The Board concluded its decision as follows: Mr. Nadarajah is "neither a Convention refugee nor person in need of protection for the reason that the [Board] does not find his fear to be well-founded. Alternatively, the [Board] finds there is a change in circumstances relative to country

conditions and/or the risk he refers to is an excluded generalized risk” (see Board’s decision at para 3).

III. Legislation

[8] Sections 96 and 97 of the *IRPA* provide as follows:

Convention refugee	Définition de « réfugié »
<p>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,</p> <p style="padding-left: 40px;"><i>(a)</i> is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p style="padding-left: 40px;"><i>(b)</i> 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.</p>	<p>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 :</p> <p style="padding-left: 40px;"><i>a)</i> 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;</p> <p style="padding-left: 40px;"><i>b)</i> 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.</p>
Person in need of protection	Personne à protéger
<p>97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of</p>	<p>97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de</p>

former habitual residence,
would subject them personally

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
themselves 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 prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

IV. Issues and standard of review

A. Issues

- 1. Did the Board breach its duty of procedural fairness by failing to inform Mr. Nadarajah that it would take notice of facts regarding the security procedures at the airport of Katunayake?*
- 2. Are the Board's credibility findings reasonable?*
- 3. Did the Board err in its assessment of a change in the country conditions?*
- 4. Did the Board err in concluding that Mr. Nadarajah faced a generalized risk in Sri Lanka?*

B. Standard of review

[9] Questions of procedural fairness must be reviewed under the correctness standard (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

[10] A credibility finding is a question of fact that is reviewable on a reasonableness standard (see *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558, [2010] FCJ No 673 at para 11).

[11] Assessment of the country conditions is factual in nature and must also be reviewed on a reasonableness standard (see *Rahman v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 562 (FCA) at para 1).

[12] As for the issue of personalized risk, the applicable standard is reasonableness (see *Innocent v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1019, [2009] FCJ No 1243 at para 36).

IV. Parties' submissions

A. Mr. Nadarajah's submissions

[13] Mr. Nadarajah submits that the Board breached its duty of procedural fairness because it failed to notify him of its intention to take cognizance of facts that were not included in the record and rely on its specialized knowledge (see *Galindo v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 781; *N'Sungani v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1759 [*N'Sungani*]). According to Mr Nadarajah, the Board unreasonably asserted that

young Tamil males have no problems leaving the country. It failed to provide Mr. Nadarajah the opportunity of making submissions on this issue.

[14] Mr. Nadarajah also argues that the Board made unreasonable credibility findings. He notes that when a tribunal makes a credibility finding it must do so in clear and express terms (see *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228). Mr. Nadarajah asserts that this requirement was not met. Credibility findings were made in the present case without regard to the evidence adduced before the Board.

[15] Furthermore, the Board made a separate assessment on the change of country conditions in Sri Lanka. It concluded that the country conditions had improved further to the defeat of the Liberation Tigers of Tamil Eelam in 2009. However, Mr. Nadarajah submits that the Board's veiled credibility findings affected its overall assessment of the country conditions. He argues that the Board failed to consider the current country conditions from his own perspective when it erroneously concluded that he would not be targeted by the army and the EPDP.

[16] Mr. Nadarajah further alleges that the Board erred in determining that he faced a generalized risk in Sri Lanka. He underlines that his ethnicity is clearly related to his fear as a young Tamil male targeted by the Sri Lankan authority.

B. Respondent's submissions

[17] The Board's determination on credibility was reasonable as it relied on the evidence adduced by Mr. Nadarajah. The Board found that Mr. Nadarajah was not targeted by the Sri Lankan authority as he was arrested in 2006 and released on the same day without payment of a bribe or further interrogation.

[18] The Respondent underlines the importance of reading the decision in its entirety.

[19] The Respondent disputes Mr. Nadarajah's allegation that in its assessment of the evidence, the Board did rely on specialized knowledge regarding exiting procedures applied by Sri Lankan authorities without providing proper notice.

[20] The Respondent argues that if indeed the Board's findings in that respect were unreasonable, it did not result in a breach of procedural fairness. Any breach of procedural fairness was not material to the decision and does not necessitate a new hearing. The Respondent relies on the case of *Mobil Oil Ltd et al v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 111 DLR (4th) 1 at paras 51-54 [*Mobil Oil*], where the Supreme Court of Canada specified that a breach of procedural fairness does not vitiate a decision where the results would have been the same.

[21] The Board's determination of Mr. Nadarajah's allegations is reasonable, according to the Respondent, as the Board did not believe he had a well-founded fear of persecution. The

Respondent also underlines that Mr. Nadarajah failed to establish the subjective component of his well-founded fear.

[22] The Respondent explains that a Convention refugee status depends upon the circumstances in the given state at the time of the hearing. In the present case, the Board diligently examined the objective evidence and concluded that the country conditions in Sri Lanka are such that Mr. Nadarajah would not be persecuted on Convention grounds or harmed.

[23] Finally, the Respondent submits that the Board's finding on generalized risk is reasonable.

VI. Analysis

1. Did the Board breach its duty of procedural fairness by failing to inform Mr. Nadarajah that it would take notice of facts regarding the security procedures at the airport of Katunayake?

[24] Mr. Nadarajah alleges that the Board failed to provide sufficient notice that it would rely on its specialized knowledge under subsection 170(i) of the *IRPA* and rule 18 of the *Refugee Protection Division Rules*, SOR/2002-228. The Board assumed that Mr. Nadarajah would have been arrested at the Katunayake airport if he truly was targeted by the Sri Lankan authorities.

[25] The Respondent maintains that the Board did not base its conclusion on acquired knowledge but made a reasonable inference.

[26] The Court finds that the Board did breach its duty of procedural fairness and relied on specialized knowledge while assessing Mr. Nadarajah's allegations.

[27] As the Court reviews both the transcript of the hearing and the Country documentation report that according to Respondent's counsel support her position that the Board did not rely on specialized knowledge, this Court comes to the opposite conclusion.

[28] One of the Board's key finding was to the effect that Mr. Nadarajah was not sought by the authorities because he was able to leave the country without any encumbrance. It writes in paragraphs 9 and 10 of its decision, as one of the fundamental findings underlying its determination on credibility.

[9] When finally he left the country through Colombo International Airport in Katunayake, he was able to get through the airport security officials without any difficulty despite his agent having to show them his papers and plane ticket.

[10] Based on these, the Panel, therefore, believes and finds that he was not or is not a person of interest to the SLA or the government.

[29] Mr. Nadarajah testified and stated the following:

MEMBER: So what passport did you use to get out of the country?

CLAIMANT: Canadian passport.

MEMBER: Canadian passport?

CLAIMANT: Yes.

MEMBER: So that Canadian passport did not belong to you?

CLAIMANT: That is right.

MEMBER: And when you went through the ... did you go through the Katunayake airport?

CLAIMANT: Yes.

MEMBER: Did you have any trouble going through the airport security and CID?

CLAIMANT: The agent who accompanied me to the passport ... to the airport he spoke with the others and they allowed me to go.

MEMBER: But the airport security and CID examine your identification papers, like your national identity card and birth certificate and so on?

CLAIMANT: They only saw the passport.

MEMBER: What countries did you go after you left Sri Lanka?

CLAIMANT: Singapore, Japan, New York America in the States.
(see Tribunal Record at pages 280 and 281)

[30] It is clear that he did not show his identification papers but a false Canadian passport.

[31] Counsel for the Respondent alleges that the Board relied on the country documentation report rather than its specialized knowledge. It suggested that the footnote to that paragraph justifies the Board's finding that Mr. Nadarajah's claim lacks credibility since he was able to leave Sri Lanka despite his agent having to show his papers.

[32] Paragraph 52 of the decision where the Board canvasses the current situation in Sri Lanka states "Exit and entry into the country through the airport is strictly controlled and the traveler is required to undergo numerous checks. Those leaving or entering and are wanted for criminal offences would face additional questioning. However these procedures were relaxed in 2010 and the

main purpose of the authorities is to check on people with criminal records and those with outstanding warrants.” The footnotes to that paragraph refer to Exhibit R/A-1, #2.7, U.K. Home Office, 11 November 2010, Country of Origin Information Report: Sri Lanka, paragraphs 33.01 to 33.09 (see certified Court Record, pages 162 to 165).

[33] In reviewing these paragraphs, the Court concludes they do not support the Board’s finding.

[34] Hence, Mr. Nadarajah is correct in alleging that the Board relied on its specialized knowledge and failed to properly notify him.

[35] Is this breach of procedural fairness severe enough to warrant allowing the application for judicial review?

[36] In the present case the Board took notice of facts that were obviously not on the record. Mr. Nadarajah was not afforded the opportunity to make submissions regarding the fact that he supposedly was able to leave the country by showing “his papers”. That finding was made in error and contrary to the evidence on file.

[37] The Respondent directed the Court to the Supreme Court’s decision in *Mobil Oil* cited above, for the proposition that a breach of natural justice should not always vitiate a decision if the outcome would have been the same regardless of that breach.

[38] Counsel also relied on *Yassine v Canada (Minister of Employment and Immigration)* (1994), 172 NR 308 (FCA) at paras 9 and 11). The Court believes that the facts in the present case lean more to the reasoning adopted by our colleague J. Tremblay-Lamer in *N'Sungani* cited above, at para.32:

“In my view, the principal established in *Yassine*, supra stands with a caveat taken from *Hu*, supra; provided credibility determinations were properly arrived at, and wholly determinative of the application, then the *Mobil Oil*, supra exception can be invoked to deny a new hearing, assuming there is no reason to suspect that the specialized knowledge in dispute in any way shaped the Board’s credibility findings.”

[39] The Court finds this error to be determinative since it was material to the Board’s decision. The Board failed to notify Mr. Nadarajah pursuant to article 170 of the *IRPA* and rule 18 of the *Refugee Protection Division Rules*. This failure constitutes a breach of natural justice.

[40] For this reason, the application is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed; and
2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6748-11

STYLE OF CAUSE: KARTHIKAN NADARAJAH
v
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 18, 2012

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

DATED: May 31, 2012

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