

Federal Court



Cour fédérale

**Date: 20120704**

**Docket: IMM-7725-11**

**Citation: 2012 FC 843**

**Ottawa, Ontario, July 4, 2012**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**PUSHPARAJAH SUBRAMANIAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated October 12, 2011, which found that the applicant was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is granted.

***Facts***

[2] The applicant, Pushparajah Subramaniam, is a Tamil citizen of Sri Lanka. He states that he and his family suffered persecution and extortion for many years by the Liberation Tigers of Tamil Eelam (LTTE), and the Sri Lankan army. His brother fled to England in 2006 after he was accused of supporting the LTTE.

[3] The applicant states that he was arrested by the army in August 2007 and accused of giving money to the LTTE. He was beaten and interrogated, and was released after his wife paid a bribe.

***Decision Under Review***

[4] After reviewing the applicant's allegations, the Board found that the applicant's fear of persecution was not well-founded, based on credibility concerns. The Board found in the alternative that there was a change in circumstances in Sri Lanka and further found that the risk alleged by the applicant was a generalized risk.

***Credibility***

[5] The Board noted that the two incidents of detention experienced by the applicant ended in his being released, albeit through the payment of bribes. The Board also noted that the applicant was not stopped by security forces when entering Colombo or confronted by them during his stay there. He also had no problem leaving the country, albeit with the help of an agent. Based on all these factors the Board found that there was no warrant for the applicant's arrest and he was not on the "security watch list" of the security forces, leading the Board to conclude that his fear of persecution is not well-founded.

[6] The Board also drew a negative inference from the fact that the applicant stated in his Personal Information Form (PIF) that he had stayed with his agent in Colombo, but at the hearing he said he stayed with a distant relative of his wife.

### *Change of Circumstances*

[7] The Board found that if credibility was not determinative, the change of circumstances would be. The Board cited section 108(1)(e) of the *IRPA* which states that a refugee claim will be rejected if “the reasons for which the person sought refugee protection have ceased to exist.” The Board noted that whether there is a change of circumstances is a factual determination and the durability, effectiveness and substantiality of the change are relevant. The Board also noted the Court of Appeal’s decision in *Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91, which found that past persecution does not create a legal presumption of future persecution.

[8] The Board acknowledged that many Tamils faced persecution by the LTTE, Sri Lankan security forces and paramilitary groups. The Board found that, based on the applicant’s circumstances, and the evidence of the current situation in Sri Lanka, it is less than likely that he will be harmed pursuant to section 97 of the *IRPA*.

[9] The Board noted the evidence that, due to the significant improvements in the security of Sri Lanka there is no longer the need for group-based protection for Tamils but rather claims should be

assessed based on certain risk profiles such as those with suspected LTTE links. The Board also cited evidence that:

- a. Check points were being removed;
- b. Refugees were returning to Sri Lanka in large numbers;
- c. Some former LTTE members have been detained or disappeared, but other evidence suggests that former LTTE members have been rehabilitated and reintegrated (although there are reports of insufficient assistance in reintegration);
- d. Security problems in the north have significantly decreased;
- e. Tourism in the north has increased;
- f. There are remaining police problems, including corruption and a lack of police that speak Tamil, but the government is aggressively recruiting Tamil-speaking police officers;
- g. Beating and torture of detainees during interrogation was common, but there was conflicting evidence about the severity of the torture; and
- h. There is some indication that returnees face scrutiny, but the more reliable evidence was that only those with warrants for their arrest or suspected LTTE links are at risk upon return.

[10] The Board concluded that the changes are durable and meaningful in so far as the applicant is concerned and therefore the applicant does not face persecution or risk under sections 96 and 97 of the *IRPA*.

[11] The applicant's claim was therefore refused.

### ***Standard of Review and Issue***

[12] The determinative issue in this application is whether the Board erred by failing to consider section 108(4) of the *IRPA*. While there has been some disagreement on the appropriate standard of review for this question, the Federal Court of Appeal's reasoning in *Yamba v Canada (Minister of*

*Citizenship and Immigration*), [2000] FCJ No 457 (CA), suggests a correctness standard. The Board is obligated to consider section 108(4) in every case in which it finds changed circumstances under section 108(1)(e). Thus, while any conclusion reached under section 108(4) would be reviewed on a standard of reasonableness, there is no deference in whether to consider section 108(4).

### ***Analysis***

[13] While the applicant raises several alleged errors by the Board, in my view the application can be determined solely based on the Board's analysis of whether there are changed circumstances in Sri Lanka such that the reasons for protection have ceased to exist, pursuant to section 108(1)(e) of the *IRPA*.

[14] The respondent argues that credibility was determinative of the application. However, the Board's credibility finding was that it did not believe the applicant was currently on a watch list or wanted by the authorities. As the applicant submits, he did not allege that he was currently wanted by police; rather, he feared persecution based on his past experiences of persecution by security forces and militant groups. The Board did make one negative credibility finding regarding an inconsistency in the applicant's testimony but, reading the Board's reasons as a whole, the determinative finding was that the applicant does not fit any of the current risk profiles due to the change of circumstances in Sri Lanka.

[15] In my view, the Board erred when, having found changed circumstances under section 108(1)(e), it failed to consider the “compelling reasons” exception under section 108(4) of the *IRPA*. The relevant portions of section 108 state:

Rejection

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

[...]

(e) the reasons for which the person sought refugee protection have ceased to exist.

[...]

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

Rejet

108. (1) Est rejetée la demande d’asile et le demandeur n’a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

[...]

e) les raisons qui lui ont fait demander l’asile n’existent plus.

[...]

Exception

(4) L’alinéa (1)e ne s’applique pas si le demandeur prouve qu’il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu’il a quitté ou hors duquel il est demeuré.

[16] There is no question that the Board found that the reasons the applicant sought refugee protection have ceased to exist, pursuant to section 108(1)(e). Therefore, as mandated by the Court of Appeal in *Yamba*, the Board was obligated pursuant to section 108(4) (section 2(3) under the previous Act) to consider whether there were compelling reasons due to the past persecution and

torture of the applicant, not to apply section 108(1)(e). The Court of Appeal stated in *Yamba*, at paragraph 6:

In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

[17] Thus, the obligation to consider the "compelling reasons" exception arises in every case in which a claimant is found to have suffered past persecution (as the Board accepted in this case, not having made any clear finding disbelieving the applicant's testimony about his detention and torture). The Board therefore erred by failing to consider section 108(4) of the *IRPA*.

[18] I note that there are some cases of this Court that have held that it will only be an error to fail to consider section 108(4) if there is *prima facie* evidence of "appalling" or "atrocious" past persecution, since that exception is only intended to arise in extraordinary circumstances: *Alfaka Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044, para 49. The reasoning in this line of cases was not followed in *Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 290.

[19] I find that the apparent tension between the decision in *Yamba* and *Alfaka Alharazim* does not affect the outcome of this application, however. The applicant testified to experiencing torture while in detention and the Board made no adverse credibility finding in respect of that testimony.

Thus, even applying the stricter standard of *prima facie* evidence of appalling or atrocious past persecution the applicant likely satisfies that standard and the Board therefore erred by failing to consider section 108(4) of the *IRPA*. The application is therefore granted.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7725-11

**STYLE OF CAUSE:** **PUSHPARAJAH SUBRAMANIAM v THE  
MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** June 6, 2012

**REASONS FOR JUDGMENT:** RENNIE J.

**DATED:** July 4, 2012

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