Federal Court  Cour fédérale

Date: 20130522

Docket: IMM-5030-12

Citation: 2013 FC 532

Ottawa, Ontario, May 22, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KALAICHELVAN RAJADURAI
AMBIGAIBALAN RAJADURAI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants seek judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada, dated May 2, 2012 (the Decision). The RPD found that the Applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

Background

[2] Mr. Kalaichelvan Rajadurai (the elder Applicant), and his younger brother, Mr. Ambigaibalan Rajadurai (the younger Applicant) are citizens of Sri Lanka. Both are unmarried, Tamil males from a town in Sri Lanka's Northern Province. Their sister and brother are Convention refugees in Canada, having fled Sri Lanka in 2000 and 2003, respectively, after the Liberation Tigers of Tamil Eelam (LTTE) attempted to recruit them.

[3] The elder Applicant worked as a farmer in Sri Lanka. He claims that during the civil war, which ended in May 2009, he had been questioned by the Sri Lankan Army (SLA) about his involvement with the LTTE. Later, in January 2009, he saw a man on the road who struggled to walk. The man asked for a ride and the elder Applicant agreed. That evening, members of the Eelam Peoples Democratic Party (EPDP), a Tamil paramilitary group that supported the government in the civil war against the LTTE, forced him into a white van and took him to a nearby camp. They asserted that the man he had assisted on the road was involved with the LTTE. The EPDP detained the elder Applicant on suspicion that he was a supporter of the LTTE. He was interrogated, beaten, and released after seven days. A few days later members of the EPDP came again with other men. They threatened him and questioned him on his involvement with the LTTE. After this he went into hiding.

[4] The younger Applicant worked as a digital graphic designer in Sri Lanka. He submits that he was approached by the EPDP in November 2009 to print brochures without charge. He refused and was later arrested and detained at the Kachchai police station. He was questioned on his

involvement with the LTTE and beaten. He was held incommunicado for one and a half months. Eventually, his parents paid a bribe and he was released.

[5] Following these incidents, the Applicants' father engaged an agent to help his sons leave Sri Lanka. The elder Applicant departed on December 26, 2009. After stops in multiple countries, he crossed the border from Mexico into the United States on February 6, 2010, remained there for four months, arrived in Canada on June 3, 2010 and applied for refugee protection. The younger Applicant departed Sri Lanka on February 21, 2010, travelled through multiple countries, spent two and a half months in the United States, arrived in Canada on August 26, 2010 and applied for refugee protection.

Decision Under Review

[6] RPD Board Member W. Lim (the Board) determined that the Applicants are neither Convention refugees under section 96 of the IRPA, nor persons in need of protection under section 97. The Board found crucial aspects of their testimony not to be credible and that their fear was not well-founded. In the alternative, the Board found that there was a change in country conditions in Sri Lanka. In a further alternative, as to section 97, the Board found that the risk faced by the Applicants is excluded as it is a generalized risk.

[7] More specifically, the Board found that the Applicants had no nexus with a section 96 Convention ground because their claims were based on criminality and extortion, which the Board described as "detention or abduction related to extortion by rogue members of the security forces and/or EPDP Tamil goons basically or largely after money". In the absence of persuasive evidence

that the state sanctioned the EPDP's extortion practices, the Board did not accept that the acts complained of by the Applicants were anything other than criminal acts. Because victims of crime generally fail to establish a link between their fear of persecution and one of the five Convention grounds, the Board then "proceeded with reviewing this claim under section 97".

[8] The Board next addressed credibility, noting that this was the determinative issue in this case. The Board explained why it did not accept that the Applicants' fear was well-founded. Regarding the elder Applicant, the Board observed that he was released every time he was questioned by the EPDP or any other group. This indicated that he is not a wanted person, nor on the government's security list. Therefore, on a balance of probabilities, the Board found that the government security forces are not hunting for him.

[9] The Board also questioned the elder Applicant about his delay in leaving Sri Lanka. He explained that he needed time to raise funds, but the Board rejected this explanation as unbelievable because he had a brother and sister in Canada which the Board stated were potential sources of funds.

[10] Regarding the younger Applicant, the Board noted that he was detained and questioned by the police following his refusal to publish EPDP materials without charge and was released a month and a half later, albeit after paying a bribe. Therefore, on a balance of probabilities, the Board found that he is also not a wanted person, nor on the government's security list.

[11] The Board supported its finding that neither Applicant is on the government's security list based on the fact that each brother was able to leave Sri Lanka, on their own passports, without "any problem". As the Applicants did not have the profile of wanted persons, the Board found that their fear of return to Sri Lanka was unfounded. The Board also noted that both Applicants admitted at the hearing that they had no criminal records and were not wanted by the government.

[12] The Board also noted that the elder and younger Applicants remained in the United States for four and two and a half months, respectively, and did not claim asylum there before coming to Canada. The Board rejected their "excuse that they had siblings in Canada and, therefore, preferred Canada" and drew a "serious negative inference" from the fact that they failed to seek asylum at the earliest opportunity. This finding was then used by the Board to support its determination that the Applicants were not credible, that their claim of fear was not well-founded and that they would not face a risk of harm or to life if they were to return to Sri Lanka today.

[13] In the alternative, the Board stated that a change of country circumstances, pursuant to subsection 108(1)(e) of the IRPA, would be the determinative issue.

[14] The Board reviewed jurisprudence on change of country circumstances and found that a change must be politically significant, effective and durable. The Board acknowledged that the documentary evidence of circumstances in Sri Lanka since the end of the civil war in May 2009 is contradictory with regard to the treatment of Tamils, but concluded that the situation for Tamils "has improved significantly over the last two years and there is less than a serious chance of persecution based on the claimant's ethnicity and it is less than likely that the claimant will be

harmed pursuant to section 97 of the IRPA." Further, the Board found that returnees from abroad are not at a particular risk and while suspected LTTE members would be detained upon return, the Applicants do not have the profile of LTTE members or LTTE supporters. Because of this, the Board found that it was "satisfied there is less than a serious possibility they will be persecuted should they return to Sri Lanka today."

[15] While acknowledging a prevalence of negative country reports, the Board found, considering the totality of the evidence, that the situation in Sri Lanka was not such that the Applicants would be persecuted on any Convention ground or harmed pursuant to section 97 of the IRPA.

[16] Finding that the changes in Sri Lanka are relatively durable and meaningful, the Board stated that "where section 96 is a consideration, [they] indicate that the claimants do not face a serious risk of harm or to life were they to return to Sri Lanka today. In any case, the Panel finds, on a balance of probabilities, that their fear is not well-founded."

[17] In the alternative to the foregoing assessment of section 97, the Board determined that the Applicants faced a generalized risk of criminality and extortion.

[18] Country documentation indicated that extortion of those perceived to be wealthy is common in Sri Lanka. The Board formed the view that the family was relatively well to do because the Applicants' father was able to pay bribes to affect their release and because the Applicants have a sister and brother in Canada who the Board stated could be looked upon for sources of money.

Noting that the Federal Court has held that people perceived to be wealthy are a sub-group of the population that can experience a generalized risk, the Board found that any risk alleged by the Applicants is excluded by paragraph 97(1)(b)(ii) of the IRPA, as it is a generalized risk.

[19] Based on its conclusions set out above, the Board stated that it was not necessary to analyze other issues. The Applicants' claims were rejected.

Issues

[20] I would phrase the issues as follows:

a) Did the Board err by using the wrong test in assessing risk under sections 96 and 97?

b) Was the Board's Decision reasonable?

c) Was the Board's alternative analysis of a change in circumstances reasonable?

Standard of Review

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where the search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis (*Dunsmuir*, above; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] FCJ No 713 at para 18).

[22] Prior jurisprudence has clearly established that the Board's determination of the applicable burden of proof under section 96 and 97 of the IRPA is a pure question of law (*Pararajasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1416 at para 20; *Paz Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681 at para 25; see also Justice Harrington's recent decision in *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151 at para 22). Therefore, the first issue attracts a standard of review of correctness.

[23] Conversely, a standard of reasonableness applies when reviewing the Board's findings of fact, credibility, and its assessment of the evidence (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) at para 4; *Jin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 595 at para 4). For example, a determination that there has been a change of circumstances, as set out in subsection 108(1)(e) of the IRPA, is a finding of fact, to be reviewed on the reasonableness standard (*Yusuf v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 35 (FCA) at para 2; *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 [*Oprysk*] at para 15). Accordingly, the second and third issues are questions of fact, or questions of mixed fact and law, that attract the standard of reasonableness.

[24] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process" (see *Dunsmuir*, above, at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 59). Put otherwise, the Court should only intervene if the decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law"

(*Dunsmuir*, above, at para 47). Where an expert tribunal makes findings of fact or credibility determinations, a reviewing court cannot "substitute its own view of a preferable outcome" unless the decision of the tribunal is unreasonable (*Khosa*, above, at para 59).

Argument and Analysis

a) *Did the Board err by using the wrong test in assessing risk under sections 96 and 97?*

Applicants' Submissions

[25] The Applicants submit that the Board erred in law by applying the wrong test in assessing their risk under section 97. The Applicants note that the Board concluded, considering the totality of the evidence, that the situation "is not such that the claimants *will* be persecuted due to any Convention ground or harmed pursuant to section 97" of the IRPA (Decision at para 74, emphasis added). However, the subsection 97(1)(b) burden of proof on the Applicants was only to show *a risk* to life or of cruel and unusual treatment or punishment (*Kedelashvili v Canada (Minister of Citizenship and Immigration)*, 2010 FC 465 [*Kedelashvili*] at para 9).

[26] Further, the Board found that, on a balance of probabilities, the Applicants' fear was unfounded (Decision at para 17) or their fear was not well-founded (Decision at para 18). The Applicants submit that it was an error in law to reject their section 97 claim on that basis.

[27] While the Board cites the proper threshold for section 97 at one point – "risk of harm" (Decision at para 22) – later it elevates the standard to that of a "serious risk of harm or to life" (Decision at para 75). The Applicants submit that the Board applied the test for a risk under section 97 in a confused manner and that, where the Court cannot determine which standard of

proof was used by the Board, it is a reviewable error of law (*Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*] at para 9; *Canada (Minister of Citizenship and Immigration) v Ekanza Ezokola*, 2011 FCA 224 at paras 76-77). They submit that such an error arises in circumstances such as are found in this case, where the test is correctly stated at the beginning of the analysis, but later findings raise doubt as to whether the proper test was applied (*Ghose v Canada (Minister of Citizenship and Immigration)*, 2007 FC 343 at paras 20-21).

[28] The Applicants further submit that, early in its Decision, the Board states that because it finds that the Applicants failed to establish a required section 96 nexus to a Convention ground, only section 97 will be considered (Decision at para 9). However, the Board then goes on to refer to the Applicants' "well-founded fear" (Decision at paras 18, 22, and 25), and ultimately rejects the Applicants' section 97 claim because their fear is not well-founded (Decision at para 75). The Applicants submit that it is an error of law to reject a section 97 claim on that basis, as the requirement for a well founded fear is an element of section 96, and is not a component of a subsection 97(1)(b) analysis (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 [*Sanchez*]).

[29] Finally, the Board also found that, because of their failure to seek asylum in the United States, the Applicants did not have a subjective fear of persecution (Decision at paras 19-20). However, section 97 does not incorporate a subjective component (*Sanchez*, above, at para 14) and the cases the Board cites in this regard consider section 96.

Respondent's Submissions

[30] The Respondent submits that on an overall reading of the Decision, the Board understood the differing burdens and distinctions under sections 96 and 97 of the IRPA. The Respondent acknowledges that the Board made an "unfortunate" statement in finding that the Applicants failed to establish that they "will be persecuted". However, the Respondent maintains that the Board corrected this error in the following paragraph by finding that the Applicants "do not face a serious risk of harm or to life" and "that their fear is not well-founded" (Decision at paras 74-75).

Analysis

[31] A Convention Refugee is defined in section 96 of the IRPA as:

Convention refugee	Définition de « réfugié »
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,	**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 :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries;	*a*) 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;
[…]	[…]

[32] Section 97 of the IRPA defines a person in need of protection as:

Person in need of protection	Personne à protéger
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 former habitual residence, would subject them personally	**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 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 :
[…]	[…]

[33] To make a successful section 96 claim, an applicant must demonstrate a well founded fear of persecution. This has both a subjective and an objective element. "The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear" (*Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601 (FCA) at para 14). An applicant must establish his or her case on the balance of probabilities and meet the legal test of "reasonable chance", that is, is there a reasonable chance that

persecution would take place if the applicant were returned to his or her country of origin (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 67 (FCA) at para 6).

[34] The standard of proof for purposes of section 97 is proof on a balance of probabilities. This is the standard of proof that a tribunal will apply in assessing the evidence adduced before it for purposes of making its factual findings (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 [*Li*] at para 29). However, the test for the degree of danger of torture in subsection 97(1)(a) is a distinct step; the question is whether, based on its factual findings, the Board is satisfied that it is more likely than not that the individual faces a danger of torture (*Li*, above). Similarly, the test for the degree of risk under subsection 97(1)(b) is whether the risk is more likely than not (*Li*, above, at para 39). In sum, the standard of proof and the test for risk of harm or danger of torture under section 97 are distinct.

[35] Finally, as discussed by the Federal Court of Appeal in *Li*, above, at para 33, in the context of subsection 97(1)(a), there are important distinctions between section 96 and section 97:

> [33] It is true that at a refugee hearing a panel may be asked to consider both whether an individual is a Convention refugee and whether that individual is in need of protection. Some of the evidence may apply to both determinations. However, there are differences between section 96 and paragraph 97(1)(*a*). For example, a claim for protection under paragraph 97(1)(*a*) is not predicated on the individual demonstrating that he or she is in danger of torture for any of the enumerated grounds of section 96. Further, there are both subjective and objective components necessary to satisfy the requirements of section 96: see *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at paragraph 120 *per* Major J., while a claim under paragraph 97(1)(*a*) has no subjective component. Because of such differences, it cannot be said that the provisions are so closely related that it would be irrational if the test under paragraph 97(1)(*a*) was not identical to the test under section 96.

[36] It is against this legal backdrop that the Decision must be reviewed.

[37] The Board states at paragraph 9 of the Decision that it does not find a connection to a Convention ground because it views the claims to be based on non-government-sanctioned criminal acts. In the absence of a nexus between the Applicants' fear of persecution and one of the section 96 Convention grounds, the Board, "therefore, proceeded with reviewing this case under section 97." Despite having apparently thus disposed of the Applicants' section 96 claim and its analysis of it, the Board then states at paragraph 17 that the Applicants' fear of return to Sri Lanka is "unfounded"; at paragraph 18 that "on a balance of probabilities, their fear is not well founded"; at paragraph 20 that "subjective fear as it relates to these claimants situation" is relevant; at paragraph 22 that it "does not believe their fear to be well-founded, or that they face a risk of harm or to life"; and, at paragraph 25, in the context of the section 108 change of country circumstances analysis, that the "question is whether those circumstances support the claimant's [sic] alleged well-founded fear of persecution".

[38] As noted above, the term well-founded fear is expressly contained in the wording of section 96, not section 97, and subjective fear is not an element of section 97 (*Li*, above, at para 33; *Sanchez*, above, at para 14).

[39] As to section 97, the correct test is whether the Applicants face a risk to their life or a risk of cruel and unusual treatment or punishment. The Board initially correctly referred to the Applicants' risk threshold under section 97 as "a risk of harm or to life" upon return to Sri Lanka (Decision at

para 22). However, later in its reasons, in the context of its change of circumstances analysis, it states that the situation in Sri Lanka is not such that the Applicants "will be persecuted due to any Convention ground or harmed pursuant to section 97" upon return to Sri Lanka (Decision at para 74). This statement suggests a higher test.

[40] The Board also appears to confuse the section 97 standard of proof with the legal test. For example, the Board states with respect to the Applicants' being permitted to pass through Colombo airport that, "The Panel finds from this experience that they did not or do not have the profile of wanted persons and, therefore believes, on a balance of probabilities, their fear of return to Sri Lanka to be unfounded" (Decision at para 17). This is a confused application of the standard of proof and the legal test, and also mixes in terminology from section 96 that is not applicable to the section 97 analysis. The balance of probability standard of proof should only have been applied to the Board's assessment of the Applicants' evidence for purposes of making its factual finding, i.e. that because they were permitted to pass through the airport without difficulty they were not on the government watch list. The test for determining risk under section 97 is whether it is more likely than not that the Applicants will suffer the risks set out (danger of torture, risk to life or risk of cruel and unusual treatment or punishment). As to the reference to "unfounded" fears, this is terminology extracted from the section 96 reference to a "well-founded fear of persecution", and is not applicable to the section 97 analysis.

[41] The Respondent acknowledges that the Board's statement at paragraph 74, requiring proof that the Applicants "*will* be persecuted due to any Convention ground or harmed pursuant to section 97 of the Act", is an "unfortunate" one (emphasis added). Regardless, it submits that the

following paragraphs clarify the Board's understanding of the correct test. The two paragraphs read as follows:

> [74] The panel acknowledges that there is a prevalence of negative reports on Sri Lanka. However, considering the totality of the evidence on this case, the panel finds that the situation, while not perfect, is not such that the claimants will be persecuted due to any Convention ground or harmed pursuant to section 97 of the Act.
>
> [75] Based on the foregoing analysis, the Panel finds that the changes are relatively durable and meaningful and, where section 96 is a consideration, indicate that the claimants do not face a serious risk of harm or to life were they to return to Sri Lanka today. In any case, the panel finds, on the balance of probabilities, that their fear is not well-founded.

[42] I cannot agree with the Respondent. While paragraph 75 may refer to the Applicants' facing a "risk" of persecution or harm, as opposed to the threshold that they "will be" persecuted or harmed, this does not cure the situation. By referring to a "serious" risk the Board again employs an incorrect and elevated test. Where such an elevated burden is applied, there is a chance that an unsuccessful claimant might otherwise have succeeded (*Alam*, above, at para 10). In addition, "risk of harm or to life" is a consideration under section 97, not section 96.

[43] Further in paragraph 72, the Board stated that, "there is less than a serious possibility they will be persecuted should they return to Sri Lanka today", again elevating the burden on the Applicants and conflating the tests under sections 96 and 97.

[44] In my opinion, the Board's reasons blur the distinction between the two separate legal tests and between its section 96 and section 97 analysis.

[45] This is not a situation as in *Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923, where the RPD conducted a single, permissible integrated assessment of a claim under both sections 96 and 97. Here, the Board explicitly rejected the Applicants' claims under section 96 and stated that the Decision would proceed as a review of the section 97 claim. In such circumstances, it is a reviewable error to import language and other elements from a section 96 analysis, as the tests are distinct (*Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 at para 6).

[46] In *Kedelashvili*, above, at para 9, Justice Snider found that the omission of the words "risk of" in stating the test under section 97 is a substantive error, unless the Court can look elsewhere in the decision "to confirm that the Board truly understood its mandate under s 97". In my view, looking elsewhere in the Decision in this case serves only to confirm the confused manner in which the Board approached its analysis.

[47] Reading the Decision as a whole, it is not possible to know if the Board required proof that harm will occur, or proof of "serious" risks described under section 97. It is equally unclear whether the Board incorporated the subjective element from the test for section 96 into the objective test for section 97. While the Board did correctly state the correct burden under section 97 at one point, in my view, in light of its subsequent reasons, that statement is not a persuasive reflection of the Board's analysis (see *Carpio v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 383 (FCTD) at para 14).

[48] Where the Court is left in doubt as to which standard of proof or legal test was applied, a new hearing can be ordered (*Alam*, above, at para 9; *Leal Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 154 at para 5). In my view, the above errors require that the matter be returned for reconsideration by another panel of the RPD.

[49] Having reached this conclusion, it is not strictly necessary to determine the remaining issues in this application. However, in light of further concerns with the Board's analysis, I will proceed to consider the reasonableness of the Decision.

b) *Was the Board's decision reasonable?*

Applicants' Submissions

[50] The Applicants submit that the Board's Decision is unreasonable with respect to the assessment of nexus under section 96, and risk under subsections 97(1)(a) and 97(1)(b) of the IRPA.

[51] The Applicants submit that the Board erred in finding that the elder Applicant was detained by the EPDP for reasons of extortion. There was no reference to extortion in his evidence. He was detained based on suspicion of ties to the LTTE. Therefore, it was an error for the Board to decline to assess his claim under section 96. Similarly, the younger Applicant was detained by police and questioned about his political allegiance. Indeed, at his port-of-entry interview, the younger Applicant stated that he was arrested in November 2009 and "accused of not supporting government". His detention also stemmed from his refusal to participate in the promotion of the EPDP's politics.

[52] Neither Applicant was detained on the basis of crime or extortion, alone. Their Tamil ethnicity played a role in their being targeted, and a mixed motivation for persecution is sufficient to establish a claim if part of the motivation is linked to a Convention ground (*Sokolov v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 411 at para 22; *Zhu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 80 (FCA) at para 2; *Nara v Canada (Minister of Citizenship and Immigration)*, 2012 FC 364 [*Nara*] at para 38). The Federal Court of Appeal has held that young Tamil males are a race and a particular social group within the Convention definition. The Applicants submit that human rights violations – including arbitrary arrest and detention – in relation to young Tamil males should be considered in light of the Convention definition (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1172 (FCA) at para 22; also *Veeravagu v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 468 (FCA); *Ragunathan v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 253 (FCA)).

[53] The Applicants submit that failing to consider a ground of a refugee claim is a fatal error (*Hujaleh v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 324 (FCA); *Navarro v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1963 (FCTD) [*Navarro*] at para 4). They submit that, in this case, they were prejudiced, as their claim was only assessed under section 97, and not under the lower threshold of section 96.

[54] The Applicants also submit that the Board failed to consider the danger of torture that each of them faces in Sri Lanka under subsection 97(1)(a). While the Board assessed generalized risk, that exception to protection only applies to subsection 97(1)(b).

[55] The Applicants submit that they were both detained and beaten by agents of the state, the EPDP and the police, respectively. Evidence cited by the Board indicates that the police tortured suspects during interrogation. Further, the Applicants submit that the EPDP, as a paramilitary group that supports the government, has the authority to detain Tamils and works in conjunction with state security forces. The Applicants claim that they face a danger of torture by state agents or others acting with the acquiescence of the government. Yet this danger was not assessed by the Board.

[56] With respect to risk under subsection 97(1)(b), the Applicants submit that the Board mischaracterized their testimony. While they testified that they had no criminal record and no pending criminal charges, the Board took this to mean that state authorities had no interest in pursuing them.

[57] The Applicants further submit that the Board failed to appreciate the elder Applicants' behaviour after being detained by the EPDP. He went into hiding and exhibited fear of his persecutors. The Board found that he could have obtained funds to flee Sri Lanka from his brother and sister in Canada. The Applicants submit that this statement is arbitrary and speculative, demonstrating no awareness that the cost of fleeing Sri Lanka was around US$30,000. The Board also erred by failing to consider that the Applicants declined to seek protection in the United States because they have family in Canada. This indicates an ignorance of the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (i.e. the Safe Third

Country Agreement), and renders the decision unreasonable (*Paramananthan v Canada (Minister of Citizenship and Immigration)*, November 16, 2010, IMM-6206-09 at page 3).

Respondent's Submissions

[58] The Respondent submits that victims of crime cannot establish a link between their fear of persecution and a Convention ground (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]; *Chavez Fraire v Canada (Minister of Citizenship and Immigration)*, 2011 FC 763 at para 10).

[59] The elder Applicant was not detained on account of his ethnicity, but because it was suspected that he assisted an LTTE member. The younger Applicant was detained because he refused to provide free services to the EPDP. In light of these facts, the Respondent says that the Board's determination regarding a lack of nexus is reasonable.

[60] In addition, the Respondent submits that the Board reasonably found that the Applicants were not credible on the whole, and did not establish a well-founded fear under section 96 or a personalized risk upon return under section 97. Both Applicants failed to show that they were wanted by Sri Lankan authorities, or that security forces were interested in them. Both were able to leave Sri Lanka on their own passports without difficulty. The elder Applicant also failed to explain his year-long delay in leaving Sri Lanka. He said he could not raise the necessary funds to leave, but did not explain why he failed to reach out to his siblings in Canada.

[61] The Board also concluded that the Applicants' subjective fear was not credible, as neither brother made a claim in the United States when presented with the opportunity. The Respondent notes that a delay in a claim can ground both a negative credibility finding and a lack of subjective fear (*Ortiz Garzon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 299 [*Ortiz Garzon*] at para 30; *Goltsberg v Canada (Minister of Citizenship and Immigration)*, 2010 FC 886 [*Goltsberg*] at para 28).

Analysis

[62] In my opinion, the Board's Decision is not reasonable. The outcome is premised on an unreasonable credibility analysis and an unreasonable factual finding that the Applicants were targeted for reasons of criminality and extortion alone.

[63] Regarding credibility, the Board's reasons fail to meet the test for credibility findings because they are not made in clear and unmistakeable terms (*Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (FCA); *Martinez Caicedo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 749 at paras 23-24). The Board states that credibility is an issue, and points to some evidentiary deficiencies, but does not draw any conclusions between the evidence and the Applicants' credibility.

[64] In fact, the Board appears to accept the Applicants' testimony as true and accurate. The Board relies on the fact that the elder Applicant was released by his captors as evidence that he is not wanted by state authorities, thus implicitly accepting his account of being detained and beaten

by the EPDP. The Board similarly accepts that the younger Applicant was detained and released by the police, and does not question his account of being beaten and interrogated.

[65] The only basis for a negative credibility finding is the Board's consideration of the Applicants' delay in claiming protection while residing in the United States. It is true that delay or a failure to claim can ground an adverse credibility finding (*Goltsberg*, above, at para 28). However, the Board cannot draw an adverse inference if there is a valid reason for not claiming asylum in a foreign country (*Ortiz Garzon*, above at para 30). The fact that the Applicants' sister and brother reside in Canada is, in my view, a valid reason to transit through the United States and then file a claim in Canada. The IRPA promotes the reunification of refugees with their family members (subsection 3(2)(f)). Further, the Safe Third Country Agreement between Canada and the United States includes a specific exception for family members. For the Board to not even consider this potential "valid reason" renders its analysis of the Applicants' delay in claiming protection unreasonable.

[66] If the Board's credibility findings are unreasonable, then there is no basis to disbelieve aspects of the Applicants' claim. Both of the Applicants claimed that they were detained and beaten based, at least in part, on their perceived links to the LTTE. This constitutes a perceived political opinion, which qualifies as one of the five Convention grounds under section 96 of the IRPA (*Ward*, above, at para 83).

[67] So long as at least one of the motives for targeting an individual is linked to a Convention ground, the Board has a duty to consider whether a nexus exists (*Nara*, above, at para 38; *Navarro*,

above, at paras 3-4). Here, however, the Board discounted the motive of perceived political opinion, and instead construed each Applicant as the victim of crime and extortion, exclusively.

[68] This determination is unreasonable. The elder Applicant was detained by a political, pro-government paramilitary group, the EPDP. He was beaten and interrogated. He was released without paying a bribe. The finding that this incident was the exclusive result of criminality and extortion is not supported by the record. In fact, as confirmed by the Respondent, the elder Applicant was detained because he assisted an LTTE member and was suspected of involvement with the organization.

[69] The Board also appears to require evidence that the government was a party to the detention of both Applicants (Decision at paras 9, 14). However, the jurisprudence is clear that the state need not be an accomplice to persecution (*Ward*, above, at para 34).

[70] Further, the younger Applicant testified that the first question the police asked upon detaining him was "do you help the LTTE?". He testified that he was repeatedly asked such questions during his one and a half month detention. This testimony is consistent with information he gave at the port-of-entry when initially filing his refugee claim. Yet the Board states that "there was no mention about questioning for involvement with the LTTE" (Decision at para 16).

[71] There was evidence in the record and in the Applicants' testimony to suggest a link between the brothers' perceived political association with the LTTE and their respective detainment and abuse by the EPDP and the police. This evidence was ignored by the Board in determining that the

Applicants failed to establish a nexus to a Convention ground. Absent a reasonable credibility finding, the Board is deemed to have accepted the Applicants' evidence. Therefore, the failure to consider their claim based on a perceived political opinion is a reviewable error and an additional basis to return the matter to the RPD for redetermination.

[72] The Board's determination that the Applicants were targeted based exclusively on criminality and extortion also coloured its alternative analysis of generalized risk under section 97. The Board considered the Applicants to belong to a sub-group of the population, namely those perceived to be wealthy, despite there being no evidence that either Applicant was previously targeted based on his perceived wealth. The evidence was that each Applicant was targeted, at least in part, on the basis of perceived LTTE sympathies or associations. The Board failed to consider whether such evidence renders the Applicants' risk upon return personalized, so the alternative analysis of generalized risk is also not reasonable.

[73] Regardless of the generalized risk analysis, the Board failed to consider subsection 97(1)(a) and the danger of torture facing the Applicants. By failing to appreciate that the Applicants may be perceived as LTTE sympathizers, the Board failed to adequately assess the threat of torture that each might face upon return. This failure to consider the danger of torture within the section 97 analysis also renders the Board's Decision unreasonable.

c) *Was the Board's alternative analysis of a change in circumstances reasonable?*

Applicants' Submissions

[74] The Applicants submit that the Board had an obligation to consider subsection 108(4) of the IRPA and assess whether, based on "compelling reasons", the change of circumstances in Sri Lanka does or does not affect their claim. Because the Applicants experienced previous torture and mistreatment, the Board was required to consider subsection 108(4), whether or not the Applicants raised the issue (*Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457 (FCA) [*Yamba*] at para 6; *Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 290 at paras 4-5). The Board cannot avoid the issue of compelling reasons by not making a finding about past persecution (*Buterwa v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1181 [*Buterw*a] at para 11).

[75] The Applicants submit that while claimants who have been persecuted must show that their persecution was severe in order to establish compelling reasons, it is not clear that this requirement applies to those who have been tortured or subjected to cruel and unusual treatment (*Alfaka Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044 at para 44; *Villegas Echeverri v Canada (Minister of Citizenship and Immigration)*, 2011 FC 390 at para 32). The Applicants submit that this is a novel issue, as there is no authority on whether past torture or mistreatment must rise to a particular degree of severity to engage subsection 108(4) of the IRPA.

Respondent's Submissions

[76] The Respondent submits that the Board's finding that the changes in Sri Lanka were of an enduring nature was open to it on the evidence. Documentary evidence shows that the situation for

Tamils in Sri Lanka has improved since 2009, so it was reasonable to conclude that subsection 108(1)(e) applied to the Applicants. The Respondent submits that the Board looked to a range of sources and undertook a balanced review of the evidence (*Mahmoud v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1442 (FCTD) at paras 25-34).

[77] The Respondent submits that looking at the evidence as a whole, the Board reasonably found that the Applicants' profile would not place them at risk and that the country conditions in Sri Lanka do not warrant protection for the Applicants under sections 96 or 97 (*Oprysk*, above, at para 22). The Respondent notes that recent decisions of this Court have upheld as reasonable findings that the end of the civil war in Sri Lanka brought about a change in circumstances (see *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 47; *Sivalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1046; *Rajaratnam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 865 [*Rajaratnam*]).

[78] Finally, the Respondent disputes the Applicants' submission that the Board was obliged to consider compelling circumstances under subsection 108(4). In order to engage in a compelling reasons analysis, the Board must first provide a clear finding that the claimants were refugees or protected persons and that they no longer have that status due to a change in circumstances. It is only then that the Board should consider if the claimant's experiences in the former country were so appalling that he or she should not be expected to return there (*Luc v Canada (Minister of Citizenship and Immigration)*, 2010 FC 826 [*Luc*] at paras 32-33; *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 [*Brovina*] at para 5). The Respondent submits that in this case the Board did not find that there was a valid refugee or protected person claim, or that that

status no longer exists because of a change of circumstances. The Applicants have also failed to establish that their past experiences rise to the level of "appalling persecution" required to engage the subsection 108(4) exception (*Canada (Minister of Employment and Immigration) v Obstoj*, [1992] FCJ No 422 (FCA) at para 19; *Oprysk*, above, at paras 25-31). It was therefore reasonable for the Board not to consider them as compelling.

Analysis

[79] Since the Board erred in assessing the Applicants' claims under sections 96 and 97, its change in circumstances alternative analysis – even if reasonable – is irrelevant. This is so because, pursuant to subsection 108(4) of the IRPA, the Board has an obligation to consider whether there are "compelling reasons" not to return a claimant where: (1) past persecution has been established; and (2) a claim is rejected on the basis of a change in circumstances (*Yamba*, above, at para 6). While the Board found that there was a change in circumstances, it failed to properly assess the first step and determine whether the Applicants experienced past persecution.

[80] Here, the Board does not cast serious doubt on the Applicants' testimony, despite an unsupported assertion of a lack of credibility. The Applicants' testimony established that each of them had been detained and beaten by paramilitary or government forces based, at least in part, on perceived support of the LTTE. Such evidence is potentially capable of establishing past persecution, yet the Board did not recognize this. However, side-stepping the question of past persecution cannot "absolve the Board from its statutory obligation to consider whether the applicant had established compelling reasons why he should not be required to go back there" (*Buterwa*, above, at para 11).

[81] In any event, even if the Board did not have an obligation to consider compelling reasons under subsection 108(4), the change in circumstances analysis is not reasonable. The Respondent accurately notes that this Court has upheld recent RPD decisions finding a change in circumstances since the end of the civil war in Sri Lanka. However, in those cases the Board had reasonably determined that the claimant did not meet a risk profile identified in the country reports (see *Rajaratnam*, above, at para 34).

[82] In this case, the Board implicitly acknowledges that those suspected of having LTTE sympathies remain at risk in Sri Lanka (Decision at paras 70 and 71), but determines that the Applicants will not be suspected of having such sympathies because, on a balance of probabilities, they are "not on the wanted list of LTTE suspects or sympathizers". As described above, this finding is premised on the unreasonable determination that the Applicants are victims of crime and extortion, alone.

[83] It is possible that a young, Tamil male from the north of the country, having fled to make a foreign asylum claim, and having been previously detained, interrogated and beaten for suspected LTTE ties, might arouse suspicion, whether or not his name is "on the wanted list". Accordingly, absent a proper consideration of whether the Applicants will be considered LTTE sympathizers, the Board's change of circumstances analysis is not reasonable.

Conclusion

[84] The Board's assessment of the Applicants claim is flawed on numerous grounds. The Board committed a reviewable error of law in applying the wrong or a confused threshold and test for a claim under section 97. The Board committed a reviewable error of fact in determining that the Applicants were targeted on the basis of crime and extortion alone. This unreasonable determination informed the Board's nexus analysis and its assessment of the danger of torture, along with its alternative findings about a change in circumstances and generalized risk. Accordingly, I must allow this application for judicial review and order a new hearing before a different panel of the RPD.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is referred back for a new hearing before a different panel of the RPD.

"Cecily Y. Strickland"
Judge

ANNEX

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Convention refugee	Définition de « réfugié »
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,	**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:
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) 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;
(*b*) 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.	*b*) 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.
Person in need of protection	Personne à protéger
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 former habitual residence, would subject them personally	**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 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 themself 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.

(2) A person in Canada who is a member of a class of persons prescribed by the

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait

regulations as being in need of protection is also a person in need of protection.

[…]

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.

partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[…]

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5030-12
STYLE OF CAUSE:	KALAICHELVAN RAJADURAI ET AL v MCI
PLACE OF HEARING:	Toronto
DATE OF HEARING:	March 20, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	STRICKLAND J.
DATED:	May 22, 2013

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