

Federal Court



Cour fédérale

Date: 20131007

Docket: IMM-11310-12

Citation: 2013 FC 969

Ottawa, Ontario, October 7, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

P.K.

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT
(Confidential Reasons for Judgment and Judgment Issued September 20, 2013)

[1] In a decision dated October 12, 2012, the Immigration and Refugee Board, Refugee Protection Division (the Board) dismissed the applicant's claim for protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). The applicant now seeks judicial review of the decision pursuant to section 72 of the Act.

[2] The applicant, PK, is a citizen of Sri Lanka of Tamil ethnicity. He arrived in Canada on October 17, 2009, along with 76 other passengers and crew on the *MV Ocean Lady*. He claims that if he is returned to Sri Lanka, he will face risk of persecution due to the perception that he has ties to the Liberation Tigers of Tamil Elam [LTTE]. PK believes that his identity has likely been shared with Sri Lankan authorities and this, coupled with the publicity surrounding the *Ocean Lady* as an LTTE affiliated boat and his unique risk profile, puts him at serious risk of persecution upon return to Sri Lanka. He claims that upon return he will be arrested, detained and tortured.

[3] The applicant submits that the Board analysed some but not all of his risk factors and failed to analyse the cumulative nature or impact of his risk factors.

Background

[4] The applicant is from the [Redacted] in the North of Sri Lanka. In 1995, he and his family were displaced to [Redacted]. He was approached several times by the LTTE in [Redacted] and he fled to India to avoid forcible recruitment. He returned to [Redacted] area in 2003, a year after the cease fire between the LTTE and Sri Lankan forces. While in [Redacted], he was arrested and detained for one night by the Sri Lankan Army, who did not believe he was from the area. Sri Lankan government officials told him to leave and threatened to kill him if he returned.

[5] The applicant then moved to [Redacted] where he was threatened by paramilitary groups. In January 2006 he went to Colombo intending to obtain a passport to leave the country. He was abducted by four armed men, interrogated, beaten, and accused of being a member of the LTTE. He was released after three days and the payment of 30,000 rupees.

[6] He then made arrangements through an agent to leave Sri Lanka. He travelled to Thailand, Singapore, Malaysia, Indonesia, and ultimately to East Timor, where he remained for two years, unable to leave due to the civil war. In 2008, with the help of an agent, he obtained a passport and went to Malaysia where he made arrangements to travel to Canada on the *Ocean Lady*.

[7] At the time the applicant boarded the *Ocean Lady* there were only about 12 crew and passengers. The applicant worked in the kitchen as a helper and, as a result, had contact with crew members and was able to provide the names of some of the crew and passengers, identify their role, and provide other information in response to questioning by Canadian Border Service Agency [CBSA] officers.

The Board's decision

Credibility

[8] The Board noted some inconsistencies between the applicant's responses to CBSA officers, his Personal Information Form [PIF] and his oral testimony at the refugee determination hearing. The Board also expressed some doubts about the applicant's travels from Sri Lanka and his two-year stay in East Timor before departing on the *Ocean Lady*.

[9] While the Board noted these concerns, it did not make specific credibility findings and it is clear that credibility was not a factor in the Board's decision. The Board's key finding and the basis for its decision was the determination that the applicant did not have a well-founded fear and would not face a serious possibility of persecution if returned to Sri Lanka.

Section 96 and 97(1)

[10] In his submission to the Board, the applicant asserted that he had a unique risk profile that placed him at greater risk than others; he was: a male Tamil from the North; a failed asylum seeker; returning from a centre of LTTE activity of fundraising (i.e. Canada) with a temporary travel document; possibly suspected of affiliation with the LTTE or having information about the LTTE due to his role on the *Ocean Lady*; and potentially of interest to the Sri Lankan authorities due to the information he provided to Canadian authorities.

[11] The Board considered the applicant's experiences before he fled from Sri Lanka and found that, despite one night held in detention in 2003, the applicant was not perceived by the Sri Lankan government to have any ties to the LTTE. The Board found that his encounters with Sri Lankan authorities in [Redacted] in 2003 were not unusual given that he was regarded as a stranger. The Board also found that the threats made to him in [Redacted] were similarly not unexpected and that he was not harmed. His abduction in Colombo was regarded as extortion.

[12] The Board acknowledged that the applicant's profile changed when he arrived in Canada on the *Ocean Lady* and, while he would likely be identified as a failed asylum seeker upon his return to Sri Lanka, there was insufficient evidence to indicate that he would be identified as a passenger on the *Ocean Lady*. The Board acknowledged that he would face additional scrutiny upon arrival as a failed asylum seeker, but would not be at risk of persecution or torture given his lack of profile and association with the LTTE, his lack of any criminal record, and because he had left the country legally with a valid and genuine passport.

[13] The Board noted independent sources suggesting that conditions have improved for many Tamils in Sri Lanka with the exception of those suspected of being members of, or having links to, the LTTE.

[14] The Board acknowledged that those suspected to have ties to the LTTE would be at risk of arrest and detention upon return and that some have been tortured. The Board considered reports indicating that the Sri Lankan government may be holding LTTE suspects beyond the two-year maximum and may be extracting confessions from detainees through inducement, threats, or promises. The Board also considered the country condition documents indicating that the Sri Lankan government is interested in the *Ocean Lady* because it believes that some of the passengers have ties to the LTTE. Some documents suggest that one third of the 76 passengers had ties to the LTTE. The Board again noted that there was insufficient evidence that the applicant would be identified as a passenger on the *Ocean Lady* and that his profile did not suggest any connections to the LTTE.

[15] With respect to the applicant's *sur place* claim, the Board found that there is no evidence indicating that Sri Lankan authorities are aware of the claimant's identity as a result of his arrival to Canada on the *Ocean Lady*. The Board analyzed media articles and other country condition documents and concluded that the Sri Lankan government is not aware of the identities of all passengers who traveled on the *Ocean Lady*. The Board acknowledged that Sri Lankan authorities are aware of the *Ocean Lady*'s arrival and the subsequent refugee claims made by those onboard, but there is no evidence that they are aware of the applicant's identity.

[16] The Board also considered the possibility that Sri Lankan authorities may become aware of the applicant's identity as a passenger on the *Ocean Lady*. The Board found that, on a balance of probabilities, he would not be perceived to be a member or supporter of the LTTE simply on this basis because: he was released from detention in Canada after extensive investigation; it is well known that not everyone onboard the *Ocean Lady* had ties to the LTTE; and, he had no history of links to the LTTE in Sri Lanka before leaving. The Board, therefore, found that he had not established his *sur place* claim.

The Issues

[17] The applicant submits that the Board erred by: making veiled and unreasonable credibility findings; failing to consider the cumulative impact of the applicant's risk factors; and, failing to consider relevant evidence regarding the risk of torture faced by the applicant if returned regardless of whether the applicant is suspected of having ties to the LTTE.

Standard of review

[18] The standard of review for the Board's assessment and findings of risk and a *sur place* claim is reasonableness. The reasonableness standard also applies to findings of credibility.

[19] When reviewing a decision where the standard of reasonableness applies, the role of the Court on judicial review is to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). There may be several reasonable

outcomes and “as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome” (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The Court will not re-weigh the evidence or substitute any decision it would have made.

Did the Board make unreasonable credibility findings?

[20] Although the Board referred to inconsistencies in the applicant’s evidence, the Board did not make credibility findings. The determinative finding of the Board was that the applicant did not have a well-founded fear and would not face a serious possibility of persecution if returned to Sri Lanka.

Did the Board err in failing to consider the totality of the applicant’s risk profile?

Did the Board ignore relevant evidence of the risk of torture to failed asylum seekers?

[21] Both issues are related and should be considered together.

[22] The applicant submits that the Board considered only some of the applicant’s risk factors and did so individually rather than considering the cumulative effect of all the risk factors which results in his unique profile. The applicant submits that this unique profile sets him apart from other failed asylum seekers and other passengers on the *Ocean Lady* and puts him at greater risk of persecution and torture upon return.

[23] The applicant notes, in particular, that the Board did not consider two specific risk factors: the applicant had information about the *Ocean Lady* of interest to the Sri Lankan government; and, he would be returning to Sri Lanka with only a temporary travel document and not a valid passport.

[24] The applicant submits that the Board ignored the fact that the applicant worked in the kitchen on the ship as a helper and gained knowledge of the operations of the *Ocean Lady*, including the names of some of the crew and their roles, which he provided to CBSA officers in response to their rigorous questioning and that Sri Lankan authorities would be interested in this information as it relates to the human smuggling operations of a LTTE vessel.

[25] In addition, the Board failed to consider the documentary evidence that supports the applicant's submission that Sri Lankan authorities are highly interested in those who travelled on the *Ocean Lady* and that torture has been used to extract information on the LTTE's smuggling operations from returnees in other circumstances.

[26] The applicant submits that the Board erred in relying on country condition evidence to conclude that passengers on the *Ocean Lady* are not at risk because Sri Lankan authorities do not consider all passengers to be LTTE. The applicant argues that this fails to take into account that some passengers would be considered to be LTTE and that Sri Lankan authorities would interrogate all the passengers, including the applicant, to determine whether they had LTTE links. The applicant notes evidence indicating that this interrogation involves the risk of torture.

[27] The applicant argues that the fact that he was interviewed extensively in Canada and then released would signal to Sri Lankan authorities that they should do the same. The Board took the opposite approach, suggesting that the release of the applicant would be a message to Sri Lanka that he was not considered to have LTTE ties.

[28] The applicant referred to *B027 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 485, [2013] FCJ No 571 [B027], where Justice Harrington noted that such inferences were over-simplistic. In addition, Justice Harrington found that the Board erred in not analysing the applicant's circumstances cumulatively:

[9] By parity of reasoning, the member also concluded that since the Canadian authorities eventually released B027, they too are satisfied he is not an LTTE supporter. That too is over-simplistic. They may well have had suspicions, but are unable to prove them under our system of law. Sri Lankan authorities would not be so bound.

[10] B027 was constantly accused of lying when he denied that he had LTTE affiliations. For instance, "...you are looking me in the eyes and lying through your teeth. Tell me, why should Canada help you?... You are being like a child. Children keep lying even when everyone knows they are lying. Adults tell the truth once they know there is no reason to lie to anyone. Why don't you be a man about this and stop being a child?"

[11] The member recognized that those suspected of being LTTE members or those suspected of having links to the LTTE face a serious possibility of persecution. However, by treating Sri Lanka and Canada as separate silos, the member failed to appreciate the risk the family faces. To that extent, the decision was unreasonable. The member did not analyze the circumstances cumulatively. It may well be that given B027's ethnicity, the nature of his injury, the fact that he worked [Redacted] in the northern controlled part of Sri Lanka, that his wife was [Redacted], and that they were passengers on the Sun Sea, they would face a serious risk of persecution if returned to Sri Lanka.

[29] The respondent's position is that the Board analyzed all the evidence and considered the totality of the applicant's risk profile and reasonably concluded that he would not be perceived by Sri Lankan authorities as a LTTE affiliate, that Sri Lankan authorities would not find out that he was a passenger on the *Ocean Lady*, and that his status as a failed asylum seeker would not put him at risk.

[30] The respondent submits that the Board did in fact consider the applicant's allegation that he was returning from a perceived centre of LTTE activity (i.e. Canada) because it sought clarification from the applicant's counsel about this issue at the hearing.

[31] With respect to the Board's failure to acknowledge that the applicant did not have a Sri Lankan passport, the respondent submits that the Board considered the overall risk the applicant faced as a failed refugee claimant and noted that, regardless of whether refugees are returning on a voluntary basis or as a result of failed asylum claims, Tamils are not at risk.

[32] The respondent submits that a cumulative assessment of risk was not necessary because the Board did not accept specific aspects of the applicant's profile; the Board found that he would not be identified as a passenger and if he were, he would not be at risk because he had no links to the LTTE before he left Sri Lanka, and because he was released by the Canadian authorities, he would not be suspected of having LTTE links now.

[33] The respondent acknowledges that the Board failed to address the applicant's submission that his work in the kitchen and the information he gained as a result, which he provided to CBSA officers, put him at a higher risk as a person of interest to the Sri Lankan authorities, but submits that the Board did not err. Because the Board found that the applicant would not be identified as a passenger on the *Ocean Lady*, it did not need to consider how his role onboard the ship would change his risk profile.

[34] In oral submissions, the respondent also argued that the applicant's role as a kitchen helper and the information he provided to CBSA was not a central part of his claim for protection nor was the information provided to CBSA extensive or significant.

[35] The respondent further submits that the Board did not fail to assess the threat of torture. The Board acknowledged that those with LTTE ties are at risk, but that the applicant would not be perceived as having such ties.

[36] In addition, the respondent submits that *B027* is easily distinguished as it was decided on very narrow grounds related to the suspicion on the part of the Canadian authorities (due to the extensive interrogation of the applicant and the applicant's injuries) that one of the applicants was affiliated with the LTTE.

The Applicant's risk profile

[37] The applicant emphasizes that his risk profile has several elements which together may put him at greater risk than other passengers and other failed asylum seekers.

[38] I agree that, as in other refugee claims, the risk an applicant faces due to his or her own particular circumstances must be considered. In this case, the applicant's risk profile includes several elements, all of which should be considered by the Board on their own and together to the extent that each may have an impact on the others.

[39] Several of the elements of the applicant's risk profile are related and were considered by the Board and were not found to be unique or to place the applicant at risk. The fact that he was a passenger on the *Ocean Lady* is related to his claim that he is returning from a centre of LTTE activity (i.e. Canada), and whether Canada is or is not such a centre, Canada is where the *Ocean Lady* landed. Similarly, that he is returning as a failed asylum seeker is not a separate risk factor but is logically linked to the other risk factors. He would not be returning if he were not a failed asylum seeker. He is returning from an alleged centre of LTTE activity because the ship arrived in Canada as intended. All other returnees would be in the same situation.

[40] However, the Board did not address the applicant's risk profile as the applicant submitted.

[41] The Board (at para 18) characterized the applicant's claim as follows:

“Claimant's counsel has submitted that were the claimant to be unsuccessful in his refugee claim, he would have a unique risk profile: that of a Tamil male who is a failed asylum seeker with suspected LTTE ties who arrived in Canada aboard the *Ocean Lady*.”

[42] As noted above, the Board found that the applicant did not have any links to the LTTE or to other events that would put him at risk of being perceived to be LTTE before he came to Canada. The Board canvassed the evidence regarding risks to failed asylum seekers and concluded that returnees are at a heightened risk of detention at the airport and face a risk of torture if they are suspected to have connections to the LTTE. However, the Board found that the applicant did not have any such connections.

[43] The applicant argues that he would face more than a mere possibility of persecution and would likely face torture upon his return to Sri Lanka because: as the Board acknowledged, Sri Lankan authorities use torture to secure information from detainees; all returning Tamils who were on the *Ocean Lady* will be interrogated to determine whether they have links to the LTTE; and, the applicant has information related to the operation of the *Ocean Lady* which was engaged in a people smuggling operation.

[44] A similar argument was rejected in *PM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77, [2013] FCJ No 136 [*PM*], a case that dealt with a passenger on the *Sun Sea*. Justice Snider noted at para 13:

[13] The flaw in the Applicant's argument arises with his third step. The Board acknowledged the human rights abuses of the Sri Lanka government and accepted that the Applicant would be detained and questioned upon his return. However, the Board refused to conclude that there was a serious possibility that this particular Applicant would be subjected to torture upon his return. The Board reasoned that, taking into account the specific circumstances of the Applicant, the Sri Lankan authorities were not likely to conclude that he was associated with the LTTE. Thus, there was not more than a

mere possibility that he would have a lengthy detention with the risk of torture. [emphasis in original]

[45] Justice Snider found that the Board's findings which resulted in its determination that PM would not be perceived to be associated with the LTTE were reasonable.

[46] I am not able to reach the same conclusion in the present case.

[47] In the present case, the Board did not consider the applicant's role onboard the *Ocean Lady* in determining that the applicant would not be perceived to have links to the LTTE or to have information of interest to the Sri Lankan authorities. If this added element of the applicant's risk profile, along with the fact that he was returning without a passport, would result in the Sri Lankan authorities regarding the applicant differently than the other returning failed asylum seekers onboard the *Ocean Lady*, the Board must assess whether the applicant would face more than a mere risk of persecution and whether, on a balance of probabilities, the applicant would face a risk of torture.

[48] Nowhere in the Board's otherwise very comprehensive and balanced assessment of the country conditions and the risk does it refer to the role the applicant had on the ship. The Board referred to the applicant at all times as simply a passenger, not as a kitchen helper. The Board did not mention the applicant's submissions regarding the potential elevated risk he faced due to his work in the kitchen and the information he provided to CBSA.

[49] At the hearing before the Board, the applicant's counsel questioned the applicant about his work in the kitchen and the information he provided to the CBSA and made repeated and clear

submissions on this aspect of his profile to the Board. In addition, the Refugee Protection Officer [RPO] questioned the applicant on the information he provided to CBSA and also made submissions to the Board, noting first, that the *Ocean Lady* was more closely aligned with the LTTE as all the passengers were male and second, that the applicant had knowledge of the other passengers and crew on the boat. The RPO submitted that the Board should consider whether the Government of Sri Lanka would have an interest in the applicant given the information he had.

[50] I do not agree with the respondent's position that the risk asserted by the applicant due to his work in the kitchen and the information he provided to the CBSA about the names of some crew, their role and the ship's travels, was not central to his claim, or alternatively, that the information he provided was not significant or unique.

[51] The only evidence on the record is that the applicant did work in the kitchen and that when interrogated by CBSA, he provided information, including the names of some of the crew members and their roles on the ship. There is no evidence about whether other passengers provided similar information or whether the information was significant or helpful. The Board should have considered this element of the applicant's personal circumstances and there is no indication in its reasons that it did so. The Board referred to several other elements of the applicant's claim but did not refer to the information he had and shared with CBSA.

[52] Nor did the Board refer to the fact that the applicant would be returning to Sri Lanka with a temporary travel document. Whether this element of his risk profile or personal circumstances elevates the risk he faces should be considered by the Board. It is true that many failed asylum

seekers return with temporary travel documents and the Board did note that Tamils are not at risk, whether they are returning voluntarily or as failed asylum seekers. However, the Board made at least two specific references to the fact that the applicant left Sri Lanka with a genuine passport, and did not mention that he would be returning without that genuine passport.

[53] For example, at para 49, the Board noted that "...documentary evidence indicates that returnees who left the country legally and who have genuine documents generally have little difficulty passing through airport security upon their return to Sri Lanka. The panel notes that the claimant was issued a passport in and left the country legally in 2009."

[54] There is some evidence before the Board suggesting that if he travelled on temporary travel documents, he would be more readily identified as a passenger on the *Ocean Lady* during the removal process.

Conclusion

[55] The applicant's particular circumstances were not considered in their totality by the Board. As in *B027*, I am allowing the judicial review on narrow grounds particular to this applicant. The Board did not assess the applicant's role on the ship and the information he provided to the CBSA, which might be of interest to Sri Lankan authorities. In addition, the Board did not assess the fact that the applicant would be returning without a passport. Both these elements should be considered to determine whether the applicant faces more than a mere risk of persecution upon return to Sri Lanka and whether he faces, on a balance of probabilities, a risk of torture.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11310-12

STYLE OF CAUSE: P.K. v THE MINISTER OF CITIZENSHIP
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 26, 2013

**PUBLIC REASONS
FOR JUDGMENT
AND JUDGMENT:** KANEJ.

DATED: OCTOBER 7, 2013

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