Federal Court  Cour fédérale

Date: 20131025

Docket: IMM-10722-12

Citation: 2013 FC 1085

Ottawa, Ontario, October 25, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

B407

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated September 13, 2012, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a Tamil man from Jaffna, Sri Lanka. Between 2002 and 2009, he operated a business.

[4] In April 2004, he was detained by the Sri Lankan army and interrogated as to his involvement with the Liberation Tigers of Tamil Elelam (LTTE). They robbed him, beat him and emptied his motorcycle of gasoline. He was constantly stopped and extorted by the army as he ran his business. The Eelam Peoples Democratic Party, and Karuna paramilitary groups also stopped and extorted him.

[5] In April 2009, the applicant was again stopped by members of the army who ordered him to buy them alcohol. Fifteen days later, he was extorted for 1,000 rupees. Two days later, an army officer required him to buy marijuana.

[6] In September 2009, the applicant sold his [redacted] but the extortion continued.

[7] The applicant fled Sri Lanka for Thailand on May 27, 2010, where he secured passage aboard the *MV Sun Sea*. He alleges the military has since asked his wife and brother about his whereabouts and have learned he is in Canada.

[8] The *Sun Sea* arrived in Canada on August 13, 2010. The applicant claimed protection at that time. His claim was heard on May 30, 2012.

Board's Decision

[9] The Board made its decision on September 13, 2012. The Board accepted the applicant's identity, summarized his allegations and indicated it had rejected his claim on the basis of credibility and lack of well-founded fear. In the alternative, the Board found that even if his story were true, he did not face a risk of persecution under sections 96 or 97 or the Act. The Board found there was neither compelling reasons nor a *sur place* situation and that under section 97, there was generalized risk.

[10] The Board noted a list of inconsistencies in the applicant's story, including regarding his involvement with the LTTE. The applicant had initially denied having any experience with the group, but later admitted he had been offered training by them as a child. When interviewed by the Canada Border Services Agency (CBSA), the applicant's brother and wife indicated he had [redacted] LTTE members five times per month for a year. The Board concluded that on a balance of probabilities, the applicant did have contact or involvement with the LTTE. The Board then went on to catalogue other inconsistencies, such as the applicant's failure to claim protection in Thailand and various interactions with the Sri Lankan state that indicated he was not a wanted person. The Board noted the applicant had not engaged in criticism of the government of Sri Lanka while abroad. Based on these inconsistencies, the Board concluded on a balance of probabilities that the applicant's fear was not well-founded.

[11] The Board considered the alternative issue of change of circumstances in Sri Lanka. It canvassed country conditions evidence showing that after the defeat of the LTTE in 2009, the treatment of Tamils in Sri Lanka had improved. The Board considered an Amnesty International report regarding passengers of the *Ocean Lady* and *Sun Sea*, but noted that this risk only applied to those being suspected of being members of the LTTE and that some of the underlying sources of the report were dated. The Board rejected the possibility of a *sur place* claim on the basis there was no indication the applicant had been involved in activities in Canada in support of the LTTE. The Board noted that at the time of the decision, it had been three years since the applicant had encountered problems with the Sri Lankan government. The Board concluded the applicant would not be identified as an LTTE member because circumstances had improved for Tamils not suspected of being LTTE members. The Board noted the return of refugees to Sri Lanka from India and other countries.

[12] The Board went on to consider a report by the Danish Immigration Service on conditions in Sri Lanka that concurred with the above conclusion that the conditions facing Tamils had improved with the exception of those being suspected of membership in the LTTE.

[13] The Board next considered the treatment of failed asylum seekers returning to Sri Lanka. The Board concluded that with the exception of those with outstanding criminal charges or suspected of links with the LTTE, these returnees were treated like any other Sri Lankan citizen entering Sri Lanka.

[14] The Board held that the applicant did not have a profile that would be perceived as having ties to the LTTE. There was no evidence that the applicant having arrived via the *Sun Sea* had led to being found to have links to the LTTE. There was no evidence the applicant had engaged in activities that would put him under suspicion of the Sri Lankan government. The Board therefore rejected the *sur place* claim.

[15] The Board also analyzed the applicant's claim under compelling reasons and concluded that he had not been mistreated during his detention in 2004 and there were therefore no compelling reasons to prevent the return of the applicant to Sri Lanka. The Board then went on to repeat its conclusions concerning the positive post-war picture in Sri Lanka since the end of the civil war.

[16] Finally, the Board considered generalized risk as an alternative issue under section 97 of the Act. The applicant had alleged he was a victim of extortion and feared becoming a victim of crime upon return due to the perception of wealth attaching to being returned from a Western country. The Board concluded this was a generalized risk faced by a sub-group of the Sri Lankan population; the wealthy or those perceived as wealthy.

[17] For these reasons, the Board rejected the claim.

Issues

[18] The applicant submits the following points at issue:

1. Did the Board make contradictory findings with respect to the applicant's profile?

2. Did the Board fail to give the applicant notice that it considered delay to be an issue in his claim?

3. Did the Board err by ignoring the evidence concerning the *sur place* claim?

4. Did the Board fail to consider the suspicions of the Canadian authorities with respect to the applicant's connection to the LTTE?

5. Did the Board use the wrong tests in analyzing compelling reasons?

[19] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in rejecting the applicant's claim?

3. Did the Board violate procedural fairness?

Applicant's Written Submissions

[20] The applicant makes five arguments against the Board's decision. He argues that the reasonableness standard applies except in the case of procedural fairness and errors of law.

[21] First, the applicant argues it is contradictory for the Board to conclude on one hand that he had in fact been involved with the LTTE and on the other hand, that he would not be suspected by the Sri Lankan government of such involvement. The Board clearly accepted the risk for suspected supporters. The Board made a clear finding of such involvement but did not apply its own findings concerning the risk that this involvement generated.

[22] Second, the applicant argues the Board never indicated delay in claiming would be an issue in his claim. The Board's screening form did not identify this issue. The Board discussed the applicant's delay in its credibility finding. The failure to give notice violated the right to a fair hearing.

[23] Third, the applicant argues the Board did not seriously consider his argument that being a passenger on the *Sun Sea* would result in being suspected of LTTE involvement by the Sri Lankan government. This risk exists independent of any credibility concerns. The applicant made lengthy and detailed submissions on this point, supported by a plethora of documentary evidence. The Board dismissed this argument in a single paragraph and only identified the issue of whether the applicant had been identified as having links to the LTTE at that time, not whether he would be identified as such upon return. This displays a lack of understanding of a crucial element of the claim.

[24] Fourth, the applicant argues the Board ignores how the Canadian government itself previously suspected him of being connected to the LTTE. He and his family members were interviewed at least 11 times by the CBSA concerning the LTTE. The applicant was detained for months and the Minister defended this detention based on a reasonable suspicion of inadmissibility on security grounds. The issue is not whether such connections exist, but whether the Sri Lankan government would suspect the applicant of such involvement. The Board failed to even consider this argument.

[25] Finally, the applicant argues the Board applied the wrong test for compelling reasons under subsection 108(4) of the Act. The Board's reasons indicate it required "egregious or atrocious" treatment, which is not the test from the text of the Act or the case law. The Board was only concerned with past incidents and did not consider the psychological effect of removal on the applicant. The Board did not explain what weight it gave to the psychiatrist's opinion in evidence. This is an error of law reviewable on a correctness standard.

Respondent's Written Submissions

[26] The respondent argues that reasonableness is the appropriate standard of review for the Board's findings and responds to each of the applicant's arguments in turn.

[27] First, the respondent argues there is no contradiction in the Board's finding that the applicant was involved with the LTTE and its conclusion that he would not be perceived as a member or supporter of the LTTE. If the Board thought the applicant was a supporter of the LTTE, it would have considered exclusion under Article 1F of the Convention. Contact or involvement does not equate to support or membership. The applicant had no trouble interacting with the Sri Lankan government before leaving Sri Lanka.

[28] Second, the respondent argues there was no violation of procedural fairness as delay in claiming protection is an element of credibility. The screening form was completed in 2010 but the hearing was not until 2012. The applicant was asked about his failure to claim in Thailand at the hearing and this constitutes adequate notice.

[29] Third, the respondent argues the Board properly considered the *sur place* claim. The Board placed less weight on the Amnesty International report dealing with risks for those on the *Sun Sea* due to its dated sources.

[30] Fourth, the respondent argues that the Canadian government concluded, based on the evidence, the applicant was not a member or supporter of the LTTE. The applicant's argument would transform anyone detained by the Canadian government in order to ascertain terrorist involvement into a *sur place* refugee. The Board concluded that this treatment did not put the applicant at risk upon re-entry to Sri Lanka.

[31] Finally, the respondent argues there was no error in the compelling reasons analysis which was an alternative finding. The Board did consider the psychological report, but it was based on the applicant's own evidence of his past experience, which the Board had concluded was not credible.

Analysis and Decision

[32] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[33] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786). Similarly, the weighing of evidence and the interpretation and assessment of evidence are reviewable on a standard of reasonableness (see *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[34] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[35] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Khosa* above, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[36] **Issue 2**

Did the Board err in rejecting the applicant's claim?

The applicant has identified three problems with the Board's substantive consideration of his claim under sections 96 and 97. I agree that these defects render the Board's decision unreasonable.

[37] The Board concluded that the applicant had "contact or involvement" with the LTTE while simultaneously concluding that the Sri Lankan government would not suspect the applicant of "membership or support" of the LTTE. The respondent's counsel goes to great lengths to distinguish between these two concepts. I agree that it is possible in theory that not all contact would amount to support. However, the Board itself offered no such fine-grained analysis. It simply offered the two factual findings side-by-side without further comment. Given the repeated findings by the Board that anyone merely suspected of supporting or being a member of the LTTE would face an enhanced risk upon return to Sri Lanka, failure to consider whether such "contact or involvement" could trigger suspicion from the Sri Lankan government is a serious omission.

[38] Regarding the *sur place* claim, the applicant filed more than thirty pages of reports concerning the attribution of LTTE links to passengers of the *Sun Sea* and two past Board decisions where successful *sur place* claims had been made out based on this exact risk. The Board's evaluation of this evidence is contained in a single sentence: "There is no evidence that the claimant having come via the Sun Sea ship has consequently been found to have links with the LTTE". While the Board is presumed to have considered all the evidence, I agree with the applicant that using this language to dismiss this substantial and relevant evidence is an error.

[39] I also agree with the applicant's concern that the verb tense in this sentence suggests the Board was only concerned with whether the applicant had already been linked to the LTTE based on travelling on the *Sun Sea*, as opposed to whether he would be linked with the LTTE upon return. It is axiomatic that the refugee definition is forward-looking and the Board failed to analyze that risk properly.

[40] On the point of the Canadian government's own suspicion of the applicant for LTTE involvement, the respondent's counsel again makes arguments that are not contained in the Board's decision. The applicant's submissions to the Board clearly argued that the Canadian government's suspicion was evidence of how the Sri Lankan government would view him. The Board failed to consider this argument in its reasons.

[41] The respondent's argument that such a submission makes a *sur place* refugee out of anyone detained by the Canadian government is hyperbole. All refugee claims must be decided based on the facts of individual cases. The Canadian government's detention and interrogation of the applicant is relevant evidence to whether the Sri Lankan government would do the same. It may very well not be determinative, but it is of adequate significance that the Board must consider it.

[42] While a reviewing court is required to supplement a tribunal's reasons before rejecting them, that does not mean the court must substitute itself for the tribunal and determine the merits on its own motion (see *Szabo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1422 at paragraph 11). Accepting the respondent's arguments on the factual irrelevance of the Board's

finding regarding the LTTE, the applicant's passage on the *Sun Sea* and the Canadian government's suspicion of him would amount to such a substitution.

[43] While I appreciate that the Board was faced with a substantial and complex record in a case with significant public profile, there are serious omissions in the Board's decision that bring it into conflict with the *Dunsmuir* above, values of transparency, justification and intelligibility. It is therefore unreasonable.

[44] Given my decision on this issue, I need not consider the procedural fairness argument or the issue relating to the test applied in the compelling reasons analysis.

[45] The application for judicial review is therefore granted, the Board's decision is set aside and the application is referred back to a different panel of the Board for redetermination.

[46] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Board's decision is set aside and the application is referred back to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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.
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.

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:

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 :

(a) the person has voluntarily reavailed themself of the protection of their country of nationality;

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

(b) the person has voluntarily reacquired their nationality;

b) il recouvre volontairement sa nationalité;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

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

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

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(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.

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

(3) Le constat est assimilé au rejet de la demande d'asile.

(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

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