

Federal Court



Cour fédérale

**Date: 20131108**

**Docket: IMM-2996-13**

**Citation: 2013 FC 1141**

**Vancouver, British Columbia, November 8, 2013**

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

**Docket: IMM-2996-13**

**BETWEEN:**

**B376**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant was one of the many persons on board the MV SUN SEA when it landed in Canada. He made a claim for refugee protection on October 10, 2010. Ultimately, his claim proceeded to a hearing on April 3, 2012. The Member of the Refugee Protection Division hearing the matter released his decision some eight months later, on March 12, 2013, finding that the Applicant was neither a Convention refugee nor a person in need of protection, therefore rejecting his claim for that protection. This is a judicial review of that decision.

[2] For the reasons that follow, I find that the matter is to be sent back for reconsideration by a different member.

[3] There is no dispute that the Applicant is a young Tamil male who, until he made his voyage on the MV SUN SEA grew up in the northern part of Sri Lanka. He and his family were caught up in the recent war in Sri Lanka causing them to move to another part in the north and, ultimately, to a government camp for displaced victims of the war. There is no evidence that the Applicant was ever recruited by, or a member of, the LTTE, a Tamil group that was ultimately defeated in the war. Apparently, his sister was recruited by the LTTE and lived in their camps until she escaped a few months later.

[4] The Applicant claims that while he was in the government camp he was subjected to beating and torture. He claims that when he was released from the camp he was required to report to the camp daily and he and his family received threatening phone calls from those who were suspicious that he was, or was still, a member of the LTTE.

[5] The war in Sri Lanka is over. However, the government is still suspicious of lingering LTTE sentiments. There are, apparently, also those with private scores to settle.

[6] The Applicant apparently secured a Sri Lankan passport without difficulty and purchased an airline ticket for Thailand without difficulty. In an amended Personal Information Form submitted a couple of weeks before the hearing, the Applicant states that he had to pay a bribe to a Sri Lankan official at the airport, of \$500 concealed in his passport, in order to exit the country.

[7] The issues considered by the Member were put forward at paragraphs 27 to 29 of his

Reasons:

*[27] The credibility of the claimant is a significant issue in this claim. As is set out below, I find that a number of important elements alleged by the claimant are not established by credible or trustworthy evidence. Having said that, there is also the question of, even if the claimant's specific story is deficient, is there a serious possibility of persecution or the probability of section 97 risk or danger should the claimant return to Sri Lanka as a young Tamil male who lived in the North Province of that country. Finally, does the fact that the claimant was one of those who traveled to Canada on the MV Sun Sea, itself, increase that possibility or probability, as well as would his being a failed refugee claimant if he returned to Sri Lanka.*

*[28] In addition to alleging the need for protection under section 97 of the Immigration and Refugee Protection Act ("the Act"), the claimant also made claim to be a Convention refugee by reason of race, nationality, membership in a particular social group and political opinion. As noted earlier, at the hearing counsel advised that he was not going to rely on the ground of nationality. As well, when asked for a brief definition of the applicable "social group" he was proposing, counsel stated it was made up of "young male Tamil passengers on the Sun Sea vessel".*

*[29] With respect to the claim based on race, i.e. the claimant is Tamil, I have considered that allegation also in the context of political opinion or "perceived" political opinion as it might relate to Tamils.*

[8] The conclusions reached by the Member can be found with reference to paragraphs 84 to 88

and 99 and 100 of his Reasons:

*[84] Considering all of the above evidence, I find on a balance of probabilities that it is a connection or suspected connection with LTTE that draws the potential for detention and mistreatment for Tamils today in Sri Lanka by representatives of the government as opposed to the earlier formulation that all Tamils from the north were exposed to the possibility for persecution or the probability of section 97 risks or danger. What then is the situation for a returning Tamil, such as the claimant, who traveled to Canada on the Sun Sea?*

[85] *As stated earlier, in my view, on a balance of probabilities, this claimant was of no interest to the authorities with respect to any connections with LTTE. That was the state of affairs when he left the country. I conclude on a balance of probabilities that the government at that time did not have any concerns about the claimant's LTTE involvement or his knowledge of its activities.*

[86] *If, upon his return, and security authorities conclude he was on the Sun Sea, they will want to question the claimant about that. They may wonder if the claimant knows who arranged for or financed the ship or who was paid for his passage. They may ask if he learned anything about any individuals or crew having LTTE connections. Aside from overhearing some squabbles during the long passage, this claimant alleges that he knew virtually nothing. In response to questions from his counsel, the claimant testified that he did not know if there were any past or current members of LTTE on the MV Sun Sea and that he would not be able to identify any LTTE members who were on the ship.*

[87] *It is important to note that the Sri Lankans will likely already know much about the claimant when he returns. Through CID and IDP camp records they will know that he was processed with hundreds of thousands of others at the end of the fighting, but was not sent to the special detention camps reserved for LTTE suspects. It is difficult for me to conclude in all of the particular circumstances of this claimant (and I do not do so) that the authorities would believe that this claimant would likely have any material knowledge about how the smuggling operation was organized, by whom, or would be in a position to provide any information about LTTE activities back in Sri Lanka.*

[88] *Counsel is suggesting that the mere fact that the claimant was part of the contingent on the Sun Sea should be sufficient to lead to a conclusion that he would be persecuted upon his return. In other words, for that reason he is a member of a particular social group for the purposes of Convention refugee determination. In fact, at the outset of the hearing, counsel defined the particular social group as "young male Tamil passengers on the sun Sea vessel". That type of formulation of a "particular social group" has recently been considered and rejected by the Chief Justice of the Federal Court in the 2012 decision in MCI v. B380.*

...

[99] *In coming to my determinations, I must do so based on the evidence presented to me. I have considered the material about the*

*treatment of returnees to Sri Lanka. In my assessment, the evidence regarding such treatment provided by the claimant is, at best, mixed and there are, as noted above, differing opinions from various sources on what has happened to returnees in the past. I find, based on my consideration of the evidence to which I have been referred in this case, that the claimant has not established with credible evidence that failed refugee claimants returned to Sri Lanka are systemically persecuted or face section 97 risks or danger, including torture, unless they are suspected of LTTE involvement. In my assessment this includes passengers who traveled on the Sun Sea.*

*[100] After taking all of the evidence into account, especially the claimant's personal circumstances about which I have concluded that the claimant is a known quantity to the Sri Lankan authorities with regard to the LTTE and that they do not likely associate him with that organization, I find that the claimant has not established with credible and trustworthy evidence that there is a serious possibility he would be persecuted or, likely, be tortured or abused upon his return or that any detention he might face while his is questioned would extend beyond the time necessary to go through that process and retrieve and review the claimant's records, unaccompanied by persecution, risk or harm.*

[9] Nowhere in his Reasons did the Member specifically give consideration to section 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

### ISSUES

[10] The following issues are for determination in this case:

1. What is the standard of review of the Member's decision?
2. Was the Member compelled to make an analysis under subsection 108(4) of IRPA?
3. Did the Member ignore or misinterpret critical evidence?
4. Did the Member fail to afford fairness to the Applicant in respect of the amendments to his PIF respecting payment of a bribe to exit the country?

5. Was the Member's decision that there was no nexus to racial and/or political grounds for granting refugee protection correct or reasonable?

1. Standard of review

[11] There are two matters to be considered. The first is in respect of the Member's determinations based on the evidence; in that respect the standard of review is reasonableness. If it is alleged that the Member ignored critical evidence then the review must be directed as to whether the evidence was ignored and whether it was critical.

[12] With respect to subsection 108(4) of IRPA, I am in agreement with Justice Rennie in his determination in *Subramaniam v Canada (MCI)*, 2012 FC 843 at paragraph 12, that the Board is obligated to consider subsection 108(4) in every case in which it finds changed circumstances under subsection 108(1)(e) of IRPA. Thus, while any conclusion reached under subsection 108(4) would be reviewed on a standard of reasonableness, there is no deference in whether to consider subsection 108(4) or not.

2. Was the Member compelled to make a finding under subsection 108(4) of IRPA?

[13] To deal with this issue the Court first must consider the findings of the Member on the evidence to determine whether they were sufficiently critical to trigger a subsection 108(4) inquiry.

[14] I begin with the Member's findings at paragraphs 50 to 55:

*[50] It is in the evidence regarding the next events where I have concluded that important parts of the claimant's story are not trustworthy.*

*[51] Upon his arrival, the claimant was ordered to a nearby CID camp where he was registered. I do not find that fact alone to be*

*persecutory and, more likely, part of the government's ongoing efforts to ensure that the war would not start up once again. Simply keeping track of the whereabouts of young Tamils alone does not, in my assessment, constitute persecution in all of those circumstances.*

*[52] The claimant alleges he was beaten severely and threatened to be dropped on his head after his ankles have been tied together. However, after interrogating him, he was then released upon the condition that he appear each day to "sign in" and not tell of what allegedly happened to him at the camp. In my assessment, the fact that he was released is strong evidence that any links government officials might have thought he had to LTTE were very weak, if nonexistent. If they held firm suspicions that he was involved, why would they simply release him as they did in the first place, rather than send him to one of the LTTE detention camps?*

*[53] The claimant then related what I find to be difficult to accept as credible evidence regarding his receiving repeated telephone calls from the CID wherein specific accusations of his being recruited by LTTE and having lied to CID about his role with the LTTE were made and that, if he did not "start telling the truth", he and his family would be killed.*

*[54] When assessing credibility, there are two principles to be followed: First, when a claimant swears to the truthfulness of certain facts, this creates a presumption that what he or she is saying is true, unless there is reason to doubt it. Secondly, when assessing credibility, a panel is entitled to rely on its rationality and common sense. In this case, applying my common sense, I find that there is reason to doubt the claimant's truthfulness in relating his evidence about these telephone calls. The explanation he provided was not satisfactory in resolving these doubts.*

*[55] As stated, the claimant had already been to the CID camp and released with the requirement that he report in daily. This he did. He wrote that, after he began getting these calls, he stated in the house, except to attend daily to the very camp where his alleged accusers had him personally available to them on an ongoing basis. While he says he was frightened when he went there, he offered no evidence that he actually was physically bothered again. Why would CID make such calls to him at home when he was easily available to them as I have described? In any event, there is no evidence that, although these calls went on for some time, the persons said to be making them ever went to where the claimant was living for any reason, including to apprehend him. I find all of that being*

*inconsistent with a genuine government suspicion that he claimant was LTTE affiliated in some way.*

[15] Then, I turn to paragraphs 96 and 97 of the Member's Reasons:

*[96] The government of Sri Lanka has a legitimate concern that the terrorist LTTE organization be prevented from renewing the conflict that ended in 2009. It is legitimate that people arriving back in Sri Lanka, such as the claimant would, as was the case in Canada upon their arrival, be interviewed, perhaps extensively, including a review of any records the authorities might have about any individual before they are released. Regarding this claimant, records in Sri Lanka would likely include his having been questioned a number of times, not being sent to an LTTE detention camp, being released from the IDP camp, allowed to move about the country, and legitimately renew his genuine passport and leave the country, as I have found, unmolested and unimpeded. As I noted earlier, the country document notes that Sri Lanka has both entry and exit immigration controls. As well, all passports are swiped into a Computerized Passenger Clearance system when individuals travel through ports of entry, such as the Colombo airport from which this claimant left Sri Lanka. The authorities in Sri Lanka would therefore know when he left and that his departure was lawful. In assessing the evidence, given my determination that this claimant would be of little interest to Sri Lankan authorities with respect to LTTE, I conclude that, while he may be detained for a period of time upon his return, that time would not be overlong, and a process a country like Sri Lanka, like Canada when he arrived here, is entitled to do in all of the circumstances.*

*[97] I have found it not likely that the Sri Lankan government held a belief that the claimant had any connections with LTTE when he was in that country and when he was freely allowed to leave it. While there is clearly support for the proposition that, for those that the government has concluded likely do have LTTE connections, there are possibilities that they could be persecuted or harmed, that connection should not be presumed simply because the claimant was on the Sun Sea.*

[16] Lastly, I turn to paragraphs 99 and 100 of the Member's Reasons:

*[99] In coming to my determinations, I must do so based on the evidence presented to me. I have considered the material about the*



*treatment of returnees to Sri Lanka. In my assessment, the evidence regarding such treatment provided by the claimant is, at best, mixed and there are, as noted above, differing opinions from various sources on what has happened to returnees in the past. I find, based on my consideration of the evidence to which I have been referred in this case, that the claimant has not established with credible evidence that failed refugee claimants returned to Sri Lanka are systemically persecuted or face section 97 risks or danger, including torture, unless they are suspected of LTTE involvement. In my assessment this includes passengers who traveled on the Sun Sea.*

*[100] After taking all of the evidence into account, especially the claimant's personal circumstances about which I have concluded that the claimant is a known quantity to the Sri Lankan authorities with regard to the LTTE and that they do not likely associate him with that organization, I find that the claimant has not established with credible and trustworthy evidence that there is a serious possibility he would be persecuted or, likely, be tortured or abused upon his return or that any detention he might face while his is questioned would extend beyond the time necessary to go through that process and retrieve and review the claimant's records, unaccompanied by persecution, risk or harm.*

[17] In looking at those reasons, it is by no means clear as to whether the Member found the Applicant's evidence as to being tortured in the camp was credible or not. It can be inferred, upon careful reading, that he may have found this evidence to be credible since he clearly found that evidence concerning continuing phone calls not to be credible. At paragraph 65 of his Reasons, the Member refers to the evidence of mistreatment at the camp to be "alleged".

[18] The Member's dealing with newspaper articles at paragraphs 93 to 95 of his Reasons have not been reproduced because of their length, he does not refer to more recent articles which correct or reflect upon the article the Member refers to. The Applicant submitted those more recent articles and they are listed as materials to which the Member ought to have reference, but he does not comment upon them. Had he looked at the more recent articles, he would have realized that the article he did examine has been severely criticized.

[19] At paragraph 99 of his Reasons, which I have reproduced, the Member acknowledges that the evidence regarding the treatment of returnees to Sri Lanka “is, at best, mixed” and that there are “differing opinions from numerous sources on what happened to returnees.”

[20] Given the doubt as to the Member’s findings as to credibility respecting torture, and the apparent overlooking of relevant articles and the Member’s acknowledgment that the evidence respecting returnees is mixed, I find that the failure of the Member to conduct a subsection 108(4) analysis is an error to be reviewed on the standard of correctness. On this ground, the matter should be returned for reconsideration by another member.

[21] At this point, I turn to the decision of Justice Harrington of this Court in *BI35 et al v Canada (MCI)*, 2013 FC 871. In that case, Justice Harrington had evidence before him that was not before the Board, namely, evidence concerning two members of the passenger list of the MV SUN SEA who had been returned to Sri Lanka. The whereabouts of one is unknown; the other was beaten and tortured for a year. This evidence could not have been before the Member in this case since the events occurred after final submissions were made in this case. Presumably, when the present matter is re-determined, the Minister may make this and like evidence available to the Member re-determining the matter.

3. Did the Member ignore or misinterpret critical issues?

[22] As I have determined in respect of the previous issues the answer is yes.

4. Did the Member fail to afford fairness to the Applicant in respect to the amendments to his PIF respecting payment of a bribe to exit the country?

[23] I have reviewed the transcript of the Applicant's testimony in this regard. The Applicant was clearly confronted with the issue and given an opportunity to respond, which he did. Further, the Applicant made substantial post-hearing submissions in respect of this matter. There was ample fairness.

[24] Counsel for the Applicant argues that the member did not fully appreciate the Applicant's reasons for not mentioning the bribe earlier, namely, that other events were more significant to him. I find that the Member's handling of this evidence was reasonable.

5. Was the Member's decision that there was no nexus to racial and/or political grounds for granting refugee protection correct or reasonable?

[25] Each case must be considered on the merits. There can be no broad generalizations as to racial or political matters. On the merits, I have found difficulties as set out above and the matter will be returned.

#### CONCLUSION – CERTIFICATION - COSTS

[26] In conclusion, the matter will be returned for re-determination by a different member. The matter is fact-specific, no question will be certified. There is no special reason to order costs.

**JUDGMENT**

**FOR THE REASONS PROVIDED,**

**THE JUDGMENT OF THE COURT is that:**

1. The application is allowed;
2. The matter is returned for re-determination by a different member;
3. No question is certified;
4. No order as to costs.

“Roger T. Hughes”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-2996-13

**STYLE OF CAUSE:** B376 v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

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AND JUDGMENT:** HUGHES J.

**DATED:** NOVEMBER 8, 2013

**APPEARANCES:**

Shepherd Moss FOR THE APPLICANT

Hilla Aharon FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Shepherd I. Moss FOR THE APPLICANT  
Barrister and Solicitor  
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Vancouver, British Columbia