Federal Court  Cour fédérale

Date: 20140731

Docket: IMM-2174-13

Citation: 2014 FC 769

Ottawa, Ontario, July 31, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AHILAN SELVARAJAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated February 6, 2013 [Decision], which

refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss. 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 37-year-old citizen of Sri Lanka of Tamil ethnicity, who came to Canada in 2010 aboard the MV *Sun Sea*. He comes from Ampara in the Eastern Province and, according to his Personal Information Form [PIF], his wife, two daughters, mother and four siblings still live there. He has a bachelor of Fine Arts from the University of Jaffna and made a living as a self-employed farmer, teacher and finance officer for the NGO CARE International from 2005 to November 2009.

[3] The Applicant alleges that in July 2008, he started receiving calls from an unknown man demanding money for unknown reasons. He claims that he was kidnapped at the end of December 2009 and was held until February 3, 2010. One of the kidnappers offered to help him escape for an amount of money smaller than what his kidnappers were demanding. After paying this individual 10 Lakhs, the Applicant was released. The Applicant testified that he later learned that his kidnappers were the Karuna group – a paramilitary group with links to the Sri Lankan government – because they called and visited his wife after he left Sri Lanka.

[4] The Applicant fled Sri Lanka on February 13, 2010 with the assistance of the same kidnapper who released him. He arrived in Thailand and then boarded the MV *Sun Sea* arriving in Canada on August 13, 2010.

[5] The Applicant claims that he fears a paramilitary Tamil group called the Karuna group because he had promised to pay them a large sum of money and did not. He claims he is also at risk from government authorities if he returns to Sri Lanka because of his travel on the MV *Sun Sea*, which has been labelled a Liberation Tigers of Tamil Eelam (LTTE) vessel.

DECISION UNDER REVIEW

[6] The RPD found that the Applicant was neither a Convention refugee nor a person in need of protection as described in s. 97 of the Act. The Board stated that credibility was the determinative issue.

[7] With respect to the Applicant's credibility, the Board found that the reasons given by the Applicant as to why he feels targeted are very general and not linked to him personally. The Applicant claims that he was perceived to have a lot of money because he worked as a finance officer for CARE International, and would be suspected of taking money from CARE and providing it to the LTTE. The Applicant testified there were rumours going around about this, and the government had alleged the same thing about people working with NGOs.

[8] The RPD found that the Applicant must show that he tried to seek and did not receive help due to the state's inability to protect him. The RPD also observed that the Applicant works for a large international NGO and did not approach them for any assistance.

[9] The RPD observed that the Canada Border Services Agency (CBSA) phoned the Applicant's wife to ask about the last time she saw him, and she claimed that he was with her

every day from January to March 2010. This contradicted the Applicant's abduction claim and stated departure date. When asked why his wife would not say that he was kidnapped, the Applicant said that he had instructed her not to say anything for fear that something might happen to her and the children. The RPD also asked why he left his family behind, and the Applicant said his wife was pregnant at the time and his parents told him to go first. The RPD found that this was not the behaviour of someone with a subjective fear, and that if the Applicant was truly fearful, he would not have left his family there alone. As such, the RPD believed his wife's statement rather than the Applicant's and found that he was not kidnapped, was not helped by a former captor to leave, and left because he did not like Sri Lanka.

[10] In addition, due to the inconsistencies between the Applicant's allegations and his wife's answers to the CBSA, the Board generally found that the Applicant was not credible. Based on this finding of a general lack of credibility, the Board found that the Applicant did not have a profile that put him at risk of serious harm.

[11] The RPD found that the Applicant has no arrests, was not wanted by police, passed through checkpoints easily, did not register in Colombo because he did not need to, and left the country without incident. When asked why the government would think that he was on the MV *Sun Sea* ship, he said that the Tamil Congress, a Tamil political party, had all the names of people in the boat and would share this information with the government.

[12] The RPD gave no weight to a letter provided by the Applicant's wife stating that the Criminal Investigation Department (CID) was looking for him, finding that this was not

independent evidence since the Applicant's wife would want to help her husband in any way she could.

[13] The RPD found that the Applicant's fear was based on a fear of criminality, namely extortion by Tamil criminals known as the Karuna group, which does not provide a nexus to a Convention ground.

[14] As for the risk to life or risk of cruel and unusual treatment or punishment, the RPD found that the Applicant would not, on a balance of probabilities, face a risk other than those faced by others generally in Sri Lanka, including Tamils. The RPD stated that the Applicant's fear is consistent with the method of extortion identified in the country documentation (citing Immigration and Refugee Board, Response to Information Requests (RIRs), LKA103588.E, 27 September 2010). The RPD accepted that the Applicant was perceived as having earned a substantial sum of money, or having access to money, because had he worked for an international NGO; however, the Board found that he is similar to others working in NGOs and as such he faces the same risk faced generally by persons who are engaged in business and/or have money. The RPD stated that a person applying for protection must demonstrate not only the likelihood of personalised risk, but also that the risk is one not faced generally by others in or from the same country. It found the Applicant had not done so.

[15] With respect to the *sur place* claim, the Board noted that the Applicant claimed he could not return to Sri Lanka because he was a passenger on the MV *Sun Sea*. Due to the media publicity regarding the MV *Sun Sea*, which Canadian officials have labelled an LTTE ship, the

Applicant claimed he is at risk of persecution because he will be perceived as an LTTE supporter. The RPD observed that, based on documentation disclosed at the hearing, there have been only four cases of returnees being detained upon arrival in Sri Lanka, and these people had outstanding criminal records while the Applicant does not. In addition, the British High Commission monitors returnees and has observed that they are able to pass through routine checks at the airport and are not mistreated. The Board found that the country documentation shows there has been an improvement to the situation in Sri Lanka and more people are returning from India and elsewhere. The documents also suggest that this trend is expected to accelerate and that repatriation by the United Nations High Commissioner for Refugees (UNHCR) had begun since October 2011.

[16] The RPD noted that the United Nations High Commission for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook) states the following with respect to the definition of a "*sur place*" refugee:

> 95. A person becomes a refugee "*sur place*" due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.
>
> 96. A person may become a refugee "*sur place*" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

[17] While the Applicant alleges that it is because of media reports in Canada that he will be labelled as LTTE in Sri Lanka, the RPD found that this is not a circumstance arising in Sri Lanka, which remains at peace with great efforts being made to rebuild the country. The RPD noted that it had to assess whether the Canadian media's opinion of the passengers on the MV *Sun Sea* would come to the notice of the authorities in Sri Lanka.

[18] The RPD examined the Minister's disclosure package, which contained documents related to both the MV *Sun Sea* and the MV *Ocean Lady*. The Board determined that it should only consider the documents relating to the MV *Sun Sea*, because the MV *Ocean Lady* was a separate ship and the issues raised might be distinct. The Board did consider a statutory declaration by an RCMP Sergeant regarding the process put in place for the treatment of claimants from the MV *Ocean Lady*, because the Board found that the same process would have applied to the MV *Sun Sea* passengers.

[19] The RPD noted a suspension of deportation from the UK based on possible evidence of torture after Tamils were deported to Sri Lanka, as discussed in media reports provided by the Applicant. The Board noted that the media reports were based on a Human Rights Watch Report, dated May 29, 2012, which "suggests there may be some new evidence relevant to the risk of ill treatment." The Board found this was in contrast to a document from UNHCR stating that security in Sri Lanka is improving and the "operational environment has been shifting from humanitarian relief to early recovery and development." This document also outlines assistance that is provided to returnees through the various phases of reintegration, and states that UNHCR is maintaining close links with government ministries and the Presidential Task Force for

Resettlement, Development and Security in the Northern Province. The RPD preferred the evidence from the UNHCR since "it is demonstrative of a plan of support action with the Sri Lankan government, on the ground and in Sri Lanka."

[20] The RPD found that there is no evidence that the government of Sri Lanka would be interested in the Applicant, despite his having arrived in Canada on the MV *Sun Sea*. The Minister's disclosure package included evidence that the Sri Lankan government is working responsibility towards establishing peace and stability, and that the country is a "full-fledged democracy" and wishes to "continue its democratic traditions," though Sri Lanka's security continued to be threatened "through indirect methods" such as the LTTE's ability to smuggle weapons using funds raised abroad and to smuggle people for financial gain. The same documentation spoke of the Sri Lankan authorities' view that Sri Lanka should ignore what it considers "western propaganda." The RPD was not convinced that the Sri Lankan authorities would be interested in what the Canadian media have to say about the passengers on the MV *Sun Sea*, finding that the authorities would view such reports as "propaganda of the west."

[21] The RPD concluded that the Sri Lankan government is engaged in rebuilding the country. In addition, there was no evidence that the Applicant is considered to be a sympathiser of the LTTE or to have links to the LTTE or any other organization. As such, the Board found his return would be of no interest to the Sri Lankan authorities beyond routine questioning.

[22] Based on these findings, the Board concluded that the Applicant is not a Convention refugee and is not a person in need of protection.

ISSUES

[23] Some of the issues identified in the Applicant's written submissions were withdrawn at the hearing of this matter. The following issues remain to be considered by the Court:

a. Did the RPD make unreasonable credibility findings?

b. Did the RPD fail to consider the Applicant's risk of torture under s. 97(1)(a) of the Act in circumstances where it should have been considered?

STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] 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 settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[25] It is well established that the Board's credibility findings are entitled to deference: see *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4; *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155 at para 9. Issue a. is therefore reviewable on a standard of reasonableness. Issue b. relates to

the Board's appreciation of the evidence and whether an analysis under s. 97(1)(a) was warranted in the circumstances. The Board's evaluation of the evidence is entitled to deference (see *Magid Sefeen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 380 at paras 4, 11; *Garavito Olaya v Canada (Minister of Citizenship & Immigration)*, 2012 FC 913 at paras 48, 68; *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at para 42) and a standard of reasonableness therefore applies to issue b. as well.

[26] 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 [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration)v Khosa,* 2009 SCC 12 at para 59. Put another way, the Court should intervene only 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."

STATUTORY PROVISIONS

[27] The following provisions of the Act are applicable in these proceedings:

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	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

social group or political opinion,

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.
[…]	[…]

ARGUMENT

Applicant

[28] As noted above, the Applicant withdrew some of his arguments at the hearing of this matter – specifically, the arguments set out in paragraphs 20-36 of his Memorandum of Argument. The following matters remain to be considered by the Court.

[29] The Applicant argues that the Board's finding that he should have sought the protection of Sri Lankan authorities was unreasonable, because his claim was based on a fear of the authorities and the record includes evidence of systemic torture by those authorities or their

associates (Application Record at p. 115). He says it was also unreasonable for the Board to find that the Applicant was required to seek the protection of CARE International.

[30] The Applicant concedes that it was reasonable for the Board to reject his evidence that he had been abducted based on his wife's answers to the CBSA. However, the RPD also rejected evidence set out in a letter from the Applicant's wife that the CID had visited his home and was searching for him, accusing him of working for the LTTE cause. The Applicant argues that the RPD cannot have it both ways: it cannot accept the wife's evidence when it destroys the Applicant's evidence regarding the basis for his fear, and then reject her evidence when it supports his fear. In this respect the Applicant says the Board's reasons are manifestly contradictory.

[31] Moreover, the Applicant says, the RPD erred in law by assigning no weight to the Applicant's wife's letter merely because she would be interested in helping her husband. While a witness' relationship to a claimant may be a relevant factor in assigning weight to their evidence, it cannot be the sole basis for rejecting that evidence or assigning it little or no weight: *R v Laboucan*, [2010] 1 SCR 397, 2010 SCC 12 at para 11; *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 458 at paras 25-29 [*Ugalde*].

[32] The Applicant argues that his fear of the Karuna group must be analyzed under s.97(1)(a), relating to a risk of torture within the meaning of Article 1 of the Convention Against Torture, rather than s. 97(1)(b). This is because the Karuna group is closely affiliated with the Sri Lankan government. The Court has confirmed this with respect to another paramilitary group

closely affiliated with the Sri Lankan government, the Eelam People's Democratic Party (EPDP): *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 353 at para 25 [*Pathmanathan*]. The Applicant says the leader of the Karuna group (aka the TMVP) is a government minister – the Deputy Minister of Resettlement. The UN Committee Against Torture has indicated that detainees at paramilitary detention centres in Sri Lanka are tortured (Application Record at p. 117). A risk of torture by agents of the government or by a person with the acquiescence of a government official or a person acting in an official capacity must be assessed under s. 97(1)(a) of the Act (UN Committee Against Torture: General Comment Number 2, paras 15, 17-18). Even if the Applicant will be tortured or mistreated in aid of extortion, or reported to the authorities falsely as a supporter of the LTTE in aid of extortion, this is still torture and the Applicant cannot be returned to face a risk of torture.

[33] The Applicant notes that unlike under s. 97(1)(b), the concept of generalized risk has no place in the s. 97(1)(a) analysis, nor does the concept of criminality since torture is always criminal. The Board's failure to consider the threat from the Karuna group under s. 97(1)(a) was a serious error, the Applicant argues.

[34] The Applicant argues that if the Court is persuaded that there are problematic findings regarding credibility, given that the credibility findings are not many, such an error would be material and the Court must return the matter for reconsideration: *Mofrad v Canada (Minister of Citizenship and Immigration)*, 2012 FC 901 at para 11. The matter should be returned if the Court "cannot be sure that, if the Board had correctly appreciated the facts, it would necessarily have reached the same conclusion": *Moagi v Canada (Minister of Employment and Immigration)*

(1986), 69 NR 229, [1986] FCJ No 326 (FCA); see also *Peng v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 119, 19 Imm LR (2d) 220 (CA); *Sitsabeshan v Canada (Secretary of State)*, [1994] FCJ No 973 at paras 13-14, 82 FTR 29 (TD); *Abdullahi v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 31 (TD).

Respondent

[35] The Respondent notes that the Applicant was found to have fabricated a central element of his claim – that he was kidnapped by the CID and held captive between December 2009 and March 2010 – and has not raised any arguable issue in relation to this finding. The Board found that this allegation was central to the claim, as the Applicant himself stated that this was the incident that led him to leave Sri Lanka, and the Applicant has not challenged this finding.

[36] The Board's reference to the Applicant's failure to seek help from CARE International was made in the context of assessing his credibility, the Respondent argues. The Applicant's credibility is diminished by the fact that he apparently made no effort to deal with the repeated threats he allegedly received, despite working for an organization that may have been in a position to help. In any event, the Respondent argues, the Board's determination in this case did not turn on state protection, but rather on a lack of credibility.

[37] Contrary to the Applicant's position, the Respondent says the Board was not obligated to accept the Applicant's wife's letter as being reliable evidence of the fact that the CID was looking for him simply because it accepted her evidence that the Applicant had been living with her from January to March 2010, at a time when he alleged he was in captivity. The Respondent

submits that these were two different pieces of evidence that were each fairly assessed by the Board. In this case, it was open to the Board to find the wife's letter to be unreliable, as it was the only evidence that was produced to suggest that the Applicant was of interest to the authorities, and it came from a source that could not be counted on to be objective. The *Ugalde* decision cited by the Applicant also held that "giving evidence little weight due to its 'self-serving' nature is an option open to the decision-maker": *Ugalde*, above, at para 25, citing *Sokhi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 140 at para 44; *Hamid v Canada (Minister of Citizenship and Immigration)*, 2007 FC 220 at para 13; and *Kahiga v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1240 at para 12. The Board is entitled to assign minimal probative value to letters written by interested parties, and its evaluation of the evidence should be considered with deference: *Obeng v Canada (Minister of Citizenship and Immigration)*, 2009 FC 61 at para 31.

[38] The Respondent also argues that the Board applied the proper test in refusing the Applicant's claim under s. 97 of the Act. While he claimed to fear extortion because, as a foreign returnee and someone who had worked for CARE International, he would be perceived as wealthy, this was something faced generally by others in Sri Lanka. An application for protection under s. 97 can be rejected if the personalized risk faced by the applicant is a risk that is also shared by a sub-group of the population that is sufficiently large and the risk can reasonably be characterized as being widespread or prevalent in that country. This is particularly so where the risk arises from criminal conduct or activity: *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182 at para 32; *Kuruparan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 745 at paras 132-33 [*Kuruparan*]; *Paramanatham v Canada (Minister of*

Citizenship and Immigration), 2012 FC 338 at paras 32-34 [*Paramanatham*]; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 at para 23, aff'd 2009 FCA 31; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 16; *Lozano Navarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 768 at paras 34-35; *Luna Pacheco v Canada (Minister of Citizenship and Immigration)*, 2012 FC 682 at paras 26-27. Furthermore, the Board's finding that the Karuna group was a criminal organization was open to it on the record: *Nageem v Canada (Minister of Citizenship and Immigration)*, 2012 FC 867 at para 18.

[39] The Respondent says the Board did not err by failing to conduct a separate assessment of the Applicant's risk of torture, because the Applicant fell so far short of demonstrating the necessary test – that it was more likely than not that he would be tortured – that no such analysis was necessary. Even if the Board should have conducted such an assessment, the failure to do so on the facts of this case was not fatal to the decision: *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 38; see also *Bouaoui v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 42; *Mbanga v Canada (Minister of Citizenship and Immigration)*, 2008 FC 738 at para 21.

Applicant's Reply Submissions

[40] With respect to the Board's discounting of the letter from his wife, the Applicant argues that based on the jurisprudence cited above, it is open to the Board to discount interested-party evidence if there is a reason for doing so, but the fact of being an interested party is not such a reason.

[41] The Applicant also argues that the Respondent mis-states what the Applicant has to prove under s. 97(1)(a): it is not that "it was more likely than not that he would be tortured upon return to Sri Lanka," but rather that there is a danger of torture: *Kedelashvili v Canada (Minister of Citizenship and Immigration)*, 2010 FC 465 at para 9.

ANALYSIS

Credibility

[42] The Applicant complains that, in its credibility analysis the Board found unreasonably that the Applicant "was required to seek the protection of CARE."

[43] What the Board actually said was as follows:

> He was asked if he could have just left to return to Amapara since his family was there, and he replied that his parents were only a few miles away. He was asked about going to Colombo, and he replied that the problem is the same everywhere. The claimant must show that he tried to get some help, and didn't because of the state's inability to protect. The claimant was working for a large International NGO and did not approach them either, which would have been reasonable given his job, and the gravity of the allegations. Considering the context, the claimant has failed to rebut the presumption of state protection.

[44] This is clumsy wording, but I think, when read in context, the sense of it is clear enough. It is not a state protection finding. The essential point is that the Applicant alleged that he was under threat, and yet he did not seek protection from either the state or the NGO he worked for.

[45] In the context of a credibility finding, the Board should have referred to some evidentiary basis for its assumption that protection from the state or the NGO was available. Indeed, the Board relies upon the Applicant's failure "to rebut the presumption of state protection," but does not carry out a state protection analysis. In the end, this amounts to a weak plausibility finding to the effect that, if the Applicant was under threat, he would have looked for some form of state or NGO protection. Whether this is the case depends upon the availability of such protection and there is no sufficient evidentiary base to support the Board's conclusion. In the end, however, this error is insufficient to overcome the key feature of the Board's credibility finding:

> [18] The claimant's wife was phoned by CBSA and asked about when she was last with her husband. From the notes, she testified that she was with him everyday from January to March 2010. This is in direct contradiction to the claimant's dates of abduction and departure from Sri Lanka.
>
> [19] He was confronted as to why she would have said this, and he said that he had instructed not to disclose what happened to her. He was asked why he did that, and he said because he feared problems that might be experienced by his wife and children. He was asked why he left the family in Sri Lanka, and stated that his parents told him to go first, and his wife had been pregnant at the time he left. The panel is not satisfied with this answer, as the panel finds that this is not the behaviour of person with a subjective fear. He had a young family, and if he was really fearful, he would not have left them there, alone. The panel draws a negative inference about his reply, and the panel finds that the wife's replies are more spontaneous, and the panel prefers her response, whereas the husband has had time to reflect on his wife's replies. Accepting the wife's statements, the claimant was at home, rather than kidnapped, and preferred to leave because he didn't like Sri Lanka. As a result there are important contradictions about what happened to the claimant; the panel does not believe that the claimant was kidnapped, and doesn't believe that he was helped by a former captor to leave.

[46] The direct contradiction between the Applicant's narrative about kidnapping and how he came to leave Canada and what his wife told the CBSA officers – that he was with her at all

material times (which the Applicant concedes was treated reasonably by the Board) – cannot, in my view, be unseated by a weak plausibility finding about his failure to seek protection.

[47] Of greater import is the Applicant's complaint that the Board unreasonably rejected the evidence of future risk contained in the letter from the Applicant's wife:

> The claimant provided a letter purportedly from his wife, stating that the CID are looking for him. The Panel gives no weight to this letter, as the wife would want to help her husband in anyway [sic] she can. This letter does not provide independent evidence that he is really sought by the CID or any other group.
>
> [footnote omitted]

[48] The Applicant alleges errors in the Board's reasons on the following grounds:

a. The RPD cannot have it both ways. It cannot accept the wife's evidence about where he was, as recounted to CBSA officers, and reject the wife's evidence in the letter; and

b. The RPD cannot reject the letter on the sole ground that it comes from the Applicant's wife.

[49] When paragraph 23 is read in the context of the whole Decision, I do not think the Board was unreasonable with regard to this issue.

[50] In my view, the wife's evidence given to the CBSA officers when she didn't know what her husband wanted her to say is totally different from evidence given (at the last minute) by a wife who has been asked to provide that evidence by her husband; a husband who gave evidence that he instructed his wife to lie and she did so (even though that lie was not accepted by the Board). In the face of this evidence, there is nothing unreasonable about the Board preferring the

wife's evidence given when she is not in a position to take instructions from her husband, but finding her evidence unconvincing when she was instructed by her husband.

[51] This is also why this is not just a case of the Board rejecting evidence simply because it comes from a wife (which clearly would be unreasonable: see *Ugalde*, above, at para 26). The Board says "the wife would want to help her husband in anyway (sic) she can" and the letter "does not provide independent evidence that he is really sought by the CID or any other group" because this evidence comes from a wife who has been instructed by a husband to provide the letter; a husband who, according to his own testimony, has instructed his wife to lie and she did so. I can see no reviewable error with regard to the Board's treatment of the wife's letter.

[52] My conclusion is that the credibility findings, taken as a whole, cannot be said to be unreasonable.

Section 97(1)(a)

[53] The Applicant says that the Karuna group has government affiliation and that he requested an evaluation under s. 97(1)(a) that the Board did not provide.

[54] The Applicant relies upon recent decisions by Justice Strickland in *Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 532at para 73 and by Justice Rennie in *Pathmanathan*, above, at para 25.

[55] As the Respondent points out, Justice O'Keefe made the following important point with regard to the Karuna group in *Kuruparan*, above:

> [131] Further, the evidence indicated that some individual members of the Karuna group extorted money from civilians, but there was no persuasive evidence that these acts were done under the authority and power of the leaders of the organizations. The importance of this observation is that if violence against Tamils was found to be promoted by the leaders of the organization, it could be indicative of a nexus with a Convention refugee ground. Conversely, if individual members are committing criminal acts against the population at large, no such nexus exists (see *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] F.C.J. No. 415 at paragraph 23; affirmed in 2009 FCA 31, [2009] F.C.J. No. 143).

[56] The Respondent takes the position that, although the Applicant may have ticked the box for s. 97(1)(a) in his application, he did not lead adequate evidence to develop this issue and the record shows it was not identified as an issue at the beginning of the hearing, and was not addressed by Applicant's counsel either in oral or written submissions before the Board.

[57] The Respondent also points out that there is very little evidence to support risk from the Karuna group. The Applicant's main point was that he was of interest because he has worked for CARE International and was perceived to have wealth. He no longer works for CARE International and there is no evidence he will do so if he returns to Sri Lanka.

[58] The Applicant points out that there was obviously sufficient evidence of risk from the Karuna group for the Board to address s. 97(1)(b) of the Act; hence, it should also have turned its mind to s. 97(1)(a). In particular, he relies upon paras 31 to 33 of the Decision:

> [31] The claimant's fear is consistent with the method of extortion described above. The claimant was perceived as having

> earned a substantial sum of money from an international NGO, and so was perceived to have some amount of money to extort and so was perceived as wealthy, or as having some money.
>
> [32] Our courts have determined that the fact that the claimant is personally at risk of harm does not necessarily mean that the risk is not one faced generally by others in the claimant's country. The court recognised that there are two elements contemplated by paragraph 97(1)(b)ii) and the person applying for protection must demonstrate not only the likelihood of a personalized risk contemplated by this section, but also that it is a risk not faced generally by others in or from that country. In another case, the court went further to say that despite the sometimes imprecision of language, "the claimant's risk is one faced generally by others, and thus the claimant does not meet the requirements of the *Act*". In this case the claimant is clearly pointed out as having worked for CARE, so he is perceived as having access to money. He is similar to others working for NGO's but doesn't know them personally, and so he faces a risk faced generally by persons who are engaged in business, and/or have money. He is no different from other Tamils who are returning from other countries.
>
> [33] As a result there is no serious reason to find that the claimant would, on a balance of probabilities, face a risk to life other than those faced by other persons, including Tamils, generally, in Sri Lanka, The claimant is not a person in need of protection in that his removal would not subject him personally to a risk to life or risk to cruel and unusual treatment or punishment or to a danger of torture.
>
> (footnotes omitted)

[59] Here we see the Board accepting that the Applicant is at risk as someone who would be perceived as having access to money because he worked for CARE International, but excluding the Applicant because he faces "a risk faced generally by persons who are engaged in business, and/or have money."

[60] Whether the Applicant faces a risk under s. 97(1)(a) is not known. To begin with, it would all depend upon whether any future Karuna group assailants were acting independently as

criminals or as surrogates or associates of the state. However, it is clear that the Board finds the Applicant to be someone who "is perceived as having access to money" and so "faces a risk faced generally by persons who are engaged in business, and/or have money." The Applicant alleges the Karuna group use torture as well as extortion and there is evidence that Karuna criminals may act (if not at all times) as agents of the state.

[61] The Respondent's argument based upon a lack of evidence of risk cannot prevail over the Board's own finding that the Applicant is at risk as someone perceived to have wealth. It is unreasonable, then, that having found the Applicant to be at risk, the Board did not consider the possible need for protection of s. 97(1)(a).

[62] My review suggests that this issue was not excluded from consideration; nor was it explicitly identified at the hearing as an issue to be determined. It was, however, identified as a basis for claiming protection in the Applicant's PIF.

[63] At the beginning of the hearing, the RPD member made reference to the screening form prepared in order to identify the issues in the claim. (This is prepared by the Board's staff and provided to the parties and the RPD member considering the claim.) After confirming with the parties that identity (initially listed as an issue on the screening form) was not in fact a live issue, the Board proceeded to identify the live issues, and the following exchange with counsel occurred (CTR at p. 1430):

> **MEMBER**: …
>
> So another issue that has been identified is internal flight alternative…

And the next issue is credibility. And it's my understanding that the Minister is here, they are intervening on the basis of credibility. That's a very important element of this claim. Correct?

MINISTER'S COUNSEL: Correct, yes. As well as program integrity (inaudible).

MEMBER: Yeah, and program integrity, okay yeah. M'hm.

And as well whether or not you fit into the convention refugee definition. So more specifically, who's the agent of persecution and perhaps you're a victim of crime. And so if you don't have a nexus, if you have no connection to the convention refugee definition then I have to look at the expanded protection which refers to life or cruel and unusual treatment or punishment and usually what we look for there is if you are a victim of crime, is it a generalized risk or is it personalized.

And the last issue is there's been a change of circumstances so there's no war, nobody is fighting anymore, and the war has been over since May of 2009. So there have been changes in circumstances.

And usually those are issues that are taken up by counsel in his – by the two sides in submissions. But, you know we'll – it also comes out in your testimony.

So I think that I've covered the issues, you know.

COUNSEL: I suggest perhaps sur place.

MEMBER: Sur place, what a surprise.

[…]

That's a complicated subject. It's sur place since he's come to Canada.

[…]

That's – I've made a little check box for that.

Those are the issues…

[64] As can be seen, the Board member did not specifically raise torture under s. 97(1)(a) as an issue (he or she only mentioned risk to life or risk of cruel and unusual treatment or punishment), nor did the Applicant's counsel (not the same counsel as before the Court) specifically add it to the list of issues to be considered (as he did with respect to the *sur place* argument).

[65] The RPD Screening Form can be found at pp. 57-58 of the CTR. At the top of p. 58, it includes the following standard notation regarding the issues identified on that page:

> In accordance with Guideline 7 (Concerning Preparation and Conduct of Hearing in the RPD), the RPD has made the following preliminary identification of the issues it considers to be central to the claim. Nonetheless, the claimant should file evidence, in accordance with the RPD Rules, and be prepared to testify with respect to all aspects of the claim for refugee protection.

[66] On this form, the box for "RISK TO LIFE OR OF CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT s. 97(1)(b)" is checked, but the box for "DANGER OF TORTURE s. 97(1)((a)" is not checked.

[67] However, on his PIF (see Applicant's Record at p. 77) the Applicant checked "Yes" in response to the question: "I am claiming protection as a person in need of protection because I face a danger of torture, as defined in Article 1 of the Convention Against Torture."

[68] The PIF was before the Board. In my view, this amounts to a request that the Board consider torture under s. 97(1)(a). The failure of Board staff to identify it as an issue on the screening form does not negate this, as it is only a "preliminary identification of the issues [the

RPD] considers to be central to the claim." Of potentially more consequence is counsel's failure to identify torture as an issue to be considered. The Applicant argues that the Board nevertheless had a duty to consider s. 97(1)(a) if such a claim arose on the facts of the case. I think this is the better view. Justice Mosely summarized the relevant principle in *Mmono v Canada (Citizenship and Immigration)*, 2013 FC 219 at paras 13-14.

> [13] The Board is not required to make a claimant's case or advance a grounds for a claim that an applicant did not contend.
>
> [14] However, the Court of Appeal did require the Board to consider evidence that obviously emerged from the evidence.
>
> > … As this Court recently said in *Pierre-Louis [sic] v. M.E.I.*, [F.C.A., No. A-1264-91, April 29, 1993.] the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. [*Ibid.*, at 3.] Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.
> >
> > *Guajardo-Espinoza v Minister of Employment and Immigration* (F.C.A.), 161 NR 132, 1993 CarswellNat 306, para 5

[69] Both the Applicant in his testimony (see CTR at p. 1433) and his counsel in submissions (see CTR at pp. 1478-79 and 1485) made reference to the government collaborating with and "making use of" armed paramilitary groups to carry out violence and abductions against Tamils while avoiding responsibility for those acts. Counsel also made reference to evidence that international NGOs are perceived by the government to be supportive of the LTTE (CTR at p. 1478), and the Applicant testified that, as an employee of such an organization with access to its

funds, he was suspected of taking the NGO's money and providing it to the LTTE (CTR at p. 1434 and summary of the Applicant's testimony by the Minister's counsel at p. 1465). It appears from the context that Applicant's counsel's submissions regarding the complicity of government forces with paramilitary groups such as the Karuna group was intended to address the issue of "agent of persecution" in relation to s. 96 (i.e. that the alleged persecution was motivated by a convention ground and not just random violence or crime), but the same evidence could be relevant to a s. 97(1)(a) claim.

[70] The Respondent's point seems to be that the profile of a person who might be targeted for criminal extortion by members of the Karuna group is not the same as the profile of a person who might be targeted for torture by that same group with the complicity of the government. This bears similarities to the distinction identified by Justice O'Keefe in *Kuruparan*, above, between persecution based on Convention grounds with the Karuna group as the agent of persecution on the one hand, and criminal extortion of civilians by individual Karuna group members on the other. Translated into the s. 97(1)(a) context, the argument would be that if the risk is not based on any objective or motive on the part of the perpetrator that the state would have any interest in, this is an indication that the risk involved is not a risk of torture, even if the potential perpetrator is one that sometimes carries out torture at the state's behest or with its acquiescence.

[71] In my view, such an analysis might have been reasonable on the facts of this case. The Applicant's claim that he was a target of the Karuna group not only because of perceived access to money but also because he was perceived to support the LTTE was somewhat in tension with

his later testimony that (at least as far as the authorities were concerned), he was never suspected of being a member of the LTTE (CTR at p. 1448) and the CID had no interest in him prior to his departure from Sri Lanka (CTR at p. 1456). Moreover, from a forward-looking perspective it is not clear why having worked for CARE International several years ago would make the Applicant a target now (unless he truly was perceived as an LTTE supporter). As such, this is a borderline case.

[72] However, this seems like the kind of analysis that should be performed by the Board and not the Court. The Board does not articulate a distinction such as the one noted above; nor can I say from a reading of the Decision as a whole that this is what the Board had in mind. The Board simply fails to deal with the s. 97(1)(a) aspect of the claim.

[73] What we are left with is a finding that the Applicant was at risk from the Karuna group, and evidence that the Karuna group sometimes carries out torture (particularly of Tamil males) at the behest of or with the acquiescence of Sri Lankan authorities. Some justification is required for why this does not amount to a risk of torture that the Applicant realistically faces if returned to Sri Lanka.

[74] In my view, then, the Applicant has established a reviewable error by the Board in its failure to consider risk under s. 97(1)(a).

[75] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Board member.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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