Federal Court  Cour fédérale

Date: 20150626

Docket: IMM-710-14

Citation: 2015 FC 804

Ottawa, Ontario, June 26, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SIVAKUMAR GNANASUNDARAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicant is a citizen of India who alleges that he has been the victim of politically-motivated threats and violence by supporters of the Dravida Munnetra Kazhagam [DMK]. He left India on January 3, 2010, making his way to the United States of America and illegally entered that country on April 21, 2010. He was eventually caught and detained for about seven

months. On May 14, 2010, an asylum officer in the United States determined that the Applicant had "demonstrated a credible fear of persecution or torture."

[2] After the Applicant was released from detention in the United Sates on a bond of $5,000.00, he was smuggled into Canada on November 28, 2010. Three days later, he asked for refugee protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. Because he was not at a port-of-entry when he made his refugee claim, the Applicant was able to circumvent the ordinary operation of the safe third country agreement and his claim was referred to the Refugee Protection Division [RPD] of the Immigration and Refugee Board (*Act*, s 101(1)(e); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 159.4(1)(a)). The hearing before the RPD was held on November 7, 2013, having previously been adjourned for various reasons, including the Applicant's poor health, late disclosure from the RPD, and the absence of an interpreter who could speak the right dialect.

II. Decision under Review

[3] In a decision dated December 24, 2013, the RPD determined that the Applicant was neither a Convention refugee under section 96 nor a person in need of protection under subsection 97(1). It rejected the Applicant's claim for essentially two main reasons. First, the RPD concluded that the Applicant did not fear persecution because his credible fear interview in the United States was successful, and yet by coming to Canada he chose to abandon that claim and "the likely protection he would obtain". Although the Applicant said he did this because there was a better support network for Tamils in Canada, the RPD did not find that explanation compelling. Drawing a parallel between this type of situation and that of delay in seeking

protection, the RPD decided that the Applicant's choice to abandon his claim not only indicated a lack of subjective fear but also damaged his credibility. The RPD stated its findings in this regard as follows:

> [16] Moreover, Professor James Hathaway, a recognized authority on national and international refugee law, has said that it is appropriate to inquire into the circumstances of any protracted postponement of, or inaction on, a refugee claim as a means of evaluating the sincerity of the claimant's need for protection. In this case, the concern is the abandonment of his otherwise promising asylum claim. In that vein, the following provides guidance in respect to the concern on subjective fear as it relates to this claimant's situation.
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> a. In *Leon*, the claimant waited over five years to make a claim. Justice Muldoon of the Federal Court commented:
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> > It is incredible that he [the claimant] would believe that he could not make a refugee claim *because he was an illegal* …. That is incredible. That he would wait for five years in that belief, if that belief were true, is even more incredible.
>
> b. In the case of *Juzbasevs*, the applicant spent about four months in the U.S.A. without making a claim for protection, as she said she was advised by a relative that her case would not qualify. It was not considered to be reasonable that she would not have taken steps to seek proper advice on making a claim. In *Gonzalez*, the applicant and her sons lived in the U.S.A. for four years and three months without making a claim for asylum. A delay of four years was said to suggest a lack of subjective fear and it was open to the Board to reject the applicant's explanations. The lack of evidence going to the subjective element of the claim was found to be in itself sufficient for the claim to fail.
>
> [17] Whether it be lack of action, inaction or simply abandoning one's claim, particularly as it was rendered credible by US authorities, the panel does not find it reasonable that the claimant would simply abandon it, and therefore also draws a serious negative inference against the overall credibility of his claim.

> [18] Based on the foregoing discussion, the panel does not believe his fear to be well-founded or that he faces a risk of harm or to life if he were to return to India today.
>
> [19] The panel also concludes that he does not fear return to India, at this time, as he was willing to risk the protection he had in the US rather than wait and see what would happen to the asylum claim.
>
> [Footnotes omitted; emphasis in original]

[4] The second reason the RPD rejected the Applicant's claim was because it determined that New Delhi was a viable internal flight alternative [IFA]. The Applicant had alleged that he belonged to the Anna Dhiravida Munnetta Kazhagam [ADMK] party at a time when it was in opposition in the state of Tamil Nadu, but the RPD noted that the ADMK had since won a landslide victory in that state in May, 2011. The RPD decided that the Applicant had overstated the dangers he allegedly faced. This was so because:

- The DMK still had power in the central government, but the president of that party almost immediately reached out and congratulated the woman who became the Chief Minister of Tamil Nadu. If the present-day antipathy between the ADMK and the DMK was as severe as described by the Applicant, the RPD did not think it likely that that would have happened.
- While there had been cases of violence during the elections and some DMK supporters are violent, the murders of AMDK functionaries cited by the Applicant had no political motive and due process was followed by the police and the courts.

[5] The RPD also found that the Applicant's profile was nothing more than a local activist from a small town in Tamil Nadu. Although the Applicant claimed he would be harmed anywhere in India because his involvement was pivotal to his party's victory in 2011, he presented no independent evidence for that allegation, his last political activity was in 2009, there was no evidence that his party even won his riding and, in any case, his involvement was

limited to one contested seat out of 234. The RPD thus concluded that the Applicant had exaggerated his importance.

[6] The RPD further decided that the Applicant had not proven that he faced any risk from the police in New Delhi. The Applicant had alleged that the police in Tamil Nadu arrested him as retribution for a complaint against members of the DMK; but that party was no longer in power there and, also, there was no clear and convincing evidence in the country documentation that the police had ever been biased in favour of the DMK. Moreover, the Applicant had only been detained for a day, no arrest warrant was ever issued, his fingerprints were not taken, he was not wanted for any crime, and the RPD inferred from evidence about Punjabi Sikhs that only hard-core militants are generally pursued across state lines. Thus, the RPD decided that the Applicant would not be at risk in New Delhi, and that it was reasonable to expect him to move there.

III. Issues

[7] The Applicant raises three issues:

1. What is the standard of review?
2. Did the RPD err in finding that the Applicant's lack of subjective fear is determinative of his claim?
3. Did the RPD err by its determination that New Delhi is an IFA?

IV. The Parties' Submissions

A. *The Applicant's Arguments*

[8] The Applicant acknowledges that reasonableness is the standard of review for questions of mixed fact and law, but states that correctness applies for questions of natural justice (citing *Kastrati v Canada (Citizenship and Immigration)*, 2008 FC 1141 at paragraphs 9-10).

[9] The Applicant criticizes the RPD's finding that he lacked subjective fear for essentially three reasons. First, it was based on an assertion that abandoning a claim in the United States indicated a lack of subjective fear in the same way that delay in making a claim did, which is a comparison the Applicant says this Court has condemned (citing *Kannuthurai v Canada (Citizenship and Immigration)*, 2012 FC 1288 at paragraphs 5-6 [*Kannuthurai*]). The RPD never actually considered the Applicant's account of the things that happened to him, but neither did it find that the Applicant generally lacked credibility; on the contrary, the RPD appeared to accept some elements of his account were true in making its finding that there was an IFA in New Delhi. The Applicant therefore argues it was unreasonable to rest the entire claim on a finding that the Applicant lacked subjective fear when he has many times been attacked and threatened (citing e.g. *Shanmugarajah v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 583 (QL) (CA) [*Shanmugarajah*]).

[10] Second, the RPD said it was "likely" that the Applicant's claim in the United States would succeed because he had passed the credible fear interview; but, according to the Applicant, there was no evidence to support that finding in the record. If the RPD was relying on

its specialized knowledge, the Applicant says it was required to disclose that knowledge at the hearing.

[11] Third, subjective fear is not required for protection under section 97, so the Applicant asserts it was an error for the RPD not to evaluate that claim at all (citing e.g. *Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501 at paragraph 7).

[12] The Applicant also attacks the RPD's finding that New Delhi was a viable IFA. The RPD relied on a response to information request [RIR] in the National Documentation Package [NDP] about Punjabi Sikhs to find that the police pursue only hard-core militants across state borders. The Applicant says there was nothing about the RIR document which could have alerted him to the fact that it might be consulted by the RPD. In this context, he says the RIR should be treated as extrinsic evidence and it was unfair not to warn him that this document would be used against him (citing e.g. *Buwu v Canada (Citizenship and Immigration)*, 2013 FC 850 at paragraphs 42-46). The Applicant states that he could not be expected to address all of the more than 100 articles in the NDP about a country of more than a billion people, no matter how irrelevant they appeared to be, just on the off-chance the RPD would consult a document that on its face has nothing to do with his claim. Even if it was fair not to warn him that the RIR would be used against him, the Applicant says the RPD completely misread the RIR and that, if anything, it actually supports his position; it states that: "people with money and political clout can pay the police to fabricate charges against someone, including making false allegations against people who are seen as a political threat, who speak out against the leading party," and that the police would use false accusations of militancy to pursue people across state lines.

[13] The Applicant further submits that it was unreasonable for the RPD to find antipathy between the DMK and the ADMK was unlikely based on nothing more than the fact that the president of the Congress party congratulated the Chief Minister after the Tamil Nadu state election, especially since the RPD accepted other evidence which showed there were violent clashes between the two political parties. The Applicant says this was a plausibility finding and should be afforded little deference (citing *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481 (QL), 143 NR 238 (CA); *Cao v Canada (Citizenship and Immigration)*, 2007 FC 819; and *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653). As Tamil Nadu was an important region and so was the city in which he was active, the Applicant says the risk that DMK party members would target him was never assessed.

B. *The Respondent's Arguments*

[14] The Respondent contends that reasonableness is the standard of review for all issues and defends the RPD's decision. Delay in making a refugee claim has long been recognized to indicate an absence of subjective fear, and the Respondent argues that abandoning a refugee claim that has received favourable treatment is an even stronger basis for such an inference. The Respondent further contends that it is disingenuous for the Applicant to criticize the RPD for saying that a grant of asylum was likely, since that implies the Applicant's position is that his claim has no merit and would probably have been rejected.

[15] The Respondent also argues that the RPD's finding of an IFA is unassailable. India is a massive country and internal relocation is an obvious option for someone seeking safety. The

Respondent states that it would be absurd to find that a document in the NDP is "extrinsic evidence." It was disclosed as part of the list and the Applicant was entitled to address it, if only to dispute its relevance. Furthermore, the RIR was only addressed in order to discount the Applicant's embellishment about how influential he was and it should not be open to him now to protest its relevance. Ultimately, the Respondent emphasizes that there are no warrants for the Applicant's arrest and it was reasonable for the RPD to find that he would not be pursued in New Delhi.

V. Analysis

A. *Standard of Review*

[16] I disagree with the Applicant's argument that it was unfair not to warn him that the RIR would be used against him, and that, consequently, this aspect of the RPD's decision should be reviewed on a standard of correctness. I agree with the Respondent that reasonableness is the standard of review for every other issue raised by the Applicant. This being so, the Court should not interfere with the RPD's decision so long as it is intelligible, transparent, justifiable, and defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190). A reviewing Court can neither reweigh the evidence that was before the RPD, nor substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339). The RPD's decision should therefore not be disturbed so long as its "reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708).

B. *Did the RPD err in finding that the Applicant's lack of subjective fear is determinative of his claim?*

[17] The RPD found it was unreasonable for the Applicant to abandon his claim in the United States since protection was "likely" forthcoming, and one of the reasons the Applicant attacks that finding is because there was no evidence that his asylum claim there would likely be granted. There is limited evidence in the record about the role of a credible fear interview in the United States' asylum process, but the box that the asylum officer checked off on the worksheet states that: "[t]here is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing" (emphasis added).

[18] Mr. Justice John O'Keefe reviewed similar language in *Rajaratnam v Canada (Citizenship and Immigration)*, 2014 FC 1071 [*Rajaratnam*], where he stated:

> [55] …the Board may have overstated the importance of a credible fear interview in the United States. There was nothing in the record disclosing what importance such a finding has in the United States' asylum system. Further, the asylum officer conducting that interview only wrote the following:
>
> > The applicant has established that a significant possibility exists that he could be found credible in a full hearing before an [immigration judge]. The applicant has also established that a significant possibility exists that he could be found eligible for asylum in a full hearing before an [immigration judge].
> >
> > [Emphasis added]

> [56] Given that language, it sounds like the credible fear interview is primarily a screening determination that would not bind the immigration judge. As such, there is no evidence that the applicant would have had a better chance in the United States than he had here.

[19] That was not the only basis for setting aside the decision in *Rajaratnam* though; the RPD's reasoning was also deficient in certain aspects and its finding that the applicant lacked credibility was problematic.

[20] A somewhat contrary assessment of the significance of a favourable credible fear interview can be found in *Nadesan v Canada (Citizenship and Immigration)*, 2015 FC 104 [*Nadesan*], where Mr. Justice Roger Hughes stated:

> [11] The final ground for finding lack of credibility is, as stated by the Member, "the claimant's foregoing an apparently good opportunity to gain asylum in the U.S.". The evidence is that in the US the Applicant's story was accepted as credible and he was to appear at a further hearing at a time to be determined. This is by no means an assurance that he had a "good opportunity" to gain asylum in the U.S. but is something that a person who had reasonable grounds to fear persecution if returned to his home country should have pursued. He did not. It was reasonable for the Member to take this into consideration.

[21] I agree that it may be reasonable for the RPD to consider that someone who does not pursue a claim after a successful credible fear interview has abandoned the claim. However, that was not the only ground upon which the RPD found the applicant in *Nadesan* lacked credibility; that finding was based upon the applicant's demeanour as well as a number of apparent inconsistencies or improbabilities with respect to his detentions.

[22] Unlike *Nadesan*, the only reason the RPD impugned the Applicant's credibility in this case was because he had abandoned his asylum claim in the United States when that claim would probably have been successful. The RPD's finding that the Applicant was "likely" to obtain protection in the United States was therefore a critical finding of fact insofar as this contributed to its understanding of the risk the Applicant took by abandoning his claim. It was also made "without regard for the material before it" (*Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(d)), since the only evidence in the record implies that a credible fear interview is just a screening mechanism with no effect on the full hearing of the claim. Moreover, the RPD never indicated that it had any specialized knowledge about the United States asylum process (*Refugee Protection Division Rules*, SOR/2012-256, s 22), and it was not reasonable to attribute such significance to the finding at the credible fear interview.

[23] The RPD's reasoning was also similar to that rejected in *Kannuthurai*, where Mr. Justice Douglas Campbell found as follows:

> [5] In the course of evaluating the evidence of the Applicant's subjective fear, the RPD consulted authorities on the effect that delay can have on the acceptance of a claim for protection. Paragraph 9 of the decision leads to this conclusion:
>
> > Professor Hathaway had said that it is appropriate to inquire into the circumstances of any protracted postponement of or inaction (and, in this case, abandonment) on a refugee claim as a means of evaluating the sincerity of the claimant's need for protection. In the case of *Juzbasevs*, the applicant spent 4 months in the U.S.A. without making a claim for protection, as she said she was advised by a relative that her case would not qualify. It was not considered to be reasonable that she would not have taken steps to seek proper advice on making a claim. In *Gonzalez*, the applicant and her sons lived in the U.S.A. for 4 years and 3 months without making a claim for asylum. A delay of 4 years was

> said to suggest a lack of subjective fear and it was open to the Board to reject the applicant's explanations. The lack of evidence going to the subjective element of the claim was found to be in itself sufficient for the claim to fail.
>
> [6] In my opinion, the authorities cited have no precedential value with respect to the Applicant's evidence. In the present case there is no evidence of "postponement" or "inaction". After being taken into immigration detention, and while being held by United States authorities, the Applicant made a claim for refugee protection. Immediately upon his release in the United States he entered Canada and made his current claim for refugee protection on the basis of the same subjective fear evidence as in the United States claim. The RPD's failure to draw an obvious distinction between the cases cited and the Applicant's evidence apparently contributed to the RPD's erroneous analysis of the Applicant's evidence of subjective fear.

[24] Furthermore, as the Federal Court of Appeal observed in *Shanmugarajah* (at paragraph 3): "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear…".

[25] However, paragraph 18.1(4)(d) of the *Federal Courts Act* is only a ground of relief if the decision was "based" on the erroneous finding of fact (see: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paragraph 33; *Rohm and Haas Canada Ltd v Canada (Anti-Dumping Tribunal)* (1978), 22 NR 175 at paragraph 5, 91 DLR (3d) 212 (FCA)). In this case, the findings about subjective fear and the consequences of a credible fear interview could only be dispositive if it was unreasonable for the RPD to find that New Delhi is an IFA.

C. *Did the RPD err by its determination that New Delhi is an IFA?*

[26] The Applicant criticizes the RPD for citing the RIR about Punjabi Sikhs without warning him that it would rely on it (RIR IND104369.E). For some reason, that document is in the application record (at pages 252-258), but not in the certified tribunal record which instead contains the predecessor which it replaced (RIR IND100771.EX). Be that as it may, the Applicant's argument that the RIR should be regarded as "extrinsic evidence" is without merit. It was fair for the RPD to refer to the RIR in making its findings with respect to an IFA in New Delhi.

[27] It was also, however, illogical and therefore unreasonable for the RPD to use the RIR about Punjabi Sikhs as a basis for its conclusion that the police would not pursue the Applicant beyond the borders of Tamil Nadu. This conclusion was central to the RPD's finding of there being an IFA for the Applicant in New Delhi, but it cannot be justified because, first of all, the RIR has no relevance whatsoever to the Applicant's personal profile as a politically active Hindu Tamil from Tamil Nadu. Secondly, even if one assumes that a person such as the Applicant would be regarded or treated by the police in the same manner as a Punjabi Sikh, the RIR itself contains some evidence that contradicts the RPD's determination that the police would not pursue the Applicant beyond the borders of Tamil Nadu. The RIR states, amongst other things, that "people with money and political clout can pay the police to fabricate charges against someone, including making false allegations against people who are seen as a political threat, who speak out against the leading party," and that the police would use false accusations of

militancy to pursue "people who criticize the police or government…even if they move to another state."

[28] In view of the foregoing reasons, I find it unnecessary to address the Applicant's argument that it was unreasonable for the RPD to find that antipathy between the Congress party and the ADMK was "extremely unlikely."

VI. Conclusion

[29] In the result, therefore, the Applicant's application for judicial review is allowed and the matter is remitted to a different member of the RPD for re-determination.

[30] Neither party raised a question of general importance for certification, so none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a different member of the Refugee Protection Division for re-determination.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Naseem Mithoowani	FOR THE APPLICANT
Lorne McCleneghan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT