

Federal Court



Cour fédérale

Date: 20180205

Docket: IMM-2674-17

Citation: 2018 FC 124

Toronto, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KAJEEPAN JEYAKUMAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this judicial review, Kajeepan Jeyakumar challenges the May 19, 2017 decision [Decision] of the Refugee Protection Division [Board] of the Immigration and Refugee Board of Canada [IRB], which found that he was neither a Convention refugee nor a person in need of protection.

[2] For the reasons that follow, I am allowing Mr. Jeyakumar's application. I agree that the Board committed several errors in its treatment of the evidence, which, when viewed together, render the Decision unreasonable.

II. Background

[3] Mr. Jeyakumar is a Tamil from the Kilinochchi District of northern Sri Lanka. He claims that if he returns to Sri Lanka, militant groups will abduct him for ransom, and kill him if payment is not made. He alleges that Sri Lankan authorities are interested in him for two reasons: (i) his connection to his cousin, who he alleges was killed in 2015 for anti-government activities, and (ii) because Mr. Jeyakumar supported his cousin's widow in seeking justice for the murder.

[4] Mr. Jeyakumar alleges that in 2016 he was abducted by Sri Lankan police intelligence officers, detained for six days, questioned about his cousin, and accused of participating in anti-government demonstrations. He alleges that his father paid for his release, following which he fled Sri Lanka with the assistance of an agent.

[5] Mr. Jeyakumar presented himself at the Fort Erie port of entry on March 2, 2017. Because he arrived at Canada's border from the United States, he would ordinarily be precluded by section 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the "safe third country" provision, from having his refugee claim referred to the Board. However, Mr. Jeyakumar's brother, Dinesh Jeyakumar, had previously made a successful refugee claim in Canada and is now a permanent resident. This meant that Mr. Jeyakumar fell into the exception

to section 101(1)(e) of IRPA provided for in section 159.5(b)(ii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. While Mr. Jeyakumar's claim for refugee protection was heard by the Board under that exception, when it rejected his claims under sections 96 and 97(1) of IRPA, he was precluded from appealing the Board's Decision to the Refugee Appeal Division of the IRB by IRPA section 110(2)(d). Thus, the Decision falls to this Court to judicially review.

III. Analysis

[6] The parties start from the common ground that the Board's Decision is to be reviewed on a standard of reasonableness, which requires this Court to consider whether the Decision was justified, transparent, intelligible, and fell within the range of acceptable outcomes defensible in fact and law (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at paras 41 and 47).

[7] Mr. Jeyakumar raises various issues in this application, but those which I find to be determinative of its outcome are:

- A. whether the Board ignored evidence regarding Mr. Jeyakumar's perceived association with the Liberation Tigers of Tamil Eelam [LTTE];
- B. whether the Board made an unfounded implausibility finding; and
- C. whether the Board implicitly accepted that Mr. Jeyakumar was detained and questioned by Sri Lankan authorities.

A. *Did the Board ignore evidence of Mr. Jeyakumar's perceived links to the LTTE?*

[8] The Board determined that Mr. Jeyakumar's claim for refugee status could not succeed solely on the basis that he was a young Tamil from northern Sri Lanka, or that he would be returning as a failed refugee claimant, but that he would need to also establish a real or perceived link to the LTTE in either case to ground his claim. The Board concluded that Mr. Jeyakumar had not established such a link, because there were only "two minor references to the LTTE in the entirety of [Mr. Jeyakumar's] evidence" — which appeared in (i) his father's letter, and (ii) his response to a question put to him by his counsel. The Board held that these "minor" references were "insignificant and insufficient on their own" to prove the requisite link to the LTTE and, therefore, that Mr. Jeyakumar had not established an at-risk profile.

[9] In this application for judicial review, Mr. Jeyakumar argues that the Board unreasonably ignored evidence that he and his brother were questioned about LTTE involvement in 2009, after which Mr. Jeyakumar's brother fled to Canada and made a successful refugee claim. The Respondent counters that the Board committed no error in failing to reference these events, submitting that, unlike his brother, Mr. Jeyakumar was not arrested or detained in 2009, and that this information was therefore only incidental to Mr. Jeyakumar's profile.

[10] I agree with Mr. Jeyakumar. The Board's conclusion that there were only "two minor references to the LTTE in the entirety of [Mr. Jeyakumar's] evidence" was unreasonable. Indeed, in Mr. Jeyakumar's Basis of Claim [BOC] narrative, a central document that went unchallenged

by the Board and was notable in its absence from the Board's analysis, Mr. Jeyakumar mentions the LTTE numerous times:

3 Vavuniya was controlled by the army but the LTTE had a clandestine presence and carried out their activities while forcing Tamil people to help them. The army in response arrested many Tamil people on suspicion of supporting the LTTE. The army questioned my father and other family members.

4. In 2009 my brother and I were stopped on the street and questioned. I was 15 years old at the time. The army suspected that we could be LTTE supporters as the LTTE used a lot of child soldiers. They came to the house and questioned my parents about the daily activities of my brother and I. They wanted to know if we had been contacted by the LTTE.

5. In May 2009, the war ended with the defeat of the LTTE. We hoped we would be able to live in peace but the army said that many LTTE members had escaped and were hiding among [sic] the people or had fled to other countries and they continued to arrest people.

6. In December 2009, my brother Dinesh was arrested by the Special Task Force (STF) which was a police military force that was highly feared by Tamil people. This happened after a bomb explosion that the army and police believed was the work of LTTE remnants. They arrested people with a connection to Vanni. My brother was detained for 6 days. He was beaten. After release he fled Sri Lanka and was accepted as a Convention refugee in Canada.

[Emphasis added]

[11] Clearly, when the Board concluded that Mr. Jeyakumar's evidence relating to the LTTE was limited to his father's testimony and his statement during questioning, with no mention of the BOC, it ignored important evidence on a key issue in the Decision: whether Mr. Jeyakumar had established a perceived association with the LTTE.

[12] A lack of analysis involving LTTE evidence has been found to be a reviewable error. In *KS v Canada (Citizenship and Immigration)*, 2015 FC 999 [KS], for instance, the Board had identified that the applicant had a “familial connection” to the LTTE, but then unreasonably did not analyse how this connection might contribute to the risk that the applicant would be perceived as an LTTE supporter if he returned to Sri Lanka (at paras 45-46, 51).

[13] Here, the Board did not reject Mr. Jeyakumar’s BOC, or its contents relating to the LTTE. Consequently, it was unreasonable for the Board to ignore this evidence of a familial connection when considering whether Mr. Jeyakumar had himself established a real or perceived connection to the LTTE. This oversight was compounded by the Board’s errant conclusion that only two pieces of Mr. Jeyakumar’s evidence spoke to his perceived links to the LTTE, without any mention of his BOC.

B. *Did the Board make made an unfounded implausibility finding?*

[14] The Board accepted that Mr. Jeyakumar had a cousin who died, but found that Mr. Jeyakumar had not established that his cousin was a political opponent, in part because of Mr. Jeyakumar’s lack of knowledge about the cousin’s political activities. The Board found that Mr. Jeyakumar failed to provide specifics about the cousin’s political activities, including political party affiliation and details of the demonstrations the cousin attended. Mr. Jeyakumar explained to the Board that his late cousin did not discuss his political views with his family, but the Board determined that this explanation was not reasonable in light of Mr. Jeyakumar’s beliefs that his cousin was murdered for his political activities, and the centrality of this event to his refugee claim.

[15] In this application, Mr. Jeyakumar argues that the Board ignored his plausible explanation for his lack of knowledge regarding his cousin's political activities.

[16] The Respondent maintains that the Board's implausibility finding is supportable: it states that, if Mr. Jeyakumar's cousin's political activities were the foundation of the events leading to his flight from Sri Lanka, and if he indeed assisted his cousin's widow after the death, Mr. Jeyakumar should have some knowledge of those activities.

[17] The parties agree that the Board's finding on this point was a plausibility finding, which should only be made in the clearest of cases (*Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at paras 35-41; *Subramaniyathas v Canada (Minister of Citizenship and Immigration)*, 2014 FC 583 at paras 20-23 [*Subramaniyathas*]).

[18] Here, the Board did not find that Mr. Jeyakumar was evasive with respect to his knowledge of his cousin's political activities. Further, it did not point to any inconsistencies or contradictions in his evidence — similar to what occurred in *Subramaniyathas* (at para 19). Rather, the Board rejected Mr. Jeyakumar's allegation that his cousin was involved in anti-government activity in large part because it found Mr. Jeyakumar's lack of knowledge of the details to be implausible. Yet Mr. Jeyakumar clearly and consistently explained that his cousin never invited him to political events, or discussed those events with him in any detail.

[19] In my view, it is apparent that the Board did not consider Mr. Jeyakumar's explanation in its context (see *Manege v Canada (Citizenship and Immigration)*, 2014 FC 374 at para 35). The

Board accepted that Mr. Jeyakumar had no personal political involvement and had a limited education. The details that Mr. Jeyakumar gave with respect to his cousin's political involvement were consistent with his explanation that his cousin did not discuss political matters with him. Mr. Jeyakumar also gave oral evidence at his refugee hearing that he only heard about his cousin's political activities when he was visiting his aunt, who he said told her son not to attend political demonstrations, and scolded her son for going anyway.

[20] The Board failed to explain, in the clearest terms, why it would be implausible in this context for Mr. Jeyakumar to have a limited understanding of his cousin's political activities, when the evidence was that the cousin avoided telling his family, including Mr. Jeyakumar, about his political activities in detail. Further, the broader Sri Lankan context in which Mr. Jeyakumar's claim took place, according to the objective evidence, was one where sharing the details of one's political involvement with family members could lead to interrogation and detrimental consequences.

[21] The Board's unreasonable plausibility finding supported its conclusion that Mr. Jeyakumar's cousin was not a political opponent, and this conclusion was in turn central to the rest of its analysis. As a result, I find that the Board's flawed reasoning on this point infected the entire Decision.

C. *Did the Board implicitly accept that Mr. Jeyakumar was detained and questioned by Sri Lankan authorities?*

[22] As mentioned above, the Board did not impugn Mr. Jeyakumar's evidence at large, or make a general finding of non-credibility. Mr. Jeyakumar contends that the Board must have therefore accepted those parts of his story that it did not specifically reject. He argues that this conclusion flows from the interplay between the presumption of truthfulness and the case law holding that the Board must make its credibility determinations in clear and unmistakable terms, relying on *Glowacki v Canada (Citizenship and Immigration)*, 2014 FC 292 (at para 8).

Mr. Jeyakumar also relies on *Mendoza v Canada (Citizenship and Immigration)*, 2015 FC 251 (at para 22) for the proposition that it is an error for a tribunal to not specify what evidence is being rejected.

[23] Because, in Mr. Jeyakumar's submission, the Decision contains no express finding to the contrary, he argues that the Board implicitly accepted several parts of his story, including that he was detained in 2016 and held for six days until his father paid for his release. Mr. Jeyakumar submits that the Board's Decision is unreasonable when considered in light of this and other implicit findings.

[24] The Respondent disagrees, relying on *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 (at para 3) for the proposition that a "general finding that the claimant lacks credibility" is "sufficient to dispose of the claim", absent independent and credible documentary evidence capable of supporting a positive disposition, and submits that Mr. Jeyakumar did not satisfy his onus to produce such corroborative evidence. The Respondent further argues that it is

clear that the Board did not believe that Mr. Jeyakumar's cousin was murdered for his political involvement, and that the Board therefore did not accept that Mr. Jeyakumar was arrested or detained at all, because the Board did not accept the premise for the detention.

[25] Once again, I agree with Mr. Jeyakumar. I find that the Board failed to make a general finding of credibility against him. Rather, it discredited certain parts of his story, while giving credence to others. It rejected that he had a perceived link to the LTTE due to a lack of evidence or corroborating documentation relating to that part of his testimony. On the other hand, the Board believed that he had subjective fear, and that he had helped his cousin's widow in some capacity after the death.

[26] Significantly, the Board did not reject Mr. Jeyakumar's detention: the Board expressly considered the content of the questioning that Mr. Jeyakumar experienced during his detention, concluding that Mr. Jeyakumar had "failed to establish on a balance of probabilities that he was questioned about a link to the LTTE during his detention as alleged".

[27] Given this statement, I do not agree, that the Board can be read — as the Respondent argues — to have concluded that the detention did not occur, when it then used its conclusions on the content of the questioning during that detention to undermine Mr. Jeyakumar's other evidence.

IV. Conclusion

[28] I find that the three errors outlined above, considered cumulatively, render the Decision unreasonable. As a result, the Decision will be set aside and remitted for a redetermination by a different member of the Board.

V. Questions for Certification

[29] At the close of the hearing, counsel for Mr. Jeyakumar proposed two questions for certification relating to the conclusions that the Board may reasonably draw from an applicant's failure to provide corroborative documentation.

[30] First, given that the answer to the proposed questions would not be dispositive of the application, they are not appropriate for certification (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9). In any event, the jurisprudence on this point is clear: the absence of a reasonable explanation for a lack of corroborative documentary evidence can reasonably lead to a negative determination of credibility (see, among others, *Alekozai v Canada (Citizenship and Immigration)*, 2015 FC 158 at para 10).

JUDGMENT in IMM-2764-17

THIS COURT'S JUDGMENT is that:

1. The Decision is set aside.
2. The matter is returned to the Board for reconsideration by a different Board Member.
3. No questions will be certified.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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