

Federal Court



Cour fédérale

Date: 20181002

Docket: IMM-5111-17

Citation: 2018 FC 980

Toronto, Ontario, October 2, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JEEVASUMAN GANESALINGAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], brought by Jeevasuman Ganesalingam [Applicant], who seeks judicial review of the December 27, 2017 decision of the Refugee Protection Division [RPD or Board], which found that he was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the IRPA [Decision]. For the reasons that follow, I will grant the

Applicant the Order that he seeks, in quashing the Decision and remitting the matter to the RPD for redetermination.

II. Background

[2] Mr. Ganesalingam is a young, unmarried Tamil male from the north of Sri Lanka. He alleges that he has experienced past persecution in Sri Lanka and, consequently, fears future persecution due to his lengthy time in Canada, past record of detentions, and his profile as a failed asylum seeker. The Applicant claims that he was detained a total of six times in the two years before leaving Sri Lanka in 2010. He states that he was beaten by his captors. Following his last detention, he was released only after a bribe was paid, and instructed to stay at the address on his national ID card.

[3] Since that time, Mr. Ganesalingam claims that his father was extorted by two members of the Eelam People's Democratic Party [EPDP] in August 2010, and that his brother was detained in a cordon and search operation and was assaulted in 2017. He was also only released after his father paid a bribe. The Applicant's father further claims that he has been stopped by the army and asked about other family members.

III. Decision Under Review

[4] The RPD found that the totality of the evidence did not objectively support a finding of persecution or risk, given the improvements in the country and the change in treatment of Tamils post-war. While conceding the Applicant would have qualified as a refugee in 2012 based on his

profile alone, given that he came to Canada just after the civil war ended, the Board found that was no longer the case at the end of 2017.

[5] Furthermore, the Board found the evidence simply did not establish a serious possibility that the army or other militia/security forces would believe that the Applicant had ties to the Liberation Tigers of Tamil Eelam [LTTE]. The Board noted that his detentions from 2008-2010 occurred due to round-ups of young Tamil men, and observed that there was no evidence that the Applicant was individually targeted for being connected with the LTTE. The Board further noted that the Applicant would not have been released from his detentions had the army or the EPDP believed he indeed had LTTE ties.

[6] Moreover, the Board found that the Applicant's claim of an ongoing risk of arrest, due to his brother's 2017 arrest, was not substantiated by the evidence, which did not show the reason for the brother's arrest, nor demonstrate any LTTE connections. The Board also found that the EPDP or other militia groups would not have an interest in the Applicant, given that his other siblings in Sri Lanka have not been affected in any way, and his father has not had any issues with other militia groups since 2012.

[7] The Board also discounted other evidence presented. For instance, it found that although the doctor's letter described the Applicant's injuries, it did not comment on how they occurred. Similarly, little weight was given to an affidavit from his father speaking to the Applicant's issues in Sri Lanka. The Board found that had any group been interested in extortion, it would have done so in the years since 2012.

IV. Issues and Standard of Review

[8] The three issues raised by the Applicant are whether the RPD erred by (a) ignoring relevant evidence, (b) misinterpreting the Convention refugee definition, and (c) failing to apply section 97 of IRPA regarding risk of return. As agreed by the parties, the Decision is to be assessed on a reasonableness standard, meaning that it must be justified, transparent, and intelligible, and fall within the range of possible, acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

a) *Did the RPD err in law by ignoring relevant evidence?*

[9] The Applicant argues that the Board overlooked evidence in arriving at its finding. While I recognize that the Respondent did his utmost to defend the Decision by arguing that all evidence was considered and that the Applicant is asking this Court to reweigh the evidence, I do not agree. Rather, as I will explain below, the Board overlooked key evidence in making its findings.

[10] First, with respect to the medical evidence, the Board only stated that it was missing “the personal circumstances of what he went through in order to get the injuries that it purports”. However, the medical report notes that the Applicant had “examination lacerations, contusions, and superficial lacerations on his arms and legs” that appeared to be caused by a “blunt plastic pipe and booted legs”.

[11] The Applicant deposed and testified to serious beatings and interrogations while under detention. Given that the Board made no negative credibility findings, the Board should, at minimum, have stated what it found inconsistent or unsatisfactory about the Applicant's evidence before rejecting the report. This is particularly so considering that the Applicant's accounts both at the hearing and prior to it (e.g. in his Basis of Claim narrative and the transcript of his 2010 US interview) appear to be consistent with the medical report.

[12] Second, with respect to the father's affidavit, which the Board referred to simply as a "support letter", the Board found as follows:

[T]his letter of support alone does [not] establish the claimant faces a serious possibility of persecution in Sri Lanka. It speaks of the claimant's prior issues with the army, but then provides no concrete evidence as to why this could happen in the future. ... Not unlike the claimant's testimony, it appears to be based on an anxiety about the future but does not provide sufficient evidence to establish the basis of that anxiety.

[13] However, there was objective evidence on the record to the contrary, which supported the Applicant's claim, but which the Board failed to address. This evidence, some of which was included in the National Documentation Package, contained recent reports on both ethnic profiling and risks facing failed asylum seekers in Sri Lanka.

[14] For instance, the Board focused on the 2012 United Nations High Commissioner for Refugees guidelines in determining that the Applicant did not fall within a risk profile. However, there is more recent evidence on the record that the Board failed to address, which speaks of certain Tamils that continue to face risks, including failed asylum seekers upon return to Sri Lanka (see United States Department Of State [US DOS], *Sri Lanka : Country Reports on*

Human Rights Practices for 2016; Amnesty International, *Annual Report 2016/2017: The State of the World's Human Rights for Sri Lanka*; UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka*; Swiss Refugee Council, *Sri Lanka: dangers liés au renvoi des personnes d'origine tamoule*).

[15] In terms of the Applicant's profile, the US DOS report from 2016 lists "persons viewed as sympathizers of the Liberation Tigers of Tamil Eelam" as part of the at-risk group, as did the 2012 risk profile the Board relied on. In coming to its conclusion that there was no evidence that the Applicant fell within this risk profile, the Board noted that there was no concrete reason why the army or other security forces would believe that the Applicant personally had ties to the LTTE, particularly given the passage of time, the changes in country conditions since 2012, and the fact that such groups had not shown an interest in his family members since 2012, other than the Applicant's brother's arrest in 2017.

[16] The Board also found that during the time Mr. Ganesalingam was in Sri Lanka "the claimant's ethnicity or his profile alone would have been enough for him to be detained and therefore found to be a refugee", and that the "fact that he was detained during those times alone therefore does not mean the army had any belief at the time that he personally had LTTE ties".

[17] These statements are difficult to reconcile, both internally, as well as with regard to the other evidence before the Board canvassed above. In *Yathavarajan v Canada (Citizenship and Immigration)* 2014 FC 297 [*Yathavarajan*], in a decision that involved issues regarding a similar profile, Justice Kane found:

[52] The Board is not required to refer to every piece of evidence; however, it is required to consider the evidence that directly contradicts its ultimate findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 at paras 16-17). In the present case, the Board addressed the contrary evidence but gave it less weight, as it was entitled to do, and provided its reasons for so doing.

[18] Here, unlike in *Yathavarajan*, there was contradictory evidence that went unaddressed. Additionally, no negative credibility findings were made against the Applicant. Before the Board could make a finding that the Applicant did not fall within a risk profile, it needed to consider the evidence which contradicted key findings, even if only briefly.

b) *Two other issues raised by the Applicant*

[19] Given my conclusions on the first issue, there is no need to address the second and third issues raised.

VI. Conclusion

[20] The application for judicial review is granted. I find that the Board erred by unreasonably overlooking the evidence noted above that appears to contradict key findings, and which it therefore had a duty to consider. The Decision is set aside, and the matter will be remitted for redetermination by a different board member. No questions for certification were proposed and I agree none arise.

JUDGMENT in IMM-5111-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The Decision is set aside, and the matter is remitted back for redetermination by a different board member.
3. No questions for certification were argued, and none arose.
4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5111-17

STYLE OF CAUSE: JEEVASUMAN GANESALINGAM v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

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APPEARANCES:

Barbara Jackman FOR THE APPLICANT

Christopher Crighton FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami and Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario