Date: 20060613

Docket: IMM-5258-05

Citation: 2006 FC 742

OTTAWA, Ontario, June 13, 2006

PRESENT: The Honourable Paul U.C. Rouleau

BETWEEN:

THAVARUBAN THAMBIAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated December 20, 2004, in which the Board found that the applicant was not a Convention refugee or a persons in need of protection under sections 96 and 97 of the Immigration and Refugee Protection Act, 2001 S.C. c. 27 (the IRPA). The Board found that the applicant, Thavaruban Thambiah, lacked credibility, and therefore denied his claim for refugee status.

[2] The applicant is a citizen of Sri Lanka. He is a Hindu Tamil, born in Jaffna, in the northern part of Sri Lanka. He fears persecution at the hands of the LTTE, the Eelam People's Democratic Party (EPDP), the Sri Lankan army and police, as well as Sinhalese classmates.

[3] The applicant alleges that, between 1991 and 1995, he was harassed by members of the Liberation Tigers of Tamil Eelam ("LTTE" or "Tigers"); that he was arrested by the Sri Lankan army on May 13, 1996, and detained until June 16, 1996; that he was assaulted by his Sinhalese classmates on November 10, 1999; that he was arrested by the Sri Lankan police, along with a classmate, and detained for 15 days.

[4] He claims that he attempted to prevent students from being recruited by the LTTE; that the Tigers attempted to find him in 2001 due to his activities on campus. They came to his home in August 2001, but he was not there – the Tigers warned his uncle, and left.

[5] On September 24, 2001, the Sri Lankan army allegedly arrested the applicant, suspecting that his family was under the protection of the LTTE. He was released on November 2, 2001.

[6] On November 10, 2001, the applicant alleges that a member of the EPDP came to his home, and warned him and his uncle to vote for the EPDP or suffer consequences. To avoid voting for the EPDP in the election, the applicant's uncle took him to Colombo where he was arrested by police on December 7, 2001 and detained overnight. He left for Singapore the next day. He arrived in the United States on May 27, 2002 and was detained for three weeks.

[7] The applicant came to Canada, and filed a refugee claim which was dismissed.

[8] The applicant's testimony was found to lack credibility, and the Board rejected his claim due to his impugned credibility.

[9] The Board found omissions, implausibility, and inconsistency in the applicant's testimony, his original and amended Personal Information Forms (PIF), and his Port of Entry (POE) notes.

[10] The Board drew a negative inference from the time it took the applicant to drastically amend his PIF. The original was filed in 2002 and the amendment in 2005. At the hearing, the applicant attested only to the amended PIF.

[11] The Board also took into consideration the applicant's failure to pursue his claim in the United States.

[12] In written submissions, the applicant argues three issues.

[13] The first is whether the Board's decision was made in a perverse and capricious manner, without due regard to the evidence before it and that it was a patently inconceivable decision on credibility.

[14] The second issues is whether the Board's decision is tainted by bias, or violated procedural fairness, in that the same Presiding Member who initially ruled that the applicant had abandoned his

claim but eventually decided the matter on the merits, notwithstanding an objection from the applicant's counsel.

[15] Finally, the third issue is whether the reverse order questioning, under Guideline 7 of the Chairperson's Guidelines is a violation of natural justice in the present circumstances. During oral submissions, counsel for the applicant advised the Court that he was abandoning this submission and I need not canvass the issue.

[16] With respect to credibility, the applicant submits that the Board came to an unreasonable conclusion for two reasons: 1) the Board compared the applicant's original and amended PIF, while only the amended PIF was attested to at the hearing, and 2) the Board made unreasonable findings based on omissions and inconsistencies.

[17] The applicant relies on the decision my Justice Nadon, in *Osman v. Canada (Minister of Employment and Immigration)* [1993] F.C.J No 1414 which stated as follows:

> Consequently, it was a futile exercise on the part of the Board to compare the original PIF and statement to the revised PIF. Rather, the Board should have tried to determine whether the applicant had any credible evidence to offer. Because of the way it proceeded, the Board never addressed this issue.
> […]
> Because the Applicant filed two contradictory stories, the Board decided that the Applicant could not be believed. I would have agreed with the Board wholeheartedly had there not been and corroborative evidence. In my view, the Board rendered its decision without regard to the material before it.

[18] The Respondent replies that the comparison of the two PIFs was not central to the Board's findings. He argues that the comparison cannot been seen as more than one of the eight contributing factors in rejecting the applicant's evidence and questioning his credibility.

[19] I am of the view that the Board's decision in the present matter, with respect to credibility, was reasonable. The applicant relies on the decision of Justice Nadon, to support the fact that a Board's decision can not rely entirely on the comparison of original and amended PIFs. The PIF comparison did not, by itself, guide the Board's findings. As Justice Nadon noted, the Board's mandate is to determine if the applicant had any credible evidence to offer. In the present matter, the Board fulfilled the mandate, and concluded that the applicant did not have any credible evidence to offer. The Board's conclusion was reasonable.

[20] Moreover, as submitted by the respondent, the Board is entitled to consider discrepancies between the original and amended PIFs in a refugee claim, in assessing credibility (see *Giminez v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1114 (FC)).

[21] Martineau J. noted the following with respect to credibility and subjective fear in *R.K.L. v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 162, at paras 7-8:

> ¶ 7 The determination of an applicant's credibility is the heartland of the Board's jurisdiction. This Court has found that the Board has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of an applicant: see Rahaman v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1800 at para. 38 (QL) (T.D.); and Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration) (1998), 157 F.T.R. 35 at para. 14.

> ¶ 8 Moreover, it has been recognized and confirmed that, with respect to credibility and assessment of evidence, this Court may not substitute its decision for that of the Board when the applicant has failed to prove that the Board's decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it: see Akinlolu v. Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 296 at para. 14 (QL) (T.D.) ("Akinlolu"); Kanyai v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 1124 at para. 9 (QL) (T.D.) ("Kanyai"); and the grounds for review set out in paragraph 18.1(4)(d) of the Federal Court Act.

[22] The applicants' application for judicial review is an attempt to have this Court re-weigh the evidence that was considered by the Board. In the present case, the Board's assessment of the evidence was reasonable, especially dealing with the omissions and inconsistencies in his testimony, POE notes, and amended PIF, and the implausibility of his oral testimony as it relates to the amended PIF.

[23] Finally, the applicant raises the issue of bias, and procedural fairness. The applicant alleges that the Presiding Member (PM) should have recused himself from the applicant's claim, as the PM had previously been the party who had declared the applicant's original claim abandoned.

[24] The claim was declared abandoned after neither the applicant nor his counsel appeared at the refugee hearing. The PM never considered the claim on its merits, but merely declared the claim abandoned.

[25] At the refugee hearing, the PM made the applicant and his counsel aware that he was the one that declared the matter abandoned; the applicant's counsel subsequently brought a motion for

recusal. The PM considered the motion and determined that , since he had not considered the claim on the merits, he did not have to recuse himself. I find that the PM's decision is supportable. The Federal Court of Appeal found, in *Arthur v. Canada (Minister of Employment and Immigration)* [1993] 1 F.C. 94 (FCA) that, "the mere fact of a second hearing before the same adjudicator, without more, does not give rise to a reasonable apprehension of bias…".

[26] The applicant has not demonstrated that the adjudicator was predisposed to decide his claim in a negative manner. The test for bias is whether an objective person, given the facts of the matter, would conclude that the Board decided the claim unfairly, or was predisposed to an answer (a negative answer, in this case). The applicant has not put forth any evidence of predisposition or bias, on the part of the PM. On the contrary, the evidence shows that he made the applicant and his counsel aware that the PM had participated in the abandonment decision. Counsel then made a motion for a recusal, which he considered, and dismissed. There is no evidence that the PM acted unreasonably. The application for judicial review, on the issue of bias and procedural fairness, must be dismissed.

[27] A further argument advanced by the applicant during oral submissions was to the effect that the panel dealt in detail with applicant's failure to make a claim in the U.S. and faults it for not having pursued the issue further; that this was a serious issue that required further explanation. A review of the transcript clearly highlights the Board's view of the matter. They mention in passing that he had only been in the U.S. for a month or so and chose not to be concerned with his failure to present a U.S. claim.

[28] The applicant refers the Court to a statement in the written decision: “the Refugee Protection Officer (R.P.O.) observations were not to her, as the panel had excused her at a late point during the hearing, as she was not well”.

[29] It was clear from the transcript that no R.P.O. was ever present and this was mentioned at least twice b y the presiding member. To suggest that she was obviously confused with another file is a complete exaggeration and I will comment no further on this preposterous allegation.

[30] I have been persuaded that the findings of credibility are not only reasonable but unassailable. A careful reading of both PIFs, as well as the transcript, does not in my view, provide any plausible evidence to persuade any panel that he has any fear of LTEE or the police in Sri Lanka.

[31] Even if a few weaknesses were identified or detected, they were not central to the ultimate finding and the conclusion should not be disturbed.

[32] At the request of counsel for the respondent, I hereby strike from the Amended Motion Record received from the applicant an affidavit sworn by the applicant on September 30, 2005 It does not comply with the rules, nor had it been subjected to proper cross-examination.

[33] As all three issues raised by the applicant must be dismissed, the application for judicial review, in its entirety, must be dismissed.

JUDGMENT

The application for judicial review is dismissed. No question of general importance has been submitted for certification.

"Paul U.C. Rouleau"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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