Federal Court  Cour fédérale

Date: 20110321

Docket: IMM-2489-10

Citation: 2011 FC 339

Ottawa, Ontario, March 21, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SASIKUMAR THIYAGARAJAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks an order setting aside the decision of the Immigration Division of the Immigration and Refugee Board of Canada (the Board), finding him to be inadmissible to Canada because he was a person described in subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*), namely, a member of a terrorist organization. The Board rejected the applicant's defence of duress. It is this finding that the applicant seeks to set aside.

[2] The Board also found that although the applicant provided material support to the Liberation Tigers of Tamil Eelam (LTTE), he did not occupy a position of power or command, and was not complicit in war crimes or crimes against humanity. The Minister's claim of inadmissibility pursuant to subsection 35(1)(a) of *IRPA* was therefore dismissed. For the reasons that follow, the application for judicial review is dismissed.

The Context

[3] The applicant is a 33-year old male (ethnic) Tamil from Sri Lanka. In May 2000 he fled from Sri Lanka to the United Kingdom where he filed a refugee claim. He left the U.K. for Canada before a decision on his refugee claim there was rendered and arrived at Pearson International Airport in Toronto on July 28, 2007 where he made a refugee claim. His U.K. refugee claim was ultimately denied. Admissibility hearings were conducted in Canada and the applicant eventually became subject to a Deportation Order by the Immigration Division of the Board. It is this order that is the subject of this application for judicial review.

[4] The applicant claimed to have been recruited at a young age to perform manual labour, to post leaflets, to assist at a hospital, to march in processions, among other similar duties, for the LTTE. He further claimed that he was coerced into performing these acts and others, and, under the threat of duress, agreed to perform them. The Board noted that neither the applicant nor the record made it entirely clear as to the nature of the threats which compelled him to perform these activities, nor as to the consequences he would have allegedly suffered for non-compliance.

The issue before this Court

[5] There is a single issue in this judicial review; whether the Board erred in its finding that the defence of duress was not established. There is no question that the Board applied the correct legal principles to its assessment of the evidence of duress; rather the precise error alleged is that the Board, in its decision, made no reference to certain country condition reports for Sri Lanka, and in particular, those passages which described the extent to which the LTTE resorted to threatened and actual violence to coerce Tamils into supporting their cause. Before this Court counsel for the applicant conducted a comprehensive and detailed review of the documentary evidence before the Board which described the LTTE tactics.

[6] In this context, counsel put particular emphasis on the April 2009 United Nations High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka (the "UNHCR Report"). The UNHCR Report documents the restrictions on movement, the restriction of civilians from fleeing battle zones; the retention of family members should one family member leave the Tamil controlled area, reprisals for refusal to support, including torture and killing. The UNHCR Report concludes that many individuals are forced to join the LTTE, necessitating close examination of the defence of duress. The UNHCR Report also notes that given the highly secretive nature of the LTTE and the absence of independent monitoring in LTTE controlled areas, limited information is available regarding the precise nature and organization of the LTTE. Given this lack of information, the UNHCR cautions that it "… does not consider it appropriate to presume that all persons who join the LTTE were heavily and individually involved in acts giving rise to exclusion."

[7] This UNHCR Report, together with two Human Rights Watch Reports: Complicit in Crime (2007) and Trapped and Mistreated (2008) were entered into evidence before the Board. The applicant's argument is that, in the light of this evidence, the Board's decision should be set aside as unreasonable. The alleged error arises from the failure to make reference to these reports and to assess the applicant's evidence, and the defence of duress, in the context of these reports.

The Decision of the Board

[8] The Board found that the applicant had supported the LTTE under pressure. The Board found it plausible and consistent with the documentary evidence that the applicant had supported the goals of the LTTE but would have preferred not to. The Board noted further that "The environment in which service was provided left little room for refusal without some degree of consequences, either to oneself or one's family."

[9] Despite these findings, the Board concluded that "…the evidence does not establish that non-compliance would have put him in a serious and imminent physical risk to his person." The Board noted that "The possibility that at some point in the future he may have to dig trenches on the front lines is insufficiently imminent to absolve him of responsibility." In sum, the Board concluded that while the applicant faced pressure to serve "… he did not face a danger of imminent physical harm such as would deprive him of freedom to choose between right and wrong." In consequence, the Board concluded that "[b]ased on all the facts of this case, the degree of pressure experienced by the Respondent is insufficient to rebut the presumption that he was a member of the LTTE for purposes of paragraph 34(1)(f) of the *Act*."

[10] The operative issue is whether this is a reasonable finding by the Board and if not, whether it constitutes a reviewable error.

[11] The applicant does not quarrel with the test of duress adopted by the Board. It applied the correct test, as expressed in *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306. The Board analyzed the defence of duress and reasoned, based on case law, that the applicant could be excused for his actions if he could show that he acted to avoid imminent peril. Relying on *Ramirez,* para 40, the Board found that:

> Conceptually, duress serves as a defence to the allegation that the Respondent engaged in war crimes or crimes against humanity under paragraph 35(l)(a). For purposes of paragraph 34(l)(f), it serves to establish a lack of the requisite *mens rea* necessary to impute membership. The Federal Court of Appeal considered duress from the point of view of paragraph 35(1)(a) in *Ramirez*. In *Poshteh* [*Poshteh v Canada (Minister of Citizenship & Immigration),* 2005 FCA 85 [2005] 3 FCR 487], the Federal Court of Appeal noted that duress or coercion may be relevant to the paragraph 34(l)(f) issue under consideration. For purposes of a paragraph 34(1) determination, I accept that the principles that the Federal Court of Appeal articulated in *Ramirez* are equally applicable to both allegations of inadmissibility, notwithstanding the functional differences.

[12] In reaching this conclusion, the Board cited some, but not all, of the contextual evidence which the applicant says it ignored:

> The documentary evidence filed indicates that the LTTE engaged in recruitment of child soldiers. According to a July 2007 BBC News article entitled *Tamil Tiger "forced recruitment"*: "People in rebel-held Kilinochchi say that Tamil Tigers have introduced a policy of demanding one person from each family… If a representative of the family doesn't join, they will come and get him or her instead." Human Rights Watch has noted that "Throughout the two-decade long civil war in Sri Lanka, the Liberation Tigers of Tamil Eelam

> (LTTE), an ethnic Tamil armed separatist group, has consistently recruited and used children in armed combat… It has used them is infantry soldiers, security and intelligence officers, medics, and even suicide bombers." Recruitment continued after the February 2002 cease-fire.

[13] The Board was aware of the coercive tactics of the LTTE and assessed the issue of duress in that context. After a review of the organization of the LTTE, the Board noted:

> A 1996 Amnesty International report subsequent to a visit to Sri Lanka concluded that the LTTE was guilty of deliberate and arbitrary killings of Sinhalese civilians, summary executions of Tamil "traitors", torture and ill-treatment of prisoners, and the forced recruitment of children. A similar conclusion was reached by the U.S. Department of State in 2004: "The LTTE was responsible for politically motivated killings, arbitrary arrests, torture, harassment, abduction, disappearances, extortion and detention.
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> A Jane's World Insurgency and Terrorism 2007 report documents LTTE assassinations of twelve senior members of the government between 1991 and 2006. The 2007 Jane's report also states that the LTTE "escalated its use of improvised explosive devices (IEDs) against security forces and civilian targets." About 30 such attacks were recorded in 2006.
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> […]
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> The Minister's submissions refer to examples of the exhibits of LTTE attacks on non-combatants. The Respondent's counsel does not contest the characterization of the LTTE as being an organization that has engaged in acts of terrorism. The documentary evidence provides credible and trustworthy evidence that the LTTE has engaged in widespread and systematic acts of violence directed against non-combatants in order to influence public opinion and government policy to achieve the political goal of an independent Tamil state in Sri Lanka. Tactics include the use of improvised explosive devises, suicide bombings, targeted assassinations, kidnapping and torture. The LTTE is an organization for which there are reasonable grounds to believe has engaged in acts of terrorism and crimes against humanity.

[14] The Board concluded that the applicant's involvement in the LTTE was neither minor nor marginal and that membership was established for the purpose of subsection 34(1)(f) of the *IRPA*. Indeed, the applicant admitted that he had been a member of the LTTE since 1988 and supported its aims and goals. The Board also found that the applicant was able to understand the nature and effect of his work on behalf of the LTTE.

[15] The Board then assessed the facts as it found them against the test in *Ramirez*, above and concluded:

> The remaining question is whether the degree of coercion deprived the Respondent with the requisite *mens rea* to be considered a member of the LTTE for purposes of paragraph 34(1)(f) of the *Act*. The danger sough to be avoided must be serious, imminent and physical. An objective "reasonable person" standard is used, not the subjective fear of the person concerned. The situation must not be of the person's own making, nor consistent with his or her own will. The harm inflicted on others must not be greater than the risk to the person concerned. In this case, the evidence does not establish that non-compliance would have put him in a serious and imminent physical risk to his person. The possibility that at some point in the future he may have to dig trenches on the front lines is insufficiently imminent to absolve him if responsibility. […] A reasonable person in his situation may have feared community scorn and social consequences, but not serious and imminent physical harm. Although the Respondent may have felt some level of pressure to serve, he did not face a danger of imminent physical harm such as would deprive him of freedom to choose between right and wrong. Any sanctions that he would have faced for non-compliance were less than the harm done by actively supporting LTTE operations. Based on all of the facts of this case, the degree of pressure experienced by the Respondent is insufficient to rebut the presumption that the was a member of the LTTE for purposes of paragraph 34(1)(f) of the *Act*. [Emphasis added]

Analysis

[16] The application of a legal standard (the defence of duress) against a given set of facts is a question of mixed fact and law, and as such, is assessed on a standard of reasonableness: *Poshteh* above. In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision making process and whether the decision falls within a range of possible outcomes that are defensible in light of the facts and law.

[17] In this context the Board examined the pressure and coercion the applicant felt and assessed it against the harm done by his continued active participation and support of the LTTE. This assessment is one which could reasonably give rise to different interpretation. The existence of another view on the evidence however, does not mean that the interpretation reached by the Board on these facts, is unreasonable. There is no reviewable error.

[18] As noted, no issue is taken with the legal framework applied by the Board to assess the question of membership or duress. Rather, the applicant contends that the factual conclusions would have been different had reference been made to the specific country condition reports. This argument, in effect, asks the Court to re-weigh the evidence and re-determine the facts as previously found. The applicant does not point to any particular findings of fact which he says would have been determined differently. Nor does the applicant point to any particular aspect of the country condition reports, which if expressly referenced, would have produced a different finding, nor to any gaps in the analysis or reasoning in respect of the facts as found; rather the applicant argues for a different conclusion.

[19] As noted earlier, the reasons of the Board indicate that it was fully aware of the oppressive and brutal methodology of the LTTE and how it may have resulted in coerced participation. The fact that the specific passages cited by counsel before me were not expressly referenced in the section dealing with duress does not support the inference that the Board ignored their import or effect on the question of the voluntariness of the applicant's participation in the LTTE. Indeed, as noted, they were not.

[20] The jurisprudence is clear that the Board need not make express reference to all the materials before it. It must however, deal with evidence which is inconsistent with or casts doubt on its evidentiary findings. That is not the situation here, where the evidence which was not referred to reinforced, or reiterated, perhaps with stronger language, a point that the Board clearly had in its grasp when it assessed the particular facts of the case before it. The case stands on a different footing than those cases cited before me where material evidence was ignored or minimized. I also note, parenthetically, that counsel for the applicant before the Board (who was not counsel before this Court) did not make reference to these materials in the course of lengthy and thorough submissions on the very question of duress.

Other Grounds

[21] The applicant also argues that the decision contains contradictory findings of the same fact, and hence is illogical and does not meet the standard of cogency and intelligibility.

[22] The applicant also says the decision is unreasonable by reason of its inconsistency with the decision of another Board member that the applicant's younger brother was a Convention Refugee.

In that case, no issue was taken by the Minister with respect to either his inadmissibility or exclusion. There is nothing, apart from their relationship as brothers that links these two cases, and that relationship does not dictate a similar result. Each case is assessed necessarily on its own merits. The fallacy of this argument is best demonstrated by testing it in the inverse; it would not necessarily follow that had his brother's claim been rejected, the applicant's would necessarily be rejected as well. Again, each case must be assessed on its individual merits.

[23] The applicant also contends that the finding under subsections 35(1)(a) and 34(1)(f) of the *IRPA* are inherently contradictory. The same facts cannot, according to the applicant, give rise to a conclusion of membership in an organization, without engaging the *Crimes Against Humanity and War Crimes Act* (2000, c. 24). In essence, the applicant contends that the same facts establish both. Taken to its logical conclusion this argument entails that a finding of membership under subsection 34(1)(f) necessarily means that a person falls within subsection 35(1)(a). This argument cannot succeed, if only because the constituent elements of an offence under the *Crimes Against Humanity and War Crimes Act* are different than the elements of membership under subsection 34(1)(f).

[24] Accordingly, the application for judicial review is dismissed.

[25] No question is proposed for certification and, in the opinion of the court, none arises.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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