

Federal Court



Cour fédérale

**Date: 20120220**

**Docket: IMM-4557-11**

**Citation: 2012 FC 228**

**Ottawa, Ontario, February 20, 2012**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**KUGAPARAN BALASUBRAMANIAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated June 21, 2011. The Board found that the Applicant, Kugaparan Balasubramaniam, was neither a Convention refugee nor person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For the following reasons, this application is dismissed.

I. Facts

[3] The Applicant is a Tamil male from northern Sri Lanka. He brought a refugee claim in Canada alleging persecution at the hands of the Liberation Tigers of Tamil Eelam (LTTE), the Sri Lankan police and army, and the Karuna group.

[4] He has no connection to the LTTE but during his teenage years he and his family faced challenges and were forced to relocate. The LTTE pressured him to join the group until his mother exchanged jewellery with them. Regardless, he was forced to provide assistance in donating blood and digging bunkers.

[5] In spite of these challenges, the Applicant attended Batticaloa University from 2002 to June 2006. Suspected of having links to the LTTE, many students were detained or questioned in this period.

[6] In June 2006, the Applicant started a business facilitating overseas telephone calls and providing internet access. Shortly after opening the business, he alleged that two men from the Karuna group came to his home and demanded five lakhs of rupees. The Applicant did not have the amount of money request, but gave them fifty thousand rupees instead. Since the men returned demanding the money, the Applicant became afraid and left Sri Lanka for India on May 20, 2007.

[7] He traveled through various countries before entering the United States on April 25, 2010. He arrived in Canada and made a refugee claim on September 22, 2010.

## II. Decision Under Review

[8] The Board identified two determinative issues: (1) the credibility of the Applicant's Personal Information Form (PIF) and oral testimony concerning his subjective fear of persecution as a victim of targeted threats and extortion at the hands of the Karuna group; and (2) changing political circumstances in Sri Lanka.

[9] The Applicant's testimony was not found, on a balance of probabilities, to be credible due to "a significant contradiction and omission of a serious nature, regarding the alleged extortion threat made by the Karuna." His story was considered a fabrication. This arose in part from an amendment made to the PIF at the commencement of the hearing. The Board stated:

The contradictions regarding when and how often the Karuna attended at the claimant's home to extort money from him is an important and central element of the claim and the omission of a second visit from the PIF and this contradiction with oral testimony of the claimant constitutes a significant credibility concern, given the claimant's inability to provide any reasonable explanation.

[10] In addition, the Board was not persuaded, on a balance of probabilities, that the Applicant would be identified by the army as a sympathizer or a person with links to the LTTE should he be returned to Sri Lanka.

[11] The Applicant's explanation that he had the foresight to scan the first page of his passport, because he believed that it would be sufficient for entry into Canada, before leaving Sri Lanka for India was considered implausible. As a result, the Board drew a further negative inference as to his overall-credibility, even though this issue on its own was not central to the claim.

[12] Finally, the Board assessed changing circumstances in Sri Lanka at paragraph 73 of its reasons:

(73) [...] The Panel would be remiss if it did not acknowledge and consider ongoing challenges in Sri Lanka during the post-war years, particularly regarding Tamils perceived to have links to the LTTE. However when considering the particular circumstances of this claimant, as directed by the UNHCR above, and as directed by *Yusuf* above, the Panel notes that the claimant is not, on a balance of probabilities, a person who is perceived to be linked to the LTTE by the Sri Lankan government and would therefore now (sic) not be likely targeted by the Sri Lankan government [...]

### III. Issues

[13] This application raises various issues that can be summarized as follows:

- (a) Did the Board err in making its negative credibility findings?
- (b) Did the Board err by failing to assess the risk the Applicant faced at the hands of the Karuna group?
- (c) Did the Board member's conduct result in the denial of a fair hearing to the Applicant?

#### IV. Standard of Review

[14] Questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 51). More specifically, this Court has reviewed credibility findings based on this standard (see *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] FCJ no 732 at para 14).

[15] Applying the reasonableness standard, decisions must reflect justification, transparency and intelligibility and fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47).

[16] By contrast, issues of procedural fairness raised by the Applicant demand the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

#### V. Analysis

##### A. *Did the Board Err in Making its Negative Credibility Findings?*

[17] The Applicant challenges the negative credibility findings on the basis that the Board misconstrued the evidence, particularly with regard to the PIF amendment at the commencement of the hearing. He insists his intention was not to delete the reference to a second visit by the Karuna

group in July 2006 from his PIF, but merely add to it that the men demanded money within one year and returned in April 2007. Consequently, he was surprised and did not understand when the Board member suggested there was an inconsistency between the Citizenship and Immigration Canada (CIC) notes at the Port of Entry (POE), PIF and oral testimony.

[18] According to the Respondent, the PIF amendment removed the allegation that two members of the Karuna group came back within one month and replaced it with “[T]hey demanded that I pay within one year. They came back in April 2007.” The transcript is clear on this point as the Board member states “I’ve indicated just to replace that sentence with they demanded a pay within one year and they came back in April 2007.” The Applicant did not object and confirmed that the contents of his PIF were true, accurate and complete. During oral testimony, however, the Applicant referred to three separate visits by members of the Karuna group.

[19] Despite the claim that there was no deletion or inconsistency, I am prepared to agree with the Respondent that it was reasonable for the Board to take a sceptical view of the Applicant’s story. If there was confusion created as a result of the PIF amendment, it seems to me that the Applicant could have simply provided the clarification he now seeks to introduce in his memorandum.

[20] The Board makes clear its determination that the Applicant fabricated his story was based on cumulative negative inferences made from inconsistent evidence. The Applicant had not provided a reasonable explanation for the discrepancies between the POE notes, original PIF, amended PIF and oral testimony. At paragraph 37 of its reasons, the Board notes:

The Panel concurs with Counsel that just because the claimant omitted any references to a visit by the Karuna in April 2007, does

not necessarily suggest that the visit did not occur. This is precisely why the Panel gave the claimant the opportunity to provide a reasonable explanation for the omission of this allegation from his CIC claim and it was open to the claimant to proffer a reasonable explanation. The claimant failed to provide a reasonable explanation for the contradictions...For this reason, the Panel draws a negative inference in regard to the claimant's credibility.

[21] While the Board should not conduct a microscopic analysis of the evidence to impute credibility as the Applicant suggests, discrepancies concerning central elements of a claim can reasonably lead to a negative inference. The Board stressed that when and how often Karuna group members attempted to extort money from the Applicant led to significant credibility concerns, given his inability to provide an explanation. I accept that it was reasonable for the Board to place emphasis on this issue.

[22] The reasonableness of drawing a negative inference as to credibility based on omissions or inconsistencies regarding important facts in POE notes, the PIF and oral testimony is well-established (see for example *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668, [2011] FCJ no 840 at para 18; *Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ no 1867, 52 ACWS (3d) 165 at para 33; *Nyayieka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 690, [2010] FCJ no 830 at para 11; *Zupko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1319, [2010] FCJ no 1637 at para 32).

[23] The Applicant further asserts that the Board was confused about his evidence as to documentation used in India as well as how he lost his passport but managed to photocopy the first page for identification purposes entering Canada.

[24] According to the Applicant, the Board initially questioned him about documents required in Sri Lanka when he was in fact traveling in India. In addition, the Board suggested there was an inconsistency in the Applicant saying that he photocopied the passport page in Buffalo when he had previously indicated that it was accessed through email. He later explained that he accessed the page through his email and had printed and copied it in Buffalo. In making this argument, the Applicant relies on the decision in *Muhwati v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1121, [2007] FCJ no 1450 where Justice Michael Phelan found the Board erred in its credibility findings by misappreciating critical facts.

[25] The Respondent maintains that in regards to documentation in India, the Board appropriately drew a negative inference as to credibility. When asked to explain the contradiction in his oral testimony, the Applicant stated that he did not wish to respond or make comments. This type of evasiveness and failure to provide coherent explanations can reasonably form the basis of an adverse credibility finding (see for example *Juarez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 890, [2010] FCJ no 1107 at para 26).

[26] Similarly, the Respondent notes that the Applicant did not fully explain contradictory accounts about how he lost and obtained a copy of his passport. The Board expressly gave him the opportunity to do so during the hearing.

[27] The Applicant only had a copy of the first page of his passport and suggested that he lost it in India. When asked how he obtained a copy of the first page, he replied that it had been photocopied in Buffalo. He also suggested that he had scanned a copy in 2007 with the intention of



using it in Canada. At the POE, he stated that he obtained it through email and was able to print it out in Buffalo. These varied stories caused the Board to make an implausibility and lack of credibility finding. The Board can reasonably make these findings based on implausibility, common sense and rationality (see *Singh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1272, [2002] FCJ no 1724 at para 7; *Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ no 415 at para 2 (FCA)).

[28] I therefore agree with the Respondent that the Board was justified in making these negative credibility findings in relation to documentation in India and a lost passport. The Applicant simply did not provide sufficient explanation or clarity as to how he carried or obtained these documents. I also recognize that the Board's findings in this regard were rather limited. The Board expressly noted that this contradiction was not central to his claim but that it permitted the drawing of a further negative inference as to overall-credibility.

[29] Combined inconsistencies led the Board to make negative credibility findings that were within the range of possible, acceptable outcomes.

B. *Did the Board Err by Failing to Assess the Risk the Applicant Faced at the Hands of the Karuna Group?*

[30] The Applicant contends that the Board's assessment of risk cannot be confined to referencing the changed circumstances in Sri Lanka. The Board erred by not considering the risk the Applicant faced of the Karuna group because of its credibility findings.

[31] Given my conclusion that the credibility findings were reasonable, it should not be surprising to the Applicant that the Board did not deal specifically with the risk posed by the Karuna group, nor is this necessarily problematic.

[32] I accept the Respondent's position that the Board thoroughly reviewed changing country conditions in Sri Lanka and there was nothing to show that he had a profile that would otherwise put him directly at risk. More significantly, the credibility finding that the Applicant had fabricated his story regarding his encounters with members of the Karuna group was determinative of the issue and his claim as a whole.

C. *Did the Board Member's Conduct Result in the Denial of a Fair Hearing to the Applicant?*

[33] The Applicant also raises concerns regarding the Board member's conduct during the hearing. The Board member misunderstood and misstated the evidence leading to the identification of erroneous contradictions. This confused the Applicant and caused him to lose confidence in the objectivity of the Board.

[34] The Applicant bases his argument on jurisprudence related to aggressive questioning by the Board and potential breaches of procedural fairness. Although it was not the Court's critical finding in *Muhwati*, above, it was noted that "there is a way for a member to question an applicant, probe the credibility of the story, without demeaning or attacking the witness or insulting them."

[35] In *Swaminathan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 86, [2007] FCJ no 106 at para 35, the Court found aggressive questioning that was intimidating resulted in an unfair hearing. Justice Douglas Campbell in *Ritchie v Canada (Minister of Citizenship and Immigration)*, 2006 FC 99, [2006] FCJ no 210 at para 18 faulted the Board for posing “unanswerable questions.” According to the Applicant, his situation is synonymous with one where the Board was aggressive and asked questions that could not be answered due to a misunderstanding regarding the evidence.

[36] However, I also note statements by this Court that vigorous and energetic questioning by the Board does not necessarily lead to a breach of procedural fairness (see for example *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124, [2000] FCJ no 1913 at para 36; *Ihibu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 288, [2001] FCJ no 499 at para 68). The Board is entitled to probe the Applicant’s story to address credibility concerns and inconsistencies. Whether a breach occurs depends on the circumstances at the hearing.

[37] As the Respondent notes, the Applicant has not provided a specific example of where the Board was aggressive or abusive in its questioning. There is nothing to suggest that the Board member was demeaning or attacking the Applicant in his search for clarifications in an inconsistent PIF narrative and oral testimony as in *Muhwati*, above.

[38] Indeed, the Board’s decision and transcript demonstrate a preoccupation with ensuring that the Applicant was relaxed, listened to questions carefully and was given the opportunity to ask for clarification. The Board member stated “I know it’s difficult but try to relax and listen carefully to

the question. I don't want to limit your answers. Sometimes I have very specific questions." She continued "But if you're uncertain, don't hold back, tell me, and I'll tell you if I think you're veering off or your counsel will." The Board member also tried to ensure that the Applicant understood what was being asked.

[39] I am not convinced that the Board engaged in overly aggressive conduct and posed unanswerable questions or that the Board acted in such a way as to confuse the Applicant and deprive him of a fair hearing. The member merely sought to address her concerns regarding credibility. On its own, this does not amount to a denial of the Applicant's right to a fair hearing.

## VI. Conclusion

[40] The Board reasonably found that the Applicant's story was not credible based on various inconsistencies as to the Karuna group's extortion and obtaining his passport information. For this reason, there was also no clear error as to the assessment of risk. In addressing its concerns, the Board member's questioning did not amount to a breach of procedural fairness.

[41] Accordingly, this application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

“ D. G. Near ”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4557-11

**STYLE OF CAUSE:** BALASUBRAMANIAM v. MCI

**PLACE OF HEARING:** TORONTO

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**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** NEAR J.

**DATED:** FEBRUARY 20, 2012

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