

Federal Court



Cour fédérale

Date: 20120425

Docket: IMM-6930-11

Citation: 2012 FC 486

Ottawa, Ontario, April 25, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SIVATHARAN SIVAPATHASUNTHARAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant challenges the legality of a negative decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD], dated September 2, 2011, in which the RPD refused the applicant's claim for protection as a Convention refugee under section 96 or a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, the Court finds that its intervention is required in this case and allows the applicant for judicial review.

FACTUAL BACKGROUND

[2] The applicant is a 34 year old Sri Lankan Tamil from the Northern Province of Sri Lanka and alleges having a well-founded fear of persecution at the hands of the Sri Lankan military and Tamil paramilitary groups. He is married since 2008 and has a three year old daughter.

[3] The applicant alleges that during the military attack in 1995, he moved to Kilinochchi and started working on a farm. During this time, the applicant experienced harassment by the Liberation Tigers of Tamil Ealam [LTTE] who took portions of his crops from his farm. The applicant alleges that he lived in fear and like other farmers he acquiesced because the area was controlled by armed LTTE members. He alleges that after the war broke out between LTTE and military in October of 2008, he moved to Vavuniya because of his medical condition (asthmatic), leaving his pregnant wife with her parents in a camp near Vavuniya.

[4] The applicant alleges that while in Vavuniya in the Vanni region, he was accused of being involved with the Tigers, arrested, beaten and interrogated by military forces on two occasions in February and April of 2009. Each time he was released upon payment of a bribe after several days of detention. He alleges that he was also abducted by the People's Liberation Organization of Tamil Ealam [PLOTE] militants in June 2009. Again, he had to pay a bribe to secure his release. The applicant's daughter was born in May 2009 during the peak of the war. At that time, the applicant's wife and daughter were detained in a camp with other Tamils who had fled the war zone. The applicant alleges that with the help of his brother who lives in Europe, he was able to pay the authorities to gain the release of his family. Together, they fled to India via Colombo and arrived in Canada on May 17, 2010.

[5] The applicant testified before the RPD that his brother was arrested and detained several times by security forces since the applicant's departure and that his brother has also now fled the country and is claiming refugee status here in Canada. He further testified that they both paid an agent to secure their passports and to clear exit controls in order for them to be able to leave the country in security.

DECISION UNDER REVIEW

[6] In a two page decision, the RPD member found that although the applicant's story is credible, the determinative issue with respect to his refugee claim is the absence of an objective basis to his fear due to the fact that the Sri Lankan civil war is over since May of 2009 and that this constitutes a durable change.

[7] The RPD referred to two BBC news articles dated May 19 and April 5, 2010, to conclude that although there are still concerns that problems could fester if the government does not seek political accommodation with Tamil minorities, the military defeat of LTTE is total so that there is little likelihood of an armed conflict resuming in the near future.

[8] The RPD also referred to a UK Home Office information report dated February 18, 2010 (National Documentation Package, Sri Lanka, August 13, 2010, Tab 2.7), which notes a decrease in the number of extrajudicial killings and human rights violations in Jaffna district and in the Eastern province of Sri Lanka and states that the military appears to have the paramilitary under control since the end of the civil war.

[9] In addition, the RPD pointed out that the recent changes in the situation in the Northern Province have led the UNHCR to revise its *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, dated July 15, 2010. The excerpt quoted by the RPD is the following:

Given the cessation of hostilities, Sri Lankans originating from the north of the country are no longer in need of international protection under broader refugee criteria or complementary forms of protection solely on the basis of risk of indiscriminate harm.

[10] The RPD stated that what the applicant went through happened in the climax months of the war. Thus, in the actual circumstances, the applicant should not fear return as he is not individually targeted for some reason other than his general demographic profile of a Tamil male from the North. The RPD added that the fact that the applicant holds a Sri Lankan passport with which he transited Colombo on his way to India indicates that he is not sought by Sri Lankan authorities.

[11] The RPD also added that because the applicant was never a member of a combatant group or political organization and is now married and has a child, his profile is now less consistent with who are most at risk (i.e. young single Tamil males from the North) and that going forward there is no reason to believe that he would have anything more than a mere risk of persecution in Sri Lanka.

ISSUES AND STANDARD OF REVIEW

[12] The applicant challenges the legality of the RPD's decision on two main grounds. Although not pleaded in this order at the oral hearing, logically speaking, the questions raised by the applicant can be summarized as follows:

- Is the RPD's conclusion that there is durable change of circumstances in Sri Lanka made without due regard to the evidence in its entirety, and therefore unreasonable?
- Did the RPD err in failing to determine whether the applicant had compelling reasons arising out of previous persecution for refusing to avail himself to the protection of his country?

[13] It is not disputed that since *Dunsmuir v New Brunswick*, 2008 SCC 9, questions of fact or of mixed fact and law are normally to be reviewed against the standard of reasonableness. It follows that the Court must consider the justification, transparency and intelligibility of the decision making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

[14] The standard of correctness may have been applied in pre-*Dunsmuir* case law: *Decka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 822; *Nagaratnam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1208 at para 17). However, most recent jurisprudence of this Court considers that the question of whether the RPD erred in failing to conduct an assessment of the compelling reasons exception under subsection 108(4) of the IRPA involves a question of mixed fact and law and is to be evaluated on a standard of reasonableness (*Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044 at para 25; *SA v Canada (Minister of Citizenship and Immigration)*, 2010 FC 344 at para 22). Be that as it may, whatever standard applies here, the Court must intervene as a result of the following analysis.

ANALYSIS

[15] With respect to the applicability of paragraph 108(1)(e) of the IRPA, a key ground of attack is that the RPD failed to engage in a detailed and comprehensive analysis of the evidence of fundamental changes in current country conditions, as described in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1988, at page 31, para 135, and as required by the jurisprudence of this Court (*Tariq v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ 822 at para 31; *Kifoueti v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 197 au para 15).

[16] Among other examples, the applicant submits that the same UNHCR eligibility guidelines to which the RPD refers in its decision, states that the situation of Tamils in Sri Lanka is “still evolving” and mentions that persons suspected of having links with the LTTE are potentially at risk:

In the immediate post-conflict period, there have been allegations of enforced disappearances of persons suspected of LTTE links.

[...]

Amongst issues relevant to the determination of eligibility for refugee protection are allegations by a number of sources regarding: torture of persons suspected of LTTE links in detention; death of LTTE suspects whilst in custody; as well as poor prison conditions, which include severe overcrowding and lack of adequate sanitation, food, water and medical treatment. According to some reports young Tamil men, particularly those originating from the north and east of the country, may be disproportionately affected by the implementation of security and anti-terrorism measures on account of their suspected affiliation with the LTTE. In light of the foregoing, persons suspected of having links with the LTTE may be at risk on the ground of membership of a particular social group. Claims by persons suspected of having links with the LTTE may, however, give rise to the need to examine possible exclusion from refugee status.

[Emphasis added]

[17] The Court finds that the documentary evidence considered by the RPD and referred to in the impugned decision is highly selective and very hastily analyzed. The conclusion that the finding that the current circumstances of the country demonstrate a durable change is unreasonable in view of the evidence in this specific case. This is all the more compelling that the applicant has been accused of being involved with LTTE forces and arrested for that reason on two occasions in 2009, and that the RPD member does not question the credibility of his account or the fact that he suffered personalized persecution.

[18] The respondent refers me to a recent decision of this Court in *Selvalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 251 at paras 24-25 [*Selvalingam*], where it was decided that a Tamil applicant's encounter with the LTTE and his subsequent arrest and detention had to be examined in the current context of political situation in Sri Lanka, leading to the conclusion that the applicant's risk was not prospective in that case. However, in *Selvalingam* the RPD had found that the incidents encountered by the applicant did not amount to persecution and the Court found this finding to be reasonable in light the evidence before it. Furthermore, at paragraph 21 of the decision, the Court specifies that the applicant was found not to be credible by the RPD and that he was principally taking issue with the RPD's negative credibility findings. I find that the *Selvalingam* case is clearly distinguishable from the one before us.

[19] In the case at bar, a review of the documentary evidence reveals that different sources of information are less unanimous on the question of durability of change since the end of the Sri Lankan war than what the RPD's decision seems to suggest. A recent Response to Information Request, dated 21 February 2011, which can be found in the National Documentation Package, Sri

Lanka, April 13, 2011, Tab. 13.1, contains information that explicitly contradict the RPD's finding of fact, at least in the case of someone who has previously been suspected of being involved with and spying for the LTTE.

[20] Some relevant excerpts of the above report read as follows:

[...] two independent research fellows and two academics maintain, in their correspondence with the Research Directorate, that the government continues to screen for suspected LTTE members among the Tamil population

[...]

The process used to screen persons for LTTE affiliation, contends the International Commission of Jurists (ICJ), not only lacks "accountability" and "transparency," but, because it relies on "allegations made by fellow IDPs and paramilitary groups in the internment camps," it also lacks "credibility"

[...]

As recently as January 2011, the Norwegian Refugee Council's Internal Displacement Monitoring Centre (IDMC) was saying much the same thing when it noted that the screening process "remains unclear," as do the criteria for detention and release (14 Jan. 2011, 5). In fact, three international human rights organizations point out that some of the separated IDPs were actually forced to fight for the LTTE (ICJ Sept. 2010, 9; MRG Jan. 2011, 26; Radio Australia 9 Dec. 2009), while the MRG notes that some IDPs "had only marginal involvement with the rebels, such as building bunkers in the last stages of the war, cooking, nursing the wounded, etc." (Jan. 2011, 26).

[...]

One of the two academics contacted by the Research Directorate -- an adjunct professor of political science at Philadelphia's Temple University -- sees the screening process as a kind of pre-emptive strategy, one used to discourage Tamils from pursuing "a new wave of Tamil radicalization" (Adjunct Professor 13 Jan. 2011), while the other fellow -- a senior fellow at the New Delhi-based Center for Land Warfare Studies -- describes it as a means to cleanse the Tamil population of any remaining LTTE cadres (Senior Research Fellow 28 Dec. 2010).

[...]

The methods for purging the "hidden" LTTE members who the government believes are still at large consist of "surveillance, arbitrary arrests and random check[s]," explains the Adjunct

Professor (13 Jan. 2011). The second academic contacted by the Research Directorate, a York University law professor who is also a member of the advisory council of the Sri Lanka Campaign for Peace and Justice, somewhat similarly reports that Tamils throughout the country, particularly young Tamil men in the north or east, are being arrested and detained on suspicion of LTTE affiliation, a practice he describes as akin to “‘ethnic’ or ‘racial’ profiling” (Professor 20 Jan. 2011). The senior army officer reportedly told *The New Yorker* reporter that the army is building large military camps in the north and gathering intelligence with the help of spies in the Tamil population and electronic surveillance systems (*The New Yorker* 17 Jan. 2011, 49).

The result of the government’s efforts to find suspected Tigers is that screening is not limited to the IDP camps (Senior Research Fellow 28 Dec. 2010; Research Fellow 30 Dec. 2010). As the law professor explains, the government believes that “quite a number” of prominent LTTE figures remain at large and so is “very much on the look-out” for them (20 Jan. 2011). With the government still concerned with separating LTTE cadres from Tamil citizens, says the Senior Research Fellow, it is carrying out its screening in “residential areas all over the country” (28 Dec. 2010).

[...]

The Research Fellow reports that, within Sri Lanka, the army and paramilitary groups are checking vehicles and houses in the Northern Province for LTTE members and supporters (Research Fellow 30 Dec. 2010). The Adjunct Professor likewise indicates that screening is primarily focused on Tamils in the Northern and Eastern provinces (13 Jan. 2011).

According to the Research Fellow, screening is also being carried out at the airport (30 Dec. 2010). The law professor similarly says that he has it on good authority that the government is using “captured LTTE leaders as spotters at both the passport office in Colombo and at the airport” (20 Jan. 2011). He reports that the government is “routinely ‘interview[ing]’ returned Tamil asylum seekers and, on what is “likely minimal standard[s],” arresting and detaining any who are suspected of being affiliated with the LTTE (Professor 20 Jan. 2011). He adds that Tamils flying into the Colombo airport who are not failed asylum claimants or deportees are also being “randomly screened and interrogated” (ibid.)

[21] Similarly, a Danish Immigration Service report on human rights and security issues concerning Tamils in Sri Lanka (19 June to 3 July 2010), found at National Documentation

Package, April 13, 2011, Tab. 2.5, also indicates that the presence of military forces throughout the North remains significant and that the government has put in place a registration system for Tamil residents in some parts of Colombo where the Tamil concentration in the population is high. The report indicates that the registration requirement is being applied in a discriminatory fashion exclusively to those of Tamil origin and has been accompanied by reports of search operations.

[22] It is apparent that the RPD failed to include the more recent documentary evidence from the April 2011 and August 2010 versions of the National Documentation Package that was made available to it at the time of the hearing. Yet, the jurisprudence is clear that it is incumbent on the RPD to examine the most recent sources of information in assessing the evidence even in cases where the updated country reports are not filed by the applicant (*Hassaballa v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ 658 at paras 33-35; *Jessamy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 20 at para 81).

[23] In passing, the applicant states that he also filed other documentary evidence consisting of several newspaper/internet articles excerpts as well as a DVD on recent events of attacks on Tamils by Sri Lankan security forces. The RPD member refused to watch the DVD even though prior arrangements had been made for the applicant to be able to present this evidence at the hearing. The RPD member stated that he will take the time to watch the DVD after the hearing. However, the impugned decision also completely ignores the evidence submitted by the applicant which is most relevant since it apparently involves members of the applicant's family as well.

[24] In coming to the conclusion that the impugned decision is unreasonable, I am mindful of the argument made by the respondent that the fact that the RPD reasons do not canvass every piece of evidence does not indicate that the decision maker did not consider these documents and is generally not fatal to its final decision. However, this is a rebuttable presumption (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ 598) and the RPD had an obligation to address this important contradictory evidence that directly contradicts its findings of fact (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425, at para 17). Thus, at the very least, the RPD had to acknowledge and explain why this negative evidence on the durability and effectiveness of the defeat of LTTE and the end of the Sri Lankan civil war is rejected or deemed irrelevant.

[25] At the risk of repeating myself, the apparent contradictions or cautionary remarks in the documentary evidence was sufficiently significant and relevant to require a more thorough weighing by the RPD when deciding whether in his specific circumstances, the applicant could encounter a personalized risk of persecution upon return to Sri Lanka. I therefore find that the RPD's finding that the applicant was not at risk of further attacks was unreasonable in the circumstances. While this error is determinative, I am of opinion that the RDP also erred in failing to proceed with a proper analysis of the compelling reasons exception pursuant to subsection 108(4) of the IRPA. It has not been really challenged by the Minister that the obligation to conduct an analysis under subsection 108(4) of the IRPA is a precondition to the dismissal of a refugee claim on the ground that, pursuant to paragraph 108(1)(e), the reasons for which the person sought refugee have ceased to exist, whether this has been raised or not by the claimant (*Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 457 at para 6 (FCA)).

[26] The issue is whether, considering the totality of the situation, compelling circumstances which are linked to past persecution warrant that the claimant be granted refugee status despite a change of circumstances. The decision, as all decisions of a compelling nature, necessitates the view that it is the state of mind of the refugee claimant that creates the precedent - not necessarily the country, the conditions, nor the attitude of the population, even though those factors may come into balance (*Suleiman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125 at paras 15-21).

[27] Not only the compelling reasons exception was formally raised by the applicant (transcripts of the hearing, tribunal record at pages 209, 210, 214, 216 and 252), but the fact that the applicant would not be personally targeted today – which is a debatable issue as found above – is an irrelevant consideration in an analysis under subsection 108(4) of the IRPA. Although the RPD member considered the applicant credible, and thus, implicitly accepted that he had been persecuted in his country, it failed to make an assessment under subsection 108(4) of the IRPA. Even if one accepts that the changes are durable, this error renders the whole decision unreasonable (*Gorria v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 457, 254 NR 388 at para 6 (FCA)). This constitutes further ground to set aside the impugned decision and refer the matter back to the RPD for reconsideration by a differently constituted panel.

[28] For these reasons, the present application for judicial review shall be allowed. No question of general importance has been stated by counsel and none shall be certified.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is granted. The impugned decision is set aside and the matter is remitted back to the Refugee Protection Division of the Immigration and Refugee Board for reconsideration by a differently constituted panel. No question of general importance is certified.

“Luc Martineau”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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