

Federal Court



Cour fédérale

Date: 20121024

Docket: IMM-1305-12

Citation: 2012 FC 1236

Toronto, Ontario, October 24, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

KAJENTHIRAN YOTHEESWARAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, a Tamil male from Jaffna, Sri Lanka, challenges by way of judicial review the decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD), dated January 11, 2012 (the Decision), in which the RPD determined that the Applicant is not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicant's claim is based on subjective and objective fear that he will be abducted and subject to torture, or worse, death at the hands of the Sri Lankan army if he is returned to Sri Lanka.

[2] In the Decision, the RPD accepts that the Applicant is a 26-year old Tamil male from Jaffna, Sri Lanka and briefly recounts the Applicant's evidence of attempts at recruitment by the Liberation Tigers of Tamil Eelam and multiple arrests and detentions by the Sri Lankan security forces up until his departure from the country, which the Applicant states was in February, 2010. However, the RPD rejected the Applicant's claim on the basis of a global negative credibility finding, and evidence of changed circumstances in Sri Lanka.

[3] The Applicant's primary argument in the present Application is that the RPD erred in law in making the negative credibility finding. For the reasons that follow, I agree with this argument because the RPD's credibility analysis does not adhere to established legal principles.

[4] In the credibility analysis, the RPD makes the following problematic statement:

The claimant's oral evidence was generally consistent with his PIF narrative however a witness's testimony does not have to be accepted because it was not contradicted and the weight and credibility to that evidence will be assessed by the Board.

(Decision, Certified Tribunal Record, p. 5)

The decision in *Efremov v Canada (Minister of Citizenship and Immigration)*, 90 FTR 259 (FCTD) is footnoted in the Decision as support for the statement. That decision does speak to the uncontested principle that the weight and credibility to be given to evidence is a matter for the RPD to determine. However, I read the RPD's statement to mean that it is open to the RPD to simply reject consistent and un-contradicted evidence. This assertion is not supportable in law and it clearly offends the basic and well understood principle set out in *Maldonado v Canada (Minister of Employment & Immigration)*, [1980] 2 FC 302 (FCA): when a refugee claimant swears to the truth

of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness.

[5] Further with respect to the RPD's credibility analysis, at paragraph 22 of the Decision the RPD relies on *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 (FCA) for the following statement:

The concept of "credible evidence" is not, of course, the same as that of the credibility of the applicant, but it is obvious that where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to "country reports" from which nothing about the applicant's claim can be directly deduced), a tribunal's perception that he is not a credible witness effectively amounts to a finding that there is no credible evidence on which the second-level tribunal could allow his claim.

[Emphasis added.]

(Decision, Certified Tribunal Record, p. 8)

In my opinion, in making this statement the RPD misses the point that in order for the statement to have any relevance, a finding must first be made that an applicant is not a credible witness on the basis of the principle articulated in *Maldonado*. The RPD also neglects to mention the requirement established by the Federal Court of Appeal in *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (FCA), that a credibility finding must be made in clear and unmistakable terms.

[6] Some time ago, in *Vodics v Canada (Minister of Citizenship and Immigration)*, 2005 FC 783 (FC) at paragraph 11, I stated why the principles stated in *Maldonado* and *Hilo* must be followed:

To say that someone is not credible is to say that they are lying. Therefore, to be fair, a decision-maker must be able to articulate why he or she is suspicious of the sworn testimony, and, unless this can be done, suspicion cannot be applied in reaching a conclusion. The benefit of any unsupported doubt must go to the person giving the evidence.

[7] Thus, I find that the RPD's interpretation of the law with respect to the making of credibility findings is an error in law.

[8] The error found was applied to the Applicant's evidence in the present case. The Applicant provided a consistent narrative throughout his refugee claim process and his testimony was found to be free of internal inconsistencies and contradictions except for one minor feature regarding his family's residence in Colombo in 2006. However, this inconsistency was addressed through an amendment to the Applicant's Personal Information Form (PIF) prior to the hearing. As noted by Counsel for the Applicant in argument, the Applicant provided a consistent narrative as to his risk concerns before US immigration authorities, at his Port of Entry interview with Canadian authorities, within his PIF, and as well before the RPD. Thus, I find that it is abundantly clear that the evidence placed before the RPD by the Applicant contained no material inconsistencies.

[9] In making the negative credibility finding the RPD did not provide clear reasons for doubting the Applicant's testimony. Instead the RPD moved on to make the following erroneous finding that is central to the rejection of the Applicant's claim for protection:

The claimant did not disclose corroborative evidence in support of the allegations of him being arrested or detained in an army camp or police station. The RPD was not provided with any corroborative documents of the arrests, detention or mistreatment he alleged by the security forces. The claimant also did not produce corroborative evidence as to when he was last in Sri Lanka.

(Decision, Certified Tribunal Record, pp. 5-6)

[10] In *Ahortor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 705 (FCTD), at paragraph 45, Justice Teitelbaum provides the following direction respecting corroboration:

The Board appears to have erred in finding the Applicant not credible because he was not able to provide documentary evidence corroborating his claims. As in *Attakora*, supra, where the F.C.A. held that the applicant was not required to provide medical reports to substantiate his claim of injury, similarly here the Applicant is not expected to produce copies of an arresting report. This failure to offer documentation of the arrest, while a correct finding of fact, cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegations.

[Emphasis added.]

The point emphasized has also been made in *Attakora v Canada (Minister of Employment & Immigration)* (1989), 99 NR 168 (FCA) and *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 (FCTD). Therefore, I find that the Decision fails to adhere to the law respecting corroboration.

[11] In the result, I find that the Decision is made in reviewable error in both findings of law, and in the application of those findings to the Applicant's evidence.

ORDER

THIS COURT ORDERS that:

The RPD's decision is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1305-12

STYLE OF CAUSE: KAJENTHIRAN YOTHEESWARAN v THE
MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 17, 2012

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: OCTOBER 24, 2012

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