

Federal Court



Cour fédérale

Date: 20130128

Docket: IMM-4419-12

Citation: 2013 FC 83

Ottawa, Ontario, January 28, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SIVAEESAN THAVACHCHELVAM

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 rendered by the Refugee Protection Division of the Immigration and Refugee Board [tribunal] which found the applicant to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (as amended) [Act].

[2] The applicant bases his refugee claim on the grounds of race, imputed political opinion, and membership in a particular social group. The applicant fears the army, the police, the Liberation

Tigers of Tamil Eelam Group [LTTE], and pro-government militant groups. Although the tribunal, alternatively, found the applicant not credible, it did not find in the first place that the applicant has a well-founded fear of persecution and would face a risk to his life upon return to Sri Lanka.

[3] The main allegations of the applicant can be summarized in the following manner.

[4] The applicant, a 23 year old Tamil male, is a citizen of Sri Lanka. He is from Point Pedro in northern Sri Lanka. The applicant's family is considered well-off and his father, who owns his own farm, cultivates onions and tobacco and his mother stays at home. He has a brother and two sisters who remain in Point Pedro with his father and mother.

[5] The applicant left school in 2004 and began helping out on his father's farm. The LTTE was recruiting members in the area where the applicant lived, and he and his brother and two sisters faced pressure to participate in LTTE activities. The applicant's father was able to keep the LTTE away from his children by using bribes.

[6] The applicant states that the police arrested him three times before his departure from Sri Lanka.

[7] Firstly, in November 2007, the applicant was detained and questioned during two days regarding the killing of a shop owner and about his connection with the LTTE before being released. According to the applicant, several others that were arrested at the time were beaten and shot.

[8] Secondly, in December 2007, afraid to have his son remain in Point Pedro, the applicant's father sent the applicant to stay with his uncle in the city of Colombo. Authorities in Colombo were nonetheless conducting numerous roundups and arrests. At one point, the police took the applicant to the police station, questioned him, and then released him that same day. Also while in Colombo the applicant states that he attended a private computer school where he took a two week computer course from home.

[9] Thirdly, in June 2009, the police took the applicant to the police station and detained him for four days, beat him, questioned him, and accused him of LTTE connections. While detained at the police station, the applicant states that there was another Tamil civilian present. The applicant believes this individual to have been part of the Karuna group who helps the authorities combat the LTTE. His uncle eventually secured the applicant's release from the police by paying a bribe. After the incident, the applicant did not require medical attention.

[10] On August 2, 2009, the applicant left Sri Lanka and travelled through nine countries before finally arriving in Canada where he has family. The applicant is unclear as to how much time was spent in each country on the way to Canada, but his route took him through Russia, Ecuador, Colombia, Panama, Guatemala, Mexico, and the United States (where he apparently made a refugee claim as well). The applicant arrived in Canada on or around June 17, 2010, and claimed protection in Montreal.

[11] The tribunal dismissed the claim. In a nutshell, the tribunal concluded that the applicant's fear of the authorities, paramilitary groups, crime, violence, extortion and questioning upon his return, constituted a risk generally faced by all Sri Lankans and by all persons returning from abroad. Moreover, in view of the different contradictions, omissions and implausibilities in the evidence, as well as the lack of sufficient corroborative documents, the tribunal also found that the applicant was not credible and that he had not established a well-founded fear of persecution or personalized risk in the circumstances.

[12] The applicant first takes issue with the conduct of the tribunal member during the hearing and alleges that the tribunal member conducted itself in an improper manner. Subsidiarily, the applicant submits that the conclusions of absence of personalized risk and non-credibility made by the tribunal are unreasonable. Key in the determination of absence of personalized risk made by the tribunal is the testimony of the applicant who "testified that he is not suspected of being an LTTE supporter" (paragraph 8).

[13] For ease of convenience, I will deal separately with the allegation of bias or breach of procedural fairness, which is directly related to the questioning of the tribunal member who wanted to know if the applicant was suspected of being a LTTE supporter. I will first dispose of the applicant's subsidiary attack with respect to certain findings of mixed fact and law, or credibility, made by the tribunal; on these matters, the applicable standard of review is reasonableness.

[14] Apart from the collateral attack concerning the manner used by the tribunal to ascertain whether the applicant was suspected of being an LTTE supporter, the applicant has not seriously

challenged the reasonableness of the tribunal's conclusion of absence of personalized risk or persecution upon return to Sri Lanka. Considering the other components of the decision that have been addressed and overlap considerations of the risk that the applicant might face upon return, I find that the tribunal has taken due consideration of the documentary evidence. I do not intend to go into a lot of details. The reasons provided by the tribunal are articulate and convincing. I am also generally satisfied of the arguments made by the respondent in his memorandum. Thus, I will only make a few comments.

[15] As noted by the tribunal, the documentary evidence regarding Sri Lanka paints a rather confusing picture of the situation in the country as to who is at risk and why. The tribunal stated it preferred the *UNHCR Eligibility Guidelines for Assessing the International Protection needs of Asylum Seekers from Sri Lanka* [UNHCR guidelines]. The UNHCR guidelines addresses five potential risk profiles, none of which apply to the applicant for the reasons provided by the tribunal who has taken the time to meticulously examine the evidence, including the risk of persons who may have the profile of a LTTE supporter.

[16] In this regard, the tribunal recognizes that persons suspected of having links with the LTTE "are likely to undergo questioning and during these questioning sessions may be subjected to physical and emotional abuse and torture." However, as noted by the tribunal, the applicant "testified that he is not suspected of being an LTTE supporter." The tribunal found further corroboration of the fact that he was never really suspected of being a LTTE supporter – and that his previous arrests were random – from the fact that he was released: "If there was any chance of him being a LTTE supporter in any form, he would not have been released as he was" (paragraph 81).

This settles the past persecution, but the fear of persecution must be forward looking and the risk must be personalized.

[17] Certainly, the applicant risks arrests and questioning by the authorities upon return to Sri Lanka, and certainly he has been abusively held by the police in the past, but the applicant has not sufficiently demonstrated to the satisfaction of the tribunal how he has been specifically and personally targeted to merit a determination of personalized risk. Arrest scenarios are plausible but also appear to be randomized. As the tribunal points out, two aspects would create a heightened level of risk for the applicant: his refusal to help the criminals and the apparent presence of a civilian belonging to the Karuna group during questioning at his third arrest. However, it appears that the applicant has only surmised that this individual was a member of the Karuna group and that this might cause problems for him upon return. The tribunal also noted that the other members of the applicant's family, including his brother and two sisters, do continue to live in Point Pedro without facing heightened difficulties. Save for inquiries made to the applicant's uncle and police as to the location of the applicant, it was not unreasonable for the tribunal to conclude that the applicant has not sufficiently demonstrated that he faced more than a generalized risk.

[18] The tribunal also found, in the alternative, that the applicant lacked credibility after conducting a credibility analysis separately. The grounds upon which the tribunal determined the applicant lacked credibility can be summarized as follows: (1) numerous contradictory statements and omissions in relation to aspects such as the account of his work experience and study permit in Colombo, details about his arrests in Sri Lanka, the ability of his brother and sisters to live safely in Sri Lanka, the details of his journey to Canada, the refugee claim he apparently made in the United

States; (2) the contradiction in his response at the hearing that the Sri Lankan government did not suspect him of being an LTTE supporter while he had already described himself as being suspected; (3) the applicant's failure to ask for asylum in the nine different countries (linked to safe third country grounds); (4) his failure to provide adequate corroborative documents; and (5) the documentary evidence relating to the current situation in Sri Lanka, which the tribunal member sees as indicating an unlikelihood of persecution for Tamils due to a Convention ground (essentially, amounting to a change in circumstances).

[19] It is well-established that decisions of the tribunal as to credibility are by nature factual and are thus owed a significant amount of deference. Reasonableness demands justification, transparency, and intelligibility in the decision-making process, which I ultimately find to be present in the tribunal member's decision (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). While I do find that some statements made by the tribunal may somewhat touch on details, nonetheless, the totality of the reasoning is based on the evidence and the credibility findings and absence of subjective fear falls within the range of acceptable outcomes.

[20] This brings me to the main argument of attack against the legality of the impugned decision.

[21] At the hearing before the Court, applicant's counsel recognized that the applicable test for bias, as set out in the relevant case law, was not met, but insisted that the tribunal member was nevertheless unfair at the hearing. When the applicant testified that he was arrested, detained and beaten by the authorities since they accused him of having links or supporting the LTTE Tigers, the

applicant's counsel argues that the tribunal member threatened to inform the Minister that there is possibility of exclusion.

[22] As the allegation against the tribunal member deals with bias or procedural fairness, it will be measured against a standard of correctness and upon a close examination of the transcripts of the hearing. Any particular comments of the tribunal member with respect to exclusion will have to be read in light of the totality of the evidence, including the answers given by the applicant, as well as the overall conduct at the hearing of the tribunal member.

[23] I note that at page 18 of the transcripts, the tribunal member and applicant have the following exchange in relation to the allegations of severe beating by the police:

MEMBER: You say sir here in your story that you were beaten severely. Did you need medical attention if you were beaten severely?

CLAIMANT: No

MEMBER: And how is that possible? If somebody is beaten severely that person needs medical attention.

CLAIMANT: They were inquiring about the happening in Jaffna, they [*sic*] and they were also questioning whether I was support [*sic*] the Liberation Tigers or those Tigers who have escaped from the camp. When I was giving the details they were hitting me by their hands and by feet.

MEMBER: When did you get into USA?

[24] The tribunal member clearly passes to another subject. He does not “threaten” the applicant. He continues to question the applicant concerning the apparent contradictions with respect to the date of the third arrest, whether it was in June or July of 2009 (pages 17, 18, and 19).

[25] Later on in the hearing, during the questioning conducted by the applicant about his third arrest, the tribunal member interjects in the following way at page 34 of the transcripts, but does not pursue the question further:

COUNSEL: So what did you tell them?

CLAIMANT: I indicated that [ph] I have no link with them whatsoever and they said that those who have come from Jaffna are trying to build up the tigers again and the threatened that they will kill me [*sic*].

MEMBER: Sir if the government thinks that you have ties to the Tigers I can inform the minister that there is a possibility of exclusion and let them get involved. Does the government think that you are an LTTE supporter?

CLAIMANT: No. They inquired me [*sic*] and then they left me.

[26] Learned applicant’s counsel now uses the above extract to explain to this Court that the reply of “No” given by the applicant in response to the query of the tribunal member as to whether or not the government thought he was linked to the LTTE was the result of fear induced when faced with the threat of being excluded, and should not be used later by the tribunal in order to note that the applicant contradicted himself.

[27] The applicant submits that the tribunal member should have notified the Minister under Rule 23 of the *Refugee Protection Division Rules*, SOR/2002-228 of any doubts regarding the applicant’s

affiliations prior to the hearing since no new facts were raised at the hearing that were not in the applicant's Personal Information Form [PIF]. The applicant contends that this alleged breach affects the entirety of the tribunal's decision before us today because the applicant would fit the profile of persons who are suspected of being LTTE supporters, which puts him at risk if he returns to Sri Lanka.

[28] I am unable to find any breach of procedural fairness. The applicant was under oath and had the obligation to tell the truth – regardless of any alleged sudden panic. He must tell the truth all the time; otherwise, if he contradicts himself – like he apparently did – how can the tribunal member know when he is telling the truth and when he is lying to the tribunal? Overall, I do not find that the questioning of the tribunal member was improper in the circumstances. There was nothing wrong in asking: “Does the government think that you are an LTTE supporter?”

[29] The tribunal member already had a number of legitimate concerns regarding the credibility of the applicant who had difficulty providing details about the third arrest and had provided either contradictory or confusing answers. It is an exaggeration to say, in this instance, that the tribunal member induced the applicant to lie in order to avoid the possibility of being excluded. Indeed, there is no indication on record from the applicant, or counsel for the applicant, that there was any concern with bias or improper conduct on the part of the tribunal member during the hearing.

[30] Regarding the tribunal's general obligation to inform the applicant and his counsel if an exclusion matter becomes an issue, it was within the tribunal's discretion at the hearing to proceed on the basis of the evidence presented before it. The applicant was not seeking an adjournment.

After all, the applicant testified that he was beaten by the authorities who suspected him of having links with the LTTE Tigers. The matter of exclusion was immediately closed following the prompt negative answer given by the applicant who explained that the police had decided to release him after the interrogation.

[31] In conclusion, there is no reasonable apprehension of bias or breach of procedural fairness on the part of the tribunal member who decided the claim. Having closely examined the hearing transcript, rather than having acted in an improper manner, I find that the tribunal member was cooperative, accommodating, and clearly identified areas where credibility may have been an issue during the course of the hearing. Overall, I find the conclusions of the tribunal – that the applicant's risk is only generalized and that he is not credible – to be an acceptable outcome in light of the evidence on record and the law.

[32] For these reasons, the present application must fail. Counsel agree that there is no question of general importance raised in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application is dismissed. No question is certified.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4419-12

STYLE OF CAUSE: SIVAEESAN THAVACHCHELVAM v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: January 17, 2013

REASONS FOR JUDGMENT: MARTINEAU J.

DATED: January 28, 2013

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