

Federal Court



Cour fédérale

Date: 20130125

Docket: IMM-6593-12

Citation: 2013 FC 77

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

P.M.

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant is a citizen of Sri Lanka, of Tamil ancestry, who arrived in Canada in 2010 as one of 492 passengers on the *M/V Sun Sea*. He denies any involvement with the Liberation Tigers of Tamil Eelam (LTTE), which is designated as a terrorist organization in Canada. Nevertheless he claims refugee protection in Canada on the basis that he is at risk of persecution because he will be perceived to be associated with the LTTE since he arrived on the *M/V Sun*

Sea. Moreover, he claims that he is at risk from the Sri Lankan authorities who will undoubtedly persecute him as a returning refugee claimant who travelled on the *M/V Sun Sea*.

[2] In a decision dated June 12, 2012, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) denied the Applicant's claim for protection under s. 96 and ss. 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The Board accepted that the Applicant had no ties to the LTTE and made a number of other key findings:

- The Applicant could relocate to Jaffna, an internal flight alternative, and live safely there;
- The Applicant would not face persecution as a returning failed Tamil asylum seeker; and
- The Applicant is not likely to be at risk on the basis of perceived association with the LTTE as a result of his coming to Canada on the *M/V Sun Sea* (the *sur place* claim).

II. Issues

[3] The Applicant seeks to overturn this decision, raising the following issues:

1. Did the Board err by failing to consider central, relevant and probative evidence relating to the Applicant's *sur place* claim?
2. Was the Board's *sur place* analysis unreasonable because it was based on incorrect information, assumptions unsupported by the evidence and unreasonable speculation?

[4] For the reasons that follow, I have concluded that the decision should stand.

III. Standard of Review

[5] The standard of review applicable to the decision is that of reasonableness. The role of the court when a reasonableness standard is appropriate is to determine “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). A court should also examine whether the decision displays “justification, transparency and intelligibility within the decision-making process” (*Dunsmuir*, above at para 47).

IV. Analysis

A. Issue #1: Failure to consider evidence

[6] The court may presume that the RPD has considered all the evidence, and the Board is not required to specifically refer to each piece of evidence presented (*Yu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1157 at para 8, 66 Imm LR (3d) 153; *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at para 90, 253 DLR (4th) 606).

However, the RPD may commit a reviewable error by failing to specify central evidence to the applicant's claim which contradicts its reasoning or conclusion (*Jordanov v Canada (Minister of Citizenship and Immigration)* (1998), 145 FTR 289 at para 11, [1998] FCJ No 367 (TD); *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 15-17, 27, [1998] FCJ No 1425 (TD)).

[7] In the context of a record in which there are multiple items of documentary evidence relating to country conditions, the Board does not have to refer to every single document. Nonetheless, if the Board fails to mention the substantive content of critical evidence that contradicts its findings, then it has erred (*Osorio v Canada (Minister of Citizenship and Immigration)*, 2012 FC 37 at para 41, [2012] FCJ No 36).

[8] The Applicant asserts that the Board ignored an article written in early 2012, posted on the Sri Lankan Ministry of Defence website, relating primarily to an organization called the Canadian Tamil Congress (Certified Tribunal Record (CTR) at 1510-1512). This article alleges

that the CTC is a front for the LTTE, seeking to advance the LTTE's goals through human rights efforts. The relevant passage states as follows (CTR, Vol 8 at 1511):

The ongoing investigations reveal the CTC facilitated the multi-million dollar LTTE run human smuggling operations by MV Ocean Lady (76 crew and passengers) and MV Sun Sea (492 crew and passengers). Spearheaded by two former Sea Tigers, Ravishankar Kanagarajah of Canada and Shanmugasundaram Kanthakaran of the UK, the LTTE also facilitated the passage of over 200 LTTE leaders, members and their families to Canada... Further, it is revealed that, not only did the CTC provide legal and financial aid to the LTTE crew and passengers but also projected that they were bona fide refugees and not terrorists. As the key LTTE cadres and their families arrived in Vancouver, the very next day Poopalapillai [CTC's Director of Public Relations] with his team flew to Vancouver to defend the LTTE infiltrators and counter Canadian efforts to develop tough legislation. Gary Anandasangaree of CTC provided legal counsel.

[9] In the case before me, the Board acknowledges the substance of this evidence. The Board states that “[t]here is no doubt that the arrival of the M/V Sun Sea generated significant interest on the part of the public and government authorities in both Sri Lanka and here in Canada” (Decision at paragraph 74). The RPD further explained that “concerns were expressed by Canadian and Sri Lankan officials as to the backgrounds and reasons why the M/V Sun Sea migrants arrived on Canadian shores” (Decision at paragraph 71).

[10] Similarly, the Board cites other articles raised by counsel relating to LTTE connections of certain *M/V Sun Sea* passengers. One article, dated March 6, 2012 and published by the Presidential Secretariat of Sri Lanka, explains that an *M/V Sun Sea* passenger admitted to working for LTTE prior to his arrival in Canada, and notes that 15 other passengers are alleged LTTE members (Decision at paragraph 68 referring to CTR Vol 8 at 1525). The second article is dated 2011 and was posted to the Sri Lankan Ministry of Defence website. This article explains

that one of the *M/V Sun Sea* migrants admitted to membership in the LTTE (Decision at paragraph 68 referring to CTR Vol 4 at 658).

[11] In sum, I am not persuaded that the Board ignored the specific documents. The substance of those documents was considered and is not inconsistent with the Board's findings. This evidence demonstrates, at the very most, that the *M/V Sun Sea* is associated with the LTTE and some, but not all, passengers may be LTTE members or have LTTE connections. However, the question is whether, on the totality of the evidence, it was reasonable for the Board to conclude that the Applicant himself would not be at risk because of perceived links to the LTTE. As discussed below, the Board reasonably concluded that this Applicant would not be perceived as LTTE upon his return to Sri Lanka. The fact that particular documents were not referred to does not affect the outcome of this case.

B. *Issue #2: Unreasonable sur place finding*

[12] The Applicant presented to the Board (and to this Court), the following line of reasoning supporting a conclusion that the Applicant would face more than a mere possibility of persecution upon his return to Sri Lanka:

1. The evidence before the Board demonstrates clearly that agents of the government of Sri Lanka engage in a systemic use of torture as a means of securing information or confessions from detainees.

2. All returning Tamils who were on the *M/V Sun Sea* will be subjected to interrogation to determine whether they might have LTTE associations or information related to those LTTE members who were responsible for this people smuggling operation.

3. It follows that there is more than a mere possibility that the Applicant will be subject to systemic torture upon his return.

[13] The flaw in the Applicant's argument arises with his third step. The Board acknowledged the human rights abuses of the Sri Lanka government and accepted that the Applicant would be detained and questioned upon his return. However, the Board refused to conclude that there was a serious possibility that this particular Applicant would be subjected to torture upon his return. The Board reasoned that, taking into account the specific circumstances of the Applicant, the Sri Lankan authorities were not likely to conclude that he was associated with the LTTE. Thus, there was not more than a mere possibility that he would have a lengthy detention with the risk of torture.

[14] The question is whether there was evidence before the Board upon which such a determination could be reached. In my view, there was. For example, the Board had before it – and referred to – the fate of other returning failed asylum seekers. The Board observed that, in spite of two investigations into the background of the Applicant, Sri Lankan officials “have reassured themselves that the [Applicant] has no LTTE ties” (Decision at paragraph 33) and “were of the opinion that he presented no risk to the peace and stability of their country”

(Decision at paragraph 35). The Board also referred to the uncontested fact that the Applicant had been cleared by Canadian officials of LTTE association after interviews with the Canadian Border Services Agency which, the Board logically assumed, would be known to the Sri Lankan officials. Further, the Board considered and explained why it did not give weight to certain general statements made to the effect that “any Sri Lankan who fled the country in an unauthorized way must be a LTTE sympathizer” (Decision at paragraph 70).

[15] The Applicant submits that the Board erred in its assumption that the decision of the Board would be persuasive evidence to the Sri Lankan authorities that he is not LTTE. In this argument, the Applicant fails to appreciate the entire context in which reference is made to the Canadian decision. The Board’s suggestion that the Applicant show his Board decision to the Sri Lankan authorities is not unreasonable in the context of the decision as a whole. As assumed by the Board and by the Applicant, the Sri Lankan authorities would know that the Applicant travelled to Canada on the *M/V Sun Sea*, and would logically conclude that he applied for refugee protection. Therefore, theoretically speaking, the Board decision could not place him at greater risk and could be helpful in demonstrating why the Canadian authorities believed that the Applicant is not a member of the LTTE. Although there is no evidence that the Board decision would necessarily be probative to the Sri Lankan authorities, the Board acknowledges that the Sri Lankan government will conduct its own independent evaluation and this is phrased merely as an option.

[16] In support of his argument, the Applicant provided me with a number of Board decisions in which different panel members of the Board accepted *M/V Sun Sea* claimants as Convention

refugees, allegedly following the Applicant's proposed line of reasoning. The problem is that these Board decisions do not have precedential value – for very good reason. The individual facts and records in each case must be examined. For example, in one of the cases referred to, the panel concluded that the claimant's profile was one suspected of having links with the LTTE, thereby exacerbating the risk on his return.

[17] Moreover, and more importantly, the decision is reviewable on a standard of reasonableness. It is possible for different conclusions to be reached on similar facts. I acknowledge that the Applicant put forward a rational line of reasoning for finding that the Applicant was at risk because of his passage on the *M/V Sun Sea*. However, that does not mean that the line of reasoning followed by the Board is unreasonable. The existence of a range of possible outcomes is the hallmark of the reasonableness standard and is the foundation of the deference owed to decision makers. Whether this Applicant would face more than a mere possibility of persecution is a factual question to be determined by the Board. While I or another panel member might have come to a different conclusion, the decision of this Board was reasonably open to it on this particular evidentiary record. The Court should not intervene.

V. Conclusion

[18] The decision is not unreasonable and should not be overturned.

[19] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and
2. no question of general importance is certified.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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