

Federal Court



Cour fédérale

Date: 20130312

Docket: IMM-3266-12

Citation: 2013FC260

Ottawa, Ontario, March 12, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

B399

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The respondent is a Tamil male from Sri Lanka who arrived in Canada in 2010 aboard the MV Sun Sea. By virtue of an order of this Court, he will be referred to as B399, rather than by his name.

[2] B399 applied for refugee protection and, in 2012, a panel of the Immigration and Refugee Board (Board) concluded that he had a well-founded fear of persecution in Sri Lanka. The Board found that B399 was at risk by virtue of his membership in a particular social group, namely, Tamil males who were passengers on the MV Sun Sea. It noted that Sri Lankan officials regard those passengers as being associated with the Liberation Tigers of Tamil Eelam (LTTE) and single them out for harassment, abuse or torture on return to Sri Lanka.

[3] The Minister contends that the Board erred in its finding that B399 is a member of a particular social group. He also maintains that the Board overlooked evidence showing that B399 was unlikely to be regarded as an LTTE sympathizer. He asks me to quash the Board's decision and order another panel to reconsider B399's claim.

[4] I agree that the Board erred in finding that B399 is a member of a particular social group. However, the Board also provided alternative grounds for granting B399's claim – persecution based on ethnicity or perceived political opinion. Further, I cannot conclude that the Board overlooked evidence. Therefore, I must dismiss this application for judicial review.

[5] The issues are:

1. Was the Board's conclusion that B399 is a member of a particular social group unreasonable?
2. Did the Board overlook relevant evidence relating to the risk facing B399 on return to Sri Lanka?

II. Factual Background

[6] B399 had numerous encounters with the LTTE and the Sri Lankan Army (SLA) over the past 20 years. Due to the conflict in the Jaffna peninsula in the early 1990s, his family was forced to live in a refugee camp. During the mid-1990s, the SLA attempted to capture the Jaffna peninsula. B399's cousin was killed in a bombing. Soon after, his family relocated to Killinochchi.

[7] When the peace accord was signed in 2002, B399 and his family returned to Jaffna. However, their home and fishing equipment was lost in the tsunami of 2004.

[8] In 2006, hostilities once again erupted and the LTTE began a new recruitment campaign. B399 tried to avoid recruitment, first by fishing during the day and hiding at night, and later, by moving to Udappu village with his parents. Along the way, the family was stopped at a number of LTTE and SLA checkpoints. After questioning, they were released.

[9] In due course, B399 moved to Colombo, while the rest of the family moved back to Jaffna. However, Tamils were targeted in Colombo and B399 returned to Udappu. Things were no better in Udappu, so B399's uncle arranged for him to travel to Thailand. He left Sri Lanka in 2008 and registered with the UNHCR in Thailand. Even though the conflict in Sri Lanka ended in 2009, B399 travelled to Canada on the MV Sun Sea, arriving in Canada in August 2010.

III. The Board's Decision

[10] The Board found that B399 was largely credible, although he had embellished his claim by asserting that he had undergone a week of forced training with the LTTE.

[11] The Board surveyed the evidence relating to the treatment of Tamil returnees in Sri Lanka, particularly passengers on the MV Sun Sea. It found that the Sri Lankan Defence Secretary believed that the voyage of the MV Sun Sea was undertaken as a means of raising funds for the LTTE, and that the passengers were associated with that group.

[12] The Board reviewed the evidence regarding the treatment of returnees and found that it was mixed. Some organizations report that returnees may face arrest or detention, and that failed asylum seekers are singled out for physical mistreatment. Other groups found that returnees are simply questioned and released. The Board preferred the former evidence, as the latter came from groups that had been given permission to monitor the actions of Sri Lankan officials. The Board believed that those officials would behave in a more benign fashion while being observed by international monitors.

[13] Based on this evidence, the Board found that B399 would likely be questioned on return to Sri Lanka. Further, because he would be identified as a MV Sun Sea passenger, he would be suspected of being a LTTE sympathizer. In turn, this meant that he faced a risk of harassment, abuse or torture.

[14] Accordingly, the Board concluded that B399 had a well-founded fear of persecution based on his membership in a particular social group: the passengers on the MV Sun Sea.

IV. Issue One – Was the Board’s conclusion that B399 is a member of a particular social group unreasonable?

[15] The Minister argues that the Board unreasonably concluded that the passengers on the MV Sun Sea are members of a particular social group.

[16] After the hearing on this judicial review, the Court rendered a decision in *Minister of Citizenship and Immigration v B380*, 2012 FC 1334 [B380]. There, Chief Justice Paul Crampton found that the Board had erred in finding that passengers on the MV Sun Sea are members of a particular social group. In particular, he concluded that passengers on the MV Sun Sea could not be described as members of a group “associated by a former voluntary status, unalterable due to its historical permanence”, a category recognized by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at para 70. Chief Justice Crampton concluded that that category was not so broad as to include people who come together for the very purpose of seeking refugee status in Canada. Rather, it is confined to groups who can be identified on the basis of immutable or fundamental characteristics related to discrimination or human rights (at paras 23-24).

[17] On the particular facts, *B380*, above, could not claim refugee protection based on his ethnicity or perceived political opinion because his account of events leading to his departure from

Sri Lanka was disbelieved by the Board. While some passengers on the MV Sun Sea may be regarded as being associated with the LTTE, there was no reason to believe that was true of *B380*.

[18] A judge of the Federal Court will follow a decision of one of his or her colleagues unless it is manifestly wrong, or there are strong reasons not to do so. I can find no basis for departing from Chief Justice Crampton's conclusion that passengers on the MV Sun Sea do not represent a particular social group. Therefore, I must find that the Board's conclusion to the contrary was unreasonable.

[19] However, that conclusion does not dispose of this application for judicial review. Here, unlike in *B380*, the Board found that B399 faced persecution based on ethnicity and perceived political opinion. Unfortunately, the Board's findings are not as clear as they could have been; yet, the following passage in its reasons supports B399's contention that the Board did not rest its conclusion solely on his membership in a particular social group as a passenger on the MV Sun Sea:

... the claimant will most likely be detained and questioned ... upon his return to Sri Lanka... The panel finds that the authorities will suspect the claimant has links to the LTTE. The country documents establish that Tamils suspected of having links to the LTTE continue to be subject to serious abuses, including torture, by the authorities in Sri Lanka.

[20] This finding distinguishes this case from *B380*. In that case, there was no evidence before the Board that Sri Lankan authorities would regard the claimant as being associated with the LTTE or that he would be otherwise exposed to persecution for any reason other than his having been a passenger on the MV Sun Sea. As Chief Justice Crampton noted, the claimant could not succeed on any other basis because the Board had found that his evidence was not credible. Therefore, the sole

issue was whether the claimant would experience persecution based on his having been a passenger on the MV Sun Sea. Here, there were broader, albeit overlapping, grounds for the claimant's request for refugee protection. And the Board found B399 to be credible in respect of those grounds.

[21] Therefore, while the Board's decision regarding B399's membership in a particular social group - passengers on the MV Sun Sea - was unreasonable, its conclusion that B399 nevertheless had a well-founded fear of persecution as a young, Tamil male perceived to have ties to the LTTE was unaffected by that part of its decision. The question remains, however, whether the Board failed to take account of evidence that contradicted its findings. That is the second issue on this application for judicial review.

V. Issue Two – Did the Board overlook relevant evidence relating to the risk facing B399 on return to Sri Lanka?

[22] The Minister argues that the Board ignored evidence showing that it was unlikely that Sri Lankan authorities would suspect B399 of involvement in the LTTE. B399 had already been questioned by authorities and, on his own evidence, was cleared of having any ties to the LTTE. Further, he had been allowed to leave the country with a genuine passport at a time when members of the LTTE were actively being sought by Sri Lankan officials. There is no evidence that authorities would regard all passengers on the MV Sun Sea as having an association with the LTTE. The UNHCR does not regard all returning Tamils as being at risk. Therefore, the Board did not have a sound basis for rejecting the reports of international monitors showing that returnees are treated fairly.

[23] I cannot conclude that the Board's treatment of this evidence was unreasonable. The Board reviewed all of B399's evidence about his personal history and circumstances, the attitude of Sri Lankan authorities toward returnees who travelled on the MV Sun Sea, and the treatment of returnees who are regarded as LTTE sympathizers. The Board also explained why it gave greater weight to independent reports as compared to the observations of international monitors. In my view, the Board's analysis was thorough and its reasons are transparent, intelligible and justified.

VI. Conclusion and Disposition

[24] While the Board's decision on B399's alleged membership in a particular social group was unreasonable, it nevertheless concluded that B399 faced persecution based on ethnicity or perceived political opinion. That conclusion was based on B399's credible evidence about his experiences in Sri Lanka before he left and the evidence about the treatment of Tamil returnees. The Board took account of the relevant evidence and explained why it gave greater weight to reports from certain sources as compared to others. Overall, therefore, its decision fell within the range of defensible outcomes based on the facts and the law. It was not unreasonable.

[25] The parties made brief oral submissions regarding potential questions of general importance. However, given the basis on which I have decided this application for judicial review, no questions arise for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3266-12

STYLE OF CAUSE: MCI
v
B399

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 9, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: March 12, 2013

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