Federal Court  Cour fédérale

Date: 20130425

Docket: IMM-5014-12

Citation: 2013 FC 429

Ottawa, Ontario, April 25, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SUJEEWAN SUPPAIAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Sujeewan Suppaiah (the "Applicant") seeks judicial review of the decision of Mr. Edward Aronoff (the "Board member") of the Immigration and Refugee Board (IRB or the "Board"), Refugee Protection Division (RPD), dated May 2, 2012. The Applicant requests that this Court quash the Board member's decision, which concluded that the Applicant was not a Convention refugee or person in need of protection.

[2] For the reasons set out below, I find that the application for judicial review ought to be dismissed.

Facts

[3] The Applicant was born in Sri Lanka on January 1, 1982, and is of Tamil ethnicity and Hindu faith. He has four siblings, three of whom have successfully claimed refugee status in Canada and a younger brother who remains in Sri Lanka, allegedly living under the protection of Catholic priests in the North of the country. The Applicant's parents are currently living in the village of Neervely in the Jaffna district, which was the family's home until they were displaced for the first time in 1994.

[4] From 1990 to 1995, Neervely was under the control of the Liberation Tigers of Tamil Eelam ("LTTE"). The Applicant's family experienced problems during this time and was forced to move around a number of times in 1994, due to the war. They returned to Neervely in 1995, but continued to have problems.

[5] The Applicant's own problems began in 2007, after he had completed his studies and worked on his family's farm for a number of years. In March of that year, the Applicant was arrested by the Sri Lankan Army (SLA), and held and beaten on suspicion of being an LTTE member. He was released after his mother intervened, on the condition that he report back daily and agree to report to the SLA if he were to become aware of any LTTE members living in the village. After two days, the SLA no longer required him to report.

[6] During the month of April in 2007, the Applicant was working in the fields and had a second encounter with the SLA. He claims that he was beaten and that they may have shot him if his mother had not arrived to deliver food at that time. Over the course of the month he was taken a number of times with several others before a masked man who identified members of the LTTE among them; the Applicant, however, was always released.

[7] Concerned for his safety, the Applicant made plans to leave the village. When he was unable to obtain a travel permit on his own, his family sought permits, telling the authorities they would travel to India, but ultimately relocating to Colombo in May 2007. They intended to stay, but sought temporary accommodations in a lodge with other Tamils.

[8] At this point, one of the Applicant's brothers in Canada suggested the family should stay in Colombo and he would sponsor them. Problems arose, however, with the police frequently requesting identification from residents at the lodge. In one instance, the brothers were taken to the police station with other young Tamils, interrogated, asked to remove their clothes, and only released when the owner of the lodge signed a release form of some sort.

[9] In July 2007, the brothers and other young Tamils were again taken to the police station, told they should not reside in Colombo, and put on a bus that took them to a school in Vavuniya, in Northern Sri Lanka. Although the young Tamils were returned to Colombo the following day, the Applicant's family left shortly thereafter for Vavuniya.

[10] Despite the fact that he was initially afraid to leave the house due to the activities of armed Tamil groups including the Eelam People's Democratic Party (EPDP), the People's Liberation Organization of Tamil Eelam (PLOTE) and the Tamil Eelam Liberation Organization (TELO), the Applicant took an electrician course from February to September, 2008, travelling back and forth each day in fear. He subsequently worked as an apprentice.

[11] Beginning in November 2008, the family was threatened three times by the EPDP who demanded money but ultimately ceased harassing the family when they explained they had none since they had been displaced.

[12] Due to the fear of being abducted or arrested by the SLA after the war ended in May 2009 and the fact that the Canadian sponsorship application was not being finalized, the Applicant's parents decided to send him to Canada on his own with the help of an agent. They could not afford to send both him and his brother. The Applicant left Vavuniya on February 11, 2010, arriving in Canada on June 3, 2010 via Dubai, Russia, Cuba, Ecuador, Belize, Guatemala, Mexico and the United States.

[13] A letter from the Applicant's father, dated March 31, 2012, suggests that after the Applicant left Sri Lanka the EPDP came to the house and threatened their remaining son, demanding all of the family's money and jewellery. Although they paid, the armed men said they should get more money from their children living abroad. The men told the family they would return and warned them not to report what had happened to the police or media. When the men again phoned to demand money and threaten the remaining son, the boy was sent to live in hiding with Catholic

priests. The parents at first stayed with friends, but returned to their village of Neervely after the windows of their house were broken in Vavuniya.

[14] When the son visited Neervely, the EPDP recognized him, pursued him, and only gave up their chase when he was hit by a car and the general public took note. Fearing for his safety, the Catholic priests sent him to their northern headquarters, where he continues to fear for his life.

[15] The father's letter indicates that he did not initially share this information with the Applicant, as he did not want him to worry.

Decision under review

[16] The Board member concluded that the Applicant is not a "Convention refugee" as contemplated by section 96 or a "person in need of protection" pursuant to section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act"). He noted that the Applicant's claim is based on his well-founded fear of persecution as a young male Tamil from Northern Sri Lanka and on his perceived political opinion of being sympathetic to and/or a member of the LTTE, as well as by reason of his nationality.

[17] In describing the Applicant's allegations, the Board member stated that the Applicant "lived without any problems [in Vavuniya, from 2007] until he left during the month of February 2010, on his journey towards Canada" (Decision, para 4). Although the hearing transcript suggests that the Applicant disputed this description, arguing that the EPDP gave them problems in Vavuniya (Tribunal Record, p 590), he agreed with the Board member that he was able to study and work as

an apprentice during his time there. His younger brother was not allowed to go to school, however, and their father didn't work because it would not have been safe.

[18] Despite finding that the Applicant lived in Vavuniya without any problems, the Board member acknowledged that the situation was not stable and that the family received calls from the EPDP on three occasions, attempting to extort money. He observed that they were no longer harassed when the parents explained they were displaced persons.

[19] The Board member noted that the Applicant had never been involved with the LTTE and reasoned that the SLA would not have permitted his release on the various occasions he claims to have been detained had the SLA believed him to be a member of the LTTE. He also noted that the Applicant acknowledged at his hearing that the SLA would never have issued his family a permit to travel to India had they believed him to be an LTTE member.

[20] The Board member observed that the Applicant and his brother were in every instance released without further consequences when detained in Colombo and noted that the Applicant possessed an identification card between the months of July 2007 and February 2010 that enabled him to work in Vavuniya. During that time, although suspected members and/or sympathizers of the LTTE were being arrested, particularly after the end of the war, the Applicant was never detained or questioned. Finally, the Board member noted that the Applicant was permitted to depart from Sri Lanka in February 2010 using his own passport.

[21] Based on the above, the Board member concluded that not only was the Applicant not associated with the LTTE, but the SLA was also satisfied that he was not involved. The member observed that, apart from those suspected of LTTE involvement, Tamil life has improved since the LTTE laid down its arms in May 2009. He cited a 2010 document from the United Nations High Commissioner for Refugees (UNHCR) that comments on this improvement, indicating that all asylum seekers may once again be considered on their individual merit. Although certain profiles are said to still need particularly careful examination, young Tamils are not identified as one such group. The Board member found as follows:

> The claimant was a victim of harassment because he was a young Tamil male, but the actions of the government during the civil war do not support a conclusion that the claimant would be perceived today as someone with links to the LTTE.

[22] The Board member concluded that the Applicant's profile does not fit that of a person having suspected links with the LTTE (identified in the UNHCR guidelines as a profile still at risk) and that, on a balance of probabilities, there is no serious possibility that the Applicant would be persecuted in Sri Lanka.

[23] In response to the Applicant's fear that he would be kidnapped by members of the EPDP, as reflected in the letter from his father and in the updated Personal Information Form (PIF), the Board member "doubts the credibility of such narrative update" (Decision, para 13), as the Applicant's claim made in June 2010 indicated that his parents were already living in Neervely and his PIF, signed in July 2010, indicated his brother was living there also. Taking issue with inconsistencies in the Applicant's corrections to his PIF, the Board member found that the Applicant would not have

been in a position to indicate that his family was already living in Neervely if the allegations surrounding the father's letter were true.

[24] In light of his findings regarding the credibility of the letter, the Board member concluded that the Applicant's parents, and most likely his brother as well, had been living in Neervely for approximately two years and that there was no evidence that they had suffered any threats or harassment by members of the EPDP.

[25] In response to the Applicant's assertion that everyone is being threatened by the EPDP, the Board member cited evidence suggesting the EPDP is only concerned with individuals suspected of supporting or fighting for the LTTE (such that the Applicant would not be at risk). The member identified a second document from the British High Commission in Colombo, according to which statements by a Sri Lankan police officer and government agent establish that paramilitary groups no longer operate in Jaffna or constitute a serious problem. While he then went on to cite a number of documents describing the EPDP's ongoing activities, the Board member concluded that there is no evidence to suggest that the Applicant would personally face a risk at the hands of the EPDP, particularly since even if a risk of extortion were found to exist it would constitute a generalized risk.

Issues

[26] This application raises three primary issues:

(i) Did the Board err in failing to consider the most recent documentation on country conditions?

(ii) Is the Board member's decision reasonable in light of his decision to give no weight to the Applicant's updated PIF and the information provided by the Applicant's father?

(iii) Did the Board member err in failing to assess the submission by the Applicant's counsel that the Applicant would be at risk in Sri Lanka as a returnee from abroad?

Analysis

[27] As submitted by the Respondent, the standard of review applicable to findings of fact and credibility is that of reasonableness: see *Selvalingam v Canada (MCI)*, 2012 FC 251, at para 20. As is now well established, reasonableness is concerned with justification, transparency and intelligibility within the decision-making process, and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47.

[28] The Applicant submitted that the Board member's failure to assess his submissions regarding risk in Sri Lanka as a returnee from abroad is a question of natural justice, compromising the Applicant's right to a fair hearing. I do not think this is a tenable position given the facts of this case. By not addressing this issue explicitly in its reasons, the Board most likely determined implicitly that it was without merit. This is a finding of fact and of credibility, just like the two previous issues raised by the Applicant.

(i) Did the Board err in failing to consider the most recent documentation on country conditions?

[29] The Applicant submits that the Board member committed a fundamental error in his analysis of country conditions by relying exclusively on the 2010 UNHCR document, while failing to consider more recent documentation on country conditions. Relying on three Responses to

Information Requests from July and August 2011, the Applicant asserts that, contrary to the Board member's findings, country conditions in Sri Lanka are in fact deteriorating and young male Tamils from the North are once again the victims of murder and disappearance. The Applicant also produced a voluminous selection of articles documenting the murders and abductions of young Tamil males from the North. Finally, the Applicant referred in his supplementary memorandum to a recent decision of Justice Martineau (*Sivapathasuntharam v Canada (MCI)*, 2012 FC 486) in which the Judge found that a conclusion that relied on the UNHCR document was unreasonable in light of the more recent documentary evidence available at the time of the hearing. The Applicant filed as additional exhibits a positive decision by the RPD regarding a claimant from Sri Lanka and a positive Pre-Removal Risk Assessment decision also regarding a claimant from Sri Lanka.

[30] I agree with counsel for the Applicant that a failure by a tribunal to take into account material evidence amounts to a reviewable error, and that the Board has an obligation to refer to important evidence regarding country conditions that goes against its ultimate findings: *Polgari v Canada (MCI)*, (2001) FCT 626 (FCTD). Having carefully considered the more recent documentary evidence submitted by the Applicant, however, I do not think that the Board erred in not referring to that evidence.

[31] First of all, and as noted by the Respondent, the Board member did refer to more recent evidence at paragraphs 14-15 of his decision, and he himself introduced a more recent documentation package, dated February 9, 2012, at the outset of the Applicant's hearing. He acknowledged that the situation in Sri Lanka is in a state of flux and noted that he had reviewed certain sections of that package and determined that it should be included in the record.

[32] Second, and more importantly, the main basis for the Board's decision is that the Applicant was not suspected by the Government of being a member of the LTTE. The Board came to that conclusion on the grounds that the Applicant was released every time he was arrested and detained, that the Applicant and his family were able to obtain exit permits allowing them to travel to India, that he possessed an identification card that enabled him to work in Vavuniya between July 2007 and February 2010, that the Applicant was not detained or questioned at the end of the war while suspected members and sympathizers of LTTE were being arrested, and that he was allowed to leave Sri Lanka with his own passport in February 2010. The Board could reasonably conclude, on the basis of these facts, that the Applicant was not suspected of being an LTTE militant.

[33] A careful reading of the three Responses to Information Requests submitted by the Applicant as exhibits to his further affidavit do not show that persons not suspected of being LTTE members face more than a mere possibility of persecution. The fact that Tamil citizens, particularly young males between the ages of 18 and 35, are subjected to harassment, prejudice and even discrimination appears, unfortunately, to remain prevalent in Sri Lanka. The first document, dated July 12, 2011 (LKA103782.E), shows that there has been increased surveillance, arrests and detentions of Tamil citizens since February 2011 under suspicion of being members or sympathizers of the LTTE. The second document, dated August 22, 2011 (LKA103816.E), indicates that the requirement for Tamils to register with the police was reinstated in July in different areas of Colombo. The final document, dated August 15, 2011 (LKA103784.E), speaks of the recourses available to Jaffna Tamils who have been victims of human rights violations, and of the challenges faced by the Human Rights Commission of Sri Lanka. None of these documents detract from the 2010 UNHCR guidelines stating that all asylum seekers should be considered on their individual

merits and that individuals with certain profiles (which the Applicant does not fit) require a particularly careful examination of the possible risks that they may face.

[34] The Applicant submitted to the IRB that he would still be at risk if he returned to Sri Lanka because he could be targeted by way of suspicion of LTTE involvement. Without further details, this is clearly insufficient. As Justice Tremblay-Lamer wrote in *Marthandan v Canada (MCI)*, 2012 FC 628 (at para 20):

> To benefit from Canada's protection under section 97 of the IRPA, the applicant must show the probable existence of personal danger, i.e. danger to which other people from or in the country are generally not exposed (see *Guifarro* v *Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No. 222 (QL) and *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] FCJ No 143 (QL)). The mere fact of being a young Tamil man from the east of Sri Lanka does not constitute personal danger. The panel found that the SLA's acts toward the applicant seemed to have always been instigated by the Pillaiyan group, and that he was able to obtain a Sri Lankan passport and leave the country, despite the fact that the Tamils in the north and east are subject to heightened attention from the authorities. By taking these factors into account, and considering that he has never had ties to the LTTE and that the Sri Lanka government released thousands of members of the LTTE, the panel concluded that the interest of the Sri Lankan authorities in the applicant, if there is any, is minimal and that there is only a mere possibility of his being persecuted in Trincomalee or elsewhere in the country. I am of the opinion that the decision of the panel falls within possible, acceptable outcomes.

[35] I agree with the Respondent that the Applicant's reliance on positive RPD and PRRA decisions of other Sri Lankan claimants is of no help to him. The fact that different administrative tribunals presented with different facts granted positive decisions to asylum seekers is completely irrelevant in answering the question of whether the impugned decision is reasonable. Moreover, the applicable standard of review is reasonableness, not correctness. The fact that another decision-

maker came to a different result in another claim, even in a claim involving a relative, is of no import because there is in most cases a range of acceptable and possible outcomes that may be defensible, and not only one correct answer.

[36] Finally, this case can be distinguished from the decision of Justice Martineau in *Sivapathasuntharam*, above. First, it appears that the decision under review in that case was only two pages long and that a key ground of attack was that the RPD failed to engage in a detailed and comprehensive analysis of the evidence of fundamental changes in current country conditions. Indeed, the Judge found that the documentary evidence considered by the RPD and referred to in the impugned decision was "highly selective and very hastily analyzed" (at para 17). I do not think the same can be said here. The Board's decision is thorough and well reasoned and, as already mentioned, the Board member referred to a number of country conditions documents, one of them as recent as February 2012. Moreover, the applicant in *Sivapathasuntharam* appears to have been released from detention on more than one occasion only upon payment of a bribe, which was not the case for the Applicant in the situation under consideration here. For all of these reasons, I find that the *Sivapathasuntharam* case is clearly distinguishable from the one before me.

ii) Is the Board member's decision reasonable in light of his decision to give no weight to the Applicant's updated PIF and the information provided by the Applicant's father?

[37] In response to the Board member's credibility findings regarding the father's letter, the Applicant argues that he knew when he arrived in Canada that his family had left Vavuniya for Neervely, but he didn't know why and had no reason to suspect that his brother wouldn't be there as well. According to the Applicant, this finding of the Board member demonstrates a complete misunderstanding of the evidence.

[38] The Board was entitled to look at the PIF before and after the amendments and to conclude that the Applicant had tried to embellish his story. This is an issue of credibility, which the Board member was in a much better position to decide than this Court.

[39] Moreover, the Applicant has not established that the information refused by the Board member would have been sufficient to change his conclusion. The refused allegations connected the persecution of the Applicant's brother to extortion by the EPDP and not to any conclusion or suspicion that the brother was connected with the LTTE. The Applicant has not established that it was unreasonable for the Board member to conclude that EPDP extortion is a generalized risk in Sri Lanka, or rebutted the Respondent's assertions that widespread crime in a claimant's country of origin is insufficient in and of itself to establish persecution (*Rajaratnam v Canada (MCI)*, 2012 FC 865, at para 33). Therefore, the Applicant has failed to demonstrate that, even if the Board member were found to have erred in refusing to consider the updates to the Applicant's PIF, such an error would be determinative or render the Board member's ultimate decision unreasonable.

iii) Did the Board member err in failing to assess the submission by the Applicant's counsel that the Applicant would be at risk in Sri Lanka as a returnee from abroad?

[40] In the last paragraphs of her submissions, counsel for the Applicant indicates that the Board member erred in failing to conduct an analysis of the risk the Applicant would face in Sri Lanka as a returnee from abroad. She notes that this was raised in her closing arguments at the hearing and that specific reference was made to a report by a UK group called *Freedom from Torture* which documents several cases of torture upon return to Sri Lanka, many of which involved individuals with no specific profile. She argues that the Board member's failure to address these arguments

constitutes a reviewable error and a violation of natural justice, compromising the Applicant's right to a fair hearing.

[41] Once again, I agree with the Respondent that the Board did not err in not addressing this risk. The Applicant did not write in his PIF that he would be at risk as a returnee from abroad, nor did he testify at his hearing on this issue. A brief reference by counsel to a document during her oral submissions at the end of the hearing does not trigger a duty on the Board to address this new ground in its reasons. While the failure by the Board to consider an additional ground of persecution can be fatal to its decision, I agree with Justice Near (now sitting on the Court of Appeal) that it will not be the case when the issue represents an afterthought not supported by the evidence, as opposed to one of the central bases of a claim: *Paramanathan v Canada (Citizenship and Immigration)*, 2012 FC 338, at paras 14-19.

[42] Moreover, this document reports the cases of 35 victims of torture in Sri Lanka, 14 of whom spent periods of time abroad prior to being deported to Sri Lanka; however, the document does not say that people deported to Sri Lanka are systematically detained and tortured. On the contrary, it states that all individuals reported being targeted due to an actual or perceived association with the LTTE (Tribunal Record, p 409). In the conclusion, we also find the following statement: "Freedom from Torture's forensic evidence demonstrates that, notwithstanding the formal conclusion of hostilities, Tamils with an actual or perceived association with the LTTE remain at particular risk of detention and torture in Sri Lanka" (Tribunal Record, p 430).

[43] As the Board member concluded that the Sri Lankan government did not seriously consider that the Applicant was an LTTE member or that he had any association with them, the *Freedom from Torture* document cannot be taken to suggest that the Applicant would be at any greater risk as a result of the fact that he would be returning to Sri Lanka as a returnee from abroad.

Conclusion

[44] For all the foregoing reasons, this application for judicial review is dismissed. The parties have not submitted questions for certification, and no question warrants certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

The parties have not submitted questions for certification, and no question warrants certification.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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