

Federal Court



Cour fédérale

**Date: 20130801**

**Docket: IMM-6624-12**

**Citation: 2013 FC 841**

**Ottawa, Ontario, August 1, 2013**

**PRESENT: The Honourable Madam Justice Snider**

**BETWEEN:**

**JEGATHEESWARAN GANESHAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Background**

[1] The Applicant is a citizen of Sri Lanka, of Tamil ethnicity, who arrived in Canada in 2009 as one of 76 crew and passengers on the *M/V Ocean Lady*. He claimed refugee protection in Canada on the grounds that he would be subject to persecution at the hands of the Sri Lankan army (SLA) and other paramilitary groups because of: (a) his perceived links with the Liberation Tigers of Tamil Eelam (LTTE); and (b) his passage to Canada on the *M/V Ocean Lady*.

[2] In a decision dated May 30, 2012, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) dismissed the Applicant's claim for protection under ss. 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The Applicant seeks to overturn this decision.

[3] For the following reasons, I see nothing in the decision that warrants the Court's intervention.

## **II. The Board's Decision**

[4] Overarching the Board's decision was its view of the situation for Tamils in Sri Lanka now that the war has been over for three years. The Board acknowledged that Tamils perceived to have links to the LTTE would have "ongoing challenges in Sri Lanka". However, the Board concluded that:

. . . there has been a change of circumstances in Sri Lanka resulting in Tamils no longer being targeted solely on the grounds of their ethnicity.

[5] With respect to the Applicant's claim of persecution because he would be perceived as having ties to the LTTE, the Board accepted his story of detainment by the SLA in 1999.

Nevertheless, the Board made a number of key findings against the Applicant, based on: (a) the lack of credibility of parts of his story; and (b) documentary evidence. Briefly stated, the Board made the following key findings:

- The Board did not believe the Applicant's allegations of subsequent interactions with the SLA or other military or government forces;
- The Board found that the 1999 event which was believed by the Board did not constitute an objective basis for his fear of the SLA;
- The ability of the Applicant to "live a fulsome life, moving freely and openly . . . with no interference from the Sri Lankan government during a period of war", demonstrated that the Applicant was not a wanted person in Sri Lanka; and
- Beyond his identity as a Tamil male and the fact that, in the period 2006 to 2008, he transported goods, there was nothing to demonstrate that the Applicant would be perceived as having an association to the LTTE by the Sri Lankan authorities.

[6] The Board also rejected the Applicant's claim that he had become a refugee "*sur place*" due to his passage on the *M/V Ocean Lady*. On this subject, the Board made the following findings:

- The personal identity of the Applicant and his mode of transportation to Canada would not have come to the attention of the Sri Lankan authorities; he would be treated as any other returning asylum seeker; and
- In any event, Sri Lankan authorities do not perceive that all of the passengers on the *M/V Ocean Lady* have ties to the LTTE.

[7] The Board concluded that there was insufficient evidence to suggest that the authorities would perceive the Applicant as a member or supporter of the LTTE merely because he was a passenger on the *M/V Ocean Lady*.

### **III. Issues**

[8] The Applicant raises four issues:

1. Did the Board make unreasonable credibility finding with respect to an incident that allegedly happened in 2009?

2. Did the Board unreasonably conclude that the Applicant did not have a profile that would put him at risk?
3. Did the Board err by conducting a highly selective analysis of the documentary evidence to conclude that there had been a durable change in Sri Lanka for Tamils such as the Applicant?
4. Did the Board fail to provide a clear evidentiary basis for its finding that there was no basis for the Applicant's *sur place* claim?

#### **IV. Standard of Review**

[9] The standard of review for findings of credibility, the Board's evaluation of risk and a *sur place* claim is reasonableness (see, for example, *PM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77, [2013] FCJ No 136).

[10] When reviewing a decision on a reasonableness standard, the Court must determine “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” and whether the decision displays “justification, transparency and intelligibility” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

## V. Credibility Finding

[11] The Applicant argues firstly that the Board erred in its finding that the Applicant did not have a subjective fear of the Eelam People's Democratic Party (EPDP) by:

- Finding the incident of the EPDP visit to the Applicant's home as not credible;
- Failing to connect the "crux" of the Applicant's allegations to the objective country documentation;
- Inaccurately portraying the Applicant's evidence with respect to the alleged incident in 2009; and
- Relying on inconsistencies between Canada Border Services Agency (CBSA) interview notes and the Applicant's Personal Information Form (PIF) to make credibility findings, since these are like Port of Entry (POE) notes which ought not to be viewed microscopically to make findings of credibility (*Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para 51, [2012] FCJ No 13 [*Cetinkaya*]).

[12] In my view, the decision, when viewed in its entirety is not unreasonable. Specifically, it was open to the Board to draw a negative inference from discrepancies in the Applicant's evidence, taking into account statements from the point of entry (in this case by CBSA officers),

the Applicant's PIF narrative and amendments to this narrative and subsequent testimony (*Zeferino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 456 at paras 30-32, [2011] FCJ No 644).

[13] The Board reasonably formed a negative credibility finding on the basis of the discrepancies in the Applicant's evidence regarding the identity of the men, the reason for their visit and police pressure regarding the relating vehicle accident. All of these contradictions are present in the record and were put to the Applicant at the hearing. The Board's findings that the Applicant's explanations were not reasonable were open to it. The Applicant was not merely elaborating on his prior evidence, but in fact, contradicting it.

[14] As pointed out by Justice Russell in *Cetinkaya*, above at paragraph 51, it is an error of the Board to impugn the credibility of claimant "on the sole ground that the information provided by the Applicant at the POE interview lacks details". In this case, however, the problem was not that the CBSA interview notes lacked details: rather, the issue was that there were unexplained contradictions in the various documents presented by the Applicant.

[15] Moreover, the Board's reasoning does not take an overly microscopic view of the Applicant's testimony. The May 2009 event was a significant aspect of the Applicant's claim, which, according to the Applicant's initial PIF narrative, was the reason why the Applicant left Sri Lanka. In sum, the Board reasonably concluded that the Applicant's evidence regarding the May 21, 2009 incident was not credible, and that the Applicant as a result did not have a subjective fear of the EPDP.

## **VI. Applicant's Profile**

[16] The second area of concern for the Applicant was the Board's finding that the Applicant would not be at risk because of his profile. In this regard, the Applicant makes a number of arguments:

- the Board erred in failing to find that he would be perceived as being associated with the LTTE;
- the Board failed to evaluate the Applicant's risk because of his work with organizations such as United Nations Office for Project Services (UNOPS), the Tsunami Housing Reconstruction Project and Save the Children; and
- the Board misconstrued the test for personalized risk in finding that the Applicant's risk from paramilitary groups was generalized.

[17] In my view, the Board's conclusions with respect to the Applicant's risk upon return to the Sri Lanka are reasonable.



[18] First, the Board reasonably concluded that the Applicant would not be at risk because of a perception that he is associated with the LTTE. The Board based this finding on a number of observations grounded in the Applicant's own evidence of his experiences, all of which are supported by the evidence:

- Following his detention in 1999, the Applicant was released by a Magistrate who dropped all charges and told the Applicant that he would not have a permanent record. It was open to the Board to infer that, if Sri Lankan government believed that the Applicant had links to the LTTE, he would not have been released at this time. The Board also reasonably considered that this detainment was the Applicant's only significant encounter with the SLA.
- The Applicant frequently travelled for his employment and, although he was often stopped and states that he was harassed, he was never arrested. The Applicant was allowed to proceed, even though he was travelling between SLA-controlled territory and LTTE-controlled territory.
- The Board also reasonably considered that the Applicant's employment had direct ties to the Sri Lankan government. The Applicant provided evidence that three organizations he worked for were semi-government organizations. In particular, one project was set up by the government and partially funded by the government.

- Furthermore, the Board reasonably took into account the evidence the Applicant provided about his family, who lives in Sri Lanka and does not appear to be at risk.
- Finally, it was open to the Board to consider the Applicant's travel when he left Sri Lanka. The Applicant had no problem travelling through government checkpoints, on his own passport, using his own government-issued letter and a copy of his own UN identity card.

[19] The Applicant raises the issue of whether the Board reasonably characterized the 1999 incident as persecution or prosecution. In my view, this finding, even if it is in error, is not material to the Board's overall conclusion. The Board acknowledged that the test for refugee protection is forward-looking, and evaluated the Applicant's risk on that basis and with consideration of the above factors, all of which were open to the Board to consider.

[20] In sum, the Board reasonably concluded that the Applicant would not be perceived as associated with the LTTE upon his return to Sri Lanka, based on his experiences before leaving that country.

[21] Second, the Board did not fail to consider a risk to the Applicant based on his prior employment. Contrary to the Applicant's submissions, the Board considered all of his employment history, including his employment with the UNOPS. I acknowledge that the United Nations High Commissioner for Refugees (UNHCR) Guidelines state that civil society and

human rights activists have a profile that may put them at risk in Sri Lanka. However, to establish risk, the Applicant must connect this documentary evidence to his personal circumstances; he failed to do so. In this case, all of the evidence regarding the Applicant's UN employment demonstrates that the Applicant believed that this position provided him with safety. The Applicant explained that he hid in the UN offices when he was frightened, he used his UN identity card to travel when he left the country and he stated that government officers left people alone when they were wearing UN shirts. Further, the Applicant testified that he did not experience any problems while working for the UN. In addition, the Applicant was not an "activist"; the Applicant worked as a technical assistant, levelling and preparing estimates for a drainage project. The Board's assessment of the Applicant's employment with the UNOPS does not disclose a reviewable error.

[22] Third, the Board's conclusion that any risk to the Applicant from paramilitary organizations was generalized was open to it on the evidence. The Board reasonably rejected the Applicant's testimony regarding the EPDP. Further, it was open to the Board to find that the Applicant's testimony regarding the Karuna was not credible, since the Applicant raised this fear for the first time at the hearing. Finally, when asked by the Board member about the activities of both the Karuna and the EPDP, the Applicant testified that he was only afraid of general activities of paramilitary groups. On this basis, it was within a range of possible, acceptable outcomes for the Board to find that the Applicant was not personally targeted by any paramilitary organization.

[23] In conclusion, the Board reasonably found that the Applicant was not at risk based on a perceived association with the LTTE, his prior employment with the UN or the activities of paramilitary groups.

## **VII. Durable Change in Circumstances**

[24] In its decision, the Board examined the Applicant's identity and profile as a Tamil male from northern Sri Lanka. The Board concluded that the changes in country conditions were "substantial and durable". The Applicant disagrees and argues that the documentary evidence shows that Tamil males are not safe in Sri Lanka. The Applicant argues that the Board selectively relied on country documentation to conclude that the Applicant, as a Tamil male, would no longer be the subject of persecution in Sri Lanka.

[25] In making his argument on this issue, the Applicant is essentially disagreeing with the weight that the Board placed on the various documents before it. Further, much of his argument is inextricably linked to his belief that the Board erred in its findings of credibility and perceived association with the LTTE. It is important to note that the Board's analysis of the question of durable change was predicated on its conclusion that the Applicant would not be perceived as being associated with the LTTE. As I have already found, this finding was reasonable. Thus, at this stage of the analysis, the Board was looking at the risks to a Tamil male with no perceived links to the LTTE.

[26] The Board's analysis of the current situation facing Tamil males in Sri Lanka begins with reference to the most recent UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka (UNHCR Guidelines). As concluded by the UNHCR:

There is no longer a need for group-based protection mechanisms or for the presumption for Sri Lankans of Tamil ethnicity originating from the north of the country.

It was entirely reasonable for the Board to give this document considerable weight.

[27] I accept, as did the Board, that the situation for Tamil males is not always perfect. For example, a Tamil male is often stopped at checkpoints for lengthy periods. This does not amount to persecution. Nor does the Board's failure to dwell on individual and anecdotal evidence of alleged persecution amount to a reviewable error.

[28] The Applicant was highly critical of the Board's reliance on one particular document. In its analysis, the Board referred to the findings of a "fact-finding" delegation of officials from the CBSA, the Australian Department of Immigration and Citizenship and the United Kingdom Border Agency. The fact-finding trip took place in March 2011, and was organized through the Sri Lankan based offices of the International Organization for Migration (IOM). The delegates travelled extensively and interviewed both voluntary returnees and non-voluntary returnees, former LTTE combatants. In the resulting report – "Area Trip Report (Trincomalee and Batticaloa), High Commission of Canada – Canada, Colombo, 28-31 March 2011" (Trip Report) – the delegates observed that: "A key theme with all persons interviewed was that they all said that they no longer had fears for their personal safety". The delegates also reported that the

interviewees raised concerns with respect to financial issues and not with respect to security and personal safety.

[29] The Applicant submits that the report of this delegation should be rejected because the entire trip was controlled, planned and executed through the Sri Lankan government. I do not agree. Obviously, the delegation interacted with the Sri Lankan government and, perhaps, there may have been some control of access to interviewees. However, I cannot believe that the report is unreliable. The delegates represented three highly respected countries. Had these delegates felt that they were being “hoodwinked” into painting a positive picture of Sri Lanka, I am certain that they would have described these concerns in the Trip Report. In my view, the Board acted reasonably in giving weight to the Trip Report and determining that it was “relevant to the claimant’s situation”. Moreover, the findings in the Trip Report are consistent with and provide further support for the conclusions set out in the UNHCR Guidelines.

[30] Taken together, the UNHCR Guidelines and the Trip Report provide a solid foundation for the Board’s conclusion that Tamil males with the profile of the Applicant “would face few problems if returned to Sri Lanka”. Stated in different terms, the Board’s conclusion falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

### **VIII. *Sur Place* Claim and Mixed Motives**

[31] In his written submissions with respect to his *sur place* claim, the Applicant focusses on the Board’s finding that his identity as a passenger on the *M/V Ocean Lady* would not be known

to the Sri Lankan authorities. The balance of the written submissions on this issue relate to whether the Applicant would be perceived as having ties to the LTTE because of his arrest in 1999. In oral argument, the Applicant expanded his argument on this question to include a submission that the Board's *sur place* analysis was flawed because the Board failed to carry out a "mixed motives" analysis. The term "mixed motives" refers to the possible motives by Sri Lankan authorities in persecuting the Applicant and appears to have been adopted by the Applicant as a result of some other decisions of this Court (see, for example, *Canada (Minister of Citizenship and Immigration) v B377*, 2013 FC 320).

[32] The argument that the Board failed to consider the possible mixed motives of the Sri Lankan authorities was not explicitly set out in the Memorandum of Fact and Law of the Applicant; it arose only at the oral hearing. Nor was this an argument made to the Board. On that basis alone, I am not prepared to entertain the argument. However, even if I were to accept this additional argument, I am not persuaded that the Board erred.

[33] As far as I can discern, the Applicant is arguing that he is subject to persecution because of both his Tamil ethnicity and because of his perceived political opinion as a passenger on the *M/V Ocean Lady*. His submission appears to be that, as a Tamil having been a passenger on the *M/V Ocean Lady*, that he would be perceived as a person with links to the LTTE making him part of a "particular social group" and, alternatively, a person with a "political opinion" for purposes of the Convention.

[34] In the Applicant's opinion, the high level of media scrutiny of *M/V Ocean Lady* and *M/V Sun Sea* has increased the chances that he will be persecuted upon his return. The Board dealt with that argument and found, on a balance of probabilities that, in spite of the media interest, the identity of this particular claimant would not have come to the attention of Sri Lankan authorities. In coming to this conclusion, the Board carefully considered and weighed all of the evidence before it. In spite of this conclusion, the Board went on to consider what might happen to the Applicant if he were identified as a passenger on the *M/V Ocean Lady*. On this question, the Board found that, as someone not perceived to have ties to the LTTE, the Applicant would not face a serious possibility of persecution.

[35] A further problem with the Applicant's argument is that the alleged risk from "mixed motives" is speculative. The Board had no evidence before it of any instance where a failed Tamil refugee claimant, who arrived at another country by ship, was persecuted upon his return to Sri Lanka. On the other hand, the Board did have evidence of returning Tamils – albeit not from the *M/V Ocean Lady* – who were questioned but not detained. The situation is different, as acknowledged by the Board for persons who are or are perceived to be LTTE or LTTE supporters. The Board dealt with that aspect of the Applicant's claim. Once it was found – reasonably, in my view – that the Applicant was not a member of the LTTE or a supporter of the LTTE, the Board turned to the possibility that, just because of his passage on the *M/V Ocean Lady*, the Applicant would be perceived as LTTE. The final question is whether the evidence shows, on a balance of probabilities, that a Tamil on the *M/V Ocean Lady*, would be subjected to persecution because he might have information on the LTTE members who were, without question, organizers of the passage of the *M/V Ocean Lady*. I can see nothing in the evidence



presented to the Board that supports a position that questioning of a Tamil upon return to Sri Lanka rises to the level of persecution.

## **IX. Certified Question**

[36] In *Canada (Minister of Citizenship and Immigration) v. A011*, 2013 FC 580, Justice Harrington certified the following question:

Is review by this Court of the meaning of “membership in a particular social group” in the United Nations Convention relating to the status of refugees, and reflected in s. 96 of the Immigration and Refugee Protection Act, as determined by a Member of the Refugee Protection Division, of the Immigration and Refugee Board, on the correctness or reasonableness standard?

[37] The Applicant asks that I certify the same question in this case.

[38] The decision to certify a question is not to be taken lightly. By enacting s. 74 of *IRPA*, Parliament signaled clearly that judicial review in the Federal Court of any decision made under *IRPA* is to be done quickly and with finality. Only if the reviewing judge determines that “a serious question of general importance is involved”, should that judge open the door for an appeal. In *Xiong Lin Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at paragraphs 9-10, [2013] FCJ No 764, the Federal Court of Appeal summarized the requirements for certification as follows:

It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge’s reasons (*Canada*

*(Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

In *Varela*, this Court stated that it is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement set out in paragraph 74(d) of the Act is a precondition to the right of appeal. If a question does not meet the test for certification, so that the necessary precondition is not met, the appeal must be dismissed.

[39] In my view, the question proposed is neither determinative of nor relevant to the decision before me. The question of what constitutes “membership in a particular social group” was not in issue before the Board or this Court. In addition, the Board’s overall conclusion demonstrates that the Board considered the *sur place* component of the Applicant’s claims under both s. 96 and s. 97. Thus, the proposed question was not determinative of the Board’s decision and would not be determinative of my decision on judicial review.

[40] Simply because an applicant to this Court was a passenger on the *M/V Ocean Lady* or *M/V Sun Sea* does not mean that a question certified on one set of facts should automatically be certified in all other such cases. The proposed question does not arise on the facts of this case and, as a result, will not be certified.

**X. Conclusion**

[41] In sum, all of the claims of the Applicant were addressed, all of the evidence was considered and weighed and the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The decision will not be overturned.

**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”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6624-12

**STYLE OF CAUSE:** JEGATHEESWARAN GANESHAN v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 10, 2013

**REASONS FOR JUDGMENT:** SNIDER J.

**DATED:** AUGUST 1, 2013

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