

Federal Court



Cour fédérale

Date: 20140326

Docket: IMM-247-13

Citation: 2014 FC 289

Ottawa, Ontario, March 26, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CHARLES KAMILA AROKKIYANATHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION AND
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Charles Kamila Arokkiyanathan was found by the Immigration Division of the Immigration and Refugee Board to be inadmissible to Canada for having been involved in “people smuggling” as a result of his work as a crew member aboard the M/V *Ocean Lady*.

[2] Mr. Arokkiyanathan asserts that the Board’s decision was unreasonable as there was no evidence supporting some of the Board’s findings. He also says that the Board erred by placing

undue weight on statements that he made at the port of entry, and by making unreasonable findings with respect to his defences of duress and necessity.

[3] For the reasons that follow, Mr. Arokkiyanathan has not persuaded me that the Board's decision was unreasonable. Consequently his application for judicial review will be dismissed.

I. Background

[4] Mr. Arokkiyanathan is a 31-year old Tamil male from Jaffna, in the Northern Province of Sri Lanka, a territory formerly controlled by the Liberation Tigers of Tamil Eelam (LTTE). He asserts that while living in Sri Lanka, he was arbitrarily targeted, arrested and detained by state security forces who suspected him of involvement with the LTTE. Mr. Arokkiyanathan denies any such involvement.

[5] Mr. Arokkiyanathan moved to Colombo in December of 2006, where he says that he was targeted for extortion by police and paramilitary groups. He also says that while living in Colombo, he was arbitrarily arrested, detained, assaulted and interrogated by the local police, due to his identity as a young Tamil male.

[6] In February of 2008, Mr. Arokkiyanathan made arrangements to leave Sri Lanka. He says that he paid an agent the sum of \$15,000 (USD) to assist him in leaving the country. Mr. Arokkiyanathan says that he initially went to Thailand, where he was met by an agent named Anthony. Mr. Arokkiyanathan lived in Thailand for the next year and a half. He says that he did not work during the time that he was in Thailand, and his food and lodging were provided by the smugglers.

[7] Mr. Arokkiyanathan says that Anthony then arranged for him to travel to Indonesia on August 23, 2009, whereupon he boarded the ship that ultimately became known as the “*Ocean Lady*”.

[8] Mr. Arokkiyanathan says that he did not have enough money to pay for the cost of the voyage on the *Ocean Lady*, which, he was told, was \$50,000 (USD). Consequently, Mr. Arokkiyanathan agreed with the smugglers that he would work on board the ship, in exchange for a reduced fare. He says that Anthony told him that unless he was prepared to work on the voyage, he would not be allowed to travel on the ship. Mr. Arokkiyanathan states that he was fearful of returning to Sri Lanka so he agreed to do so.

[9] Mr. Arokkiyanathan stayed on board the *Ocean Lady*, which was anchored out at sea off Indonesia, for a couple of months. During this time he left the ship on three separate occasions in order to pick up other passengers and bring them onto the ship for the voyage to Canada.

[10] While travelling to Canada, Mr. Arokkiyanathan worked in the engine room of the *Ocean Lady*, working two four-hour shifts each day. Unlike the other passengers, who stayed in the cargo hold of the ship, Mr. Arokkiyanathan and the other 11 crew members on the ship slept above board in double occupancy rooms.

[11] Upon arriving in Canada on October 17, 2009, Mr. Arokkiyanathan and his fellow *Ocean Lady* passengers were placed in immigration detention. He then made a refugee claim based on the persecution he says that he faced in Sri Lanka because of his race, his perceived political opinion and his membership in a particular social group. He also advanced a *sur place* claim, alleging that he was at risk in Sri Lanka by virtue of having been a passenger on the *Ocean Lady*.

[12] Mr. Arokkiyanathan was subsequently determined to be eligible to proceed with a refugee claim. However, before his refugee hearing took place, the Minister filed a section 44 report alleging that he was inadmissible to Canada pursuant to paragraphs 37(1)(a) (being a member of a criminal organization) and 37(1)(b) (engaging in “people smuggling”) of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[13] As a result, Mr. Arokkiyanathan was referred to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing.

II. The Immigration Division’s Decision

[14] The Immigration Division found that it had not been established that Mr. Arokkiyanathan was inadmissible to Canada on the grounds of organized criminality for being a member of a criminal organization under paragraph 37(1)(a) of *IRPA*. However, the Board did find that Mr. Arokkiyanathan was inadmissible under to paragraph 37(1)(b) of *IRPA* as there were reasonable grounds to believe that he had been engaged in human smuggling.

[15] In coming to this conclusion, the Board had regard to the definition of human smuggling in subsection 117(1) of *IRPA*, which states that “No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act”.

[16] The Board noted that in order to demonstrate inadmissibility under paragraph 37(1)(b) of *IRPA*, it must be established that Mr. Arokkiyanathan was a foreign national, that he engaged in people smuggling, and that the activity was carried out in the context of a transnational crime. The Board was satisfied that Mr. Arokkiyanathan was a foreign national and that the voyage of

the *Ocean Lady* involved a transnational crime. No issue is taken by Mr. Arokkiyanathan with respect to either of these findings.

[17] Insofar as the identification of the elements necessary to establish “people smuggling” were concerned, the Board had regard to the decisions of this Court in *B010 v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 569, 412 F.T.R. 23, and the decision of the Ontario Superior Court of Justice in *R v. Alzehrani*, (2008), 75 Imm. L.R. (3d) 304, [2008] O.J. No. 4422, where the following four elements were identified:

1. That the person being smuggled did not have the required documents to enter Canada;
2. That the person being smuggled was coming into Canada;
3. That the person concerned was organizing, inducing, aiding or abetting the person being smuggled to enter Canada; and
4. That the person concerned had the knowledge of the lack of required documents.

[18] The Board found as a fact that Mr. Arokkiyanathan knew before the *Ocean Lady*'s departure from Indonesia that the ship was coming to Canada. The Board further found that most of the passengers on board the *Ocean Lady* did not have valid passports, and none of them had the visas required to enter Canada legally.

[19] The Board noted that Mr. Arokkiyanathan had described himself as part of the crew of the *Ocean Lady*, and that he admitted having retrieved passengers to bring them onto the ship prior to the ship's departure and having worked in the ship's engine room during the voyage. The Board was satisfied that Mr. Arokkiyanathan derived a material benefit from his efforts, securing

passage on the ship at a greatly reduced fare as well as superior accommodation on board the ship.

[20] Mr. Arokkiyanathan argued at his admissibility hearing that he had only worked as a crew member on the *Ocean Lady* out of fear, believing that if he failed to carry out his duties in the engine room, he would be killed. The Board rejected this argument, noting that Mr. Arokkiyanathan had never mentioned any such fear in any of his interviews with Canadian immigration authorities after his arrival in Canada.

[21] The Board was thus satisfied that there were reasonable grounds to believe that Mr. Arokkiyanathan had aided or abetted the *Ocean Lady* in coming to Canada and aided the migrants on board the ship being smuggled into this country.

[22] Finally, the Board found that there were reasonable grounds to believe that Mr. Arokkiyanathan knew of the migrants' lack of required immigration documents, and that if he did not have actual knowledge of this fact, it was because he was wilfully blind to it.

[23] Consequently, the Board concluded that Mr. Arokkiyanathan was inadmissible to Canada and a deportation order was issued against him.

III. Issues

[24] Mr. Arokkiyanathan admits that he worked as a crew member on board the *Ocean Lady* and that he derived a material benefit for doing so. He also admits that the passengers on the ship did not have the documents necessary to lawfully enter Canada, although he denies being aware of this fact at the material time. He also denies that he knew that the ship was coming to Canada with the result that the second element of the *Alzehrani* test had not been satisfied.

[25] Mr. Arokkiyanathan also says that in concluding that there were reasonable grounds to believe that he had been engaged in people smuggling, the Board erred by placing unreasonable weight on statements that he made upon his arrival in Canada. The Board further erred, Mr. Arokkiyanathan says, by misstating some of his evidence regarding his fear for his life, leading to unreasonable findings with respect to his defence of duress and necessity.

IV. Analysis

[26] The parties agree that, based upon the recent decisions of the Federal Court of Appeal in *J.P. v. Canada (Minister of Public Safety and Emergency Preparedness)*; *B306 v. Canada (Minister of Public Safety and Emergency Preparedness)*; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness*, 2013 FCA 262 at para. 74, 451 N.R. 278 [collectively “JP”], the standard of review to be applied to the Board’s decision is that of reasonableness.

[27] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59, [2009] 1 S.C.R. 339.

A. *Mr. Arokkiyanathan’s Knowledge of Canada as the Ocean Lady’s Destination*

[28] Mr. Arokkiyanathan notes that the second element of the *Alzehrani* test for people smuggling requires that the person involved knows that the people being smuggled were coming

into Canada. He says that there was no evidence to support the Board's finding that he had such knowledge, and that the evidence on this point was actually to the contrary.

[29] In support of this contention, Mr. Arokkiyanathan points to a statement that he made in his testimony before the Board where he stated that he did not know where the smugglers were going to send him.

[30] I do not accept Mr. Arokkiyanathan's argument. First of all, the statement that Mr. Arokkiyanathan did not know where the smugglers were going to send him referred to the state of his knowledge at the time that he was first dealing with the smugglers in Sri Lanka, more than 18 months before he set sail for Canada on board the *Ocean Lady*.

[31] It was, moreover, quite clear from statements given by Mr. Arokkiyanathan to Canadian immigration officials that he knew before he left Thailand that the *Ocean Lady* was bound for Canada: see, for example, pages 269, 281, 310 and 354 of the Certified Tribunal Record.

B. *Reliance on Mr. Arokkiyanathan's Interviews as Evidence of Absence of Fear*

[32] Mr. Arokkiyanathan argues that the Board erred in rejecting his claim that he only performed his crew duties out of fear, believing that he would be killed by the smugglers if he refused to work in the engine room of the *Ocean Lady*.

[33] According to Mr. Arokkiyanathan, it was an error for the Board to base its finding that his alleged fear was not credible on statements that he gave at the port of entry.

[34] In support of this contention, Mr. Arokkiyanathan relies on this Court's decision in *Cetinkaya v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 8, 493 F.T.R. 46.

There, the Court noted the dangers of using port of entry notes to impeach the credibility of refugee claimants because the circumstances surrounding the taking of statements at the port of entry are often far from ideal, and questions as to the reliability of such statements will often arise: at para. 50.

[35] I accept that caution does indeed have to be exercised with respect to port of entry notes for the reasons cited in *Cetinkaya*. It is, however, open to the Board to have regard to prior inconsistent statements made by a refugee claimant, including statements made at a port of entry: see, for example, *Singh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 453 at para. 17, [2008] F.C.J. No. 574.

[36] Moreover, the statements made by Mr. Arokkiyanathan that are in issue in this case were not even made at the port of entry. The statements in question were given by Mr. Arokkiyanathan on four separate occasions over a two month period, the first such occasion being three days *after* his arrival in Canada.

[37] Mr. Arokkiyanathan had the assistance of a Tamil interpreter for all four of the interviews. While the questions were, in some cases, posed in an aggressive fashion, Mr. Arokkiyanathan's answers were transcribed, and the veracity of the transcriptions has been attested to by the interviewing officers. Where Mr. Arokkiyanathan's answers were summarized rather than transcribed, as appears to be the case with one of the interviews, the accuracy of the summary was also attested to by the interviewing officer.

[38] It was up to the Board to decide how much weight should be ascribed to Mr. Arokkiyanathan's prior statements - both what he said and what he did not say. Tellingly, at

no time during any of his interviews with immigration officials did Mr. Arokkiyanathan ever express any fear of the smugglers.

[39] There was nothing unreasonable about the Board's reliance on the answers given by Mr. Arokkiyanathan to Canadian immigration officials as a basis for a finding that his claim to fear his smugglers lacked credibility, and no error has been demonstrated in this regard.

C. *Failure to Consider Mr. Arokkiyanathan's Fear of Returning to Sri Lanka*

[40] Mr. Arokkiyanathan also says that the Board erred in failing to properly consider his fear of returning to Sri Lanka in connection with his claims of duress and necessity. In support of this argument, Mr. Arokkiyanathan relies on comments made by this Court in *B006 v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1033, 20 Imm. L.R. (4th) 64, to the effect that regard must be had to an applicant's subjective view of the options available to him.

[41] A similar argument was advanced in *JP*. However, the Federal Court of Appeal gave this argument short shrift, observing that the Board in that case had "rightfully dismissed" the applicant's argument that the defence of necessity flowed from his fear of returning to Sri Lanka, given that the applicant had first traveled to Thailand where he could have made a refugee claim, before boarding the ship in issue in that case, the *MV Sun Sea: JP* at paras. 129-130.

[42] Both the defence of necessity and the defence of duress require that the person invoking the defence face a clear and imminent peril. Once Mr. Arokkiyanathan left Sri Lanka, no such peril existed. Consequently no reviewable error has been demonstrated in relation to this issue.

D. *The Board's Finding of Wilful Blindness*

[43] Mr. Arokkiyanathan's final argument is that the Board erred in finding that if he did not know that the migrants on board the *Ocean Lady* lacked the immigration documents required to lawfully enter Canada, it was only because he was wilfully blind to it.

[44] I am not persuaded that the Board erred in this regard. The Board's wilful blindness finding was clearly an alternative to its main finding that Mr. Arokkiyanathan did in fact know that the passengers on the *Ocean Lady* were entering Canada illegally. This finding is amply supported by the evidence, in particular, by Mr. Arokkiyanathan's acknowledgement that he was aware that no one on the *Ocean Lady* was coming to Canada legally.

V. **Conclusion**

[45] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and

2. On the consent of the parties, the style of cause is amended to add the Minister of Public Safety and Emergency Preparedness as a respondent.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-247-13

STYLE OF CAUSE: CHARLES KAMILA AROKKIYANATHAN v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION
AND THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

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**REASONS FOR JUDGMENT
AND JUDGMENT:**

MACTAVISH J.

DATED: MARCH 26, 2014

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