

Federal Court



Cour fédérale

Date: 20140403

Docket: IMM-1556-13

Citation: 2014 FC 330

Ottawa, Ontario, April 3, 2014

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

L.S.

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review challenging a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) which denied the Applicant's claim to refugee protection. The identity of the Applicant is protected under the terms of a confidentiality Order.

[2] The Applicant is a 32-year-old Tamil male from Sri Lanka who came to Canada on October 17, 2009 aboard the *M.V. Ocean Lady*.

[3] The Applicant asserts a number of errors in the Board's analysis. He argues that the Board failed to consider the likelihood of torture being used to extract information about a perceived relationship to the Liberation Tigers of Tamil Eelam (LTTE). Having been a passenger on the *M.V. Ocean Lady*, it is said that the Sri Lankan authorities would assume a connection to the LTTE and act accordingly. It is also argued that the Board erred by failing to refer to an earlier Board decision that had found a risk of torture in the same circumstances. Finally, the Applicant contends that the Board applied an incorrect standard going beyond the mere possibility of persecution and otherwise carried out an "illogical analysis". These are all evidence-based issues that must be reviewed under the standard of reasonableness.

The Board's Decision

[4] The Board found that the Applicant did not have a well-founded fear of persecution in Sri Lanka. Although the Board acknowledged that he is a relatively young Tamil male from northern Sri Lanka, it found nothing in the evidence that actually linked him to the LTTE. Indeed, the Applicant consistently maintained that he had no connection to the LTTE. The Board noted that the Applicant had not encountered "significant difficulties" in Sri Lanka. He was able to attend school, graduate from university, run a business and find successful NGO employment during the period of armed conflict.

[5] When the Applicant left Sri Lanka in 2009 bound for Thailand, he did so lawfully and openly travelling on a valid Sri Lankan passport. The Board considered the potential for risk arising from a return to Sri Lanka as a failed asylum seeker. After reviewing "reliable and trustworthy"

country condition reports from the United Kingdom, Australia and the United Nations High Commissioner for Refugees (giving it "a great deal of weight"), the Board found that only those with perceived or actual associations to the LTTE faced a risk of abuse or torture. The Board concluded that, based on the Applicant's particular circumstances, he was not a person who would be perceived to be linked to the LTTE by Sri Lankan authorities.

[6] The Board went on to examine the Applicant's *sur place* claim which was based on his acknowledged transit to Canada aboard the *M.V. Ocean Lady* and his returning status as a failed asylum seeker.

[7] The Board examined the country condition evidence dealing with the experiences of other failed asylum seekers who had recently returned to Sri Lanka. It noted that all returning Tamils are subjected to screening measures including airport interviews and background checks usually taking a few hours or, in a few cases, up to one to two days. Generally those, like the Applicant, who left Sri Lanka with genuine documents had "little difficulty passing through airport security".

[8] The Board did acknowledge a heightened risk of torture for those with connections to the LTTE. Those at particular risk were said to be Tamils with "an actual or perceived association with the LTTE" or with a history of opposing the government. The Board found, on a balance of probabilities, that the Applicant did not fit that risk profile.

[9] In response to the argument that the Applicant's connection to the *M.V. Ocean Lady* was such that he would be perceived to be an LTTE supporter, the Board made the following findings:

- a) the Sri Lankan authorities had publicly acknowledged that not all of the passengers on the *M.V. Ocean Lady* were connected to the LTTE;
- b) the Sri Lanka government did not know the personal identities of everyone on board but they may ultimately come to know about the Applicant;
- c) considering the risk to the Applicant if his connection to the *M.V. Ocean Lady* did become known to the authorities, the Board found that no meaningful risk was present based on the following analysis:

[37] Although Sri Lankan authorities may come to know how the claimant came to Canada, the panel has considered if, in fact, the claimant faces an increased risk of persecution by having travelled aboard the *Ocean Lady*. Would Sri Lankan authorities perceive the claimant to have LTTE links simply by virtue of his having travelled on the ship? If so, then does this fact suggest that none of the many migrants who have left Sri Lanka and arrived in Canada and claimed refugee protection but did not arrive by ship are believed by Sri Lankan authorities to have no LTTE connections? Not likely. The arrival of 76 and 491 individuals aboard two different ships garnered a great deal of media attention, unlike the many others who have arrived by other means, individually and with little fanfare. What then determines when and on what basis Sri Lankan authorities consider individuals to be members of or associated with the LTTE? The panel concludes that it is their past history in Sri Lanka, unless their activities since leaving the country suggest otherwise. Those, such as the claimant, with little recent profile with Sri Lankan authorities, have been allowed to leave the country with no difficulty. Why now would they be arrested, detained, and tortured for simply having arrived by ship, unless there were good reasons for believing they had substantive LTTE connections? The claimant insists that he has no links to or sympathies with the LTTE. He has not had any problems with the authorities. He has not been involved with or supportive of any pro-LTTE organization during his time in Canada. The panel finds that there is insufficient credible evidence before it to suggest that since he fled Sri Lanka, other than his presence on the *Ocean Lady*, the Sri Lankan government has any further reason to believe he is a member or supporter of the LTTE.

- d) if Sri Lankan authorities presumptively suspected the Applicant, they would take some comfort from the fact that Canadian authorities had found nothing to link him to the LTTE.

[10] The Board concluded, on a balance of probabilities, that, given the Applicant's history in Sri Lanka, the authorities would not perceive him to be member or supporter of the LTTE simply on the strength of his transit to Canada aboard the *M.V. Ocean Lady*.

Issue

[11] Did the Board err in its treatment of the evidence or the law?

Analysis

[12] The Applicant argues that his connection to the *M.V. Ocean Lady* placed him in a different and higher risk category than other failed Tamil asylum seekers. The argument is that the Board erred by failing to appreciate this distinction and, in particular, by failing to recognize the propensity of the authorities to use torture to extract information from those it perceives to be connected to the LTTE. The Board rejected this argument by finding that the Applicant's connection to the *M.V. Ocean Lady* did not put him uniquely at risk.

[13] The Board relied primarily on the recent experiences of returning Tamils and found that they were not being abused. It found no reason to conclude that a person aboard the *M.V. Ocean Lady* would be treated differently than other returning Tamils with similar profiles. This was a finding that was reasonably open to the Board on the evidence before it. Arguably, the best

evidence of possible risk would come from the actual experiences of those with similar profiles – in this case Tamil males with no actual connection to the LTTE. It was not unreasonable for the Board to assume that all Tamil males of a certain age returning involuntarily to Sri Lanka would be perceived with some degree of suspicion. That is so because LTTE fighters and supporters were strongly motivated to leave Sri Lanka and they adopted a number of strategies to escape. According to the Board, the means of exit would not displace a general underlying concern that some returning Tamils were likely LTTE fighters or supporters. If the Applicant's argument had merit one could reasonably expect to see the frequent use of torture as a means of extracting information from anyone considered to be suspicious (i.e. all young Tamil males returning as failed asylum seekers). The Board found no evidence to support such conduct. It, therefore, declined to place the Applicant into a higher risk category. While a different outcome could have been obtained on the same record, that alone does not undermine the reasonableness of the Board's decision. I can identify nothing in the Board's analysis of the *sur place* evidence that renders its decision unreasonable.

[14] The Applicant argues that the Board erred by failing to cumulatively assess the relevant risk factors. Instead, the Board is accused of looking at each risk element in isolation of the others.

[15] If I was convinced that the Board had erred in the manner described, I would not hesitate to set the decision aside. But there is nothing in the Board's reasons to suggest that it failed to consider the evidence in its proper context. The decision carefully examines and weighs the competing factors and concludes in the following way:

[40] After carefully considering the arguments and evidence regarding the consideration of the claimant as a refugee *sur place*, the panel finds, on a balance of probabilities, that the Sri Lankan government would not perceive the claimant to be a member or

supporter of the LTTE simply on the basis of his travel on the *Ocean Lady* given his history in Sri Lanka before coming to and after arriving in Canada.

[16] The Board's decision seems to me to appropriately conform to the standard described in *KK v Canada*, 2014 FC 78, [2014] FCJ No 74, where Justice Peter Annis stated:

51 I also have some difficulty seeing how a decision can be set aside on the basis that the Board considered all of the evidence but did not take consideration of its cumulative impact, unless there is a clear statement or grounds to that effect, which would be highly unlikely. It is one thing to criticize a decision for not having considered an important relevant factor or having considered an irrelevant factor, because these situations can be determined from a review of the decision. It is quite another I would think to conclude that despite having considered a factor, a decision maker did not consider that factor along with all the other factors. It is not evident how one can demonstrate such a conclusion other than by the decision itself, and that would just mean the Court substituting its opinion for that of the Board. Such an intervention by the court would also appear to contradict the Supreme Court's direction in *Newfoundland Nurses*, which provides a considerable degree of latitude to an administrative tribunal as to the manner in which it arrives at its decisions.

[17] The Applicant contends that the Board had an obligation to explain why it came to a different assessment of the risk than other panels dealing with claimants who were passengers on either the *M.V. Sun Sea* or *M.V. Ocean Lady*. In particular, he relies on the decision of the Board in its file No. VBO-03306 (contained in the Certified Tribunal Record at pp 1425-1445) where the member found as follows:

[61] LTTE suspects continue to be subjected to prolonged incommunicado detention without charge or trial, all of which increases the risk of torture. Many LTTE suspects are held in a variety of irregular, unofficial or secret places of detention and have been victims of enforced disappearances and extra-judicial killings?

[62] What all of this means for the claimant, a claimant who does have information about human smuggling as a passenger on the MV *Sun Sea*, and who may have information on LTTE members who were on board the boat, is that he faces more than a mere possibility of detention and torture if he were to return to Sri Lanka. The detention might occur at the airport or at some later time.
[Footnotes omitted]

[18] Counsel for the Applicant acknowledges that the Board had no obligation to follow earlier panel decisions involving similarly situated individuals. Nevertheless, it is argued that the Board had an obligation to explain why it differed from at least one other panel that had concluded that a Tamil male aboard the *M.V. Sun Sea* was at risk of persecution in Sri Lanka.

[19] I do not accept the proposition that the Board has a legal duty to provide reasons for differing from other panel decisions in like cases. If there is no obligation to follow other decisions and if conflicting outcomes are to be expected and accepted in administrative decision-making, there cannot be a responsibility to explain why a contrary decision was not followed. Furthermore, by providing its own reasons, the Board is implicitly explaining why and where it differs from the risk assessments of other panels. While I accept that inconsistent outcomes among factually indistinguishable cases may appear to the persons involved to be arbitrary, that is the price to be paid for deference.

[20] To the extent that this view may differ from the decisions of some of my colleagues, I decline to follow them. Instead I adopt the analysis of Justice Catherine Kane in *B198 v Canada*, 2013 FC 1106, [2013] FCJ No 1198 citing with approval from the decision of Justice Judith Snider in *PM v Canada*, 2013 FC 77, [2013] FCJ No 136:

66 There is a great deal of jurisprudence dealing with judicial review of Board decisions made with respect to refugee claimants who were passengers on the *MV Sun Sea*. Counsel is justified in noting some earlier decisions that upheld determinations of the Board which found that being a passenger on the ship was sufficient to base a claim for protection or that being a passenger was equated with membership in a particular social group and that this membership provided the required nexus. However, despite what appear to be different approaches to similar situations, no two claims are the same. The role of the Court is to consider the reasonableness of the Board's decision, not to impose its own determination.

67 As noted by Justice Snider in *PM*:

[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 *MV 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 *MV 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.

Accordingly I find that the Board did not err by failing to cite other Board decisions that ran counter to its own risk analysis.

[21] For the foregoing reasons, this application is dismissed. Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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v
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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**REASONS FOR JUDGMENT
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