Federal Court  Cour fédérale

Date: 20111020

Docket: IMM-382-11

Citation: 2011 FC 1196

Ottawa, Ontario, October 20, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SATHAN THAMBIRAJAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 8, 2010, dismissing the applicant's claim for refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow the application is allowed.

I. Background

[3] The applicant is a young Tamil from Delft, a small island in the north of Sri Lanka. He arrived in Canada in January 2010 and claimed protection upon his arrival. He based his claim for protection on incidents that occurred during 2007 and 2009.

[4] The applicant recounts incidents that occurred in 2007 in Delft when he had to pass through checkpoints between his home and his place of work. On occasions he was harassed, stopped and questioned on suspicion of helping the Liberation Tigers of Tamil Eelam (LTTE). On one occasion, he was slapped and chased away. On another occasion, in March 2007, the applicant was "stopped in the hot sun, slapped on the cheek and beaten with a cane" and detained for five hours. The applicant's siblings in Sri Lanka experienced similar issues. In February 2008, the applicant was stopped by the Army and beaten. He states that one of his friends was killed in March 2008, after which he decided to leave Delft.

[5] In March 2008, the applicant moved to Vavuniya. On one occasion, he was kidnapped and detained by the Eelam People's Democratic Party (EPDP) and released only after his father paid a bribe of 25,000 rupees. The applicant moved to Colombo in February 2009, left Sri Lanka in the same month, and arrived in Canada in January 2010, after passing through Malaysia, Thailand, India, Lebanon, Ecuador, Mexico and the United States. He claimed refugee protection upon his arrival in Canada.

II. Decision under review

[6] The Board found that the claimant was neither a convention refugee pursuant to section 96 of the IRPA nor a person in need of protection pursuant to section 97(1) of the IRPA.

[7] Despite some concerns about the applicant's testimony, the Board found the applicant, on a balance of probabilities, credible.

[8] The Board made its assessment based on the following facts, outlined in its decision:

- The Sri Lanka authorities, under serious threat from the LTTE established numerous checkpoints to stop all persons crossing and to check their identity;
- In Delft, the applicant, who worked three kilometres away from his home, had to pass through a checkpoint to get to work;
- On occasion, when he was late reaching a checkpoint, he was asked to explain why he was late, and on one occasion he was asked if he helped the LTTE; they slapped him on the face and then chased him away;
- On another occasion, in March 2007, he was stopped, slapped on the cheek and beaten with a cane; he was detained for about five hours.
- On one occasion, while he lived in Vavuniya, he was detained by the EPDP, a paramilitary group, and was released after is father paid a bribe of 25,000 rupees.

[9] The Board accepted that these incidents happened and could happen again should the applicant return to Sri Lanka. The Board found that, based on the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating

to the Status of Refugees (UNHCR handbook), it was not easy to distinguish between harassment, discrimination and persecution. The Board found that, in this case, the incidents did not amount to persecution and that, if similar incidents occurred in the future, they would likely not amount to persecution. The Board Member indicated that, while he accepted that young Tamils were likely to receive harsh treatment, in some cases amounting to torture or death on suspicion of being supporters of the LTTE, this was not the situation of the claimant. The Board characterized the treatment received by the applicant as follows:

> [15] … He was stopped questioned, inconvenienced and harassed. However such treatment considering the situation in the country does not amount to persecution. The treatment he received was not someone going about his business should receive yet it was not serious or systemic enough or shock the conscious of people to be characterized as persecution.

[10] Based on that reasoning, the Board concluded that the applicant was neither a Convention refugee nor a person in need of protection.

[11] At paragraphs 17 and 18 of the decision, the Board carried on with an assessment under subsection 97(1) of the IRPA. It stated the test applicable to establish a risk of harm under subsection 97(1) of the IRPA and concluded the following:

> [18] I find however, that the evidence presented in support of your allegations does not establish a serious possibility of persecution or a likelihood on a balance of probabilities of the other harms alleged. The claimant was picked up by the EPDP and released after they extorted his father for Rs.25,000. Extortion by the EPDP may happen again. The claimant father's holds a senior and respectable position in the government. He is the "Divisional Secretary" for the Delft region. The claimant's four brothers and one sister continued to live and study in Jaffna without any problems except being questioned at the checkpoints, as the claimant was albeit more vigorously on one

> or two occasions. He has not persuaded me on evidence that it is more likely than not that he would suffer harm pursuant to section 97 (i) [*sic*] upon his return to Sri Lanka.

III. Issues

[12] The issues in this case can be defined as follows:

Did the Board impose an elevated burden of proof when applying section 97(1) of the IRPA?

Did the Board err in determining that the applicant was neither a Convention Refugee nor a person in need of protection?

IV. Standard of review

[13] The first issue should be reviewed on the standard of reasonableness. While a question regarding the appropriate standard of proof may be construed as a question of law, *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] recognises that some questions of law may be decided on the basis of reasonableness (at para 56). This is especially so when the question of law is highly related to the tribunal's area of expertise. I find that the burden of proof with respect to refugee claims is exceedingly intertwined with the expertise of the Board and, therefore, a review on this issue warrants a standard of reasonableness.

[14] The second question involves the Board's findings of fact. It is trite law that in matters of assessment of evidence and credibility, the applicable standard of review is that of reasonableness (*Dunsmuir* at para 53; *Ndam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 513 at para 4 (available on CanLII); *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 798 at para 7, (available on CanLII)).

[15] The Court's role when reviewing a decision against the standard of reasonableness is defined in *Dunsmuir,* above**,** at paragraph 47:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Analysis

A. *Did the Board apply an elevated standard of proof regarding the risk of harm facing the applicant if he was returned to Sri Lanka?*

[16] The applicant argued that the Board applied the wrong test under subsection 97(1) of the IRPA and required an elevated burden of proof on selected elements of the applicant's testimony. He contends that this constitutes a misunderstanding of how to apply subsection 97(1) of the IRPA, and that in cases where there is doubt about whether the officer misapplied or misunderstood a burden of proof the Court must quash the decision.

[17] It is well established that the test is whether it is more likely than not that the person would be subject to the risk in question (*Li v Canada (Minister of Citizenship and Immigration),* 2005 FCA 1, [2005] 3 FCR 239.

[18] The Board's decision is not a model of clarity but I consider, when taking the reasons as a whole, that the Board did not put a heavier burden of proof on the applicant. At the end of its reasoning, the Board stated "He has not persuaded me on evidence that it is more likely than not that

he would suffer harm pursuant to section 97(i) [*sic*] upon his return to Sri Lanka." I find that the Board expressed the "gist" of the appropriate standard of proof.

B. *Did the Board err in determining that the applicant was neither a Convention Refugee nor a person in need of protection?*

[19] The applicant argued that the Board erred in finding that being stopped and beaten by soldiers because you are a young Tamil male is not persecutory and is not harm, as defined in subsection 97(1) of the IRPA. The applicant contended that arbitrary detention motivated by the person's ethnicity is persecutory and cannot be justified by a state of emergency. The applicant further contended that the Board erred in ignoring that the cumulative effect of the incidents amounted to persecution. He also argued that the Board erred in considering whether mistreatment would "shock the conscience of people to be characterized as persecution" because this is not a relevant consideration in law.

[20] In his Further Memorandum of Argument, the applicant raised a new argument. He contended that the Board failed to consider that he would face persecution on grounds of membership in a particular social group, that group being failed refugee claimants.

[21] The respondent argued that the applicant should not be allowed to raise this new argument this late in the process. The respondent contended that the Court has consistently declined to hear new arguments raised for the first time at the Further Memorandum stage (*Garcia v Canada*

(Minister of Citizenship and Immigration), 2006 FC 645 at paras 15-17, 149 ACWS (3d) 300) and contended that it was prejudiced because it did not have the opportunity to counter the argument.

[22] The Court is allowed to exercise its discretion and hear new issues based on the following considerations taken from *Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 at para 12, 314 FTR 1:

> (i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?
> (ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?
> (iii) Does the record disclose all of the facts relevant to the new issues?
> (iv) Are the new issues related to those in respect of which leave was granted?
> (v) What is the apparent strength of the new issue or issues?
> (vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[23] I agree with the respondent. In this case, the facts and matters relevant to the new issue were known at the time the applicant perfected his application for leave and could have been raised on a timely basis. The applicant is in the position to know the issues and raise them. The respondent rightly contends that it is prejudiced by not having an opportunity to submit evidence on this possible serious issue.

[24] On the merits of the application, the respondent alleged that the applicant is asking the Court to reweigh the facts and evidence. The applicant failed to establish that the decision is unreasonable and warrants the Court's intervention. The respondent insisted that the Board acknowledged that the applicant experienced the incidents he described in his testimony but found that they did not amount

to persecution; while it may be difficult to draw the line between discrimination and persecution, it is within the Board's mandate, and part of its duty, to draw conclusions based on facts by analyzing the evidence submitted, including about what constitutes persecution. This Court ought not to intervene unless the findings are capricious or unreasonable.

[25] The respondent also contends that all claims made for asylum should be considered on their individual merits in a fair and efficient way, taking in to account the up-to-date situation in their country of origin. The test for refugee status is prospective. The respondent relied on *Hettige v Canada (Minister of Citizenship and Immigration)*, 2010 FC 849 at paras 22 to 23 (available on CanLII) where this Court decided that it was reasonable for the Board to conclude that the claimant no longer faced a threat because circumstances have changed in Sri Lanka since May 2009.

[26] Despite the deference owed to the Board, I consider that its decision is unreasonable.

[27] I find that the Board unduly minimized the treatment imposed on the applicant. The Board found that the claimant was "stopped, questioned, inconvenience and harassed". It also found that he was questioned "more vigorously" than his siblings at checkpoints. With all due respect, I do not see how being beaten, detained or made to pay a bribe to a paramilitary group to be released can be considered as being merely inconvenienced or as being vigorously questioned. I further find that the diluted way in which the Board characterized the treatment received by the applicant coloured the remaining of its reasoning and rendered the outcome unreasonable.

[28] Moreover, the Board acknowledged that the treatment imposed on the applicant stemmed from him being a young Tamil living in the northern portion of Sri Lanka and that it could happen again if he was to return to Sri Lanka. Yet, it found that the experience was not serious or systemic enough to be characterized as persecution. The Board seems to minimize the gravity of the treatment received by the applicant because of the situation that prevailed in Sri Lanka. The Board explained that the Sri Lanka authorities were under a serious threat from the LTTE and were justified in establishing checkpoints. The Sri Lankan state may have had legitimate reasons to establish checkpoints but there can be no legitimate reasons to harass, beat and detain citizens who have to cross those checkpoints.

[29] In the same vein, the Board described the treatment received by the applicant as "not shocking the conscious of people." I consider that this was not a relevant consideration.

[30] Finally, the Board acknowledged that the applicant may receive similar treatment if he returns to Sri Lanka but concluded that such a situation would not amount to persecution. The basis for this finding is not clear. The Board may have based its reasoning on its characterization of the treatment received by the applicant in the past. If that is the case, it failed to assess whether a repetition of the incidents could cumulate in persecution. The respondent underscored the prospective nature of the risk and the changes in the prevailing conditions in Sri Lanka since May 2009. However, it is worth noting that the Board did not refer to any change in the country conditions and, on the contrary, acknowledged that the applicant could face similar treatment if he were to return to Sri Lanka.

[31] For all of the above, the application for judicial review is allowed and the Board's decision will be overturned. No questions of general importance were proposed for certification and none arise.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is sent back for re-determination by a differently constituted panel.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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