

Federal Court



Cour fédérale

Date: 20140408

Docket: IMM-13216-12

Citation: 2014 FC 341

Ottawa, Ontario, April 8, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

A069

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review concerns another decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) involving refugee claims made by Tamil asylum-seekers who arrived in Canada on either the *M/V Ocean Lady* or *M/V Sun Sea*.

[2] By way of background, section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides that claimants who have a well founded fear of persecution by reason of race, religion, nationality, membership in a particular social group or political opinion will be granted

refugee status if they are unable or, if due to their well-founded fear, are unwilling to obtain protection in their country of nationality or habitual residence. To establish section 96 protection a claimant must prove on the balance of probabilities that there is more than a mere possibility, or a reasonable chance, that he or she will face persecution if returned to their country of origin (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at 683 (FCA), explained in *Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681 at paras 22-34; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420 at para 184; aff'd 2007 FCA 171).

[3] In this matter, the Respondent, a 33 year old citizen of Sri Lanka, was a passenger on the *M/V Ocean Lady* and arrived in Canada on October 17, 2009. The Board determined that he is a Convention refugee because he has a well founded fear of persecution by reason of his nationality and membership in a particular social group: young Tamil males who would be suspected of links to the Liberation Tigers of Tamil Eelam (LTTE) resulting from travel to Canada on board the *M/V Ocean Lady*. This placed him within the third possible category of particular social groups described by the Supreme Court in *Canada (Attorney General) v Ward*, [1993] 2 SCT 659 at 726-744, [1993] 2 SCR 689 [*Ward*], being those “associated by a former voluntary status, unalterable due to historical permanence”.

[4] The Board found the Respondent to be credible. Further, that he is a *sur place* refugee as described by the *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (UNHCR Handbook) having a well founded fear of persecution should he return to Sri Lanka. While there was no evidence to suggest that while he lived in Sri Lanka he was a

member of or would have been considered to have connections to the LTTE, the Board found that his profile changed when he boarded the *M/V Ocean Lady*, a ship owned and operated by the LTTE and whose passengers included persons who were members of the LTTE. The Board found that the Respondent's nexus to a Convention ground changed from the particular social group of "young Tamil males from Jaffna *not* suspected of being LTTE members or supporters" to "young Tamil males from Jaffna, passengers on the *Ocean Lady*, suspected of being LTTE members or having information about LTTE members on board the *Ocean Lady*". As a result of passage to Canada on that vessel and his subsequent claim for refugee protection, the Board found he would very likely come to the attention of the Sri Lankan authorities. Given this, and upon review of the documentary evidence, the Board concluded that there was more than a mere possibility that the Respondent would be stopped, detained, interrogated, tortured, disappeared or even killed by the Sri Lankan authorities if he were returned.

[5] The Applicant submits that the Board erred in finding that the Respondent had a nexus to a Convention ground. More specifically, that the Board erred in finding that the Respondent was a Convention refugee on the basis of nationality and particular social group.

[6] With respect to nationality, the Applicant submits that the Board provided no reasons for its finding that the Respondent's claim had a nexus to the Convention ground of nationality. Simply identifying him as Sri Lankan and referencing potentially problematic country conditions will not ground a nexus based on nationality, and thus results in a lack of a justifiable, transparent and intelligible conclusion (*Canada (Minister of Public Safety and Emergency Preparedness) v Baraniroobasingam*, 2010 FC 92 at para 6; *Canada (Minister of Citizenship and Immigration) v*

Fouodjl, 2005 FC 1327 at para 20; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*]).

[7] As to particular social group, the Applicant submits that the Board's finding was contrary to the relevant law on the scope of "particular social group" for the purposes of the Convention refugee definition. In support of this, the Applicant submits that the Supreme Court of Canada in *Ward*, above, held that the particular social group category was not meant to include any association bound by some common thread, but must take into account the general underlying themes of the defence of human rights and anti-discrimination which form the basis for the international refugee protection initiative. The third category—described by the Supreme Court as "groups associated by a former voluntary status, unalterable due to its historic permanence"—does not capture Tamil males who voluntarily associated for the reason of passage on the *M/V Ocean Lady* as there is no link to the underlying theme of the defence of human rights and anti-discrimination (*Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334 at para 24 [*B380*]; *Canada (Minister of Citizenship and Immigration) v A011*, 2013 FC 580 at para 40 [*A011*]; *Canada (Minister of Citizenship and Immigration) v B171, B169, B170*, 2013 FC 761 at para 7 [*B171, B169, B170*]; *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636 at paras 31-41).

[8] The Applicant also submits that because, other than nationality and particular social group, the Board made no other finding as to nexus, the Court is precluded by *Ward* and an absence of reasons from reading in a nexus finding on other grounds such as ethnicity and perceived political opinion (*Ward*, above at para 78; *B171, B169, B170*, above at para 10; *Newfoundland Nurses*, above at para 16-17; *Canada (Minister of Citizenship and Immigration) v Harvey*, 2013 FC 717 at

paras 58-60; *Agidi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 691 at paras 8-9; *Alberta Teachers' Association v Alberta*, 2011 SCC 61 at para 54; *A011*, above at para 42; *Canada (Minister of Citizenship and Immigration) v B377*, 2013 FC 320 at para 27 [B377]).

[9] Further, that while being a Tamil could fall under the Convention nexus ground of race, the Board did not find that the Respondent would face a risk of persecution on that basis. Accordingly, any mixed motives argument on ethnicity or race must fail because it is not clear that the Board turned its mind to the Respondent's ethnicity or race in coming to its conclusion. Rather, the Board found that there was no evidence that his profile as a young Tamil male from Jaffna created any risk of persecution. The Court cannot separate the Board's conclusions on the Respondent's profile prior to leaving Sri Lanka from his profile for the purposes of his *sur place* claim. A finding of mixed motives would amount to speculation (*Kengeswaran Thanpalasingham v Canada (Minister of Citizenship and Immigration)*, 2013 FC 380 at para 16; *Jegatheeswaran Ganeshan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 841 at para 35).

[10] The Applicant also submits that recent jurisprudence supports its position (*Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151 at paras 27-28, 32; *Canada (Minister of Citizenship and Immigration) v B323*, 2013 FC 190 at para 6; *A011*, above at para 42; *PM v Canada (Minister of Citizenship and Immigration)*, 2013 FC 77 at para 13; *SK v Canada (Minister of Citizenship and Immigration)*, 2013 FC 78 at para 21; *B171*, *B169*, *B170*, above at para 10). Further, decisions where the Minister's applications for judicial review were denied can be distinguished (*Canada (Minister of Citizenship and Immigration) v B399*, 2013 FC 260 [B399]; *Canada (Minister of Citizenship and Immigration) v A032*, 2013 FC 322 at paras 18-21 [A032];

Canada (Minister of Citizenship and Immigration) v B420, 2013 FC 321 at paras 23, 26; *B377* at para 27).

[11] Addressed in the hearing of this matter, but not noted in the written submissions of the Applicant, is the November 19, 2013 decision of Justice Gleason in *Canada (Minister of Citizenship and Immigration) v A068*, 2013 FC 1119 [A068]. That decision is significant to this judicial review for a number of reasons. First, because in *A068*, Justice Gleason undertook a careful and thorough analysis of the decisions of this Court concerning those who entered Canada on board the *M/V Ocean Lady* or *M/V Sun Sea*. Second, because the issues raised and submissions made by the Minister in *A068* mirror the issues and submissions in this case. And third, because the decision of the Board in *A068* is, other than its consideration of the credibility of the individual claimants, almost a mirror image of the decision rendered by the Board in this case.

[12] There, as here, the Board determined that the claimant was a refugee due to the risk he faced as a result of his presence on the *M/V Ocean Lady*. The Board found that his presence on that ship, along with his background, subjected him to the risk of possible torture by the Sri Lankan authorities if he were to return to that country because they would either suspect him of being a member or supporter of the LTTE, or would seek to obtain information from him about the LTTE members or sympathizers who were on board the *M/V Ocean Lady*.

[13] On the issue of whether the claimant in *A068* was a member of a particular social group for the purposes of section 96, Justice Gleason reviewed recent jurisprudence concerning claimants who were on board the *M/V Sun Sea* and *M/V Ocean Lady*, and the principles set out in *Ward*. She

determined that the Board's decision should be maintained on the basis of its finding that the claimant would be at risk due to his background and the belief of the Sri Lankan authorities that he might be an LTTE supporter. She stated that the basis of her analysis was similar to that applied by Justices O'Reilly, Noël and de Montigny in *Canada (Minister of Citizenship and Immigration) v B420*, 2013 FC 321, *Canada (Minister of Citizenship and Immigration) v B344*, 2013 FC 447, *Canada (Minister of Citizenship and Immigration) v B272*, 2013 FC 870 [B272], and *B399, A032, B377*, above. Because of this, she concluded she did not need to address the issue of whether *A068* was or was not a member of a particular social group.

[14] In the matter before Justice Gleason, as in those cases, there were several places in the Board's decisions where it commented on the risk that the claimant would face by reason of being a young Tamil male from the north of Sri Lanka who would be perceived by the Sri Lankan authorities as being an LTTE member or sympathizer (and as having information about the LTTE) due to his background and presence on the *M/V Ocean Lady*.

[15] There, as here, the Board stated in its determination that:

[7] The claimant is a Convention refugee, in that he has a well founded fear of persecution for a Convention refugee ground in Sri Lanka by reason of his nationality and membership in a particular social group of young Tamil males who would be suspected of links to the LTTE resulting from their travel to Canada on board the *Ocean Lady* [...]

[16] There, as here, at several other places in its decision the Board commented on the risk of torture the claimant might well face upon return to Sri Lanka by reason of the fact that the

authorities would perceive him as having links to the LTTE. Justice Gleason gave several examples, quoting paragraphs from the Board's decision in *A068*. It is unnecessary to repeat these here. What is relevant is that of the eight paragraphs quoted, six are also contained in the decision of the Board in this matter (paragraphs 23, 27, 29, 31, 41, 44 in *A068* have equivalents in paragraphs 16, 21, 23, 25, 36 and 38 of the decision at issue).

[17] In *A068*, as in this matter, the Board did not use the words "political opinion" or "perceived political opinion" in those passages. However, Justice Gleason found that the Board clearly delineated that the risk the claimant would face is tied in part to the fact that the Sri Lankan authorities would perceive that he had links to the LTTE. And while in *B420*, *A032*, *B377*, *B272* and *B399* the Board had expressly used the words "perceived political opinion", that was not the case in *B344* in which Justice Noël upheld the Board's decision on a "mixed motives" analysis (paras 37 and 45). Justice Gleason concluded:

[36] I find the reasoning of Justices de Montigny, O'Reilly, Blanchard and Noël to be persuasive and believe that the Board in this case should be viewed as having tied its nexus finding to race or nationality and perceived political opinion. In this regard, it must be recalled that under the reasonableness standard of review, reasons need not be perfect or follow any particular form as long as they allow the parties and the reviewing court to understand why a decision was made (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). Here, as the above quotations demonstrate, it is clear that it was the combination of the claimant's race or nationality and perceived political opinion, acquired as a result of his background and presence on the *M/V Ocean Lady*, that led the Board to find him to be a Convention refugee.

[37] Upholding the Board's decision on this basis is in line with the decision of the Supreme Court in *Ward*. There, the Supreme

Court dismissed the argument that the claimant was a refugee on the basis of membership in a particular social group, namely, for being a former member of the Irish National Liberation Army. However, the Court found the claimant to have a well-founded fear of persecution based on political opinion, even though this ground had not been raised either before the Board or the Federal Court of Appeal (at 745, cited to SCR). Therefore, *Ward* establishes that where the facts support a well-founded fear of persecution based on political opinion, a reviewing court is free to consider that ground even if the parties had framed the issue in the context of membership in a particular social group.

[38] Thus, the Board's determination that there was a nexus to a ground in the *Refugee Convention* is reasonable.

[18] Justice Gleason then turned to the Board's factual findings regarding the likelihood of risk for the claimant and found that there were multiple pieces of evidence before the Board upon which it premised its risk determination and listed examples of this. Justice Gleason also distinguished the case before her from *B380*, decided by the Chief Justice, on this basis. She concluded that the Board's decision was based on a reasonable determination of there being a nexus to a ground enumerated in the Convention and that its factual findings related to there being a reasonable chance that the claimant would be persecuted if returned to Sri Lanka were reasonable, therefore the Board's decision was upheld.

[19] In this matter the record shows that much of the same evidence was before the Board when it rendered its decision concerning *B069*. Similarities include: articles from various media outlets linking the vessels to the LTTE, including a Toronto Star Article in which the Minister of Public Safety and Emergency Preparedness stated that the LTTE "are behind operations to smuggle people into Canada"; evidence the RCMP and the Canadian Government have communicated with the Sri Lankan government (Decision, paras 18, 19 and 20; Media index, CTR pp. 789-793); and, reports

from various government bodies and non-governmental organizations indicating persons with suspected links to the LTTE are at risk of abuse and torture on return (Decision, para 32; CTR pp. 701, 712, 1475, 1493, 1500, 1527). Additionally, the documentary evidence here stated in numerous sources that at least 25 of the 76 persons on board the *M/V Ocean Lady* were LTTE members (Decision, paras 16, 17).

[20] Given the common issues, similar documentary evidence and almost identical reasons contained in the Board's decision in *A068*, I can see no reason to depart from the reasoning and findings of Justice Gleason. The application for judicial review must therefore be dismissed.

[21] The Respondent submitted in this case special reasons exist which would support a costs award in its favour (relying on the reasoning in *A44*, above at paras 43-46). He brought *A068* to the attention of the Applicant and requested that this proceeding be abandoned as, based on that decision, it was plain and obvious that this matter could not succeed. Further, having had the benefit of *A068*, *A061*, *A025*, *A44* and other decisions, the zeal with which the Applicant has pursued this application also warrants an award of costs. On the other hand, the Applicant submits that the decisions of this Court in the *M/V Ocean Lady* and *M/V Sun Sea* cases are not consistently decided in favour of claimants, demonstrating that there were valid issues before the Court.

[22] While I can understand why the Respondent would feel an award of costs to be justified in this case, I am not convinced that the high threshold for establishing the existence of special reasons has been met in this circumstance warranting a departure from Rule 22. Accordingly, no costs will be awarded.

[23] The parties did not propose any questions for certification and none arise.

JUDGMENT

THIS COURT’S JUDGMENT is that

1. This application for judicial review is dismissed;
2. There is no order as to costs; and
3. No question is certified.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
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