

Date: 20061026

Docket : IMM-7766-05

Citation: 2006 FC 1287

Ottawa, Ontario, October 26, 2006

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

ARASAPATKUNARAS KATHIRAVELU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”), for judicial review of a decision of the Immigration and Refugee Board (the “Board”), Refugee Protection Division (the “RPD”), rendered on December 5, 2005, which denied the applicant’s claim for refugee protection under section 96 and subsection 97(1) of the Act.

BACKGROUND

[2] The applicant is a Sri Lankan Tamil who arrived in Canada on June 18, 2005, seeking protection as a refugee. He has a wife and three children, all of whom still reside in Sri Lanka.

[3] In Sri Lanka, the applicant was a farmer who also worked for a number of years for the Ministry of Health, doing spraying in malaria-infested areas, which

required him to travel between government-controlled and LTTE-controlled areas. The applicant alleges that during his employment, he was sometimes forced by the Liberation Tigers of Tamil Eelam (the “LTTE”) to spray in areas under their control. He was also systematically stopped and interrogated at the army checkpoints.

[4] The applicant alleges that in 2001, he was arrested, interrogated and tortured by the army, following a landmine explosion in his village.

[5] Frustrated with having to pay extortion taxes and to give away his land to the LTTE, he decided to sell some of his land to finance fleeing the country. After the LTTE learned of his plan to sell his land, and his attempt to evade paying their ‘taxes’ on such a sale, the applicant claims that they threatened to kill him if he sold the land without their knowledge. Instead, the applicant transferred the ownership of the land to his brother, and they borrowed money to pay a smuggler to get him out of Sri Lanka.

[6] Should he be forced to return to Sri Lanka, the applicant has also stated that he fears being detained at the airport and tortured by security forces.

[7] Prior to the hearing on the merit of the claim, counsel for the applicant asked the Board to be allowed to question his client in chief, instead of following the regular procedure of having the panel question the refugee claimant first.

[8] His request was denied and the applicant’s claim was heard, following regular procedure, on October 24, 2005 before Barbara Berger (the “Board member”).

[9] The Board member questioned the applicant extensively. The applicant states that the Board member’s questioning was very upsetting and as such, following the hearing, his counsel arranged for him to see a psychologist, whose report was then submitted to the Board along with a request that the applicant be given another hearing before a different Board member. On December 2nd, 2005, the Board rejected this request on the basis that the report had been received a month after the hearing and that the Board member had already rendered her decision on the claim.

[10] On December 5th, 2005, the Board member officially rendered her decision and rejected the applicant’s claim.

ISSUE FOR CONSIDERATION

[11] The following issue was considered by the Court in this application:

Whether the Board member improperly fettered her discretion in her decision relating to the reverse order questioning.

STANDARD OF REVIEW

[12] In looking at the question of fettering of discretion by the Board member, there is no need to proceed with a detailed analysis to determine the proper standard of review. Rather, this issue must be examined by the Court in light of the particular

circumstances of the case and if a breach of natural justice or procedural fairness is found by the Court, no deference will be due to the Board and the application to set aside the decision will be granted.

ANALYSIS

Fettering of Discretion

[13] At the heart of this issue lie the directives for questioning refugee claimants, provided to Board members by Guideline 7. The relevant portions of Guideline 7 are paragraph 19, which sets out reverse order questioning as the norm for such procedures, and paragraph 23, which allows the Board to consider varying the order of questioning. Paragraph 23 reads:

23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*.

23. Le commissaire peut changer l'ordre des interrogatoires dans des circonstances exceptionnelles. Par exemple, la présence d'un examinateur inconnu peut intimider un demandeur d'asile très perturbé ou un très jeune enfant au point qu'il n'est pas en mesure de comprendre les questions ni d'y répondre convenablement. Dans de telles circonstances, le commissaire peut décider de permettre au conseil du demandeur de commencer l'interrogatoire. La partie qui estime que de telles circonstances exceptionnelles existent doit soumettre une demande en vue de changer l'ordre des interrogatoires avant l'audience. La demande est faite conformément aux *Règles de la SPR*.

[14] In the past year, the fairness of reverse onus questioning and the possible fettering of discretion stemming from Guideline 7 have been the subject of litigation before the Federal Court, most notably in the cases of *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 8, and of *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631, which gave rise to contradictory jurisprudence. In *Thamotharen*, Chief Justice Edmond P. Blanchard concluded that Guideline 7 unlawfully fetters the discretion of Board members in determining whether or not to proceed with reverse order questioning. In *Benitez* however, Justice Richard Mosley concluded that the directives in Guideline 7

were not mandatory and thus the Board members were not bound by them. As such, there was no evidence that Guideline 7 fettered Board members' discretion to determine the proper procedures to follow in a refugee hearing. The decision in *Thamotharen* is being appealed before the Federal Court of Appeal.

[15] That being said, both judgments are in agreement that, in general, reverse order questioning does not violate natural justice, as long as Board members are free to consider the fairness of reverse order questioning on the facts of each case and can vary the order of questioning if they feel that it is appropriate. In order to do so, the Board members should not be fettered in their discretion on whether an exception should be granted or not.

[16] The applicant submits that the Board member erred by holding that Guideline 7 requires a psychological evaluation of the claimant for the order of questioning to be reversed. Regardless of what the administration's intent was in regards to Guideline 7, there is no requirement for a psychological evaluation in paragraph 23 and as such, the Board member fettered her discretion by imposing a requirement that does not exist.

[17] Having read the decision carefully and having reviewed the relevant portion of the transcript of the hearing, this Court must agree with the applicant that the Board member did fetter her discretion in this particular instance.

[18] The Board member held in her decision at pages 1 and 2:

The Tribunal stated that in her decision to accept the change in order of questioning, she has always taken into consideration the particular situation of the claimant. The Tribunal did not consider that in the case at bar, it was necessary to reverse the order of questioning set in Guideline 7. The tribunal noted that after nine years as a member of the RPD, she has a solid experience of questioning people who might be victims of torture and people with little formal education, who constitute a large portion of the refugee claimants.

So far, her analysis was reasonable. She then continues:

In the absence of psychological evaluation of the claimant, the Board considered that the reasons put forward by the counsel were insufficient to warrant a change in the order of questioning, as established in the paragraph 19 of Guideline 7.

[19] This reference to a psychological evaluation raises the following question: is it necessary, in all circumstances, that such an evaluation be made to warrant a change in the order of questioning? A careful reading of sections 19 and 23 of Guideline 7 certainly does not disclose such a requirement.

[20] Nevertheless, as the decision not to allow the change in the order of questioning was made before the hearing started, it is interesting to look at the transcript for a record of what the Board member said at that very moment (pages 769-770 of the Tribunal Record):

Well, I do not have any psychological evaluation which would indicate that your client has psychological problems to the extent, which would suggest that the order of questioning should be reversed. I understand that the claimant has a fairly low level of education, but it is nothing unusual for this tribunal to work with the claimants who have a low level of education. Those from Asia and Africa I mean most of the claims are, I have to assess their demands, do not have extensive formal education. And I will make my questioning as simple as possible as I usually do, and without any effort to intimidate the claimant, on the contrary, to make him at ease. So, I don't see that here any, in this case there are exceptional circumstances which would warrant the reversing order of questioning, which I sometimes agree when I have sufficient psychological evidence that the claimant, that it's important for the claimant. So I am...I will not accept your request. (my emphasis)

[21] My understanding of her reasons for not making an exception and varying the order of questioning is that she would have needed a psychological evaluation, since in the past “she sometimes agreed when she had sufficient psychological evidence that it is important for the claimant”.

[22] In my view, this constitutes a reviewable error. I agree with the Board member when she says that a psychological evaluation is a valid piece of evidence to warrant a change in the order of questioning. However, I do not agree with her when she says that to allow a change in the order of questioning, you *must* have such an evaluation. I base such a conclusion on her assertion that she only agreed in the past to vary the order of questioning when she had psychological evidence, as this means that she created a new criterion to assess the exceptional circumstances provided by section 23 of Guideline 7, and in the process fettered her discretion.

[23] Having decided to grant the application on the ground that the Board member improperly fettered her discretion, it will not be necessary to address the other arguments raised by both sides. The whole hearing could have been different had it not been vitiated by this interlocutory decision based on a wrong criterion.

[24] To be consistent with other decisions rendered in our Court regarding Guideline 7, I will certify the following question:

Has the implementation of Guideline 7 led to fettering of Refugee Protection Division member's discretion?

JUDGMENT

This application is allowed;

The Board's decision is set aside and the matter is remitted for redetermination by a panel differently constituted;

The following question is certified:

Has the implementation of Guideline 7 led to fettering of Refugee Protection Division member's discretion?

“Pierre Blais”

Judge