Date: 20050308

Docket: A-217-04

Citation: 2005 FCA 91

CORAM: NADON J.A.

SHARLOW J.A.

MALONE J.A.

BETWEEN:

EOMAL FERNANDOPULLE

TERENCIA KUMARI FERNANDOPULLE

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Winnipeg, Manitoba, on February 14, 2005.

Judgment delivered at Ottawa, Ontario, on March 8, 2005.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: NADON J.A.

MALONE J.A.

Date: 20050308

Docket: A-217-04

Citation: 2005 FCA 91

CORAM: NADON J.A.

SHARLOW J.A.

MALONE J.A.

BETWEEN:

EOMAL FERNANDOPULLE

TERENCIA KUMARI FERNANDOPULLE

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of a Federal Court judgment dated March 18, 2004: *Fernandopulle v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 415, [2004] F.C.J. No. 491 (QL). The judge dismissed an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board, which had dismissed the claims of the appellants that they are "Convention refugees" as defined in section 96(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. (The Board also rejected the claim of Mr. Eomal Fernandopulle that he is a person in need of protection as defined in section 97 of the *Immigration and Refugee Protection Act*, but that determination is not challenged in this appeal.)

[2] The term "Convention refugee" is defined in section 96 of the *Immigration and Refugee Protection Act*, the relevant parts of which read as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality,	96. A qualité de réfugié au sens de la Convention - le réfugié - la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de

membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries....

son appartenance à un groupe social ou de ses opinions politiques_:
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays....

[3] This definition substantially tracks the language of the *United Nations Convention Relating to the Status of Refugees* (July 28, 1951), to which Canada is a party.

[4] The appellants are citizens of Sri Lanka. They lived in Dankotuwa, approximately 40 kilometres north of Colombo. Mr. Fernandopulle came to Canada in August of 2001 and made a refugee claim. His mother, Ms. Terencia Kumari Fernandopulle, arrived in Canada in September of 2002 and also made a refugee claim. The Board heard their refugee claims together.

[5] Mr. Fernandopulle's father fled Sri Lanka in 1996 and went to India, where he apparently still remains. The older brother of Mr. Fernandopulle came to Canada in July, 1997, and was accepted as a Convention refugee. Mr. Fernandopulle has another brother, who remains in Sri Lanka.

[6] The refugee claims of the appellants are based on a well-founded fear of persecution based on their race or ethnic group, namely Tamils. The Board found both appellants to be credible in describing what had happened to them, and accepted the allegations within the narrative portions of their personal information forms. Mr. Fernandopulle claimed to have been detained, questioned and beaten by the police, who accused him of collaborating with Tamil rebels. The most recent such detention occurred in July of 2001. Ms. Fernandopulle claimed that her home had been looted by a Sinhalese mob, and that she and her family had been harassed by police, who repeatedly searched her home, and arrested, detained and physically assaulted her husband and sons.

[7] Sri Lanka has been the site of a long and fierce civil war between the government and the ethnic Tamil minority. Many Tamil people have fled Sri Lanka and established claims as refugees in other countries, including Canada. A cease fire was declared in December of 2001, which was still in place as of the date of the hearing before the Board. Very quickly after the cease fire, most barriers and checkpoints were removed in Colombo, enabling residents of that city to move around freely for the first time in seven years. On February 22, 2002, the Sri

Lankan government and the Tamil rebels entered into a formal truce and an agreement to negotiate a settlement of the conflict. There was evidence before the Board that the cease fire had resulted in substantial improvements in conditions for Tamils living in predominantly Sinhalese areas. There was also evidence before the Board that Mr. Fernandopulle's brother who remains in Sri Lanka was not arrested after July of 2001, and that police visits to the family home ceased after December of 2001.

[8] The Board rejected the appellants' claims because it found that, although there was a possibility that they might face some harassment in Dankotuwa because of their ethnicity, there was insufficient evidence to establish a well-founded fear of persecution under current conditions in Sri Lanka. The judge dismissed the appellants' application for judicial review of that decision, but he facilitated an appeal to this Court by certifying the following question pursuant to section 74(*d*) of the *Immigration and Refugee Protection Act*:

> In a case where a claimant has suffered persecution, is the Refugee Protection Division of the Immigration and Refugee Board required to apply the rebuttable presumption found in paragraph 45 of the *Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status*:
> "that a person has well-founded fear of being persecuted if he has already
> been the victim of persecution for one of the reasons enumerated in the 1951
> Convention"
> or is this presumption not part of Canadian law?

[9] This certified question is the only legal issue raised in this appeal. Counsel for the Minister argues that it should not be answered because, according to the jurisprudence of this Court, a certified question should not be answered unless the answer is determinative of the appeal: *Oppong v. Canada (Minister of Citizenship and Immigration)* (1996), 193 N.R. 306, 37 Imm. L.R. (2d) 83; leave to appeal dismissed, [1996] S.C.C.A. No. 140 (QL). This is an application of the principle that a moot appeal should not be entertained except in certain well defined circumstances: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[10] It is argued for the Minister that no answer to the certified question can possibly affect the outcome of the appeal. The Minister submits that the Board did not find that Ms. Fernandopulle has or ever had a well-founded fear of persecution. As for Mr. Fernandopulle, the Minister submits that even if he once had a well-founded fear of persecution, there is ample evidence that current conditions in Sri Lanka have effectively removed any basis for that fear.

[11] Counsel for the appellants argues that the certified question is not moot, because if it is answered in the appellants' favour, it would compel the Board to reconsider their refugee claims on the basis of an entirely different analytical

framework. That framework would require all of the evidence to be considered *de novo*, and it is not for this Court to determine that the result would necessarily be the same. Although I have some doubt that counsel for the appellants is correct on this point, I am prepared to give the appellants the benefit of the doubt, and answer the certified question.

[12] As I understand the argument for the appellants, they advocate two related propositions. The first proposition is that if a person has been the victim of persecution in his or her country of nationality for one of the reasons listed in section 96 of the *Immigration and Refugee Protection Act* (race, religion, nationality, membership in a particular social group or political opinion), then as a matter of law that person must be found to have a well-founded fear of persecution for one of those reasons, and therefore must be found to be a Convention refugee, unless there is reason to conclude that the fear is no longer well-founded because, for example, conditions in the person's country of nationality have changed. This first proposition is characterized by counsel for the appellants as a rebuttable presumption of law.

[13] The second proposition advocated by counsel for the appellants is that once the rebuttable presumption of law is engaged by proof of past persecution for one of the reasons listed in section 96, it is an error of law for the Board to place on the refugee claimant the onus of proving that the presumption is not rebutted by a change in country conditions. As I understand it, the second proposition depends upon the first proposition, because if there is no rebuttable presumption of law as argued for the appellants, the refugee claimant has the onus of proving all elements of the refugee claim, including the existence of a well-founded fear of persecution.

[14] With respect to the first proposition, the argument for the appellants is based primarily on the second sentence of paragraph 45 of the *Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status*. The stated purpose of the *Handbook* is set out in its foreword, the closing paragraph of which reads as follows:

> The Handbook is meant for the guidance of government officials concerned with the determination of refugee status in the various Contracting States. It is hoped that it will also be of interest and useful to all those concerned with refugee problems.

[15] Paragraph 45 appears in the section of the *Handbook* entitled "Interpretation of Terms", under the heading "well founded fear of being persecuted", a phrase that is intended to have the same meaning as the phrase in

section 96 of the *Immigration and Refugee Protection Act*, "well-founded fear of persecution". Paragraph 45 of the *Handbook* reads as follows (I have added emphasis to the second sentence, which is the basis of the argument for the appellants):

> 45. Apart from the situations of the type referred to in the preceding paragraph [emergency situations resulting in the displacement of entire groups of people, where individual determinations of refugee status may not be practicable], an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

[16] It is argued for the appellants that the underlined sentence creates a rebuttable presumption of law that a person has a well-founded fear of persecution for one of the enumerated reasons if he or she has been the victim of such persecution in the past, and that because Canada is a party to the Convention, the *Handbook* forms part of the law of Canada.

[17] In my view, it is appropriate to look to the *Handbook* for guidance in interpreting the elements of the statutory definition of Convention refugee, because that definition substantially incorporates by reference the corresponding provisions of the Convention. However, the *Handbook* is not law. It cannot be treated as more than a guide.

[18] That said, it seems to me that even if the second sentence of paragraph 45 of the *Handbook* is accepted as a weighty authority on the question of the determination of refugee claims where there is proof of past persecution, I cannot read it as intending to create, or as actually creating, a legal presumption as proposed by counsel for the appellants. As I read that sentence, it simply explains that evidence of past persecution may support a finding of fact that the claimant has a well-founded fear of persecution. The corollary must be that whether such a finding is made in a particular case would depend on all of the evidence, including evidence of current country conditions.

[19] Counsel for the appellants submits that *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, supports the existence of the rebuttable legal presumption for which he argues. *Ward* dealt with a refugee claim based on persecution by someone other than the state of which the claimant was a national, in circumstances where it was admitted that the state could not protect the claimant.

A number of issues were addressed in the case, but the only part of the judgment that is relevant to this case is the following passage (per La Forest J., writing for the Court, at page 722, emphasis in original):

> It is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality. Goodwin-Gill's statement, the apparent source of the Board's proposition, reads as follows, at p. 38 [Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon Press, 1983]:
>
> Fear of persecution and lack of protection are themselves interrelated elements. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear. [Emphasis added.]
>
> Having established that the claimant has a fear, the Board is, in my view, entitled to presume that persecution will be likely, and the fear well-founded, if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution. But I see nothing wrong with this, if the Board is satisfied that there is a legitimate fear, and an established inability of the state to assuage those fears through effective protection. The presumption is not a great leap. Having established the existence of a fear and a state's inability to assuage those fears, it is not assuming too much to say that the fear is well-founded. Of course, the persecution must be real -- the presumption cannot be built on fictional events -- but the well-foundedness of the fears can be established through the use of such a presumption.

[20] This passage (which deals with a factual situation quite unlike the present case) does not establish the existence of any kind of legal presumption relating to refugee claims. Rather, it describes a particular factual situation that may support a factual conclusion that a refugee claimant has a well-founded fear of persecution.

[21] The existence of the rebuttable legal presumption advocated by counsel for the appellants is inconsistent with the Canadian jurisprudence. For example, in *Pour-Shariati v. Canada (Minister of Employment and Immigration) (T.D.)*, [1995] 1 F.C. 767 (affirmed on other grounds (1997), 215 N.R. 174, 39 Imm. L.R. (2d) 103 (F.C.A.)), Rothstein J. said this at paragraphs 17:

> Before turning to the cases themselves, I would observe that a Convention refugee claimant must demonstrate a well-founded fear of persecution in the future to support a Convention refugee claim. In making a claim for Convention refugee status, an individual will often advance evidence of past persecution. This evidence may demonstrate that he/she has been subjected to a pattern of persecution in his/her country of origin in the past. But this is insufficient of itself. The test for Convention refugee status is prospective, not retrospective: for example, see *Minister of Employment and Immigration v. Mark* (1993), 151 N.R. 213 (F.C.A.), at page 215. The relevance of evidence of past persecution is that it may support a

well-founded fear of persecution in the future. However, it is a finding that there is a well-founded fear of persecution in the future that is critical.

[22] The same point is made in *Yusuf v. Canada (M.E.I.)* (1995), 179 N.R. 11 (F.C.A.), per Hugessen J.A., speaking for the Court at paragraph 2:

We would add that the issue of so-called "changed circumstances" seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal "test" by which any alleged change in circumstances must be measured. The use of words such as "meaningful" "effective" or "durable" is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention Refugee in s.2 of the Act: does the claimant now have a well founded fear of persecution? Since there was in this case evidence to support the Board's negative finding on this issue, we would not intervene.

[23] The principle established by these cases is correctly summarized as follows in paragraph 10 of the reasons of the judge in this case:

I agree with the Respondent [the Minister] that past persecution is insufficient of itself to establish a fear of future persecution, although such persecution is capable of forming the foundation for present fear. With respect to the impact of changed country conditions, the Federal Court of Appeal has indicated that there is no separate legal test to be applied when considering a Convention refugee claim where there has been a change in country conditions in an applicant's country of origin, and that the only issue to be determined is the factual question of whether, at the time of the hearing of the claim, there is a well-founded fear of persecution in the event of return (*Yusuf v. Canada (M.E.I.)* (1995), 179 N.R. 11 at p. 12 (F.C.A.).

[24] I have not ignored the submission of counsel for the appellants to the effect that other countries that are parties to the Convention, including the United States, recognize the rebuttable presumption of law for which he advocates. This is said to favour the proposition that the rebuttable presumption is inherent in the Convention and so a part of the law of Canada. However, counsel for the Minister points out that other parties to the Convention, including the United Kingdom, New Zealand, Australia and most European countries, recognize no such rebuttable presumption of law, although they appear to recognize a factual presumption similar to the one described in the Canadian jurisprudence. It seems that the language of the Convention is sufficiently general to accommodate a number of different approaches to this issue.

[25] I would dismiss this appeal, and I would answer the certified question as follows:

The second sentence of paragraph 45 of the *Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* does not establish a presumption of law or a rebuttable presumption of law that must be applied in determining refugee claims under the *Immigration and Refugee Protection Act*. A person establishes a refugee claim by proving the existence of a well-founded fear of persecution for one of the reasons listed in section 96 of the *Immigration and Refugee Protection Act*. Proof of past persecution for one of the listed reasons may support a finding of fact that the claimant has a well-founded fear of persecution in the future, but it will not necessarily do so. If, for example, there is evidence that country conditions have changed since the persecution occurred, that evidence must be evaluated to determine whether the fear remains well founded.

"K. Sharlow"

J.A.

"I agree

M. Nadon J.A."

"I agree

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-217-04

(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MARCH 18, 2004, DOCKET NO. IMM-3069-03.)

STYLE OF CAUSE: EOMAL FERNANDOPULLE, TERENCIA KUMARI FERNANDOPULLE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: February 14, 2005

REASONS FOR JUDGMENT: Sharlow J.A.

DATED: March 8, 2005

APPEARANCES:

Mr. David Matas	FOR THE APPELLANTS
Winnipeg, Manitoba Ms. Nalini Reddy	FOR THE RESPONDENT
Department of Justice	
Winnipeg, Manitoba	

SOLICITORS OF RECORD:

Mr. David Matas	FOR THE APPELLANTS
Barrister & Solicitor	
Winnipeg, Manitoba John H. Sims, Q.C.	FOR THE RESPONDENT
Deputy Attorney General of Canada	