Date: 20070504

Docket: IMM-3568-06

Citation: 2007 FC 484

Ottawa, Ontario, May 4, 2007
PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

BALACHANDRAN PANCHALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated March 20, 2006, finding that the applicant was not credible and was neither a Convention refugee nor a person in need of protection.

ISSUES

[2] The applicant raises the following two issues:

a) Did the Board err in law by failing to do a proper assessment based on the evidence that it found to be credible?

b) Did the Board err in law with respect to its credibility finding?

[3] For the following reasons, the answer to each question is negative and the present application shall be dismissed.

BACKGROUND

[4] Born on February 20, 1971, the applicant is a Hindu, northern Tamil, citizen of Sri Lanka who was forced to work for the Liberation Tigers of Tamil Eelam (LTTE) at various times between 1993 and 1997.

[5] In 1995, during Operation Leap Forward, the applicant's village was attacked and he had to take refuge for two weeks. In October 1995, after the failure of the peace talks, fighting erupted again and the applicant was injured during the shelling. He fled to Kilinochchi and stayed in a refugee shelter. In August of the following year, the army attacked Kilinochchi and the applicant took refuge in a bunker with his young family.

[6] In 1997, the army began to harass the applicant on several occasions, forcing him to act as a human shield at checkpoints near Elephant Pass. He was assaulted by army officers in August 1997, when he refused to go with the army. In September 1997, the applicant fled with his family to Chilaw, where they stayed with the applicant's sister. However, her Sinhalese neighbour complained and the 18 occupants of the house were arrested and accused of being members of the LTTE. The applicant's wife and children were released one week later.

[7] Along with a number of other suspects, the applicant was held in detention for three months. He was released by court order and ordered to attend a hearing. After five or six court appearances, the applicant was released on condition that he had to report to the police every day. After a period of three months, the applicant was told he did not have to report further because there was insufficient evidence to charge him (translation of a letter from the Attorney General's Department from Colombo, dated July 18, 2001, Tribunal's Record, page 146).

[8] In August 2004, the Karuna, a splinter group of the LTTE began targeting northern Tamils. For fear of being killed, the applicant relocated to his local village, where he was interrogated and harassed by the army and the LTTE. The army accused him of being a supporter of the Tigers. On January 1, 2005, the army threatened that if he did not cooperate with

them, he would be tortured. As a result of this, the applicant fled the north on January 16, 2005. With the aid of an agent, he left Sri Lanka for Malaysia, then on to France and ultimately arrived in Canada on February 13, 2005.

[9] On March 11, 2005, the applicant claimed refugee status on the basis of his fear of persecution at the hands of the Sri Lankan authorities, the LTTE and the Karuna Faction. The Board concluded that the applicant was not credible as a result of the implausibility and incredibility of his embellished stories. As a result, his claim was denied and it forms the basis of this application for judicial review.

DECISION UNDER REVIEW

[10] After examining both the oral and documentary evidence, the Board concluded that the applicant was not credible. In particular, the tribunal doubted the applicant's credibility in the following matters:

a) inconsistent and evasive testimony regarding the 1997 court case and his related fears;
b) inconsistencies in his testimony regarding the nature of the work he did for the LTTE and the period in which he worked;
c) inconsistencies in his story as to why the LTTE forced him to work for them in 1993-1995 but not in 1996 or 1997;
d) inconsistencies in his testimony regarding when he left Sri Lanka and where he stayed before coming to Canada;
e) implausible parts in his testimony regarding claiming asylum in France and behaviour inconsistent with a genuine fear.

[11] The Board also considered the documentary evidence before it and noted the fact that plenty of problems have surfaced in Sri Lanka since the February 2002 ceasefire agreement. Nonetheless, the Board concluded that the applicant did not provide credible evidence, which would establish a well founded fear of future persecution or that he faces a danger of torture, a

risk to life, or risk of cruel or unusual treatment or punishment. Consequently, the applicant was found to be neither a "Convention refugee" nor a "person in need of protection."

ANALYSIS

Standard of review

[12] The standard of review for issues of credibility is patent unreasonableness as was established by the Federal Court of Appeal in *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (QL).

Failure to provide proper assessment of evidence deemed credible

[13] The applicant filed a considerable amount of documentary evidence, including personal documents, court documents and several newspaper and country reports detailing the escalation of violence in Sri Lanka. While it is expected that the Board would have considered these documents, the applicant submits that the Board made not a single reference to these documents. The only reference to the country conditions and one would assume to the documentary evidence in this regard, is as follows:

> The panel is aware that, since the ceasefire agreement in February 2002, plenty of problems have surfaced. The road to final peace between the belligerents is not an easy one. Although there are still isolated incidents, the ceasefire has been in effect for more than three years now, which is a tremendous achievement in itself. […]

[14] The applicant argues that the Board erred by failing to properly assess this documentary evidence that it deemed credible. It makes no references to the various reports documenting the changing country conditions except in the brief passage cited above. The applicant argues that his past court appearances and harassment at the hands of the LTTE and the army, would heighten the risk to him in light of the surge of violence in his country. Had it properly

considered his 1997 charges and court case, the Board would not have discounted this evidence simply because no charges were laid against him in 2001.

[15] The respondent rejects the notion that the Board erred in its assessment of the 1997 legal proceedings against the applicant. He was charged under the *Emergency Powers Act* and detained for three months but later the police was advised by the Attorney General that there was insufficient evidence to file a charge against him. The Board did not err since the actual basis of risk assessment is forward looking, a notion the applicant does not contest. There was no need to take into consideration a normal court proceeding where there was no evidence that the applicant was tortured or mistreated during his detention or was denied due process of law. Moreover, he benefited from a complete discharge and declared during his testimony that he had no fears related to the 1997 charges and court case. There was no future prospect of risk from these legal troubles, such that the Board could arrive at the conclusion that the applicant's experience in court would support a prospective fear of persecution.

[16] In support of its position, the respondent cites Professor James C. Hathaway who stated in *The Law of Refugee Status* (Toronto: Butterworths, 1991) p. 65:

> The concept of well-founded fear […] was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past.
>
> [my emphasis]

[17] Similarly, the respondent asserts that the Board did not misapprehend the facts contained in the documentary evidence regarding the tenuous ceasefire. The Board does not have to make reference to each document before it and where it did so with respect to the ceasefire, there was no evidence to show in the articles referred to by the applicant that the ceasefire has been lifted. While there are fears that the skirmishes between the belligerents may jeopardize the peace talks and the ceasefire, there is no evidence to suggest that the applicant would face a danger of torture or risk to his life upon returning to Sri Lanka even if the ceasefire is dissolved.

[18] Having reviewed the said documents including the court documents and the newspaper clippings, along with the reports of Amnesty International, I am satisfied that the Board did not err in its assessment of the documentary evidence. Habitually, there is jurisprudence that encourages refugee claim decision makers to make more than a passing reference to country conditions where there are changes that may affect the outcome of the claimant's status.

[19] In this regard, I rely on the decision of Chief Justice Isaac of the Federal Court of Appeal in *Mahanandan v. Canada (Minister of Employment and Immigration),* [1994] F.C.J. No. 1228 (QL), who stated at paragraphs 7 and 8:

> Before us, the Appellants contend that the Board failed to consider adequately or at all the objective basis of their fear. First, the Appellants say that the documentary evidence, which was considerable, if properly assessed, could well have enhanced the Board's appreciation of the objective basis of their claim. They say, secondly, that beyond a bare acknowledgment that the evidence presented at the hearing consisted of documentary evidence which constituted background information on Sri Lanka, the reasons of the Board were bereft of any further reference to the documentary evidence, let alone any consideration of their claim in light of that evidence. Next, they say that the Board's assessment of their claim might well have been different, if they had considered it in that light and, further, that by failing to do so, the Board fell into reversible error.
>
> We agree. Where, as here, documentary evidence of the kind in issue here is received in evidence at a hearing which could conceivably affect the Board's appreciation of an Appellant's claim to be a Convention refugee, it seems to us that the Board is required to go beyond a bare acknowledgment of its having been received and to indicate, in its reasons, the impact, if any, that such evidence had upon the Applicant's claim. As I have already said, the Board failed to do so in this case. This, in our view was a fatal omission, as a result of which the decision cannot stand.

[20] In applying this line of jurisprudence, I must distinguish *Mahanandan* from the facts in this case. In *Mahanandan*, the Board had failed to consider the documentary evidence. That is not the case here. In the present matter, the Board did consider the court documents regarding the 1997 charges and court case. Because of the applicant's changing testimony and the

inconsistencies and backtracking during oral evidence, regarding the court case and the prospective fear of persecution, it was reasonable for the Board to not specifically cite these documents but assess weight in the context of all the evidence. I do not believe that these are circumstances such as those found in *Mahanandan*, where the Board erred by not making specific reference to the court documents. The 2001 letter from the Attorney General is clear "there are no sufficient evidence to be filed action against the applicant", and this is well before he left Sri Lanka in 2005.

Did the Board err in its credibility findings?

[21] The Board's credibility findings are fact based and are therefore reviewable on a standard of a patent unreasonableness.

[22] The applicant argues that the Board committed reviewable error in its various credibility findings as enunciated earlier in these reasons. The respondent submits that the Board did not find the applicant to be a credible witness because of the number of instances where he was forced to backtrack to account for inconsistencies between his testimony and information provided both on his Personal Information Form (PIF) and during his interview with the Immigration Officer on February 14, 2005. The respondent argues that the Board is in a better position than this Court to gage the credibility and plausibility of the applicant and his embellished story. As such the Board's credibility findings should remain undisturbed.

[23] I agree. I am not satisfied that the Board's findings were patently unreasonable in that they were not based on a capricious disregard or a misapprehension of the material before it. Moreover, I find nothing in the transcripts that would suggest that the Board erred in its decision. That is why, I am satisfied that there is no reason for the Court to intervene.

[24] There were no questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Michel Beaudry"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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