Federal Court Reports
Ranganathan v. Canada (Minister of Citizenship and Immigration) (C.A.) [2001] 2 F.C. 164

Date:***20001221***

Docket:***A-348-99***

CORAM: LÉTOURNEAU J.A.

SEXTON J.A.

MALONE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

AND:

ROHINI RANGANATHAN

Respondent

Heard at Toronto, Ontario, Thursday, December 14, 2000

Judgment delivered at Ottawa, Ontario, Thursday, December 21, 2000

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: SEXTON J.A.

MALONE J.A.

Date: 20001221

Docket: A-348-99

CORAM: LÉTOURNEAU J.A.

SEXTON J.A.

MALONE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

AND:

ROHINI RANGANATHAN

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

_. *This is an appeal pursuant to subsection 83(1) of the Immigration Act, R.S.C.1985, c. I-2 as amended thereafter (Act) against the decision of a motions judge which allowed the respondent's application for judicial review of a decision rendered by the Convention Refugee Determination Division (Board) dismissing the respondent's claim for refugee status. The motions judge's decision is reported in the Federal Court reports as: Ranganathan v. Canada (Minister of Citizenship and Immigration) [1999] 4. F.C. 269.*

_. *The sole issue before the Board was whether there was an internal flight alternative (IFA) in Colombo that was reasonably available to the respondent who is a Tamil woman from Sri Lanka. The motions judge reversed the Board's decision on two grounds:*

a) It failed to mention and deal in its reasons with some documentary evidence in the file that Tamils from the north are not permitted to remain in Colombo for more than three days and with the respondent's evidence that she had been warned by the police to leave Colombo;

b) It failed to consider as relevant the fact that the respondent had relatives in Canada, but none in Colombo, when determining whether it was unreasonable to expect the respondent to live in Colombo.

_. *In rendering his decision, the motions judge certified the following question:*

Is it an error of law for the Refugee Division to fail to take into account for the purpose of the unreasonableness inquiry under the second branch of the Rasaratnam test the fact that a refugee claimant who has relatives in Canada has no relatives in the safe area of the country of nationality?

Facts

_. *The facts need not be cited at length for the purpose of this appeal. Suffice to say that the respondent is a 42 year-old Tamil woman and a citizen from Sri Lanka whose closest relatives now live in Canada. She suffered from polio as a child and walks with the assistance of crutches.*

_. *In 1993, she left the north of Sri Lanka with her mother and moved to Colombo. One year later, her mother emigrated to Canada as a permanent resident. She was sponsored by a daughter who is a Canadian citizen.*

_. *After her mother's departure, the respondent continued to live in Colombo until she left in September 1997 and came to Canada where she claimed refugee status on an alleged fear of persecution. She testified before the Board that she had an encounter with the police at the beginning of September 1997 at which time she said she was told to leave*

Colombo immediately. Her encounter was unfortunate and fortuitous: she happened to be at the wrong place at the wrong time.

_. Until that encounter, the respondent had lived in Colombo undisturbed for more than three years. She was financially supported by her family who is relatively wealthy.

_. The Board found her not to be a Convention refugee as it concluded that it was not unreasonable for her to reside in Colombo. It expressed sympathy for the claimant who wishes to reside in Canada with her mother, brother and sister, but it ruled that it did not have jurisdiction to determine refugee claims based on humanitarian and compassionate grounds.

Analysis

_. I shall begin my analysis of the motions judge's decision with the first stated ground for reversing the Board's decision. Then I shall deal with the certified question and the failure of the Board to consider as a relevant factor the absence of relatives in Colombo and their presence in Canada.

Whether the Board erred in not dealing in its reasons with the three-day policy applicable to Tamils in Colombo and with the respondent's evidence that she had been warned to leave Colombo immediately

_. I am of the view that the Board cannot be faulted for not having addressed in its reasons the fact that Tamils are not allowed to reside in Colombo for more than three days. It appears from a version of the transcript of the hearing before the Board that the respondent was represented by counsel at the hearing and never raised that issue with the Board. The burden was on the respondent to establish that living in Colombo was not an internal flight alternative because of the alleged three-day policy. One would have expected her to raise that issue if it was really a serious concern to her. But she did not and the Board was entitled to assume that this was a non-issue especially as she had lived there for four years before departing for Canada in 1997.

_. In addition, no clear evidence was adduced by the respondent who had the burden of showing that the three-day policy applied to her. She did not even make an argument about it and her representative never even alluded to that in her submissions to the Board. In this context, the Board cannot be blamed for having refrained from engaging in pure speculation about something which, evidently, was of little, if no concern, to the respondent. The Board is performing a difficult function under time constraints and stressful conditions. A failure by a claimant to fulfill his obligations and assume his burden of proof cannot be imputed to the Board so as to make it a Board's failure.

_. As regards the respondent's testimony that the police allegedly told her to leave Colombo immediately, the evidence establishes that she did not and that nothing happened to her. Furthermore, again her counsel made no representation at all on this point thereby enticing the Board to believe, especially as the respondent had been living there for four years, that the police intimation to leave was not taken seriously by the respondent.

The Certified Question

_. The absence of relatives in the safe area where a claimant finds refuge in his home country is an issue that was canvassed by this Court in the case of Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration) [1994] 1 F.C. 589. Speaking for the Court, Linden J.A. wrote at pages 5 and 6 of the decision:

An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselvesof it unless they can show that it is objectively unreasonable for them to do so.

Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether,given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere.

In conclusion, it is not a matter of a claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location before travelling half-way around the world to seek a safe haven, in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country.

(Emphasis added)

_. I agree with Rothstein J., as he then was, in Kanagaratnam v. Canada (Minister of Employment and Immigration) (1994) 28 Imm. L.R. (2d) 44 (F.C.T.D.), that the decision of our Court in Thirunavukkarasu does not exclude, as a relevant factor on the issue of the reasonableness of the IFA, the absence of relatives in or in the vicinity of the safe area. It makes it obvious though that more than the mere absence of relatives is

needed in order to make an IFA unreasonable. Indeed, there is always some hardship, even undue hardship, involved when a person has to abandon the comfort of his home to leave in a different part of his country where he has to seek employment and start a new life away from relatives and friends. This is not, however, the kind of undue hardship that this Court was considering in Thirunavukkarasu.

_. We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.

_. There are at least two reasons why it is important not to lower that threshold. First, as this Court said in Thirunavukkarasu, the definition of refugee under the Convention "requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country". Put another way, what makes a person a refugee under the Convention is his fear of persecution by his home country in any part of that country. To expand and lower the standard for assessing reasonableness of the IFA is to fundamentally denature the definition of refugee: one becomes a refugee who has no fear of persecution and who would be better off in Canada physically, economically and emotionally than in a safe place in his own country.

_. Second, it creates confusion by blurring the distinction between refugee claims and humanitarian and compassionate applications. These are two procedures governed by different objectives and considerations. As Rothstein J. said in Kanagaratnam at page 48:

While in the broadest sense, Canada's refugee policy may be founded on humanitarian and compassionate considerations, that terminology in the Immigration Act and the procedure followed by officials under it has taken on a particular connotation. Humanitarian and compassionate considerations normally arise after an applicant has been found not to be a Convention refugee. The panel's failure to consider humanitarian and compassionate factors in its Convention refugee determination in this case was not an error.

Indeed, the guidelines applicable to humanitarian applications are both generous and flexible: see Immigration Manual (1999), Chapter 6, The H & C Decision: Immigrant Applications in Canada made on H & C grounds, at pages 13-32. They are certainly broad enough, in my view, to be of assistance to the respondent should she decide to make such an application. The more humanitarian grounds are allowed to enter the determination of a refugee claim, the more the refugee procedure resembles and blends into the humanitarian and compassionate procedure. As a result, the more likely the concept of persecution is to be replaced in practice by that of hardship in the definition of refugee.

_. I would answer the question in the affirmative and rule that the Board erred in not considering, for the purpose of the unreasonableness inquiry, the fact that the

respondent had no relatives in the safe area of his country because it remains a relevant factor. However, it is a factor which carries little weight unless it meets the threshold mentioned in paragraph 15.

_. In the case at bar, this was the only factor raised by the respondent and it did not meet that threshold. Therefore, the Board's error was immaterial. I am satisfied after having reviewed the transcript and the scant evidence on the unreasonableness of the IFA that the Board would have come to the same conclusion had it considered that evidence.

_. For these reasons, I would allow the appeal with costs and answer the certified question in the affirmative. I would set aside the decision of the motions judge and, rendering the decision that he should have rendered, I would dismiss the respondent's application for judicial review.

"Gilles Létourneau"

J.A.

"***I agree***

J. Edgar Sexton J.A."

"***I agree***

B. Malone J.A."