

Anandasivam v. Canada (Minister of Citizenship and Immigration)

Between
Vallipuram Anandasivam, applicant, and
The Minister of Citizenship and Immigration, respondent

[2001] F.C.J. No. 1519
2001 FCT 1106
Court File No. IMM-4748-00

Federal Court of Canada - Trial Division
Montréal, Quebec
Lemieux J.

Heard: July 31, 2001.
Judgment: October 10, 2001.
(32 paras.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Credible basis for claim — Appeals or judicial review, grounds.

Application by Anandasivam for judicial review of a decision that he was not a Convention refugee. He claimed to have been told by a Sri Lankan army commander that his name was on a list of persons to be taken for questioning about a bomb blast that killed a prominent citizen. The Convention Refugee Determination Division of the Immigration and Refugee Board did not believe that his name was on the list or that he was sought for questioning. The tribunal observed that in one version of Anandasivam's testimony the list had been prepared, whereas in another version he was not sure whether or not his name had yet been added. The tribunal also observed that he was allowed to travel within Sri Lanka on his own identity card, notwithstanding that he was allegedly wanted for questioning. Anandasivam was asked to explain how his name was connected with the bombing when he was able to prove that he was more than 300 kilometres away at the time. He explained that the connection was through his son's friend. The tribunal found it implausible that the link could have been made through the son's friend without the son also being on the list. Anandasivam claimed to have been detained twice. After the first detention, he sent his son away to live with a relative. When asked why he stayed, he replied that he did not expect any danger to his life. On that basis, the tribunal concluded that he did not have a subjective fear of persecution.

HELD: Application dismissed. The evidence revealed that Anandasivam had no subjective fear of persecution. The tribunal made no reversible error in its determination that Anandasivam was not wanted for questioning.

Counsel:

Styliani Markaki, for the applicant.
Thi My Dung Tran, for the respondent.

LEMIEUX J. (Reasons for Order):—

BACKGROUND

1 Vallipuram Anandasivam, the applicant, is a fifty-five-year-old male citizen from Sri Lanka, a Tamil from Jaffna, who was denied refugee status in an August 7, 2000 decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the "Tribunal") which he challenges in this judicial review proceeding. The applicant is well educated and from 1978 to 1999 worked a farm and owned a grocery business.

2 The precipitating event for his flight from Sri Lanka arose in July 1999 when Major Edema, in charge of a camp operated by the Sri Lankan Army, is said to have told him that his name had been included on a list of persons to be taken to Colombo for questioning about a bomb blast that killed a prominent citizen, Neelan Thiruchelvam, who was a close friend of the elder brother of his son's acquaintance, a Mr. P. Krishna, a suspected member of the LTTE. Mr. Krishna's elder brother was the Mayor of Jaffna and also died in a bomb blast.

3 The July 1999 conversation with Major Edema was preceded, in 1998, by two detentions of the applicant and his son by the Sri Lankan Army, all in connection with Mr. P. Krishna. The first detention was in May 1998. The applicant was released upon payment of a bribe to the Army Commander and both he and his son were told to report every Saturday which they did for three months when the need to report no longer became necessary.

4 It was after the May 1998 incident the applicant sent his son to live with a relative in another village in an area, also controlled by the Sri Lankan Army.

5 In November 1998, the applicant was taken a second time to the Army camp. He identified from photos a friend of Mr. Krishna. The authorities told him the person he identified was a member of the LTTE. He alleges he was assaulted and detained for three days. Because of his medical condition, he has been suffering high blood pressure since early age, he was released and was sent to hospital where he underwent treatment for five days.

THE TRIBUNAL'S DECISION

6 The tribunal rejected the applicant's refugee claim for two reasons. First, the tribunal did not believe that, on the balance of probabilities, his name was on the list or that he

was sought for questioning in Colombo. Second, it found the applicant did not have a subjective fear of persecution, that is, he did not fear for his safety.

7 The first reason is based on a credibility finding arising from a contradiction and on two implausibilities.

8 The tribunal expressed the inconsistency in the applicant's testimony in the following manner at page 3:

Early in this testimony, the claimant testified that he was given a warning by Major Edema on July 31, 1999. He was asked by his Counsel what the warning was? He said that Dr. Neelan was assassinated on July 29 and that Major Edema told him that he was to be interrogated regarding that incident. Later in testimony, he was asked by the panel if his name was on the list of people to be interrogated. He said yes. He was then asked why a pass would be issued in his name if he was on a list of people who were wanted in Colombo for questioning? The claimant's answers then became less categoric. He replied that as far as he knew it was Major Edema's responsibility to prepare the list for that area. He added that he did not know which procedures were used. He then admitted that he did not know whether his name was on the list or not. It might have been the Major's intention to keep his name off the list. In his PIF narrative, we read the following about the incident:

"In July 1999, Major Edema of Nelliady camp told me unofficially that my name too has been included in the list of persons who have to be raken[sic] to Colombo for questioning on the bomb blast that killed Dr. Neelan Thiruchelvam."

The claimant could not say how the list was made or who made it. One version had a list pre-made and the other version had his name to potentially be added to a list. The panel considers this a very important inconsistency in the claimant's testimony. This was the incident that the claimant alleged was his reason for leaving Sri Lanka. This seriously undermined the claimant's credibility. [my emphasis]

9 The tribunal drew its first implausibility finding because the pass the applicant required to travel to Colombo had been issued in his own name. The tribunal wrote at page 4:

He travelled using his own national identity card, birth certificate and a card given to him by the hospital saying that he needed emergency medical care. The claimant travelled on a plane operated by the Sri Lank Airforce based on his documents.

The panel finds it implausible that if the claimant had his name on a list of the Sri Lanka authorities and was wanted for questioning in connection with the suicide bombing of Dr. Neelan in Colombo, that he would have been able to travel on his own name, as he alleges.

10 The second implausibility drawn by the tribunal arose when he was asked to explain how he thought his name would come up in connection with the suicide bombing in Colombo when he was at home, a fact several people could attest, 300 kilometres away from Colombo on the day of the bombing. He gave an explanation tied to his son's friend Krishnan and his previous identification of an LTTE member when detained in November of 1998 at the Army camp. The tribunal went on to write as follows at page 4:

The claimant testified that no one else in his village was to be questioned in this matter. He did say that people in neighbouring villages had their name on the list but he has no details of what happened to them. The panel finds it implausible that if the link to the claimant with the suicide bomber could have been made through his son's acquaintance, Krishnan, then his son's name would not have been on the list of people to be questioned. There is no mention in the PIF or in the claimant's oral testimony of his son being sought in this matter. [my emphasis]

11 The tribunal found the applicant not to have a fear for his safety because, after the first detention, he sent his son out of the village to a safer area. The tribunal reasoned:

He was asked why he did not move with his whole family to that area? He replied that his wife and her mother were with him and his wife's mother did not want to leave the village. He was asked if he perceived the danger to himself or to his family at that time. He replied that he did not expect a danger to his life.

THE APPLICANT'S CASE

12 The root of the applicant's case is that the tribunal based its decision on speculation instead of on the evidence tendered which was both testimonial and documentary in nature.

13 First, counsel for the applicant argues there was no real inconsistency in his testimony because he was questioned in areas where he lacked knowledge. He himself was guessing because he was unaware of the specifics and simply relied on the warning given to him by Major Edema who spoke of a list of persons to be interrogated and the applicant's name being on it. The applicant also relied on Major Edema for travel arrangements. The applicant, on this point, concludes that not only is it unreasonable for the tribunal to doubt the applicant for his inability to provide explanations which result from a lack of knowledge that he cannot control, it is manifestly unfair.

14 As to the implausibility drawn that he travelled under his own name, counsel for the applicant says there are several possibilities which would explain why the applicant was able to travel under his own name despite the warning he had been given by Major Edema. Firstly, counsel for the applicant says it is possible the list had not yet been officially communicated from Colombo and that Major Edema had had access to it before it became official. It is also possible the applicant was able to obtain a pass through the bribery of the officials in charge of issuing the passes -- the applicant did, after all, pay Major Edema a certain sum of money to secure release from his first detention, as explained in his PIF. It is also possible Major Edema had certain control on the composition of the list as is the applicant's opinion and as he testified at the hearing.

15 As to the implausibility to think the applicant's son would not be on the list of persons to be questioned, counsel for the applicant says the applicant had no specific knowledge of his son's name being on the list and it does not mean it wasn't.

16 Counsel for the applicant says this implausibility is drawn based on uncorroborated assumptions that Major Edema was in charge of the whole area, including his son's village. Counsel argues the applicant testified his family was not providing him with details regarding his son's situation because of his health condition (elevated blood pressure and recent heart attack) and they did not want him to worry.

17 Counsel also argues against the finding of the tribunal the treatment received by the applicant does not amount to persecution. In so deciding, she argues, the tribunal specifically excludes the particular characteristics of the applicant and in doing so commits a serious error of law. She argues that although being interrogated by the authorities and being at risk of further interrogation might not amount to persecution from another refugee claimant, it does so for the applicant because he suffers from serious heart problems which the tribunal accepts at the end of its decision. Counsel for the applicant submits a simple interrogation might result in his death, a risk which is certainly serious enough to amount to persecution within the meaning of the Convention.

18 Counsel refers to evidence on country conditions as substantiation that even a simple risk of further interrogation amounts to persecution even where the particular characteristics of the applicant were not taken into account. She argues the documentary evidence shows the Sri Lankan Army uses torture and mistreatment when interrogating detainees and there is evidence of disappearance of individuals simply taking in for questioning.

19 Concerning the applicant's lack of a subjective fear of persecution, counsel argues that even if he lacked that fear in August of 1998, the events which subsequently took place changed that. The applicant was again interrogated in November of 1998 and was warned he would again be questioned in relation to the death of Dr. Neelan Thiruchelvam killed on July 31, 1999. Counsel argues that it was after these events the applicant decided to leave his home, family and country and his state of mind a year earlier cannot place these events in doubt.

ANALYSIS

20 In my view, this judicial review application must fail because the applicant has not persuaded me the tribunal committed any reviewable error.

(1) No subjective fear

21 The evidence relied on by the tribunal for finding the applicant lacked a subjective fear of persecution was clear. Testifying why he sent his son away from home and why he stayed after the first detention, the applicant, at page 33 of the transcript, said this:

I didn't expect any danger to my life. If there had to be an investigation or interrogation, I had the confidence that I could tackle them.

22 He did not flee his village after his second detention in November of 1998. In addition, he could not rely to make a case of subjective fear, as suggested by his counsel, on the 1999 bombing in Colombo and his being questioned about it because the tribunal did not believe his testimony on that point.

23 I agree with Justice Tremblay-Lamer's comment in *Mohammed Tabet-Zatla v. Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1778, (docket IMM-6291-98, November 2, 1999) that lack of subjective fear constitutes a critical barrier to a refugee claim which, on its own, justifies non recognition.

(2) Not wanted for questioning

24 The tribunal's finding that the applicant was not wanted for questioning was based, as noted, on what the tribunal found to be an inconsistency and two implausibilities. *Aguebor v. Minister of Employment and Immigration* (1994), 160 N.R. 315 is authority for the proposition the tribunal, a specialized one, has complete jurisdiction to determine the plausibility of testimony provided that plausibility findings are reasonably drawn on the evidence. Also, there can be no doubt the tribunal may base its findings on internal contradictions or inconsistencies which are at the heartland of the discretion of triers of fact.

25 It is also well to recall Justice Laskin's, as he then was, admonition in *Boulis v. The Minister of Manpower and Immigration*, [1974] S.C.R. 875 at 885 that "the Board's reasons are not to be read microscopically; it is enough if they show a grasp of the issues that are raised ... and of the evidence addressed to them, without detailed reference. The record is available as a check on the Board's conclusions".

26 The tribunal drew an implausibility Major Edema would have issued the applicant a pass for him to go as a free man when he was wanted for questioning. He would be taking a personal risk. The transcript shows there was sufficient evidentiary foundation for the implausibility which cannot be said to have been unreasonably drawn.

27 The same can be said of the second implausibility drawn from the fact the applicant did not testify that his son was wanted for questioning when the link to the applicant with the suicide bomber was through his son's acquaintance, Krishnan.

28 In terms of the inconsistency, my reading of the transcript would not have led me to draw it as sharply as the tribunal did but this is not the issue. The question is whether the tribunal's finding of this fact was patently unreasonable. My review of the record leads me to conclude the tribunal did not commit a reversible error on this point.

29 Lastly, counsel for the applicant argues that a simple interrogation might result in his death, a risk which she says is certainly serious enough to amount to persecution within the meaning of the Convention. Since the tribunal did not believe he was wanted for questioning, this argument is theoretical.

30 Counsel for the applicant proposed the following certified question:

Should the particular characteristics of a refugee claimant, such as a fragile state of health, be taken into consideration when evaluating whether a particular act amounts to persecution?

31 I decline to certify that question because, answering it, would not have any practical result in this judicial review.

DISPOSITION

32 For all of these reasons, this judicial review application must be dismissed. No question is certified.

LEMIEUX J.