

BETWEEN:

VIJEYARATNAM KANESHARAN

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HEALD D.J.:

This is an application for Judicial Review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board ("the Board") dated December 12, 1995. In that decision the Board found the Applicant to be excluded from the definition of Convention Refugee by virtue of Article 1E of the 1951 U.N. Convention. Article 1E provides:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.¹

FACTS

The Applicant is a Sri Lankan Tamil who left Sri Lanka because of his alleged fear of persecution by the Sinhalese majority based on his race. The Applicant was born in 1974. After an ethnic riot in 1977 in Colombo, the Applicant and his family (excepting his father) moved from Colombo to Jaffna. The father remained in Colombo to work. During the ethnic violence in July 1983, the Applicant's father was nearly killed by "Sinhalese thugs". After this incident the Applicant's father quit his job and also moved to Jaffna. In August of 1987, the Government of India sent the Indian Peace Keeping Force ("IPKF") to Sri Lanka, to protect the Tamils from the Sri Lankan army. When the Tamil Tigers ("LTTE") refused to surrender their arms to the IPKF, a battle ensued. As a result of this fighting, the Applicant's house was bombed in November 1987, his mother was seriously injured, and the family was forced to flee to a refugee camp. At the camp, the Applicant and his brothers were arrested, detained, beaten and questioned. The Applicant was released after four days of detention. In the Applicant's view, this brutal treatment was due to the belief of the IPKF that they were members of the LTTE.

In 1989 the Applicant was attacked by the Tamil National Army. The Applicant fled and remained in hiding until February of 1990. He then went to Colombo and obtained a passport with the intention of escaping. At this juncture, the IPKF and the Tamil National Army were ordered out of Sri Lanka. Since peace was returned, the Applicant returned to his family in Jaffna.

In June 1990, fighting between the LTTE and the Government of Sri Lanka erupted once more. Fearing forced participation with the LTTE in combat, the Applicant fled to Colombo again. In Colombo he was arrested and questioned because the police apparently believed that he was a member of the LTTE. Upon payment of a bribe, the Applicant was released; however, he was again arrested. At this point he concluded that there was no possibility of his living in safety in Sri Lanka. Accordingly, he fled to the United Kingdom on December 24, 1990.

In May of 1991, the Applicant applied for Convention Refugee Status in the U.K. This application was refused; nevertheless, he was given permission to remain in the U.K. until September 29, 1993. This right to remain included the right to make trips from and to the U.K. during that period. On May 25, 1994 the Applicant was granted an extension of his right to remain in the U.K. until May 25, 1997.

He was refused a visitor's visa to Canada on August 15th, 1994 by the Canadian High Commission in the U.K. Nevertheless, he journeyed to Canada and, on September 24, 1994, made a claim to Convention Refugee Status in this country.

THE DECISION

In determining whether the exclusion clause in Article 1E applied to the Applicant, the Board expressed the view that it was "necessary to decide what rights and obligations the claimant's resident status in the U.K., confer[red] on him." After referring to a statutory declaration by Michael Watts, a Foreign Service Officer at the Canadian High Commission in London and after examining the criteria for the application of Article 1E of the Convention, the Board concluded that "the claimant has the right of residence in the U.K. until May 1997, and can return to that country to resume his residential status without hindrance."² The Board went on to state:

The claimant, therefore, enjoys the rights and obligations of nationals in the U.K. and after seven years of residence, it is reasonable to expect that he would be granted permanent residence. The fears that the claimant expressed of being returned to Sri Lanka by the U.K. (except if he commits an offence which requires his deportation), has no justification from the evidence which was adduced. The claimant is, therefore, excluded under Article 1E of the Convention.³

ISSUES

The essential issue herein is whether the Board's interpretation and application of Article 1E of the Convention was erroneous and whether the Board was obliged to assess the Applicant's claim on its merits.

ANALYSIS

The definition of Convention Refugee set out in Section 2 of the *Immigration Act* expressly provides that such definition "does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act."

Article 1E of the Convention, incorporated in the *Immigration Act* pursuant to the definition of Convention Refugee set out in section 2 thereof, provides:

This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

(i) The relevant jurisprudence and opinions

There is no dearth of opinions or jurisprudence on this issue. Professor Hathaway in *The Law of Refugee Status* (Markham: Butterworths, 1991) stated at pages 212-213:

"... *de facto* nationality is qualitatively distinct from even long-term residence in a state, since it requires a consequential guarantee of rights to the refugee on terms at least as favourable as those which follow from Convention refugee status."

Lorne Waldman in *Immigration Law and Practice* (Markham: Butterworths, 1992+), "8.218 at 8.206, Vol. 1, after submitting that Boards should apply section 1E with "great caution" outlined four criteria, which, in his view should be followed in analyzing the "basic rights" enjoyed by an applicant:

- (a) the right to return to the country of residence;
- (b) the right to work freely without restrictions;
- (c) the right to study, and

- (d) full access to social services in the country of residence.

If the applicant has some sort of temporary status which must be renewed, and which could be cancelled, or if the applicant does not have the right to return to the country of residence, clearly the applicant should not be excluded under Art. 1E.

In the Federal Court of Appeal decision in *Hurt v. Minister of Manpower and Immigration*⁴ it was decided that Article 1E did not apply to exclude the claimant from refugee status. In that case the claimant, a Polish national was claiming refugee status against Poland. He had legally resided in West Germany for four years before coming to Canada, although he was only able to stay in Germany through temporary visas. He had not been able to obtain permanent resident status and was threatened with deportation as his visa was not being renewed. The Court held that, in these circumstances, it could not be said that the claimant had been recognized by West Germany as having the rights and obligations of a West German national.

In the recent case of *Canada (M.C.I.) v. Mohamud*⁵, Mr. Justice Rothstein found no error in a decision by the Board that a claimant was not excluded under Article 1E, even though she had a permit to stay in Italy until the war in her native Somalia was concluded.

- (ii) The application of the relevant jurisprudence and opinions to the facts at bar

In analyzing the rights accrued to this applicant in the U.K., the statutory declaration by CEIC Foreign Service Officer, Michael Watts, must be examined since it was the document relied on by the Board. In that document Mr. Watts declared:

4. Exceptional leave to remain is granted to those persons who do not meet the definition of a convention refugee, but are nationals of countries to which the Home Office will not remove them by virtue of the situation in those countries. The Home Officer reserves the right to remove persons to their country of nationality should the prevailing circumstances change significantly in a positive manner; however such removals are not routine and are usually predicated by other factors such as the person committing a serious criminal offence. The asylum division of the Home Office exercises an ex-statutory provision whereby a person resident in the U.K. on exceptional leave to remain for a period of seven years is eligible to apply for indefinite leave to remain (the UK equivalent of permanent residence). Prior to being granted indefinite leave to remain, a person who has been in the UK on exceptional leave for a period of four years will be granted a further three years leave to remain. Following this period the person is eligible for indefinite leave to remain. Based upon the endorsements in his passport, Mr. Vijeyaratnam⁶ should presumably be eligible for indefinite leave to remain by May 25, 1997 as he has been granted a further three years leave to remain after residing in the UK four years; moreover, he will have met the seven year residency requirement.⁷

In my view, the following sentence from that document is particularly significant: "the Home Officer reserves the right to remove persons to their country of nationality, should the prevailing circumstances change significantly in a positive manner". Equally significant, in my view, is another excerpt from the Watt's declaration:

Prior to being granted indefinite leave to remain, a person who has been in the U.K. on exceptional leave for a period of four years will be granted a further three years leave to remain. Following this period the person is eligible for indefinite leave to remain.

In my view, the tentative language employed in both of these passages is significant. In the first passage it is clear that the Home Officer reserves the right to remove a person from the U.K. In the second passage, the word "eligible" is used. From this evidence it seems clear to me that the Applicant could be deported from the U.K. While removal is not done routinely, as noted *supra*, it can be done. The use of such tentative and conditional language does not, in my view, entitle the Board to conclude, as it did, that the claimant "enjoys the rights and obligations of nationals in the U.K."

CONCLUSION

For the foregoing reasons, I conclude that the Board committed a reviewable error in excluding this Applicant from the definition of Convention Refugee.

Accordingly, the application for Judicial Review is allowed, the decision of the Board dated December 12, 1995 is set aside and the matter is referred back to the Board for rehearing and redetermination by a differently constituted Panel of the Board.

At the conclusion of the hearing, counsel for the respondent asked for certification of the following question, pursuant to subsection 83(1) of the *Immigration Act*:

Is the applicant's status in the U.K. sufficient to exclude him under Article 1E of the Convention from claiming refugee status in Canada?

I have decided that this question should not be certified. In *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4 (F.C.A.), Déary J.A., writing for the Court, stated that in order to be certified, a question must be one which "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application". The proposed question, however, turns on the specific facts of the case at bar and, as such, is not one of broad significance or general application. Furthermore, the Court of Appeal has already considered the proper interpretation of Article 1E in *Mahdi v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 1 (F.C.A.) and sufficiently answered the question proposed by the respondent.

Darrel V. Heald D.J.

JUDGE

OTTAWA, ONTARIO

September 23, 1996.

¹ R.S.C. 1985 (4th Supp.), c. 28, s. 34

² Application Record, at 7

³ Application record, at 7 & 8.

⁴ [1978] 2 F.C. 340 (F.C.A.).

⁵ (19 May 1995) IMM-4899-94 (F.C.T.D.).

⁶ In his statutory declaration, Mr. Watts refers to the respondent as Mr. Vijeyaratnam.

⁷ Applicant's Application Record, at 33.

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-269-96

STYLE OF CAUSE: VIJEYARATNAM **KANESHARAN** v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO

DATE OF HEARING: SEPTEMBER 10, 1996

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE HEALD, DEPUTY JUDGE

DATED: SEPTEMBER 23, 1996

APPEARANCES:

Ms. Naomi Solomon FOR THE APPLICANT

Ms. Claire le Riche FOR THE RESPONDENT

SOLICITORS ON THE RECORD:

Lewis & Associates FOR THE APPLICANT Toronto, Ontario

Mr. George Thomson FOR THE RESPONDENT Deputy Attorney General of Canada