

Date: 20040812

Docket: IMM-3530-

03

Neutral citation: 2004 FC

1122

BETWEEN:

SUHITHA **KULARATNAM**

ant

Applic

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

ent

Respond

### REASONS FOR ORDER

PHELAN J.

#### Introduction

[1] The applicant, a 24 year old Tamil female, had her application for refugee status and for protection dismissed by a single member of the Immigration and Refugee Board (the Panel). The Panel made comments about, amongst other topics, the standard of proof under section 97 and about the relationship between detention, bribery, and persecution, all of which are problematic.

#### Background

[2] Ms. **Kularatnam** claimed that her family had been harassed by the Tigers for several years. As a result, they moved to Colombo. All of her siblings, with one exception, finally fled Sri Lanka. A brother and a sister have already been determined to be refugees in Canada.

[3] In July 2001, following attacks by the Tigers, Ms. **Kularatnam** was detained for 3 days and physically mistreated. She was only released upon payment, by her father, of a bribe to police officials.

[4] The Panel never said that it disbelieved her but the Panel did make comments which suggest issues of credibility.

[5] The Panel concluded, that this Court has held, that short periods of detention for purposes of preventing disruption or dealing with terrorism does not constitute persecution. The Panel's only comment, on the matter of bribery, is that this Court has upheld IFA determination even in cases where a bribe was paid to facilitate release.

[6] The Panel further held, that under section 97 of the *Immigration and Refugee Protection Act* (the Act), since she was not a refugee, she had a higher burden of proof in respect of her claim to be a "person in need of protection".

## Analysis

[7] Dealing with this last comment first, the Respondent acknowledges that the Panel erred in respect of the burden of proof under section 97. However it says that the comment is irrelevant to the real basis of the decision.

[8] Since this matter is to be referred back to the Board for a new determination, I will only say that in the context of the veiled credibility finding, it is by no means certain that this error of law was immaterial. A new panel will doubtlessly stay on the correct side of the burden of proof issue.

[9] The Panel's finding, on short detentions not constituting persecution, is a conclusion on the applicable law. The standard of review in respect to conclusions of law is correctness.

[10] Since the decision in *Velluppillai v. Canada (Minister of Citizenship and Immigration)* [2000] F.C. 301, the Panel's statement is only partially correct. While short detentions for legitimate enforcement purposes do not generally constitute persecution, the Board is required to consider the particular circumstances of each applicant, including such factors as the person's age and prior experiences. There was no such consideration in this case.

[11] In addition to age and past experiences, one could see, in relevant circumstances, that the nature of the location and treatment during detention would be relevant. The manner of release from detention could also be relevant.

[12] The Panel dismissed the bribery issue, where the applicant has argued that bribery can be persecution, by reference to its finding that there is a viable IFA. The Panel erred in linking bribery exclusively to its IFA determination.

[13] Demands for bribes by police is a form of extortion. This Court in *Nadarajah v. Minister of Citizenship and Immigration* [2004] F.C. 500 and *Packiam et al v. Minister of Citizenship and Immigration* [2004] F.C. 649 has held that extortion may, in certain circumstances, be "persecution" for purposes of the Convention. Certainly the pervasiveness of demands for bribes is relevant to the issue of state protection.

[14] Given these decisions, a new Board will wish to consider the issue of whether bribery is persecution, at least on the facts in this case. In so saying, I am not suggesting what that determination should be, only that the issue should be addressed.

[15] For these reasons, the judicial review is granted, the matter is remitted back for a new determination by a differently constituted panel.

[16] Since this matter is being sent back, no question will be certified.

Phelan"

Judge

\_\_\_\_\_ (s) "Michael L.

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-3530-03

**STYLE OF CAUSE:** SUHITHA **KULARATNAM** v. MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 17, 2004

**REASONS FOR ORDER:** The Honourable Mr. Justice Phelan

**DATED:** August 12, 2004

APPEARANCES:

Mr. Michael Crane  
APPLICANT

FOR THE

Mr. Jamie Todd  
RESPONDENT

FOR THE

SOLICITORS ON THE RECORD:

Mr. Michael Crane

Toronto, Ontario  
APPLICANT

FOR THE

Mr. Morris Rosenberg

Deputy Attorney General

Ottawa, Ontario  
RESPONDENT

FOR THE