

Date: 20030929

Docket: IMM-4706-02

Citation: 2003 FC 1114

Ottawa, Ontario, this 29th day of September, 2003

Present: THE HONOURABLE MR. JUSTICE O'REILLY

BETWEEN:

RAJARANI MURUGAMOORTHY

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

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REASONS FOR JUDGMENT AND JUDGMENT

[1] Rajarani Murugamoorthy claims that she was persecuted in Sri Lanka by the Liberation Tigers of Tamil Eelam ("LTTE") and the police. A panel of the Immigration and Refugee Board dismissed her claim. It disbelieved her account of mistreatment by the LTTE. Ms. Murugamoorthy does not dispute that aspect of the Board's decision. The Board also found that the police discriminated against Ms. Murugamoorthy but did not persecute her. Ms. Murugamoorthy says that the Board made a legal error and asks for a new hearing so that this aspect of her claim can be re-assessed by a different panel. I agree that a new hearing is required.

[2] Ms. Murugamoorthy said she was arrested twice: once in 1996, and again in 2000. On both occasions, the police detained, interrogated and released her with warnings, but without any physical abuse. On both occasions, the police were responding to terrorist acts on the part of the LTTE. On both occasions, the police were not particularly interested in Ms. Murugamoorthy - they usually arrested Tamils who were between the ages of 16 and 30. Ms. Murugamoorthy was 54. She seems to have been caught in a fairly wide security net.

[3] The Board analyzed this part of her claim with reference to case law from this Court. It purported to quote from that jurisprudence when it said: "The Federal Court Trial Division ... outlined that 'short detentions for the purpose of preventing disruptions or dealing with terrorism do not constitute persecution'".

[4] The Board cited two cases for the proposition it declared: *Brar v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 883 (QL) (T.D.) and *Mahalingam v. Canada (Solicitor General)*, [1993] F.C.J. No. 1140 (QL) (T.D.). However, those cases do not contain the words that the Board purported to quote. They do deal, however, with arrests for law enforcement purposes. In both of those cases, the police arrested and beat the claimants in the interests of public order. The Board found that the police had not persecuted the claimants because the police were pursuing legitimate security concerns at the time. This Court held that the Board's decisions were not unreasonable.

[5] Just after those decisions, the Federal Court of Appeal held that police were never entitled to arrest and beat persons in custody: *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (QL) (F.C.A.). There, the police had arrested and beat the claimant twice. The Court held that the police were not justified in detaining and physically abusing him, even though there was a state of emergency in Sri Lanka at the time.

[6] It appears to me that the Board has reduced its understanding of the case law to the brief formulation set out above. The same statement appears in numerous decisions of the Board (see, for example, *Q.W.T. (Re)*, [2002] C.R.D.D. No. 15, at para. 17). This formulation derives from *Brar* and *Mahaligam* but, since *Thirunavukkarasu*, those cases are of questionable authority. I believe the correct approach is set out in *Vellupillai v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 301, (QL) (T.D.), at para. 15. There, Justice Gibson agreed that, *in general*, short detentions for legitimate law enforcement purposes did not constitute persecution. However, the Board must go on to consider the particular circumstances of the applicant - including factors such as the person's age and prior experiences - in deciding whether he or she was persecuted. The Board failed to do so in Ms. Murugamoorthy's case.

[7] Therefore, in my view, the Board erred when it stated that short-term arrests for security reasons cannot be considered persecution, even when they are carried out, as here, in a discriminatory way. The Board specifically acknowledged that the Sri Lankan authorities discriminate against the Tamil population and found that, indeed, the police had discriminated against Ms. Murugamoorthy.

[8] I realize that the Board also found other elements of the definition of persecution to be missing. It said that Ms. Murugamoorthy had failed to show that the police had seriously mistreated her by depriving her of a "core human right" and that they had done so persistently. However, it did not explain why depriving a person of liberty did not involve a limitation on a "core human right". Nor did it say why two arrests were too few, or consider the risk that the police might subject Ms. Murugamoorthy to similar treatment in the future.

[9] Under the circumstances, I must allow this application for judicial review and order a different panel of the Board to reconsider Ms. Murugamoorthy's claim.

[10] Counsel for Ms. Murugamoorthy made the following additional argument: states who carry out arbitrary arrests violate the *International Covenant on Civil and Political Rights*. They may derogate from their obligations under the Covenant for purposes of national security. But if they do, they cannot go beyond what the circumstances require and they cannot discriminate. Otherwise, they are persecuting the arrested persons. Counsel did not cite any case law for this approach, but credited Professor James C. Hathaway: *The Law of Refugee Status*, Toronto: Butterworths, 1991, at pp.109-110.

[11] Given the manner in which I have decided this case, it is unnecessary for me to pronounce on this supplementary argument. Nor would it be appropriate for me to state the general questions of law proposed by counsel for Ms. Murugamoorthy.

JUDGMENT

IT IS HEREBY ADJUDGED that:

1. The application for judicial review is allowed.
2. The matter is returned to the Immigration and Refugee Board for redetermination by a different panel.
3. No question of general importance is stated.

W. O'Reilly"

"James

Judge

FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: IMM-4706-02

STYLE OF CAUSE: RAJARANI **MURUGAMOORTHY**

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: WEDNESDAY, JULY 9, 2003

REASONS FOR JUDGMENT

AND JUDGMENT BY: THE HONOURABLE MR. JUSTICE O'REILLY

DATED: MONDAY, SEPTEMBER 29, 2003

APPEARANCES BY: Mr. Micheal Crane

For the Applicant

Mr. Michael Butterfield

For the Respondent

SOLICITORS OF RECORD: Mr. Micheal Crane

Barrister and Solicitor

166 Pearl St.

Suite 200

Toronto, Ontario

M5H 1L3

For the Applicant

Morris Rosenberg

Deputy Attorney General of Canada

For the Respondent