

Neutral citation: 2001 FCT 1222

BETWEEN:

JANAPALARAJAN NADARAJAN

Applicant

-and-

THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

Respondent

**REASONS FOR ORDER**

**GIBSON J.**

**Introduction**

[1] These reasons arise out of an application for judicial review of a decision of the Convention Refugee Determination Division (the "CRDD") of the Immigration and Refugee Board wherein the CRDD determined the Applicant not to be a Convention refugee within the meaning given to that expression in subsection 2(1) of the *Immigration Act*<sup>11</sup>. The decision of the CRDD is dated the 8<sup>th</sup> of November, 2000.

**Background**

[2] The Applicant is a Hindu Tamil citizen of Sri Lanka. At the date of the hearing before me, he was 47 years of age. He was born and brought up in the North of Sri Lanka and, until coming to Canada in the summer of 1999, he lived virtually all of his life in the North of Sri Lanka. He alleges a fear of persecution if he is required to return to Sri Lanka on the basis of one or more of the grounds specified in the definition "Convention refugee" in subsection 2(1) of the *Immigration Act*, namely, race, religion, nationality, membership in a particular social group and political opinion. He fears both the Tamil Tigers and government security forces and alleges that there is no safe haven for him in Sri Lanka.

[3] The Applicant's tale of alleged persecution extends from 1985 until the day he left Sri Lanka, the 28<sup>th</sup> of July, 1999. He suffered regular destruction of his home and property. He faced extortion, forced labour and forced training. He was regularly forced to move from place to place to preserve his safety and the safety of his family members. He left the north, more particularly the Kilinochchi area, in May or June of 1999. He made his way to Colombo via Vavuniya where he obtained a pass by bribery that enabled his onward travel to Colombo. When he arrived in Colombo, he stayed at a lodge and registered with the police. He was advised that he would not be allowed to sojourn in Colombo for more than one week.

[4] As earlier indicated, he left Sri Lanka on the 28<sup>th</sup> of July, 1999. On his way to Canada, he sojourned for ten days in the United States. He arrived in Canada on the 15<sup>th</sup> of August, 1999 and made his claim to Convention refugee status on the same day.

**The Decision of the CRDD**

[5] The CRDD identified the issues of concern to it in the following terms: The panel addressed the issue [of] identity as the claimant had not adduced his National Identity Card or a similar document with his picture on it. The issues of

credibility, the well-foundedness of his fear and a possible Internal Flight Alternative (IFA) were reviewed as well. The claimant's stay in the USA was discussed and why he did not claim there as the first opportunity presented itself to save his life. He was asked why he did not leave his country early [earlier] considering that his allegation[s] go as far back as 1985. This was important to know because his brother ... left Sri Lanka in 1991 and made a successful claim in Canada. The panel needed to know when he decided to leave his homeland and what prompted this action.

[6] Regarding failure to claim in the United States, the CRDD wrote: The claimant testified that he stayed ten days in the USA and did not make a claim there. He explained that he has a brother in Canada who had offered to help the claimant here. If the panel is to believe in his alleged fear, then the panel has difficulty to believe that he would not claim in the USA. He was told that this was his first opportunity to save his life. To this, he replied that his brother had told him to come to Canada. The panel find[s] this response not to be reasonable considering his allegations to fear since 1985 in Sri Lanka. Considering his behaviour under the circumstances and absence of an acceptable explanation, the panel doubts in his allegations to fear.

[7] The CRDD had difficulty with the Applicant's explanation as to why he finally determined to leave Sri Lanka. It wrote:

... He explained that the Tigers had told him that the military training is compulsory for people below the age of 60. This posed a danger to his life and the family. He went on to detail how he was told about this by the Tigers. According to him, each month there were meetings held in a school near his business in which about fifty businessmen plus general public would participate. He stated that these were regular meetings, the Association president would tell them about these and he would obtain participants signatures to confirm. Such meetings took place since 1990 and Tigers would participate in some of these. He testified that the Tigers told them that they did not have enough fighters during [the] April 1999 meeting. Therefore, the recruitment of people below the age of 60 became compulsory to obtain military training. He also said that the Tigers advised that these people may not participate in direct fighting, but would help in moving the heavy vehicles and the arms. He was told that there is no mention of such meetings since 1990 in his Personal Information Form (PIF) ... most importantly since April 1999 when the Tigers announced recruiting of people under the age of 60. ... He failed to explain why the information about meeting or meetings was not covered in his PIF. The panel finds him not to be credible, hence the panel doubts such a meeting took place in April 1999 with the Tigers present. Moreover, the Tiger's demand was not specifically targeted to the claimant, it was a message they gave to many present in the said meeting. The panel, therefore, does not believe in his allegations of fear.

The claimant and his counsel were asked if they could produce a documentary evidence that the Tigers demanded to recruit by force persons of an age below 60 for military training. The panel was told that no such evidence could be made available to prove this allegation. The claimant was unable to confirm whether the Tigers made this threat real. It is the claimant who has the burden of proof. In absence of that, the panel discounts the claimant's claim of fear to be recruited by the Tigers because he is not 60 yet.

## Issues

[8] While counsel for the Applicant raised a broad range of issues in his written submissions, in his oral submissions before me, he focussed on four, those being, more specifically, first, corroborating evidence for the Applicant's allegation of recruitment, in the spring of 1999, at least for training of Tamils in the north of Sri Lanka who are under the age of 60 years; second, failure on the part of the Applicant to claim Convention refugee status at the first opportunity, namely, when he sojourned in the United States before his arrival in Canada; third, the omission from the Applicant's Personal Information Form of any mention of how he learned of recruitment by the Tamils of persons such as himself who were Tamils under the age of 60 in the north of Sri Lanka; and fourth, failure on the part of the CRDD to take into account residency controls, to which the Applicant was apparently subjected when he arrived in Colombo, and which he alleged would preclude him from remaining in Colombo if he were required to return to Sri Lanka.

[9] In each of the foregoing aspects, counsel for the Applicant alleged that the CRDD erred. He further urged that, if such errors were not individually reviewable errors, at least collectively, they were sufficient to justify allowing this application for judicial review.

## Analysis

[10] The single member of the CRDD panel addressed the following question to counsel for the Applicant and received the following answer<sup>[2]</sup>:

Q. Do we have any documentary evidence, counsel, regarding the below 60 to be forced to join the compulsory training with the Tigers?

A. I don't have any specific, Mr. Chairperson, but I used to about three years, two years back file pictures showing "obvious senior citizens" above 60 years of age carrying arms in Tiger uniform. But specifically on point, in 1999, I don't have.

This answer was clearly wrong. In a Human Rights Watch World Report, 1999 that is indexed in the Tribunal Record before the Court, the following appears:... In April [1999] the LTTE began a practice of enlisting all residents in some areas of the north for military training as a "civilian defence force." Older residents were reportedly directed to act as guards for their villages, while younger members were sent to the front lines to aid LTTE combat units. Residents attempting to flee these areas said they were leaving. among other things, because of LTTE recruitment.<sup>[3]</sup>

[11] In *Adodo v. Canada (Minister of Citizenship and Immigration)*<sup>[4]</sup>, Mr. Justice McKeown, referring to a report of the Research Directorate of the Immigration and Refugee Board, noted in paragraph 7 of his reasons: In my view the Board may very well have been innocently misled by the Research Directorate's summary of [a reference to a research report] but it was clearly wrong. This is central to her claim. In my view, this is reversible error.

Mr. Justice McKeown continued in the same paragraph:... but I cannot uphold the Board's statement that:

... the panel does not have sufficient trustworthy or reliable evidence before it to find that the claimant faces a serious possibility of persecution... .

In my view, I should not speculate on what the Board would have found had it not considered [the erroneous Research Directorate summary].

[12] I am satisfied that precisely the same might be said here. While on the facts of this matter, the CRDD was not misled by an internal document of the Immigration and Refugee Board, but rather by a misguided assurance from counsel for the Applicant, it nevertheless failed to have regard to documentary evidence before it that was clearly corroborative of a central element of the Applicant's claim to a well-founded fear of persecution that was, he alleged, the triggering event that led finally to his decision to flee Sri Lanka after he had endured hardship for so many years. To paraphrase Justice McKeown, I am not prepared to speculate on whether, if the CRDD had taken into account the corroborative evidence, its decision would have been different and in favour of the Applicant.

[13] I am satisfied that this error alone, no matter how innocent it may have been on the part of the CRDD, and notwithstanding that the CRDD was led into the error, at least partly, by counsel for the Applicant himself, is sufficient of itself, to require that I allow this application for judicial review and refer the Applicant's application for Convention refugee status back for redetermination. This is not a case where the Applicant had placed before the CRDD voluminous documentary evidence that no panel of the CRDD could be expected to have taken cognizance of in all its detail. Indeed, the document in question was put into the Record, at least by reference, by the CRDD itself. It was a summary of one in a series of well-known and reputable documents on country conditions. It was a document with which the CRDD member and the Refugee Claim Officer should both have been familiar and on which they should not have had to rely on counsel for the Applicant for an appropriate reference.

[14] Given my foregoing conclusion, I will comment only briefly on other issues raised on behalf of the Applicant.

[15] I am satisfied that the law regarding failure to claim Convention refugee status at first opportunity is reasonably well settled. In *Gavryushenko v. Canada (Minister of Citizenship and Immigration)*<sup>[5]</sup>, Associate Chief Justice Lutfy, after citing and quoting from Professor Hathaway's work *The Law of Refugee Status*<sup>[6]</sup> and the decision of Mr. Justice MacKay in *Ilie v. Canada (Minister of Citizenship and Immigration)*<sup>[7]</sup>, wrote at paragraph 11: The fact that a person does not seize the first opportunity of claiming refugee status in a signatory country may be a relevant factor in assessing his or her credibility, but it does not thereby constitute a waiver of his or her right to claim that status in another country.

I am not satisfied that the CRDD here misapplied the foregoing principle.

[16] The CRDD made much of the fact that the Applicant failed to identify on the face of his Personal Information Form narrative the source of his knowledge acquired in the

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spring of 1999 that he was at risk of recruitment by the Tigers, notwithstanding that he was significantly older than those generally considered to be at risk of recruitment. In the result, the CRDD determined not to believe the Applicant's allegations of fear that transcended the fear arising from the experiences that he had endured from 1985. This finding is closely interrelated with the determination regarding lack of corroboration for the Applicant's expressed fear of recruitment. Given that the CRDD in fact had before it corroboration of that expressed fear, once again, I will not speculate as to whether or not the CRDD might have reached a different conclusion regarding the absence of a reference to the source of the fear on the face of the Applicant's Personal Information Form narrative.

[17] Finally, while the CRDD identified Internal Flight Alternative as an issue before it, it did not directly address the issue. This may well have been because the CRDD concluded before reaching that issue that the Applicant's alleged fear was not well-founded anywhere in Sri Lanka. Once again, given the corroboration on the Record before the CRDD regarding the Applicant's alleged fear of recruitment, IFA becomes a more significant issue that should be addressed in any rehearing and redetermination of this application. The Applicant's uncontradicted evidence was that, during the brief period that he sojourned in Colombo before leaving Sri Lanka, he was warned that he would not be allowed to stay there. It is therefore a significant issue for determination, if the Applicant's fear of persecution in the north of Sri Lanka is found to be justified, whether there is any safe haven for him in Sri Lanka.

#### **Conclusion**

[18] Based upon the foregoing analysis, this application for judicial review will be allowed. The decision under review will be set aside and the Applicant's application for Convention refugee status will be referred back to the Immigration and Refugee Board for rehearing and redetermination by a differently constituted panel.

[19] Neither counsel recommended certification of a question on the facts of this matter. No question will be certified.

J.F.C.C.

Ottawa, Ontario

November 9, 2001

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<sup>11</sup> R.S.C. 1985 I-2.

<sup>12</sup> Tribunal Record, p. 216.

<sup>13</sup> Applicant's Record, p. 49.

<sup>14</sup> [2001] F.C.J. No. 1589 (Q.L.), (F.C.T.D.).

<sup>15</sup> (2000), 194 F.T.R. 161.

<sup>16</sup> Toronto, Butterworths, 1991.

<sup>17</sup> (1994), 88 F.T.R. 220.

