

**Date: 20080114**

**Docket: IMM-6516-06**

**Citation: 2008 FC 44**

**BETWEEN:**

**THAYASEELAN SELLAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT**

**PHELAN J.**

**I. INTRODUCTION**

[1] The Immigration and Refugee Board's (Board) denial of the Applicant's claim for protection raises the issue of whether the Board should have considered the objective risks faced by the Applicant as a young Tamil male from Jaffna, Sri Lanka, despite the Board's negative credibility findings.

## II. BACKGROUND

[2] The Applicant, 27-years old at the time of his application, is a Tamil male from the Jaffna area in northern Sri Lanka. He claimed that he and his brothers had been subjected at various times to forced labour, detention, interrogations and beatings by both the LTTE and the army. In addition, his father had been forced to pay “protection money” to keep his family safe.

[3] The Applicant further claimed that he left Sri Lanka to avoid the consequences of his refusal to join the LTTE. He said that he left Sri Lanka on June 17, 2005 and arrived in Canada via Paris the next day.

[4] The Board did not believe the Applicant’s account of his travel itinerary because the time taken to travel the route should have been longer than the period claimed. The Board did not accept that the Applicant had lived in Sri Lanka until June 2005 because he claimed to have experienced travel restrictions at a time when none existed.

[5] The Board rejected his uncorroborated story of his itinerary and his testimony as to his whereabouts prior to coming to Canada. Therefore, the Board concluded that the Applicant had failed to establish a subjective fear of persecution under s. 96 of the *Immigration and Refugee Protection Act* (IRPA) nor produced credible evidence that he was in need of protection under s. 97 of the IRPA. However, the Board did accept his identity as a young Tamil male from the Jaffna area.

[6] The principal issue argued by the parties was whether the Board erred by failing to analyse the risk to the Applicant, independent of any issue of credibility, when his identity as a Tamil male was accepted.

### III. ANALYSIS

[7] As the issue is phrased, in paragraph 6, this is an issue of law for which the standard of review is correctness. The Board did not undertake a s. 97 analysis after having concluded that the Applicant's story as to where and when he lived prior to arrival in Canada was not credible.

[8] In *Balakumar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 20, I held that the Board was required to conduct a separate s. 97 analysis even where the subjective element of a s. 96 claim failed. In particular, I concluded at paragraph 13 of that decision:

It is not necessary that there be a rigid bright line between the s. 96 and s. 97 considerations. A finding that the objective element of s. 96 had not been met could, depending on the circumstances, dispose of the s. 97 issue as well. However, the rejection of the subjective element of s. 96 does not entitle the Board to ignore the objective element of fear particularly in respect of s. 97. The form in which that consideration occurs is not one which the Court should direct – what is important is that it be done and appear to be done.

[9] In the present case, even if the Applicant had not lived in the Jaffna area immediately before coming to Canada, there is no evidence to suggest that he could, upon rejection of his claim, go to any other country but Sri Lanka or any other part of Sri Lanka but the Jaffna area.

[10] The Board, having accepted his identity, did not go on to consider the objective evidence which was before it as to country conditions in Sri Lanka or the nature and extent of the risk to the Applicant upon being returned to his home country.

[11] The matter of objective risk was put in issue by the Applicant and there was material before the Board upon which it could rely. This is not a situation where there was no claim under s. 97, nor any s. 97 evidence and a simple reliance on a free-standing right to s. 97 consideration independent of the burden which rests on an applicant to state his/her case or independent of the evidentiary record in the case. Nor does the Applicant argue that all young Tamil males are entitled to protection by virtue of their identity *per se*.

[12] Given the record before the Board, it was under an obligation to assess the s. 97 risk despite a credibility finding which did not dispose of the s. 97 risk.

[13] Therefore, this application for judicial review will be granted, the decision will be quashed and the matter remitted for a new determination by a different panel of the Board.

[14] As to the issue of a question to be certified, the parties will be entitled to make submissions before a formal Order is issued.

Ottawa, Ontario  
January 14, 2008

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6516-06

**STYLE OF CAUSE:** THAYASEELAN SELLAN

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 28, 2007

**REASONS FOR JUDGMENT:** Phelan J.

**DATED:** January 14, 2008

**APPEARANCES:**

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