Date: 20070328

Docket: IMM-2710-06

Citation: 2007 FC 334

Ottawa, Ontario, March 28, 2007
PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RASIAH SINNATHAMBY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

Overview

[1] This is the second judicial review for this Applicant, Rasiah Sinnathamby. These are the reasons for my Order pronounced orally granting this judicial review.

[2] The Applicant's first refugee claim was denied. The matter was sent back to the Immigration and Refugee Board (Board) because the Board had failed to analyze the section 97 of the *Immigration Refugee and Protection Act* (IRPA), S.C. 2001, c.27 aspect of the Applicant's claim.

Background

[3] Mr. Sinnathamby is an elderly Tamil from Sri Lanka. He currently lives with his daughter. He suffers from serious ailments including parasagittal and sphenoid meningioma,

heart failure and seizure, benign brain tumours, cognitive alterations, epilepsy, high cholesterol, asthma, high blood pressure and thyroid deficiency. His daughter had to testify on his behalf.

[4] The basis for his claim is that he would face extortion and violence at the hands of the Liberation Tigers of Tamil Eelam (LTTE) because all of his children live in developed countries and therefore he would be a target for the LTTE fundraising activities. He had already experienced such threats of extortion in Sri Lanka. The evidence at the Board hearing even included an effort by the LTTE to demand money from his family in Canada. (Regrettably, the family did not report this matter to the Canadian authorities.)

[5] In the Board's decision, the Member discounted these extortion threats because the latest ceasefire was in effect. While the Member acknowledged the independent evidence of the LTTE fundraising/extortion activities, the Member found that there was a viable Internal Flight Alternative (IFA) in Colombo because it is not under the control of the LTTE.

[6] The decision recites the Applicant's concern about living in Colombo, his lack of familiarity with the city and language, his fear that the LTTE can reach him, his deteriorating health and reliance on his daughter and absence of family in Colombo.

[7] In rejecting the Applicant's claim for protection, the Member relied on the decision in*Ranganathan v. Canada (Minister of Citizenship and Immigration),* [2001] 2 F.C. 164, [2000] F.C.J. No. 2118 (C.A.) and drew the following conclusions:

- that refusal to take up on IFA can only be justified if it would jeopardize the claimant's life or safety;
- for a claim to succeed, it must be based on persecution linked to a Convention ground; and
- lowering the standard for an IFA from threats to life or safety undermines the definition of a refugee and thus the distinction between refugee claims and humanitarian and compassionate applications.

Analysis

[8] The standard of review in respect of an IFA finding is well settled as "patent unreasonableness". However, the standard of review in regards to the applicable legal test is correctness (*Ezemba v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 1265, 2005 FC 1023).

[9] There are a number of difficulties with the Board's decision both in regards to the facts of an IFA, the legal test, applicable, and the nature of the analysis of section 97 requirements.

[10] The Board put heavy reliance on the ceasefire and the LTTE's lack of control ofColombo. That consideration did not take into account that the risk was to Tamils who had children living outside Sri Lanka. This risk does not require control of a particular area, merely access to the targets. The evidence before the Board in both the Human Rights Watch Report and the United States Department of State (DOS) report is that the risk is real and that the LTTE operates in the north and east of the country as well as in Colombo. The risk to the target group is recognized in this Court's decision in *Christopher v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 910, 2005 FC 730.

[11] The Board did not address whether the LTTE might continue to extort money from the Applicant in Colombo. It simply held that the LTTE did not control Colombo. This is an error to fail to consider important evidence, to fail to address a relevant consideration and therefore the finding of a safe IFA is patently unreasonable.

[12] The Board erred in its section 97 analysis by interweaving the section 96 requirements of persecution on Convention grounds into its analysis. As indicated above, the Board erred when it concluded that for a section 97 claim to succeed, the Applicant must base its claim of persecution on Refugee Convention grounds.

[13] To the extent that the Board engaged in a section 97 analysis, it restricted itself to considering whether Colombo was a safe flight alternative in terms that being in Colombowould not jeopardize the Applicant's life or safety. The Board erred in not performing the personalized assessment which counsel for the Respondent so eloquently performed. Indeed the Board seemed to reject considering whether it would be reasonable for the Applicant to flee to Colombo as this would somehow lower the standard for an IFA finding.

[14] The consideration of whether an IFA is reasonable for an applicant cannot be a disguised full force humanitarian and compassionate (H & C) application. Likewise, it is not solely restricted to considerations of physical safety. An IFA analysis focuses on whether the alternative place is safe from the risks found to exist and whether it is reasonable for the particular applicant to avail themselves of that alternative location in their home country.

[15] As Justice James Hugessen pointed out in *Ramanathan v. Canada (Minister of Citizenship and Immigration)* [1998] F.C.J. No. 1210, the consideration of whether an IFA is unreasonable or unduly harsh is bound to involve some of the same factors as taken into account in an H & C application. If those factors were excluded, the only thing left to consider is safety which is only the first branch of the IFA test. Therefore, the Board erred in its consideration of the test for an IFA and failed to consider whether for this Applicant the IFA was unreasonable or unduly harsh.

[16] For all these reasons, this judicial review will be granted. There is no question for certification.

ORDER

THIS COURT ORDERS that this application for judicial review is granted, the Board's decision quashed, and the matter of section 97 *Immigration Refugee and Protection*

*Act*application remitted back to the Immigration Refugee Board for a new determination to be conducted by a differently constituted panel.

"Michael L. Phelan"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2710-06
STYLE OF CAUSE:	RASIAH SINNATHAMBY and MINISTER OF CITIZENSHIP & IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 19, 2007
REASONS FOR ORDER AND ORDER:	PHELAN, J.
DATED:	March 28, 2007

APPEARANCES:

JACKIE ESMONDE	FOR APPLICANT
AMY LAMBIRIS	FOR RESPONDENT

SOLICITORS OF RECORD:

JACKIE ESMONDE Barrister & Solicitor Toronto, Ontario	FOR APPLICANT

John H. Sims, Q.C. FOR RESPONDENT
Deputy Attorney General of Canada