

Date: 20010830

Docket: IMM-5524-00

Neutral Citation: 2001 FCT 975

**BETWEEN:**

**DEBALATHAS SINNATHURAI**

**Applicant**

**- and -**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**BLAIS J.**

[1] This is an application for judicial review of the Immigration and Refugee Board's [the "Board"] decision rendered on September 28, 2000, wherein the Board determined that the applicant was not a Convention refugee.

**FACTS**

[2] The applicant is a 42 years old and a citizen of Sri Lanka. He claims Convention refugee status on the grounds of membership in a particular social group (a Tamil from the North of Sri Lanka) and of political opinion that may be imputed to him since the applicant paid taxes to the Liberation Tigers of Tamil Eelam (LTTE) when that organization controlled the Jaffna area.

[3] The applicant's wife and three daughters were determined to be Convention refugees when their claims were heard by the Board in June 1996. The applicant arrived in Canada at the end of July 1996 but his refugee claim has been delayed through a series of actions involving a landing application with his family and a withdrawal of his refugee claim based on his understanding that his landing would be allowed to proceed. His refugee claim was reinstated by the Board as the withdrawal of his claim was deemed not to be his fault.

[4] The applicant's personal information form (PIF) states the applicant's difficulties with the LTTE when that organization was the de-facto government in the north. The applicant also explains in his PIF that he was arrested by the police when he arrived in Colombo after fleeing Jaffna with his family and that he was forcibly taken and detained at the Kotehena police station. During his detention which lasted three days, he was accused of belonging to the LTTE and of coming to Colombo for the purpose of carrying out terrorist activities. The applicant was physically assaulted more than once. He was released on the condition that he reported to the police once every week.

[5] The applicant testified before the Board that if he went to an area controlled by the LTTE, he would be recruited by them. He claimed that the LTTE are asking everyone to join the movement, including married people and old people. However, the applicant is from the town of Ariyalai which is not under LTTE control and is three miles from Jaffna town.

[6] The applicant testified that no one lived in Ariyalai. He said that his mother was living in his house in Ariyalai and that he last heard from his mother six months ago. He also has an uncle who lived in the area with his wife and six children. However, he believes they would by now, all be displaced.

[7] The applicant testified that it was possible that the army would arrest him because he paid a tax to the LTTE. He also explained that he could not live in the north because of bombing and shelling attacks.

### **THE BOARD'S DECISION**

[8] The Board noted that the recent history of the Sri Lankan civil war included the fact that when the army took control of the Jaffna peninsula in 1995-96, they urged the population that had earlier fled to the Vanni to return. The Board observed that although the LTTE earlier in 2000 mounted an assault in Jaffna, the army continued to maintain its control. The Board further noted that persons similarly situated to the applicant (mother, uncle and family) continued to live in the area. The Board explained that the applicant produced no evidence that his mother and uncle had left the Jaffna area.

[9] Given that the army induced thousands of Tamils to return to Jaffna, the Board found it unreasonable to believe that they would then sanction all those who paid compulsory taxes to the LTTE. There was no evidence to support such a proposition. The Board found that there was not a serious possibility that the applicant would be harassed or seriously harmed by the army if he returned to Jaffna.

[10] With respect to the applicant's belief that the LTTE were now recruiting elderly and married people, the Board noted that there was no persuasive documentary evidence to suggest that the LTTE are active in recruitment of any age group within areas under the control of the security forces. The Board found that there was not a serious possibility that the applicant will be approached by the LTTE if he returns to Jaffna.

[11] Regarding the applicant's fear of being caught in a crossfire of shelling and bombing attacks, the Board was of the view that there was no persuasive evidence that the army is targeting the civil population in their attacks upon LTTE positions. Thus, the risk that the applicant may face is not grounded in his civil or political status.

[12] The Board was of the view that the applicant was a Tamil in an army-controlled area under periodic assault by the LTTE. The Board considered the documents about the army recapturing the town of Chavakachcheri. Although the documents state that the town has been devastated, the only reference to those killed and wounded referred to soldiers (army) and rebels (LTTE). The Board found that there was no reference to Tamil civilian deaths or to Tamil civilians being targeted by either side in the conflict. The Board found that there was not a serious possibility that the applicant will be persecuted if he returns to Sri Lanka.

### **ISSUES**

[13] 1. Did the Board err in law when it concluded that for the applicant to be found a Convention refugee he had to be personally a target of reprehensible acts directed against him in particular?

2. Did the Board ignore the evidence before it in determining whether the applicant had a well-founded fear in Sri Lanka as a result of his membership in a particular social and political group even if the Board rejected the applicant's account of his own experience in Sri Lanka?

### **ANALYSIS**

**1. Did the Board err in law when it concluded that for the applicant to be found a Convention refugee he had to be personally a target of reprehensible acts directed against him in particular?**

[14] The applicant submits that in order to claim Convention refugee status, there is no need to show either that the persecution was personal or that there had been persecution in the past.

[15] The applicant contends that there was ample evidence before the Board to indicate that Tamil males and females from the northern part of Sri Lanka are persecuted in Sri Lanka.

[16] The applicant alleges that the Board cannot ignore the civil war that is ongoing in Sri Lanka and the potential effect of the aerial bombardments on the applicants. The applicant submits that the aerial bombardments are discriminate since it is the Tamils from Northern Sri Lanka, due to their perceived support for the LTTE activities by the government, that are targeted and hit by them. The applicant submits that the Board erred in law in ignoring the Guidelines with respect to civil war issued by the Chairperson, and article 3 of the Geneva Convention on the Status of the Civil War.

[17] The respondent submits that contrary to the applicant's submission at paragraph 4 of his memorandum of fact and law, nowhere in the Board's reasons does the Board conclude "that for the applicant to be found a Convention refugee, he had to be personally a target of reprehensible acts directed against him in particular". Instead, the Board concluded that the applicant had not established, on a balance of probabilities, that he has a well-founded fear of persecution in his home country.

[18] The applicant relies on the decision in *Salibian v. M.E.I.*, [1990] F.C.J. No. 454 (F.C.A.), where the Federal Court of Appeal stated:

In short, the Division concluded that for the plaintiff to be eligible for refugee status he had to be personally a target of reprehensible acts directed against him in particular. The Division further concluded, despite evidence that the plaintiff was a victim of these acts in his capacity not as a Lebanese citizen but as an Armenian and Christian Lebanese citizen, that the plaintiff was "a victim in the same way as all other Lebanese citizens are". This in my opinion is an error of law, in the first case, and an erroneous conclusion of fact in the second, drawn without taking into account the factual evidence available to the Division. This error of fact is especially significant in the context of the error of law.

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

- (1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;
- (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
- (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; and
- (4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin (see *Seifu v. Immigration Appeal Board*, A-277-82, Pratte J.A., judgment dated 12/1/83, F.C.A., not reported, cited in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), at page 683; *Darwich v. Minister of Manpower and Immigration*, [1979] 1 F.C. 365 (C.A.); *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129 (C.A.), at pages 133 and 134).

The impugned decision falls squarely within the line of authority described by Prof. Hathaway as follows:

In view of the probative value of the experiences of persons similarly situated to a refugee claimant, it is ironic that Canadian courts historically have shown a marked reluctance to recognize the claims of persons whose apprehension of risk is borne out in the suffering of large numbers of their fellow citizens. Rather than looking to the fate of other members of the claimant's racial, social, or other group as the best indicator of possible harm, decision makers have routinely disfranchised refugees whose concerns are based on generalized group-defined oppression.

and I adopt this description of the applicable law to be found at the end of the aforementioned article:

In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for

which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

In the case at bar the Refugee Division misunderstood the nature of the burden the applicant had to meet and dismissed his application on the basis of a lack of evidence of personal persecution in the past. This conclusion is a twofold error: in order to claim Convention refugee status, there is no need to show either that the persecution was personal or that there had been persecution in the past.

[19] In *Rizkallah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 412 (F.C.A.), the Federal Court of Appeal held:

To succeed, refugee claimants must establish a link between themselves and persecution for a Convention reason. In other words, they must be targeted for persecution in some way, either personally or collectively.

Although the Refugee Division in the case at bar expressed itself incompletely in emphasizing only personal targeting, the evidence, as presented to us, falls short of establishing that Christians in the claimant's Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war.

[20] In *Siad v. M.E.I.*, [1993] F.C.J. No. 608 (F.C.T.D.), Rothstein J. held:

Counsel for the applicant submits that the errors he has formulated constitute errors of law. However, in my view, they are not errors of law.

If the Refugee Division does not address the question of whether or not an applicant falls within a particular social group as referred to in subsection 2(1) of the *Immigration Act*, then they may commit an error of law.

But if they address the question and err by not correctly identifying the social group which the evidence discloses, they do not err in law.

Similarly, a finding that an applicant's fear is based on the fear of random violence and not on being a member of a social group may be an error, but it is not an error of law.

[...]

I see nothing in the Refugee Division's decision in this case that is not consistent with the criteria set forth by Decary, J.A.

The Division did not base its decision on personal persecution or threat of personal persecution. The Division addressed the fact that the applicant belonged to the Habr Gedr subclan and did not confine itself to a consideration of whether or not reprehensible acts would be committed or would likely be committed against the applicant alone. And the Refugee Division considered the Civil War in Somalia. It concluded that many women in other clans have been the victims of the Civil War.

It is clear that the Refugee Division concluded that the fear felt was that felt indiscriminately by all citizens as a result of the Civil War and random violence, and was not related to membership in a social group.

The applicant's counsel says that it was incumbent on the Refugee Division to expressly find that the applicant's fear was related to random violence. He seems to be saying that the Civil War, *per se*, entitles a person to claim refugee status.

However, the question the Division must address is whether the applicant falls within a social group for which there can be a well-founded fear of persecution. The Division did address that question and found against the applicant. That is what they were required to do based on their appreciation of the evidence before them.

[21] In my view, the Board did not misapply the law and did not conclude that for the applicant to be found a Convention refugee he had to be personally a target of reprehensible acts directed against him in particular.

[22] In fact, the Board in the case at bar, determined that the risk that the applicant may face is not grounded in his civil or political status, since there was no persuasive evidence that the army is targeting the Tamil civil population in their

attacks upon the LTTE. The Board found that the applicant's fear resulted from the general situation of civil war and that the applicant did not establish a link between himself and persecutors for a Convention reason pursuant to *Rizkallah*. It appears from the Board's reasons that it concluded that the applicant was not targeted for persecution in some way, either personally or collectively. In my view, the Board applied the test correctly.

[23] However, the applicant also submits that the Board erred in its consideration of the evidence in arriving at the above conclusion and submits that there was ample evidence before the Board to indicate that Tamil males and females from northern part of Sri Lanka were persecuted in Sri Lanka. According to the applicant, the government have targeted the Tamilian population living in northern Sri Lanka due to their perceived support for the LTTE activities. Therefore, the aerial bombardments do discriminate as to who is being hit. The persons who are targeted and hit are the Tamils from northern Sri Lanka.

[24] The Board stated at page 3 of its decision:

The panel has also considered counsel's documents about the army recapturing the town of Chavakachcheri. Although the documents note that the town has been devastated, the only reference to those killed and wounded referred to soldiers (army) and rebels (LTTE). In the article on fighting between the army and LTTE in Jaffna, again reference is made to 13 soldiers and 17 rebels being killed. There is no reference to Tamil civilian deaths or to Tamil civilians being targeted by either side in the conflict.

[25] On this issue, it has to be remembered that the weighing of the evidence is the Board's expertise. As was stated by the Federal Court of Appeal in *Hassan v. Canada (M.E.J)* (1992), 147 N.R. 317 (F.C.A.), the Federal Court of Appeal:

Counsel for the appellant submitted, however, as noted *supra*, that other portions of the Amnesty International Report were ignored by the Board and that such a circumstance represents a valid ground of appeal. I respectfully disagree. In my view the conclusions of the Board were reasonably open to it based on the totality of the evidence adduced and, consequently, it did not err in law. The fact that some of the documentary evidence was not mentioned in the Board's reasons is not fatal to its decision. The passages from the documentary evidence that are relied on by the appellant are part of the total evidence which the Board is entitled to weigh as to reliability and cogency.

[26] In the case at bar, the Board's conclusion was supported by the evidence and I cannot find that it erred.

**2. Did the Board ignore the evidence before it in determining whether the applicant had a well-founded fear in Sri Lanka as result of his membership in a particular social and political group even if the Board rejected the applicant's account of his own experience in Sri Lanka?**

[27] The applicant also contends that the Board had to consider the question of whether the applicant had a well-founded fear in Sri Lanka as result of his membership in a particular social and political group, i.e. a Tamil from the north.

[28] The respondent alleges that the Board did consider whether the applicant's subjective fear of persecution was well-founded in an objective sense.

[29] The respondent further contends that a nexus must exist between the personal situation of a refugee claimant and the general situation with respect to human rights in the country from which the refugee claimant is fleeing. Convention refugee status does not exist "at large" so that anyone from a country with an unfavourable human rights record is automatically determined to be a Convention refugee. Rather, the claimant must adduce some evidence to indicate that violations of human rights established by documentary evidence threaten him personally if he returns. In the case at bar, the applicant has failed to discharge this onus.

[30] With regard to the applicant's allegation that the Board failed to consider the question of whether the applicant had a well-founded fear in Sri Lanka as result of his membership in a particular social and political group, i.e. a Tamil from the north, I agree with the respondent that the Board did consider the question as can be seen from its analysis and its conclusion regarding the situation in Jaffna.

[31] The applicant also submits that the Board should have considered the circumstances of the applicant in rendering its decision. It is submitted that the Board, in not considering the documentary evidence led by counsel and the refugee claim officer at the hearing, ignored relevant evidence on the record and thus determined that the applicant did not have good grounds for fearing persecution.

[32] The applicant submitted some excerpts of the documentary evidence that was before the Board in support of its contention that the Board ignored the evidence.

[33] However, in *Florea v. Canada (M.E.I)*, [1993] F.C.J. No.598 (F.C.A.), the Federal Court of Appel held at paragraph 1:

The fact that the Division did not mention each and every one of the documents entered in evidence before it does not indicate that it did not take them into account: on the contrary, a tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown. As the tribunal's findings are supported by the evidence, the appeal will be dismissed.

[34] As is apparent from its decision, the Board relied on various documentary evidence that was before it in order to determine that the applicant did not establish that he had a well-founded fear of persecution in Sri Lanka. The Board was entitled to rely on this evidence. The Board's conclusion is supported by the evidence and I cannot find that it erred in weighing the evidence and concluding as it did.

[35] Therefore, this judicial review application is dismissed.

[36] Counsel for the applicant submitted two questions for certification:

1. Is it enough for the Panel to rely on a couple of newspaper articles, that state no civilian casualties took place in aerial bombing, while ignoring a plethora of documents that show that Tamil civilians are targeted by the Sri Lankan army?

2. In order to show subjective fear, does the applicant have to provide specific instances of why he fears persecution and is it not enough for the applicant to show fear based on knowledge obtained through press publications and hearing from persons similarly situated?

[37] Counsel for the respondent opposed those questions.

[38] In my view, I cannot conclude that they raise a serious question of general importance, therefore, no question will be certified.

Pierre Blais \_\_\_\_\_

Judge

OTTAWA, ONTARIO

August 30, 2001