A-81-92

SathiyanathanThirunavukkarasu (*Appellant*)

v.

The Minister of Employment and Immigration (*Respondent*)

Indexed as: **Thirunavukkarasu** v. Canada **(Minister of Employment and Immigration) (C.A.)**

Court of Appeal, Heald and Linden JJ.A.and Holland D.J. – Toronto, October 21;
Ottawa, November 10, 1993.

Citizenship and Immigration – Status in Canada – Convention refugees – CRDD holding appellant not Convention refugee because of internal flight alternative (IFA) although faced serious risk to life in north of Sri Lanka – Nature of IFA as set out in Rasaratnam – F.C.A. in Bindra, followed in Sharbdeen(F.C.T.D.), confusing obligation on Minister or Board to warn claimant IFA issue will be raised with obligation to establish facts of Convention refugee claim, which rests with claimant – When IFA must be sought – Objective test – Question whether unduly harsh to expect persecuted person to move to less hostile part of country before seeking refugee status abroad – IFA must be attainable option as accessible to claimant, not theoretical.

This was an appeal from the Convention Refugee Determination Division's (CRDD) decision that the appellant was not a Convention refugee. The appellant is a citizen of Sri Lanka and a Tamil. In the late 1980s he had difficulties with various Tamil factions in the north of Sri Lanka, which culminated with a life-threatening letter from the LTTE accusing him of being a traitor and an informant. The CRDD found that the appellant faced a serious risk to his life in the north of Sri Lanka, where he was born and lived, but held that he was required to make reasonable efforts to relocate within a different part of the country as part of reasonable steps to seek the protection of the state before fleeing the country. It found that the appellant could obtain the protection of the state by moving to Colombo, the capital of Sri Lanka. While the appellant had twice been arrested, detained and beaten by police at Colombo in 1989 and seen by an LTTE member, the CRDD held that these arrests were part of the Sri Lankan government's "perfectly legitimate investigations into criminal and/or terrorist authorities" by Tamil organizations. It found that the appellant had not shown adequate internal safety did not exist at Colombo for the Tamil people simply because they were Tamils. The CRDD concluded that the Country Profile and Overview made it "quite clear" that Tamil populations in the southern regions of Sri Lanka, where Colombo is located, do live in safety from persecution. It found that there was insufficient evidence that the claimant would face more that a minimal possibility of persecution upon return to Sri Lanka.

Held, the appeal should be allowed.

The notion of an internal flight alternative (IFA) is merely a convenient way of describing a fact situation in which a person may be in danger of persecution in one part of a country, but not in another. The idea of an IFA is "inherent" in the definition of a Convention refugee; it is not something separate. The definition of "Convention refugee" requires that claimants have a well-founded fear of persecution which renders them unable or unwilling to return to their home country. If claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country.

Since the existence or not of an IFA is part of the question of whether the claimant is a Convention refugee, the onus of proof rests on the claimant to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA. *Bindrav. Canada (Minister of Employment & Immigration)*(1992), 18 Imm. L.R. (2d) 114 (F.C.A.) and *Sharbdeen v. Canada (Minister of Employment and Immigration)*, 92-A-7203, Dubé J., order dated 23/6/93, F.C.T.D., not yet reported, following *Bindra*, confused the obligation that rests on the Minister or the Board to warn a claimant that the IFA issue will be raised, with the obligation to establish the facts of the Convention refugee claim, which always rests with the claimant. IFA must be sought, if it is not

unreasonable to do so, in the circumstances of the individual claimant. The question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. This is an objective test and the onus of proof rests on the claimant. An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. The alternative place of safety must be realistically accessible to the claimant. If it is objectively reasonable to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee. It is not a matter of claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travellinghalf-way around the world to seek a safe haven in another country.

The evidence was that the appellant had a well-founded fear of persecution on the basis of political opinion in northern Sri Lanka. The appellant had shown, on a balance of probabilities, that he faced a serious risk of persecution at Colombo from the Sri Lankan government on the basis of race. The CRDD erred when it found, on the evidence before it, that there was no serious possibility that the appellant would face persecution at Colombo on the basis of race. The appellant's testimony revealed that he had been subjected to arbitrary arrest and detention, as well as beatings and torture, at the hands of the Sri Lankan government during his time at Colombo. These arrests were motivated by the simple fact of the appellant's being a Tamil. While the appellant may be safe from the LTTE at Colombo, he is not safe from persecution at the hands of the Sri Lankan government on the basis of being a Tamil. The Country Profile as well as the Amnesty International Reports on Sri Lanka spoke of several violent incidents in which Tamils had been persecuted by the Sri Lankan government in the southwest in retaliation for activities of the LTEE and other Tamil groups. Colombo was not an internal flight alternative.

statutesand regulations judicially considered

Immigration Act, R.S.C., 1985, c. I-2, s. 2(1) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1).

casesjudicially considered

applied:

Rasaratnamv. Canada (Minister of Employment and Immigration), [1992] 1 F.C. 706; (1991), 140 N.R. 138 (C.A.); *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 153 N.R. 321; *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; (1980), 110 D.L.R. (3d) 311; [1980] 2 W.W.R. 125; 18 B.C.L.R. 124; 31 N.R. 214.

notfollowed:

Bindrav. Canada (Minister of Employment & Immigration)(1992), 18 Imm.L.R. (2d) 114 (F.C.A.); *Sharbdeenv. Canada (Minister of Employment and Immigration)*, 92-A-7203, Dubé J., order dated 23/6/93, F.C.T.D., not yet reported.

authorscited

Hathaway, James C. *The Law of Refugee Status*. Toronto: Butterworths Co., 1991.

United Nations.Office of the United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. Geneva, 1988.

APPEAL from the Convention Refugee Determination Division's decision that the appellant was not a Convention refugee based on the existence of an internal flight alternative. Appeal allowed.

counsel:

*Douglas A. Johnson*for applicant.

*Leigh A. Taylor*for respondent.

solicitors:

Chapnick& Associates, Toronto, for applicant.

*Deputy Attorney General of Canada*for respondent.

The following are the reasons for judgment rendered in English by

Linden J.A.: The appellant is a citizen of Sri Lanka and a Tamil who claimed Convention refugee status on the basis of a well-founded fear of persecution. The panel denied the appellant's claim on the basis that, although he "faced a serious risk to his life in the north of Sri Lanka", he could live in a "state of safety from persecution" elsewhere in the country. The issue here, therefore, is the so-called "internal flight alternative".

THE LAW

Despite the decision of this Court in *Rasaratnamv. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706, there remains some confusion about the nature of "the internal flight alternative" in Convention refugee claims. It should first be emphasized that the notion of an internal flight alternative (IFA) is not a legal defence. Neither is it a legal doctrine. It merely is a convenient, short-hand way of describing a fact situation in which a person may be in danger of persecution in one part of a country but not in another. The idea of an internal flight alternative is "inherent" in the definition of a Convention refugee (see Mahoney J.A. in *Rasaratnam*, *supra*, at page 710); it is not something separate at all. That definition requires that the claimants have a well-founded fear of persecution which renders them unable or unwilling to return to their home country. If claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country. As Mahoney J.A. stated in *Rasaratnam*, *supra*, at page 710:

[T]he Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists.

Mr. Justice Mahoney continued, at page 710:

[S]ince by definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country, a claimant cannot be a Convention refugee if there is an IFA. It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee. I see no justification for departing from the norms established by the legislation and jurisprudence and treating an IFA question as though it were a cessation of or exclusion from Convention refugee status.

This view was also expressed earlier by Mr. Justice Décary in *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.) where he stated, at pages 614-615:

I know that in principle persecution in a given region will not be persecution within the meaning of the Convention if the government of the country is capable of providing the necessary protection elsewhere in its territory. . . .

This is not unlike the situation where a person has dual citizenship and shows that he is being persecuted in one of his countries"this is not enough, for he must, to be found a refugee, be in danger in both of his countries. For one can be found to be a refugee only as a last resort. Writing for the Supreme Court of Canada, in *Canada (Attorney General) v. Ward ,*[1993] 2 S.C.R. 689, Mr. Justice La Forest stated, at page 752:

[T]he rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is the claimant's sole option.

Ward, a citizen of Ireland and the United Kingdom,therefore, had to demonstrate that he was persecuted both in Ireland and the United Kingdom in order to qualify for refugee status.

In *Rasaratnam*, *supra*, this Court also addressed and settled the question of who bears the burden of proof with respect to an IFA. In *Rasaratnam*, it was argued unsuccessfully before this Court that the onus is not on the claimant to disprove an IFA once the claimant has shown a well-founded fear of persecution in one part of a country. Mahoney J.A. held that, since the question of whether or not there is an IFA is simply part and parcel of whether or not the claimant is a Convention refugee, the onus of proof rests on the claimant to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA.

In other words, Convention refugee claimants carry the onus of establishing that they satisfy all of the components of the definition of a Convention refugee as set out in subsection 2(1) [*Immigration Act*, R.S.C., 1985, c. I-2 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1)] of the Act. An important component of that definition may be whether, in a particular case, there is an IFA. But it remains only a component of the final issue to be decided"namely, whether the claimant is a Convention refugee. Accordingly, I do not think it possible to conclude that, in so far as the IFA issue is concerned, the original onus carried by the refugee claimant, should, somehow, be shifted to the Minister.

Since *Rasaratnam*, *supra*, however, a panel of this Court has indicated otherwise. (See *Bindra v. Canada (Minister of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 114 (F.C.A.); see also *Sharbdeen v. Canada (Minister of Employment and Immigration)*, June 23, 1993, 92-A-7203, not yet reported (F.C.T.D.) following *Bindra*.) *Bindra* was a two-and-a-half page oral judgment concerning an application for judicial review of the decision of a credible basis tribunal. While on the facts of the case the decision was correct, the language used to explain the onus was *obiter dictum* since the onus of proof question did not strictly arise in the context of the first level tribunal.

Moreover, with respect, these two cases misconceived the holding of *Rasaratnam*, *supra*. In particular, they appear to have confused the obligation that rests on the Minister or the Board to warn a claimant that the IFA issue will be raised, with the obligation to establish the facts of the Convention refugee claim which always rests with the claimant. Let me explain.

On the one hand, in order to prove a claim to Convention refugee status, as I have indicated above, claimants must prove on a balance of probabilities that there is a serious possibility that they will be subject to persecution in their country. If the possibility of an IFA is raised, the claimant must demonstrate on a balance of probabilities that there is a serious possibility of persecution in the area alleged to constitute an IFA. I recognize that, in some cases the claimant may not have any personal knowledge of other areas of the country, but, in all likelihood, there is documentary evidence available and, in addition, the Minister will normally offer some evidence supporting the IFA if the issue is raised at the hearing.

On the other hand, there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised. A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met (see, for example, *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, at page 1114). The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing. As was explained by Mr. Justice Mahoney in *Rasaratnam*, *supra*, at pages 710-711:

[A] claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.

These two very different obligations, therefore, should be carefully distinguished.

Finally, what threshold must an IFA meet before claimants will be required to avail themselves of it rather than seeking international refugee protection? The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* suggests that a person will not be prohibited from claiming Convention refugee status "if under all the circumstances it would not be reasonable to expect" that person to seek internal refuge (at page 22). However, the reasonableness standard suggested by the Handbook is very brief and it does not seem to me to express clearly enough the basis of the IFA. Professor Hathaway, in *The Law of Refugee Status*, at page 134 has suggested the following:

The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized

Professor Hathaway's explanation is helpful but it does not quite achieve the appropriate balance between the purposes of international protection for refugees and the availability of an internal flight alternative.

Mahoney J.A. expressed the position more accurately in *Rasaratnam*, *supra*, at page 711:

In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.

Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.

Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?

An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe

area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

In conclusion, it is not a matter of a claimant`sconvenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travellinghalf-way around the world to seek a safe haven, in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country.

THE FACTS

The panel found that the appellant faced serious risk to his life in the north of Sri Lanka where he was born and lived. In the late 1980s, the appellant had difficulties with various Tamil factions in the north of Sri Lanka which peaked with a letter from the LTTE accusing him of being a traitor and an informant and threatening him with death. The appellant fled to Colombo, the capital of Sri Lanka. The panel found that the Sri Lankan government could not protect the appellant from the threat that the LTTE posed in the north of the country. The panel stated:

Therefore, were protection not available in any other way from the government of Sri Lanka, it is quite likely that he would be found to be a Convention refugee. (Case, at page 168.)

Turning to the IFA, the Refugee Division held that the appellant was required to make reasonable efforts to relocate within a different part of the country as part of reasonable steps to seek the protection of the state before fleeing the country. The panel stated that the availability of protection in another part of the state must not be speculative and must take into consideration the individual circumstances of the claimant.

The panel found that the appellant could obtain the protection of the state by moving to Colombo, since there was adequate internal safety from persecution there. While the appellant had twice been arrested in Colombo in 1989 by the police and subjected to beating and detention, the panel held that these arrests were part of the Sri Lankan government's "perfectly legitimate investigations into criminal and/or terrorist authorities" by Tamil organizations. In my view, beatings of suspects can never be considered "perfectly legitimate investigations", however dangerous the suspects are thought to be. Moreover, the panel attached little significance to the fact that the appellant had been seen by an LTTE member in Colombo.

Before coming to Colombo, the appellant had been arrested in Jaffna in 1984 on suspicion of being a Tamil militant, was detained for one month and was released upon bribing the guards. The appellant had also been hit by a bullet during a raid on Jaffnaby the Sri Lankan army.

The panel found that the appellant had not shown that adequate internal safety did not exist in Colombo for the Tamil people simply because they were Tamils. The panel concluded that the Country Profile and Overview made it "quite clear" that Tamil populations in the southern regions of Sri Lanka, where Colombo is located, do live in safety from persecution. Accordingly, the panel found that there was insufficient evidence that the claimant would face more than a minimal possibility of persecution upon return to Sri Lanka and declared that the appellant was not a Convention refugee.

In my view, the panel was correct when it stated that the appellant was required to prove, on a balance of probabilities, that there was a serious possibility that he would face persecution in Colombo before obtaining refugee status. However, in my opinion, the Refugee Division seriously erred when it found, on the evidence before it, that there was no serious possibility that the appellant would face, and indeed had faced, persecution in Colombo on the basis of his race.

The panel made no adverse finding about the appellant's credibility. The appellant's testimony reveals that he was subjected to arbitrary arrest and detention, as well as beatings and torture, at the hands of the Sri Lankan government during his time in Colombo. These arrests were motivated by the simple fact of the appellant's being a Tamil. As the appellant argues, the state of emergency in Sri Lanka cannot justify the arbitrary arrest and detention as well as beating and torture of an innocent civilian at the hands of the very government from whom the claimant is supposed to be seeking safety. While the appellant may indeed be safe from the LTTE in Colombo (although this is not entirely clear), he does not appear to be safe from persecution at the hands of the Sri Lankan government on the basis of being a Tamil.

Further, contrary to the finding of the panel, the Country Profile as well as the Amnesty International reports on Sri Lanka do not show "quite clearly" that Tamils are all safe in the southwest of the country. Indeed, the reports speak of several violent incidents in which Tamils have been persecuted by the Sri Lankan government in the southwest in retaliation for activities of the LTTE and other Tamil groups. The appellant's personal experience that some Tamils may not be living in safety and security from government persecution in Colombo is confirmed by these reports. Accordingly, I am of the opinion that, on the principles outlined above and on the basis of the evidence in this case, Colombo is not an internal flight alternative for this appellant.

I emphasize that I have reached this determination on the evidence before the panel and solely with respect to this particular appellant. In other cases involving Tamils in Sri Lanka, it may well be that the claimants will not be able to demonstrate to the satisfaction of the panel that they are subject to persecution in Colombo and, hence, Colombo might well be an internal flight alternative for them. Indeed, such was the case in *Rasaratnam*, *supra*.

DECISION

The panel found that the appellant faced serious risk to his life in the north of Sri Lanka, and that the Sri Lankan government could not protect him there. The evidence shows that the appellant has a well-founded fear of persecution on the basis of political opinion in northern Sri Lanka. It is also apparent that the appellant has shown on a balance of probabilities that he faces a serious risk of persecution in Colombo from the Sri Lankan government on the basis of race.

I would allow the appeal and exercise the discretion of this Court by declaring the appellant to be a Convention refugee.

HealdJ.A.: I agree.

Holland D.J.: I agree.