

Date: 20000309

Docket: IMM-2043-99

BETWEEN:

SELVARATNAM VELLUPPILLAI

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 assigned to that phrase in subsection 2(1) of the *Immigration Act*⁴ (the "Act"). The decision of the CRDD is dated the 31st of March, 1999.

Background

[2] The applicant is a 76 year-old Tamil, and a citizen of Sri Lanka from the Jaffna region. In the Jaffna region, he claims to have been subjected to harassment in his business activities by a Tamil group associated with the Indian Peace Keeping Force (the "IPKF"). A son of the applicant was arrested and killed in 1989 by the IPKF. After the IPKF left Sri Lanka, the applicant was harassed in his business activities by the Tamil Tigers. In August of 1991, the applicant's house was destroyed in a bombing raid by Sri Lankan forces. According to the applicant, his wife died shortly thereafter as a direct result of the trauma caused by the bombing.

[3] In 1993, the applicant quit his private transportation business. Despite this fact, he alleges the Tamil Tigers continued to harass him. In the result, the applicant fled in November of 1995 to Kilinochchi, and from there through Vavuniya to Colombo. In the course of this travel, the applicant continued to be harassed and, at one stage, he was detained for three days by the Sri Lankan Army.

[4] In Colombo, the applicant was again detained and questioned. He was released under a requirement to return to the North of Sri Lanka and to report to the police every week. Rather than comply with the requirement, the applicant fled Sri Lanka for Canada two weeks later.

[5] The applicant made a Convention refugee claim in Canada on his arrival. That application was rejected in November of 1996 and an application for leave to seek judicial review of that decision was denied.

[6] The applicant voluntarily left Canada for the United States in November of 1997 where he was held in immigration custody. He made no claim to asylum in the United States.

[7] In February of 1998, the applicant returned to Canada from the United States and filed a second claim to Convention refugee status. It is the decision of the CRDD on the second claim that is here before the Court. It was not in dispute before me that, apart from a psychological report filed on the second claim, the evidence on the applicant's two claims for Convention refugee status in Canada was essentially the same.

Decision of the Convention Refugee Determination Division

[8] On the applicant's second claim for Convention refugee status, the CRDD again dismissed the claim. Written notice of the decision was sent to the applicant in accordance with subsection 69.1(9) of the *Act*. In accordance with subsection (11) of that section, written reasons for the decision were given to the applicant with the written notice of the decision. The reasons for decision included in the Tribunal Record filed with the Court differ from the reasons provided to the applicant with the notice of decision.

[9] In a letter dated the 14th of February, 2000, a legal adviser to the Immigration and Refugee Board advised the Court in part as follows:

....

4. It appears that through inadvertence, the Registry provided with the Notice of Decision a version of the Reasons for Decision that was not the final Reasons for Decision in this matter. The Reasons for Decision in this matter are those contained in the Board's [the CRDD's] record,..... Upon being notified of this error, the Board immediately provided to the parties the correct version of the Reasons for Decision.

The Board felt it important to draw the Court's attention to this issue as it might be necessary for the Court to provide its direction in responding to this issue.....

By letter dated the 22nd of February, 2000, counsel for the respondent advised the Court that: "....the Respondent will take the position at the judicial review that the Board's [the CRDD's] Reasons which were forwarded to the Applicant and are included in the Applicant's Application Record constitute the Board's Reasons in this matter."

In both versions of the reasons of the CRDD that were here before the Court, the CRDD wrote:

Given the claimant's profile and the reliable documentary evidence about persons at risk of security force interest, we find that there is not a serious possibility that the claimant would be persecuted for a Convention ground should he returned to his home area in Jaffna.

[10] The two versions of the reasons of the CRDD that were before the Court are identical except in one regard: the later version of the reasons, included in the Tribunal Record, includes the following passage which is entirely absent from the version of the reasons provided to the applicant with the notice of decision:

The claimant also submitted a psychologist's report dated 15 October 1998. The panel found the psychologist's report to be of very limited probative value. The panel had a number of credibility concerns with the claimant's oral testimony which were not resolved in his favour. While the psychologist's clinical impression that the claimant appears to be confused from time to time and occasionally experiences problems of forgetfulness or absent-mindedness helped explain some of the deficiencies in the claimant's oral testimony, particularly concerning his contradictory evidence about correspondence with his friend Subramanian in Colombo, and the absence of mention in his PIF narrative that he was photographed and fingerprinted in Colombo, the panel finds the psychologist's statement,

According to Mr. Vellupillai, the only thing that keeps him alive is the hope that one day he will be reunited with his son in the United States

to be totally at odds with the claimant's oral testimony to the panel, during the course of which he gave the opposite impression, namely that he was not particularly anxious to be reunited with his son whom he described as a drinker and a drifter and not capable of looking after him. As well the claimant made no attempt to contact his son after he received a document with his son's address and telephone number in the United States. Counsel's attempts in redirect examination to fill the gaps in our understanding of the claimant's relationship with his son only compounded our credibility concerns rather than resolved them. The claimant said his son deliberately left his family behind in Sri Lanka and then immediately changed his evidence and said he did not know if his son's actionwe prefer to make our determination of this claim on the issue of whether there is an objective basis.² [citations omitted]

Analysis

[11] It was not in dispute before me that, in reaching my decision on this application for judicial review, I should rely on the first version of the CRDD reasons, that is to say, the version given to the applicant with the notice of decision against him and included in the applicant's record. Put in another way, I should reach my decision ignoring the quotation from the second version of the reasons that appears above.

[12] I am in agreement that I have no alternative but to rely on the first version of the reasons. Subsection 69.1(11) is in mandatory terms regarding the provision of written reasons with the decision where the decision is against the person making a refugee claim. It is in the following terms:

(11) The Refugee Division may give written reasons for its decision on a claim, except that

(a) if the decision is against the person making the claim, the Division shall, with the written notice of the decision referred to in subsection (9), give written reasons with the decision; and

(b) if the Minister or the person making the claim requests written reasons within ten days after the day on which the Minister or the person is notified of the decision, the Division shall forthwith give written reasons. [emphasis added]

(11) La section du statut n'est tenue de motiver par écrit sa décision que dans les cas suivants_:

a) la décision est défavorable à l'intéressé, auquel cas la transmission des motifs se fait avec sa notification;

b) le ministre ou l'intéressé le demande dans les dix jours suivant la notification, auquel cas la transmission des motifs se fait sans délai.

[Je souligne]

[13] If the first version of the reasons, that is to say the version provided to the applicant with the notice of decision, does not constitute the reasons for decision, then the CRDD failed to comply with the statutory obligation provided in subsection 69.1(11). Notwithstanding the position taken by the counsel for the Immigration and Refugee Board in correspondence to the Court, I am not prepared to assume that to be the case.³

[14] By reference then to the first version of the CRDD reasons, counsel for the applicant urged that the CRDD erred in ignoring in its reasons the psychological report that was before it and in particular, the following paragraph from that report:

If Mr. Velupillai is deported to Sri Lanka, there is every indication that he would become retraumatized as he has come to associate his country of origin with his long standing history of suffering. I doubt that he will survive particularly given his age. I believe that he will not be able to cope with his despair and retraumatization and he will just "give up". Mr. Velupillai is convinced that he will be killed if he is deported and the fact that his wife and one son have lost their lives due to the political strife in his country, further reinforce his fear of returning.

[15] In both versions of its reasons, the CRDD notes: "Short detentions for the purpose of preventing disruption or dealing with terrorism do not constitute persecution." While this statement may be generally true, the CRDD fails to take into account the special circumstances of the applicant herein, in particular his age and, given that age, the impact of the applicant's prior experiences, as forecasted in the foregoing quotation from the psychological report. I am satisfied that, in so doing, the CRDD, in the first version of the reasons failed to take into account the special circumstances of the applicant and evidence before it that is directly relevant to those circumstances. In so doing, the CRDD erred in a reviewable manner⁴.

[16] For the foregoing reasons, this application for judicial review will be allowed.

Postscript

[17] Despite the fact that both counsel before me were in agreement that I should rely on the first version of the reasons for decision, that is to say those given to the applicant with the notice of the decision against him and included in the applicant's application record, counsel for the respondent drew to my attention the decision of the Federal Court of Appeal in *Singh v. Canada (Minister of Citizenship and Immigration)*⁵ where the Court determined that reasons for decision are reasons that are signed by the member or members of the CRDD rendering the decision. Here, on the material before the Court, only the later reasons, that is to say, those included in the Tribunal Record and including reference to the psychological report, appear to have been signed by the members of the panel. If I were to take the position that the later reasons were in fact the reasons for decision of the panel, and in light of the position of counsel I have not done so, the result would nonetheless be the same because the later reasons were not given to the applicant with the notice of decision as required by subsection 69.1(11) of the *Act*.

Conclusion

[18] This application for judicial review will be allowed, the decision of the CRDD that is under review will be set aside and the applicant's latest application for Convention refugee status in Canada will be referred back to the Immigration and Refugee Board for re-hearing and re-determination by a differently constituted panel.

[19] Neither counsel recommended certification of a question. No question will be certified.

J.F.C.C.

OTTAWA, ONTARIO

March 09, 2000

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO: IMM-2043-99
STYLE OF CAUSE: SELVARATNAM VELLUPPILLAI

- and -

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

DATES OF HEARING: MONDAY, FEBRUARY 28, 2000
PLACE OF HEARING: TORONTO, ONTARIO
REASONS FOR ORDER BY: GIBSON J.
DATED: March 9, 2000

APPEARANCES: Mr. Lorne Waldman
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FEDERAL COURT OF CANADA

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REASONS FOR ORDER

¹ R.S.C. 1985, c. I-2.

² The version of the reasons appearing in the Tribunal Record that is before the Court clearly reflects an omission where noted in the second paragraph. In a copy of what is apparently the same version of the reasons that was provided to the Court under cover of a letter from counsel to the Immigration and Refugee Board dated February 14, 2000, the following words appear to fill in the omission: "was deliberate. While the panel was not persuaded that the claimant is a reliable witness".

³ As to the mandatory nature of subsection 69.1(11) of the *Act*, see *Isiaku v. Canada (Minister of Citizenship and Immigration)* (1998), 46 Imm. L.R.(2d) 79(F.C.T.D); affirmed, 1999 Carswell Nat 1968 (F.C.A).

⁴ See for example *Sivayoganathan v. Canada (Minister of Citizenship and Immigration)* (1994), 86 F.T.R. 152 and cases cited therein.

⁵ (1998), 10 Admin. L.R. (3d) 167.