Date: 20020426

Docket: IMM-2489-01

Neutral citation: 2002 FCT 470

BETWEEN:

GREGORY THOMAS WICKRAMASINGHE

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

MARTINEAU J.

[1] The applicant, a Sinhalese citizen of Sri Lanka and married to a Tamil woman since 1994, seeks judicial review of a decision of the Convention Refugee Determination Division, Immigration and Refugee Board (the "Board") wherein he was found not to be a Convention refugee.

[2] Between 1994 and 2000, while they were living in Sri Lanka, the applicant and his wife experienced several incidents of harassment from state authorities as a result of the Tamil ethnicity of the applicant's wife and suspicions that the couple were supporting Tamil Tiger terrorist group members. The applicant felt at that time that the incidents were not serious enough to leave the country.

[3] On June 9, 2000, the applicant was arrested at his home by the police. His house was searched, and letters and photographs from his wife's family in Jaffna were removed. His wife and her niece, who was visiting from the north, were also arrested. Three days earlier, the applicant and his wife were in Moratuwa visiting friends where there had been a bomb blast and a government minister killed. The applicant's wife and niece were released three days after the June 9, 2000 arrest, but the applicant was taken to an unknown location near Ja-Ela, where he was detained and allegedly tortured while being accused of harbouring the Liberation Tigers of Tamil Eelam (LTTE) in his house. He denied these allegations. The applicant testified that he was stripped and had chili powder put on him. He was also forced to smell petrol. He was held for six days and, after a bribe was paid, he was released. As a result of this incident, the applicant decided to flee the country.

[4] The Board accepted the applicant's description of events occurring during his six days of detention but found that it did not meet the concept of "persecution":

The panel is not suggesting that the claimant was not arrested and detained. But the omission had changed the testimony from persecutory, because he had a Tamil wife, and was hiding LTEE members to justified, because he had lied to the security forces when questioned about something as innocent as a visit to friends. The panel finds that what the claimant describes as torture does not meet the concept of persecution as defined in Rajudeen,[4], Valentin[5] and James C. Hathaway[6](*Rajudeen* v. *Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.) at 134; Valentin v. *Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.) at 396, per Marceau J.A.; and James C. Hathaway, The Law of Refugee Status, pages 104 and 105)

... If the security forces for security reasons carry out cordon and search operations and have checkpoints, the Trial Division of the Federal Court has said that short detentions for the purpose of preventing disruptions[7] (*Mahalingam, Paramalingam* v. *S.G.C.* (F.C.T.D., No. A-79-93), Joyal, November 2, 1993) or dealing with terrorism do not constitute persecution.

[5] Key to the Board characterization of the June 9, 2000 arrest and detention as being not "persecutory" but "routine" is the following finding:

...The panel finds that had the claimant not lied about the family's visit with their friends in Moratuwa, the police visit would have been a routine part of the cordon and search operations.

[6] I find this statement gratuitous and totally unsupported by the evidence. There is simply no evidentiary basis for the inference made by the Board that the reason the applicant was arrested and detained was for lying to the authorities. Moreover, there is no evidence to indicate that had he told them of his visit to Moratuwa that he would not have been subject to detention and physical abuse.

[7] The June 9, 2000 arrest by the Wattale police was made at the applicant's home several days after the bomb blast and killing in Moratuwa. It was not the result of the carrying out of cordon and search operations by security forces on the roads or in the perimeter of the blast in the hours following the terrorist attack. Based on information collected in the preceding days, the police were specifically searching for the applicant and his wife. The evidence accepted by the Board reveals that his wife's friends in Moratuwa had been arrested and the police had learned from them that the applicant and his wife had been there a few days earlier. Therefore, it is unquestionable that the June 9, 2000 arrest and detention was provoked by the association of the applicant and his wife with their Tamil friends in Moratuwa.

[8] Furthermore, regardless of the reason for arrest and detention, the nature of the treatment received by the applicant is not justifiable. It is the nature of the treatment and its *nexus* to a ground in the definition of Convention refugee, absent evidence of violence or terrorism used on the part of the applicant, that makes it persecution. In my opinion, lying to the authorities cannot change such treatment to acceptable behaviour. The Federal Court of Appeal decision in *Thirunavukkarasu* v. *Canada (M.E.I.),* [1994] 1 F.C. 589, is an authoritative statement to the effect that beatings, arbitrary arrests and detention of suspects, even in a state of emergency, can never be justified or considered a legitimate part of investigations into criminal or terrorist activities, however dangerous the suspects are thought to be. This view has been followed by this Court in *Kaler* v. *Canada (M.E.I.)*, [1994] F.C.J. No. 134.

[9] The Board concluded in the case at bar that the applicant's marriage to a Tamil wife did not and will not place him at risk if he were to return to Sri Lanka. In the course of the hearing the applicant's counsel pleaded that the applicant's arrest and detention was motivated at least in part by the political opinion imputed to the applicant. In *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689, the Supreme Court of Canada, referring to the UNHCR Handbook, said at para. 80 that "it is not the duty of a claimant to identify the reasons for the persecution. It is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground." While political opinion was not raised in *Ward, supra*, as a ground for fear of persecution either before the Board or the Federal Court of Appeal, the Court decided to deal with the issue and found it appropriate to apply this ground to the facts of the case. Concerning the definition given to "political opinion", the Supreme Court stated in *Ward, supra*, at para. 82, that "... the political opinion at issue need not have been expressed outright" and, at para. 83, that "... the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs."

[10] I am satisfied that the interpretation of the word "persecution" in the context of the "Convention refugee" is a question of law and that "the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved" (*Sagharichi* v. *Canada (M.E.I.)*, [1993] F.C.J. No. 796 (C.A.)). Such a finding is therefore subject to the reasonable *simpliciter* standard of review (*Jayesekara* v. *Canada* (M.C.I.), [2001] F.C.J. No. 1393 (F.C.T.D.)). The same holds true in the establishment of a *nexus* with one of the enumerated grounds mentioned in section 2 of the *Immigration Act*. In the case at bar, the Board failed to address the question of whether or not, in light of the gravity of the "culminating incident" of June 2000, the applicant established a well-founded fear of persecution based on an enumerated ground of persecution including membership in a particular social group or political opinion. I am therefore of the view that the Board applied an incorrect test and is clearly wrong in its determination that the applicant did not have a well-founded fear of persecution.

[11] Consequently, this application for judicial review is granted, the decision of the Convention Refugee Determination Division, Immigration and Refugee Board is set aside and the matter is referred back to a differently constituted panel for re-hearing and re-determination of the refugee claim of the applicant.

[12] Neither counsel submitted a question of general importance for certification.

OTTAWA, Ontario

April 26, 2002

Judge

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

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REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE MARTINEAU

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