

BETWEEN:

**EBENEZER THEVARAJ THEVASAGAYAM,  
MELANI THEVASAGAYAM and  
MICHELLE RUTH PREMALA THEVASAGAYAM  
(By her Litigation Guardian Ebenezer Thevaraj Thevasagayam)**

Applicants

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

Respondent

**REASONS FOR ORDER**

**TREMBLAY-LAMER J.**

The Applicants, a family of Sri Lankan citizens, seek judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board wherein it was determined that the Applicants were not Convention refugees because they lacked a well-founded fear of persecution and had a viable internal flight alternative.

The Applicants' claim is based on a fear of persecution by reason of the principal Applicant's membership in a particular social group (Tamil).

The principal Applicant is a Tamil from Chavakachcheri, northern Sri Lanka. His first run-in with Sri Lankan authorities occurred in 1986 when he was arrested by navy officers during a cordon and search operation in Trincomalee. After his arrest, he was handed over to the Sri Lankan army who detained and tortured him. The trauma suffered at the hands of the army was such that the Applicant developed ulcerative colitis and emotional stress

from which he still suffers today. A psychiatric report filed on record confirms the Applicant's medical condition.

Fearing he could not live a trouble-free existence in northern Sri Lanka, the Applicant left the area and relocated in Kandy. There he met his Sinhalese wife and together, they appear to have lived in Kandy without any serious difficulties for approximately nine years, until 1995. That is the year the Applicant's cousins arrived in town and stayed at the Applicant's house. They came to Kandy in order to escape the LTTE and the government security forces in northern Sri Lanka.

A month after their arrival, the cousins were arrested and detained by the police on suspicion of being LTTE members. Their imprisonment lasted seven months. They were released upon payment of a bribe and were ordered to regularly report to the police. They complied with the directive for two months but soon after left town. As a result of his cousins' arrest and subsequent flight, the Applicant was repeatedly visited by the police at his house and questioned about his cousins' whereabouts.

The Applicant was also targeted by the police after the bombing of the Central Bank in Colombo in January 1996. Since the people responsible for the bombing were reportedly Tamils from the northern region of the country, the police proceeded to arrest many Tamils. The Applicant was arrested on February 12, 1996. He was interrogated and beaten over the course of a four-day period. He claims that he was eventually released because the police thought he was going to die and they wanted to avoid an embarrassing incident. The Applicant's release, however, was conditional. He was to report to the police station every week.

Once he was freed, the Applicant went to the hospital to seek medical treatment for the injuries he had sustained at the hands of the police. Afterwards, he reported three times to the police station. On every one of those occasions, the Applicant was ill-treated and verbally abused by the police. Fearing he would eventually be killed by the police, the Applicant

decided to flee Sri Lanka. With the help of an agent, the Applicant, his wife and young daughter obtained valid passports and left the country.

The Board rejected the Applicants' claim on two grounds. First, it found that the Applicants did not have a well-founded fear of persecution. The Board was not convinced that the police perceived the male Applicant to be an LTTE member or for that matter, a security threat. In support of its finding, the Board noted that the Applicant was released after four days of interrogation and that he was able to obtain a valid legal passport and leave the country without any great difficulty.

In my view, it is clear that the Board failed to properly assess the issue of persecution because it misconstrued and ignored material evidence relating to the principal Applicant's arrest and detention in February 1996. Evidence of past persecution does play a role in the determination of a refugee claim. Even though the Convention refugee definition is forward looking, past acts of persecution may be helpful in evaluating the well-foundedness of a claimant's prospective fear of persecution. As stated by

Teitlebaum J. in *Saka*:

The Federal Court of Appeal has repeatedly emphasized that it is the well-foundedness of a fear of future persecution that is tested; thus, a refugee need not show that he or she has been persecuted in the past in order to establish persecution in the future (*Saliban v. Canada* (1990), 11 Imm. L.R. (2d) 165 (F.C.A.)).

Certainly, evidence of past persecution is a most effective means to show that a fear of future persecution is objectively well-founded (*Alfredo Manuel Oyarzo Marchant v. Canada (M.E.I.)*, [1982] 2 F.C. 779 (C.A.)). As the Federal Court of Appeal has stated the Board must look at the cumulative nature of the persecution (*Retnem v. Canada* (1991), 132 N.R. 53).

Consequently, while evidence of persecution in the past is not determinative of the future, whether there is evidence of past or current persecution may be relevant in assessing the likelihood of future persecution<sup>1</sup>.

In the case at bar, the Board failed to evaluate the arbitrariness of the Applicant's arrest and detention and the ill-treatment suffered by the Applicant in police custody. Further, it failed to consider the psychiatric

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<sup>1</sup> *Saka v. Canada (Minister of Citizenship and Immigration)* (July 23, 1996), A-1638-92 (F.C.T.D.).

evidence which indicates that the Applicant suffered from post-traumatic stress disorder and ulcerative colitis as a result of his experience in Sri Lanka. Finally, it ignored evidence of continued police surveillance of the Applicant following his release. These incidents were relevant in assessing whether the Applicant suffered past persecution and if his fear of future persecution is well-founded.

Second, the Board also concluded that the Applicants had a viable internal flight alternative in Colombo. In reaching this conclusion, the Board considered that there was no evidence adduced at the hearing which proved that the principal Applicant had suffered "undue harassment" when travelling to Colombo on business. The evidence only indicated that he had been stopped at army checkpoints in order for the authorities to ascertain his identity.

In my opinion, the Board erred in focusing on events prior to the bombing in Colombo and the Applicant's arrest. The fact that the Applicant could travel on business to Colombo prior to the bombing without any great difficulty is not indicative of the risk he now faces after his arrest. The evidence of past detention and torture in relation to a bombing that took place in Colombo casts a doubt on the reasonableness of an IFA in Colombo for the Applicants. As Jerome, A.C.J., remarked in *Ramanan et al. v. Minister of Employment and Immigration*<sup>2</sup>:

Had the Board not so misconstrued the evidence before it, it would likely have reached a different conclusion with respect to the reasonableness of an IFA in Colombo.

For the foregoing reasons, the application for judicial review is allowed. The matter is returned to the Board for rehearing by a newly constituted panel in a manner consistent with these reasons.

Neither counsel recommended certification of a question in this matter. Therefore, no question will be certified.

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<sup>2</sup> (1995), 83 F.T.R. 121 at 125 (T.D.).

OTTAWA, ONTARIO  
This 23<sup>rd</sup> day of October 1997

JUDGE