

Date: 20070926

Docket: IMM-5013-06

Citation: 2007 FC 967

Toronto, Ontario, September 26, 2007

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

RAGINI RAJESWARAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ragini Rajeswaran is a 45 year old Tamil woman, originally from Sri Lanka, who came to Canada after having allegedly spent some seven years in India. Upon her arrival in this country, she claimed refugee protection.

[2] The Refugee Protection Division of the Immigration and Refugee Board rejected Ms. Rajeswaran's claim. The Board found that there were serious credibility concerns relating to her sojourn in India, and questions as to her whereabouts during the years immediately prior to her

arrival in Canada. These concerns led the Board to conclude that she did not have a subjective fear of persecution in Sri Lanka, with the result that her claim for protection was dismissed.

[3] For the reasons that follow, I am satisfied that some of the Board's negative credibility findings were patently unreasonable. Moreover, the Board erred in failing to properly assess the risk faced by Ms. Rajeswaran in Sri Lanka, in light of her past experiences in that country. As a consequence, the application for judicial review will be allowed, and the Board's decision set aside.

Background

[4] Ms. Rajeswaran testified that while she was living in Sri Lanka, her brother was shot and killed by the Indian Peace Keeping Forces. She says that she herself was forced to work for the Liberation Tigers of Tamil Eelam, having been threatened with severe punishment should she refuse. Ms. Rajeswaran also claims that the LTTE extorted money from her and her family.

[5] Moreover, Ms. Rajeswaran stated that she was detained by the Sri Lanka Armed Forces on two separate occasions, during which time she was physically assaulted. After her release from custody, she says that she was approached by representatives of the LTTE, who wanted to know if she had given any information to the Sri Lanka authorities. The LTTE also exerted pressure on Ms. Rajeswaran to join them.

[6] Fearing for her life, Ms. Rajeswaran says that she left Sri Lanka in 1998 for India, where she remained until coming to Canada to seek refugee protection in 2005. She was unable to seek

refugee protection in India, as that country is not a signatory to the Refugee Convention. While Ms. Rajeswaran was in India, she married a fellow Sri Lankan citizen. Despite their lack of status in that country, the couple was able to live and work in India by paying bribes to the appropriate officials.

[7] Ms. Rajeswaran testified that she fears returning to Sri Lanka. Having already been arrested on two occasions by the Sri Lanka authorities, she fears that they may arrest her again. She also claims to fear that the LTTE may continue to try to recruit her. Finally, she fears getting caught in the cross-fire, in light of the deteriorating situation in Sri Lanka.

[8] While the Board evidently had concerns with respect to the credibility of Ms. Rajeswaran's testimony insofar as it related to the period between 1998 and 2005, it did not make a clear finding that her testimony regarding events in Sri Lanka prior to 1998 was not credible. As such, the Board appears to have accepted that what Ms. Rajeswaran says happened to her in that country actually took place.

Analysis

[9] I am of the view that several of the Board's negative credibility findings with respect to Ms. Rajeswaran's alleged lack of subjective fear are problematic. For example, Ms. Rajeswaran testified that she obtained a passport in 1990, with a view to going to work in another country to help support her ailing mother and younger siblings. According to the Board, Ms. Rajeswaran then stated that she decided not to go, because her mother was ill and her siblings were young. The Board found this testimony to be 'contradictory', and held that it negatively affected her credibility.

[10] This, in my view, is a patently unreasonable finding. A review of the transcript discloses that what Ms. Rajeswaran actually said was that while she had initially intended to go to work overseas to support her ailing mother and younger siblings, when her mother's health took a turn for the worse, she decided not to go. There is nothing inherently inconsistent about this evidence.

[11] Ms. Rajeswaran also testified that when the situation in India deteriorated for herself and her husband, they became fearful that they would be sent back to Sri Lanka where conditions were worsening. As a result, she decided to come to Canada to seek refugee protection. She stated that her husband is still in India, but that he is trying to make arrangements to leave that country to come to Canada.

[12] With respect to Ms. Rajeswaran's evidence regarding her husband's situation, the Board noted the fact that he was still in India, stating "Why? It appears to be a financial reason but the panel also notes by the claimant's own evidence that he is working as a vegetable salesman."

[13] With respect, the fact that Ms. Rajeswaran's husband has been able to support himself in India by selling vegetables does not mean that he has the financial resources readily available to him to pay for an agent to help him get to Canada. The Board's finding in this regard is patently unreasonable.

[14] Finally, the Board noted that a number of Sri Lanka nationals had returned to Sri Lanka during 2002 and 2003, suggesting that this called into question the sincerity of Ms. Rajeswaran's

subjective fear of persecution. There was, however, no evidence before the Board as to whether the individuals in question were similarly situated to Ms. Rajeswaran.

[15] That is, there is no way of knowing whether any of the individuals who had returned to Sri Lanka had experienced persecution in the past at the hands of the LTTE and Sri Lankan authorities. In the absence of such evidence, the fact that others had returned to Sri Lanka was irrelevant to Ms. Rajeswaran's claim: see *Sabaratnam v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 901.

[16] While the findings discussed above were not the only reasons given by the Board for doubting that Ms. Rajeswaran had a subjective fear of persecution in Sri Lanka, they were clearly viewed by the Board as having a significant negative impact on her story. As such, I am satisfied that the Board's finding that Ms. Rajeswaran did not have a subjective fear of persecution cannot stand.

[17] Moreover, having seemingly accepted that Ms. Rajeswaran had faced past persecution at the hands of both the LTTE and the Sri Lankan authorities, it was incumbent on the Board to assess whether her stated fear of future persecution at the hands of both agents of persecution was well-founded. This the Board utterly failed to do.

Conclusion

[18] For these reasons, the application for judicial review is allowed.

Certification

[19] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different panel for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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AND JUDGMENT:** Mactavish J.

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