

Date: 20071119

Docket: IMM-4883-06

Citation: 2007 FC 1208

BETWEEN:

SENTHURAN NAGARATNAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing of an application for judicial review of a decision of a Designated Immigration Officer (the “Officer”) at the Canadian High Commission in London, England wherein the Officer determined the Applicant not to be entitled to a permanent resident visa in Canada as a member of the Convention refugees abroad class or as a member of the Humanitarian-protected persons abroad designated class. The decision under review is dated the 18th of August, 2006.

BACKGROUND

[2] The Applicant is a thirty-two (32) year old Tamil male citizen of Sri Lanka from the north of that country. He fled Sri Lanka to the United Kingdom in 2001. He attests that, in October,

1995, he was displaced from his home in the north of Sri Lanka by fighting and moved to Vanni, in an area controlled by the Tamil Tigers (the “Tigers”). The Tigers attempted to recruit him. To avoid the recruitment attempts, the Applicant fled to a Sri Lankan army controlled area. He was arrested by the army, beaten and accused of being a spy for the Tigers.

[3] The Applicant returned to the Tiger controlled area that he had left where he was forced to work for the Tigers from December, 1999 to June, 2000 digging bunkers and putting up notices. Once again, the Tigers attempted to recruit him. Once again, he fled.

[4] The Applicant was arrested at an army checkpoint and was detained for six months. During the time he was detained, he was beaten, burned with cigarettes, hung upside down and beaten and forced to dig bunkers. He was able to escape from his army captors while being transported with two others to dig bunkers. In the course of the transport, there was an explosion and, in the ensuing confusion, he made good his escape.

[5] The Applicant fled to Columbo, where he remained in hiding until he was able to depart for the United Kingdom.

[6] The Applicant made an unsuccessful claim for asylum in the United Kingdom.

[7] The Applicant was sponsored to come to Canada by family members in Canada as a member of the Convention refugees abroad class or as a member of the Humanitarian-protected persons abroad designated class. He was interviewed by the Officer. The decision under review followed.

THE LEGISLATIVE SCHEME

[8] The definition of those who are Convention refugees is set out in section 96 of the *Immigration and Refugee Protection Act*¹. That section reads as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[9] Section 145 of the *Immigration and Refugee Protection Regulations*² defines those who are members of the Convention refugees abroad class. It reads as follows:

145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

145. Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

¹ S.C. 2001 c.27.

² S.O.R./2002-227.

[10] Section 147 of the *Immigration and Refugee Protection Regulations* defines those who are members of the country of asylum class which is a humanitarian-protected persons abroad class. It reads as follows:

<p>147. A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because</p> <p>(a) they are outside all of their countries of nationality and habitual residence; and</p> <p>(b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries</p>	<p>147. Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :</p> <p>a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;</p> <p>b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.</p>
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[11] The opening words of subsection 139 (1) of the *Immigration and Refugee Protection Regulations*, and paragraph (e) of that subsection, read as follows:

<p>139. (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that</p> <p>...</p> <p>(e) the foreign national is a member of one of the classes prescribed by this Division;</p> <p>...</p>	<p>139. (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis</p> <p>...</p> <p>e) il fait partie d'une catégorie établie dans la présente section;</p> <p>...</p>
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The Convention refugees abroad class and the country of asylum class are classes prescribed by the same Division of the *Regulations* of which subsection 139(1) is a part. By virtue of subsection 146(1) of the *Regulations*, the country of asylum class is a humanitarian-protected persons abroad designated class.

THE DECISION UNDER REVIEW

[12] The substance of the decision under review is quite brief. It consists of the following two paragraphs:

You have said that you fear to return to Sri Lanka because you will be persecuted and prosecuted both by the Sri Lankan Army and the LTTE as well as forces and individuals you described as behind or working with the government. You said you were arrested by the army and detained for six months, but not that you were ever formally charged with any offence. Although you said you were ill-treated, I note that you did not report this to the authorities, nor did you seek assistance from organizations such as the Anti-Harassment Committee or the National Human Rights Commission. You said that you had also worked for the LTTE for approximately one year and, although you departed the area of their control without their permission, it appears that you were able to do so with relative ease. Likewise, the fact that you were able to escape from the army during what apparently was perceived as an attack by the LTTE appears to indicate that the army did not regard you as a serious threat; if the army had genuinely believed you to be a member of the LTTE, it does not appear credible that they would not have kept you under more restricted custody or that you could have escaped from them during what they perceived to be an attack by the LTTE. Given the fact that you were never charged with any offence, this would appear to indicate that the Sri Lankan authorities did not feel that whatever involvement you had with the LTTE was serious enough for them to have any continued interest in you. Likewise it appears that the LTTE did not regard your level of involvement with them as warranting forcible detention or other restrictions on your movement. I am therefore not satisfied that you have reason to fear the authorities or the Army or the LTTE would have any interest in you.

The cease-fire between the LTTE and the government remains in place and, although there have been instances where individuals were targeted by the LTTE (for instance the assassination of the Foreign Minister Kadirgamar in August 2005), these were politically motivated and the civilian population is not reported as being targeted. Your situation, were you to return to Sri Lanka, would appear to be no more hazardous than that of any other person in that country. Organizations such as the Sri Lanka Monitoring Mission and Amnesty International, while concerned about the peace situation in Sri Lanka, have acknowledged that the Government of Sri Lanka has taken steps to restore the rule of law. I am therefore satisfied that there is no more than a mere possibility that you are at risk from the LTTE and, if you were, you could reasonable expect protection from the authorities.

References in these reasons to the “Tamil Tigers”, the “Tigers” and the “LTTE” are all references to the Liberation Tigers of Tamil Elam.

THE ISSUES

[13] Counsel for the Applicant urged that the Officer erred in three respects as follows: first, by failing to give consideration to the “compelling grounds” exception set out in subsection 108 (4) of the *Immigration and Refugee Protection Act*; secondly, by drawing patently unreasonable inferences from the Applicant’s story of his treatment in the north of Sri Lanka at the hands of the Tigers and the Sri Lankan Army; and thirdly, by ignoring evidence before him regarding the risk faced by young Tamil males from the north of Sri Lanka, such as the Applicant, who have endured experiences such as those of the Applicant.

ANALYSIS

a) Compelling Grounds

[14] Subsection 108 (1) of the *Immigration and Refugee Protection Act*, and paragraph (e) of that subsection, provide that a claim for Convention refugee protection shall be rejected, and a claimant found not to be a Convention refugee, if the reasons for which the person sought protection have ceased to exist. Subsection 108(4) provides an exception to the foregoing. That subsection reads as follows:

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L’alinéa (1)e) ne s’applique pas si le demandeur prouve qu’il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu’il a quitté ou hors duquel il est demeuré.

[15] The Officer makes no finding whatsoever with regard to the credibility of the Applicant's tale of his treatment at the hands of the Tigers and, more importantly, at the hands of the Sri Lankan Army. Further, the Officer makes no determination as to whether that treatment amounted to persecution or torture or similar treatment or punishment. On the facts of this matter, particularly the Applicant's evidence of his treatment, I regard this omission as an implicit acceptance or finding that the Applicant was mistreated by the Tigers and was persecuted, tortured or suffered similar treatment or punishment at the hands of the Sri Lankan army.

[16] In *Yamba v. Canada (Minister of Citizenship and Immigration)*³, Justice Robertson, for the Court, wrote:

In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but there has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

The references in the above quotation to the "Refugee Division" are to the predecessor to the Refugee Protection Division established under the *Immigration and Refugee Protection Act*. I am satisfied that they apply equally to an officer such as the Officer who took the decision here under review. Further, the references to paragraph 2(2)(e) and subsection 2(3) are to provisions of the predecessor to the *Immigration and Refugee Protection Act* which are for all intents and purposes identical to paragraph 108(1)(e) and subsection 108(4) of the *Immigration and Refugee Protection Act*.

³ [2000] F.C.J. No. 457 (F.C.A.).

[17] Against the authority of *Yamba* as quoted, I am satisfied that the Officer erred in law and in a reviewable manner, against a standard of review of correctness, by failing to consider and to comment on whether the exception in subsection 108(4) of the *Immigration and Refugee Protection Act* applied in respect of the Applicant by reason of previous persecution, torture or like treatment or punishment. I am further satisfied that, by reason of my finding in paragraph [15] of these reasons, of an implicit acceptance or finding, the qualifications of *Yamba* in *Kudar v. Canada (Minister of Citizenship and Immigration)*⁴, at paragraph 10, and *Naivelt v. Canada (Minister of Citizenship and Immigration)*⁵, at paragraph 37, do not here apply.

b) Patently unreasonable inferences

[18] In the first paragraph quoted above from the decision of the Officer that is under review, the Officer draws the following inferences:

- first, that the Applicant was able to leave the area under the control of the Tigers where he had been forced to work "... with relative ease";
- secondly, that because the Applicant was able to escape from the Army during what apparently was perceived as an attack by the Tigers indicates that the Army "...did not regard [the Applicant] as a serious threat";
- thirdly, that, given the fact that the Applicant was never charged with any offence, Sri Lankan authorities did not feel that whatever involvement the Applicant had with

⁴ [2004] F.C.J. No. 778, 2004 FC 648, April 30, 2004.

⁵ [2004] F.C.J. No. 1543, 2004 FC 1261, September 17, 2004.

the Tigers "... was serious enough for them to have any continued interest in [the Applicant];

- and finally, that the Sri Lankan army did not regard the Applicant's level of involvement with the Tigers as "... warranting forcible detention or other restrictions on [the Applicant's] movement."

Based on these inferences, the Officer determined that he was "...not satisfied that [the Applicant] has reason to fear the authorities or the Army or the [Tigers] would have any interest in [the Applicant]."

[19] The Applicant is a young Tamil male from the north of Sri Lanka. His evidence is that the Tigers attempted to recruit him; that the Tigers forced him to work for them; that the Army regarded him as spy for the Tigers, forced him to work for them and subjected him to what I am satisfied must be regarded as persecution or torture.

[20] In *Divsalar v. Canada (Minister of Citizenship and Immigration)*⁶, my colleague Justice Blanchard noted at paragraphs 22-24 of his reasons that a tribunal such as the Refugee Protection Division, and I am satisfied that the same might be said of the Officer, has complete jurisdiction to determine the plausibility of testimony, so long as the inferences drawn are not so unreasonable as to warrant intervention, that a Court should intervene and set aside a plausibility finding only where the reasons that are stated are not supported by the evidence, and that a tribunal, and I am satisfied on the facts of this matter that the Officer falls within the concept of Tribunal, must proceed on the

⁶ [2002] F.C.J. No. 875.

basis of a lack of plausibility with caution or, put another way, plausibility findings should only be made in the clearest of cases.

[21] Against the profile of the Applicant at the time when he was being abused by both the Tigers and the Military in Sri Lanka, and that profile continues to this day, I am satisfied that the Officer's conclusion that the Army and the Tigers would no longer have any interest in the Applicant if he were returned to Sri Lanka is "...so unreasonable as to warrant intervention..." of this Court or, put another way, is simply not supported by the evidence that was before the Officer.

c) Country conditions

[22] In the second paragraph from the Officer's decision that is quoted above, the Officer concludes:

...Your situation, were you to return to Sri Lanka, would appear to be no more hazardous than that of any other person in that country.

and

...I am therefore satisfied that there is no more than a mere possibility that you are at risk from the [Tigers] and, if you were, you could reasonably expect protection from the authorities.

[23] In so concluding, the Officer makes no reference to any of the extensive country conditions documentation that was placed before him on behalf of the Applicant. In fact, he does not even acknowledge that documentation. While the conclusions reached by the Officer regarding country conditions in Sri Lanka might have been open to him on a more fulsome analysis, I am satisfied that they cannot stand, even against a standard of review of patent unreasonableness, on the basis of the single paragraph at issue. That paragraph provides no assurance whatsoever that the Officer had regard to the totality of the material before him. In fact, it raises serious doubt as to whether the

Officer had any regard whatsoever for the documentary evidence placed before him on behalf of the Applicant.

CONCLUSION

[24] For the foregoing reasons, this application for judicial review will be allowed, the decision under review will be set aside, and the Applicant's application for status in Canada will be referred back to the Respondent for redetermination by a different officer.

CERTIFICATION OF A QUESTION

[25] Neither counsel recommended certification of a question. The Court itself is satisfied that no serious question of general importance arises on the facts of this matter that would be determinative of an appeal from the decision herein.

Ottawa, Ontario
November 19, 2007

“Frederick E. Gibson”

JUDGE

FEDERAL COURT
SOLICITORS OF RECORD

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