

Date: 20071116

Docket: IMM-6680-06

Citation: 2007 FC 1197

Ottawa, Ontario, November 16, 2007

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

SATKUNANANTHAN NALLAIYA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2006, Mr. Satkunanathan Nallaiya was found to be a refugee from Sri Lanka by a panel of the Immigration and Refugee Board. The Minister of Citizenship and Immigration argues that the Board made a number of errors when it found that Mr. Nallaiya was not legally excluded from making that claim. The Minister submitted to the Board that Mr. Nallaiya had been active in the Liberation Tigers of Tamil Eelam (LTTE) and, therefore, should be excluded from obtaining refugee protection as a person who had been complicit in the commission of crimes against peace, war crimes, crimes against humanity, or other acts contrary to the purposes and principles of the United Nations.

[2] The Minister asks me to order a new hearing before a different panel of the Board. I agree that the Board erred and that a new hearing is justified. Therefore, I will grant this application for judicial review.

I. Issues

1. Did the Board fail to apply the proper test when it found that Mr. Nallaiya was not excluded from obtaining refugee protection?
2. Was the Board's conclusion that Mr. Nallaiya's evidence was credible out of keeping with the evidence before it?

II. Analysis

[3] I can overturn the Board's decision if it was based on an error of law or was out of keeping with the evidence before it.

1. *Did the Board fail to apply the proper test when it found that Mr. Nallaiya was not excluded from obtaining refugee protection?*

(a) Factual Background

[4] The Board considered numerous versions of Mr. Nallaiya's account of events in Sri Lanka. Mr. Nallaiya had been interviewed a number of times, provided a written narrative, filed amendments to his narrative, and testified before the Board. This evidence contained numerous inconsistencies and contradictions. In essence, Mr. Nallaiya conceded that he was associated with the LTTE from 1988 to 1990. At that point, he fled to India and returned in 2002 after the cease-fire took effect in Sri Lanka. He had further contact with the LTTE on his return.

[5] At a minimum, Mr. Nallaiya's activities on behalf of the LTTE included putting up posters, delivering food, raising flags to honour LTTE heroes and, when he was working in a telephone shop, providing information to the LTTE about persons requesting new telephones (in doing so, he would identify new residents whose assistance the LTTE could then solicit or demand). He claimed the Sri Lankan Army arrested him, questioned him about his dealings with the LTTE and beat him. In turn, he says, the LTTE wanted to know why he was talking to the army. He also claimed that his assistance to the LTTE was forced. He fled to Canada to avoid having to provide any further service to the LTTE or to expose his children to further risks.

(b) The Board's Decision

[6] The Board noted that the LTTE was "arguably the most lethal and organized terrorist group in the world". However, it found that Mr. Nallaiya was not directly involved in any violence. Nor did his actions result in any brutal violence being inflicted on any individuals by the LTTE. Further,

he did not volunteer for the LTTE; his actions were coerced. Therefore, the Board found that Mr. Naillaiya should not be excluded from refugee protection.

[7] The Board went on to find that there was a reasonable chance that Mr. Naillaiya would be persecuted on his return to Sri Lanka and, therefore, that he was entitled to refugee protection in Canada. The Minister does not challenge this aspect of the Board's decision.

(c) The Test for Exclusion

[8] According to section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 (see Annex), a person who is referred to in paragraphs 1F(a) or (c) of the *United Nations Convention Relating to the Status of Refugees* is not a refugee. Those provisions state:

1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) He has committed a crime against peace, a war crime, or a crime against humanity
...

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

[9] Based on these provisions, it fell to the Board to determine whether there were grounds for considering that Mr. Nallaiya had committed serious crimes or acted contrary to the purposes and principles of the United Nations.

[10] The Board correctly cited the leading authority on the interpretation of these provisions in situations where, as here, the refugee claimant is alleged to have furthered the objects of an organization involved in acts contrary to the Refugee Convention: *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, 89 D.L.R. (4th) 173, 135 N.R. 390 (F.C.A.).

[11] According to *Ramirez*, a person should be excluded from refugee protection only if there is evidence of the person's "personal and knowing participation" in the group's unlawful objects (at para. 15). Complicity in the group's conduct involves having "a shared common purpose and the knowledge that all of the parties in question may have of it" (at para. 18). However, where the group has a "limited, brutal purpose", one can infer that the person knowingly participated in the group's activities from the mere fact that the person was a member of it (at para. 16). A person who claims to have been coerced into assisting the group must show that he or she did so to avoid serious and imminent harm, and that the harm avoided was equal to or greater than the harm caused to others (at para. 40).

(d) Applying the test to Mr. Nallaiya

[12] The Minister argues that the Board erred in failing to determine whether the LTTE was an organization with a "limited, brutal purpose" and whether Mr. Nallaiya was a member of it. The Minister also submits that the Board failed to apply the proper test for coercion or duress.

[13] True, the Board never stated whether it found the LTTE to be an organization with a “limited, brutal purpose”. However, it seems to have arrived at an equivalent finding when it said that the LTTE was “arguably the most lethal and organized terrorist group in the world”. Having made that finding, it was open to the Board to then go on to consider whether Mr. Nallaiya was a member of the LTTE. If he was, then he would be excluded from refugee protection.

[14] At one point in its reasons, dealing with the question whether Mr. Nallaiya had a well-founded fear of persecution if returned to Sri Lanka, the Board stated that there was insufficient evidence to establish that he was a member of the LTTE. However, this finding was not contained in the part of the decision dealing with the issue of exclusion, nor was there any reference to the evidence on this point.

[15] Still, in my view, the Board was not obliged to determine whether Mr. Nallaiya was a member of an organization with a “limited, brutal purpose”. According to *Ramirez*, the main issue in these cases is whether the person was complicit in the activities of a group involved in serious crimes or conduct contrary to the purposes and principles of the United Nations. Finding that a person is a member of an organization singularly devoted to brutal conduct is one route to a conclusion on the issue of exclusion, but it is not the only one.

[16] In my view, however, the Board did not make a clear finding on the issue of complicity either. It concluded that Mr. Nallaiya had not personally committed any violent acts or engaged in any conduct that enabled the LTTE to carry out violent acts against others. But this conclusion did

not answer the question whether Mr. Nallaiya was a “personal and knowing participant” in a group whose conduct was contrary to the Convention.

[17] In addition, the Board went on to conclude that Mr. Nallaiya’s actions on behalf of the LTTE were coerced. Again, however, the Board did not analyze this issue according to the criteria set out in *Ramirez*. It simply stated that Mr. Nallaiya was “coerced into being involved with the LTTE and at no time volunteered to be part of their organization”.

[18] In light of these ambiguities in the Board’s decision, I conclude that it failed to apply the criteria for exclusion as set out in *Ramirez*. This failure amounts to an error of law and I must, therefore, allow this application for judicial review on that basis.

2. *Was the Board’s conclusion that Mr. Nallaiya’s evidence was credible out of keeping with the evidence before it?*

[19] In light of my conclusion on the first issue, it is unnecessary to address this issue fully. However, I wish to note that it might have been possible for me to order a reconsideration of the issue of exclusion on the basis of the existing record if the Board’s credibility findings had been clearer. After setting out the various versions of the facts that Mr. Nallaiya had provided, the Board simply concluded that it had “mainly accepted the claimant’s explanations for his inconsistencies”. Of course, it was open to the Board to make that finding. However, the Board did not state which aspects of Mr. Nallaiya’s evidence were accepted and which were not. That being the case, I believe

it is necessary for a new hearing to be convened before a different member of the Board so that specific findings on the issues of complicity and, if necessary, duress can be made.

III. Disposition

[20] This application for judicial review is allowed and a new hearing before a different panel of the Board shall be held on the issue of exclusion under s. 98 of IRPA. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Act, S.C.
2001, c. 27

Loi sur l'immigration et la protection des
réfugiés, L.C. 2001, ch. 27

Exclusion — Refugee Convention

Exclusion par application de la Convention sur
les réfugiés

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-6680-06

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REASONS FOR JUDGMENT: O'REILLY J.

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