Date: 20050208

Docket: IMM-1563-04

Citation: 2005 FC 199

OTTAWA, ONTARIO, FEBRUARY 8, 2005

Present: THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN:

SAMBASIVAM SIVAMOORTHY

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Division of the Immigration and Refugee Board (the Board) dated February 3, 2004 wherein the applicant was found not to be a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the Act.

[2] The present application must fail. The applicant has not convinced me that the Board=s findings of fact are arbitrary or capricious, that the Board ignored relevant evidence, or that it otherwise erred in law in dismissing the applicants= claims for protection.

[3] The Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence, so long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms" (see *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236 (F.C.A.); *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.); *Zhou v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1087 (F.C.A.) (QL)). Furthermore, the Board is entitled to make reasonable findings based on implausibilities, common sense and rationality (see *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (F.C.A.) (QL)). The Board may reject uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence (see *Akinlolu v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 296

(F.C.T.D.) (QL); *Kanyai v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 850, [2002] F.C.J. No. 1124 (F.C.T.D.) (QL)).

[4] In my view, the Board rightly concluded that the applicant is not a credible and trustworthy witness. As the Board has a well-established expertise in the determination of credibility, and it properly set out in the impugned decision the numerous inconsistencies and implausibilities in the applicant=s evidence, this Court should not interfere with those determinations (see *Akinlolu*, *supra*; *Kanyai*, *supra*; and the grounds for review at subsection 18.1(4)(*d*) of the *Federal Court Act*).

[5] In the case at bar, the Board clearly explained why it did not give credibility to the applicant=s story. On this matter, the Board found that the applicant failed to provide credible or trustworthy testimony or alternate evidence to establish the material aspects of his claim, that is that the thugs, the Liberation Tiger of Tamil Eelam (LTTE) or the security forces would be interested in him if he returns to Sri Lanka. In fact, the applicant did not even provide evidence that he was threatened by the thugs or their family after he returned from Oman in 1994. Moreover, the applicant failed to mention in his narrative that the LTTE attempted to kidnap him when he did not comply with their request. Furthermore, the explanations offered by the applicant, were not convincing. In my opinion a person claiming refugee status would not forget to include in his narrative the fact that the LTTE attempted to kidnap him. In addition, I cannot conceive why a person in his position would not at least try to warn his employer that the LTTE

wanted the floor plans for their building nor alert the security personnel that he was aware of threats to kidnap him. On another note, the applicant did not provide any evidence that he was harassed after he returned from Bangkok in 1996 nor did he provide credible evidence which could support his allegation of fear of security forces in general in Sri Lanka.

[6] Indeed, it is well established that a general lack of credibility can affect all relevant evidence submitted by the applicant and ultimately cause the rejection of a claim. On this matter, in *Sheikh v. Canada*, [1990] 3 F.C. 238 (C.A.) the Federal Court of Appeal held that:

> I would add that in my view, even without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim on which a second-level panel could uphold that claim. In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony.

[7] This brings us to the issue of Aindirect persecution@ which is raised here by the applicant. The applicant submits in this regard that the Board erred in finding that:

> I sympathize with a father who is worried about his son, however, this cannot be used as a basis for a refugee claim.

Reasons, page 4, Application Record, page 10.

[8] That said, the applicant points out that the Board clearly accepted this evidence:

They are interested in recruiting his son, however, as mentioned before there are venues to avoid that problem.

Reasons, page 7, Application Record, page 13.

[9] In his first memorandum, the applicant submits that, as a matter of law, the Board=s finding is incorrect. Persecution visited upon one=s loved ones, can be persecution on the relatives, i.e. the applicant. There is nothing more basic that feeling anxiety and pain because a loved one is at risk. In his supplementary memorandum the applicant now raises this rhetorical question: Aif the applicant is required to return to Sri Lanka can anyone doubt that the LTTE will bring violent pressure to bear on the head of the family to force the son into the LTTE.@

[10] The applicant has not proven that he suffered persecution on that basis nor did he establish that there is a clear nexus between the persecution that is being levelled against his son and that which is allegedly taking place against him. Claims for refugee or protected person status cannot be based on persecution or threats of persecution on relatives. Indirect persecution does not constitute persecution within the definition of Convention refugee and a claim based on it should not be allowed (*Pour-Shariati v.*

Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 810 (F.C.A.) (QL) at para. 3; *Castellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (F.C.T.D.) at paras. 17, 28, 33-36; *Rafizade v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 359 (F.C.T.D.) (QL) at paras. 8-16; *Molaei v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 107 (F.C.T.D.) (QL) at paras. 26-27; *Nithiyakanthan v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 136 (F.C.T.D.) (QL) at paras. 5-8; *Marinova v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 178 at para. 18).

[11] The applicant=s argument that his concern for his son amounts to personal persecution of the father, is neither cogent nor supported by the jurisprudence of this Court. *In Packiam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 649 at paras. 8-10, a case referred to by the applicant, the Court was referring to the direct effect in the applicants (not their children), who were victims of particularly violent beatings, detentions, threats and extortion. On the facts of the case at hand, the applicant has provided no evidence that he has or will face similar treatment

(such as beatings, detentions, threats and extortion) as a result of the LTTE=s interest in recruiting his son, who is still in Sri Lanka. The applicant does not mention that he will face any risk at the hands of the LTTE because his son, in his Personal Information Form, at his hearing, or in his affidavit filed in support of his application for leave and for judicial review. Further, the applicant has not established, either by way of affidavit evidence or by way of documentary evidence, that the applicant will be targeted and face violence at the hands of the LTTE because of their interest in his son.

[12] As for the applicant=s allegation that the 3-day detention amounts to a Acrime against humanity@, I find that it is unfounded. The applicant has not convinced me that the Board was in error when it concluded that the said detention was not committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. In my view, the Board rightly concluded that it was an isolated act since there was no documentary evidence that there was of arbitrary large-scale or massive detention of Tamils at that time. Anyhow, this is not material in the case at bar since the applicant does not plan to

return to the particular town where he was detained, there is no longer a requirement to register with the police in Colombo, road blocks and checkpoints were largely lifted in Colombo and the applicant can clearly still live in Colombo or prevail himself of the protection of the state of Sri Lanka in Colombo.

[13] As for the applicant=s allegation regarding the lack of separate analysis under section 97 of the Act, I find that it is clearly unfounded. I am satisfied that the Board=s reasons address the issue covered by section 97 of the Act. Apart from the evidence that the Board found to be not credible, there was no other evidence before the Board in the country documentation, or elsewhere that could have led the Board to conclude that the applicant was a person in need of protection. Anyhow, as long as the Board=s findings in connection with state protection are correct, the Board cannot be said to have erred in law in its determinations on this point, and thus the Applicant's claim must fail.

[14] On another note, the Federal Court of Appeal stated on January 5, 2005, in *Li v. Canada (Minister of Citizenship and*

Immigration), 2005 FCA 1, [2005] F.C.J. No. 1 (FCA) (QL), that the standard of proof for the purpose of section 97 of the Act is proof on a balance of probabilities. The Federal Court of Appeal also found that the requisite degree of risk under paragraphs 97(1)(*a*) and 97(1)(*b*) of the Act is Amore likely than not@. Consequently, the applicant argument regarding this issue must fail since the Board correctly decided, on a balance on probabilities, that the applicant would not be more likely than not personally facing a risk of cruel and unusual treatment or punishment upon return to Sri Lanka.

[15] In short, the Board found that the applicant has not satisfied his burden of establishing that he has a well-founded fear of persecution upon returning to Sri Lanka. Despite the noble efforts made by his counsel at the hearing, the applicant has not convinced me that the Board made an error of law or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it.

[16] The applicant has proposed the following question for certification:

> If there is a finding of Aindirect persecution@, as defined in the *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (F.C.T.D.) decision, is there a duty for the Refugee Division to consider the underlying evidence under paragraphs 97(1)(*a*) and 97(1)(*b*) of the Act?

[17] A certified question must transcend the interests of the immediate parties, contemplate issues of broad significance and be determinative of the appeal at hand *(Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (F.C.A.) (QL)). I find the text of the question unclear and I doubt that a positive answer would serve a useful purpose and would be determinative of the appeal. The concept of indirect persecution was first thought to be part of Canadian refugee law in *Bhatti v. Canada (Secretary of State)*, [1994] F.C.J. No. 1346 (F.C.T.D.) (QL) (Bhatti). In other words, indirect persecution was thought to be a valid basis for granting refugee claim. However, the Federal Court of Appeal has overruled Bhatti's recognition of the concept of indirect persecution as a principle of our refugee

law (*Pour-Shariati*, *supra*). Furthermore, the Federal Court of Appeal found that the concept of indirect persecution went directly against the decision of that Court in *Rizkallah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 412 (F.C.A.) (QL), where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention grounds. Moreover, the Federal Court of Appeal stated that since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed. In my opinion, the Board does not have a duty to consider the underlying evidence under paragraphs 97(1)(*a*) and 97(1)(*b*) of the Act solely because it found that indirect persecution is affecting the applicant. Indeed, regarding the analysis under section 97 of the Act, the Board already has a duty to consider all relevant evidence and did so in the present case. Therefore, no question shall be certified.

ORDER

THIS COURT ORDERS that the present application for judicial review be dismissed.

ALuc Martineau@

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1563-04
STYLE OF CAUSE:	SAMBASIVAM SIVAMOORTHY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 2, 2005
REASONS FOR ORDER AND ORDER:	**THE HONOURABLE MR. JUSTICE MARTINEAU**
DATED:	FEBRUARY 8, 2005

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