IMM-4606-96

BETWEEN:

BALARANJANI NADESU
VAISHNAVI NADESU
MITHUNAN NADESU

Applicants,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent.

REASONS FOR ORDER

WETSTON J.:

The applicant and her two children are Tamils. The mother was born in Sri Lanka, and her children were born in Kuwait. They fear returning to Sri Lanka, primarily because of a serious misunderstanding that the mother may have had with the Colombo police.

The applicant claims that this misunderstanding came about as a result of her efforts to raise money, on behalf of her uncle, to secure a pass for her aunt and cousin to travel from Jaffna, through LTTE-controlled territory, to be re-united with her uncle in Colombo. Having raised the money, the applicant testified that she was visited by her uncle and his friend, Sivathansan. They took the money, and a note from the applicant to her aunt, and provided it to a distant relative of the applicant, Paramanathan. Paramanathan was apparently involved because he had a Jaffna chequing account, and drafted a cheque for Sivathansan to bring to Jaffna.

Sivathansan was apparently apprehended with the cheque and the applicant's note to her aunt. As a result, the applicant claims to have been arrested and interrogated. She was released upon the payment of a bribe, and was ordered to report daily, until Sivathansan was returned to the police and the investigation was completed. The applicant and her children left the country within a day and a half of her release. Her children were not present at the hearing.

The Board did not accept the credibility of the applicant for the following reasons:

1. The applicant's PIF omitted that the Colombo police showed her an arrest warrant. The panel viewed her testimony about the warrant as an embellishment of her claim.

2.The applicant's PIF omitted that Paramanathan had also been arrested. The Board viewed her testimony about his arrest as an embellishment of her claim.

3.The Board noted that the applicant had stated that her note was unsigned, but later changed her story (saying that it had an address), when it became apparent that she required an explanation for how the police found her.

4.The Board found that the applicant provided contradictory evidence in that she testified about having denied writing the note to the police, but later admitted that she told the police about her involvement in the scheme. The Board observed that she changed her story only when it had been noted that her PIF indicated that she had explained the reason for her action to the police.

5.Given that the police knew of her involvement in the enterprise, and authorship of the note, the Board found "... it implausible that the authorities would require Sivathansan to identify the claimant _personally_".

6.The Board found that the applicant had initially stated that she did not contact her uncle because, in view of his ill health, she did not wish to upset him. However, the Board found that she later stated that she did call him from the airport, told him of her detention, the confiscation of the cheque and the arrest of Paramanathan, but did not have sufficient time to ask him whether the police had contacted him as well. The panel also viewed the applicant's attempt to explain this apparent contradiction as an embellishment of her claim.

At issue is whether the Board erred in law by misconstruing the evidence before it.

As noted above, the Board identified six grounds upon which it made its determination that the applicant's testimony was not credible. Normally, the Court will not interfere with the credibility findings of a Board, which has had the opportunity to

observe the applicant's testimony first-hand: *Rajaratnam* v. *M.E.I.* (1991), 135 N.R. 300 (F.C.A.).

I will address each of the Board's findings in order:

1. The Arrest Warrant

The Board did not question the applicant as to why the mention of an arrest warrant did not appear in her PIF. The Board should have done so if it intended to rely on this omission in its findings as to credibility; to fail to do so is to deny the applicant the opportunity to explain the omission: *Gracielome* v. *M.E.I.* (1989), 9 *Imm. LR.* (2nd) 237 (F.C.A.). The Board may not accept the explanation but it should have, at the very least, inquired into it.

2. Paramanathan's Arrest

The Board construed the applicant's failure to mention Paramanathan's fate on her PIF, and her subsequent mention of his arrest in her testimony, as a material omission, upon which it drew a negative inference regarding her credibility. This information was provided by the applicant after in depth questioning from the Board. It seems to me that since information about Paramanathan was not part of the applicant's personal experiences, it is entirely reasonable that the applicant did not mention it in her PIF.

The Board saw this omission as sufficient to draw an adverse inference about the applicant's credibility. Where the Board has based its findings on inferences drawn from the evidence, the Court may question the reasonableness of those inferences: *Frimpong* v. *M.E.I.* (1989), N.R. 164 (F.C.A.).

3. The Note to Her Aunt

The applicant appears to have been completely forthright in response to the detailed questioning from the Board made during the examination in chief. There is no indication that she was evasive, as the Board noted, but it appears that the Board's frequent interruptions may have confused her. For example, the applicant never stated that her note was unsigned. The Board suggested in one of its questions that the note may have had an address on it, to which the applicant replied that it did.

The Board appears to have been very interested in whether the note was signed, or contained an address, because it wanted to determine how the police came to find the applicant in the first place. The Board inferred that the applicant's explanation for having addressed the note, but having failed to sign it, was not credible. As a result, the Board seems to have concluded that the police could not have otherwise found her.

In *Attakora* v. *M.E.I.* (1989), 99 N.R. 168 (F.C.A.), at 169, Hugessen J. noted that a Board should not be "over-vigilant in its microscopic examination" of the evidence of persons who required the use of an interpreter for their testimony.

4. The Police Interrogation

The applicant initially denied having written the note to the police, but admitted her involvement in the enterprise upon further police questioning. In my opinion, there is no apparent inconsistency in her evidence, and no evidence that she volunteered this information. Since this portion of the applicant's evidence is uncontradicted, consistent, and not inherently suspect or improbable, the Board erred in making adverse findings of credibility in respect of it: *Armson* v. *M.E.I.* (1989), 9 Imm. L.R. (2d) 150 at 157 (F.C.A.).

The applicant required an interpreter and has no specialized legal knowledge. She was thoroughly questioned about whether she had been merely arrested, or had been charged with an offence. In relying on apparent inconsistencies in the applicant's responses to this questioning, the Board's adverse inferences were unreasonably drawn.

5. The Need for Sivathansan to be Brought to the Police Station

The Board also inferred that the applicant's testimony was not credible because it found her suggestion that the police required Sivathansan's presence to identify her personally was implausible. The applicant stated that she was awakened in the middle of the night, brought to a police station and questioned for over two hours. She was only conditionally released upon payment of a bribe.

The applicant testified that the police told her that they required Sivathansan's presence to identify the applicant in person. Even if she was wrong about why the police actually wanted to speak with Sivathansan, it is apparent that she testified as to what she heard, not to the accuracy of how the police were conducting their investigation. Indeed, it is plausible that the police may have wanted to question Sivathansan, in person, about the matter, in order to determine what was actually going on.

The Board erred in drawing an adverse inference about the applicant's credibility, based on this evidence. In absence of a valid reason for the Board to doubt the applicant, her testimony must be presumed to be truthful: *Sathanandan* v. *M.E.I.* (1991), 15 Imm.L.R. (2d) 310 (F.C.A.).

6. The Call to Her Uncle

It is clear that the Board misconstrued the applicant's evidence about her contact with her uncle. She replied to questioning that she "did not go to mention all this to him." The applicant explained that she did not go to explain what had happened because she was in a rush to leave the country and because she did not want to upset him.

The applicant then stated that she did call him from the airport, told him of her plight, but was too pressed for time to inquire about whether he had yet had trouble with the police. The applicant also mentioned that because her uncle was elderly, he would not have been bothered by the police. Regardless of whether the applicant was correct in holding this belief, is it not plausible, given her circumstances and the fact that her uncle did not mention anything to her, that she should have assumed everything was all right?

Where the Board has identified inconsistencies in the applicant's evidence that do not, in fact, exist, its reliance upon them to draw an adverse inference about the applicant's credibility is a reviewable error: *Owusu-Ansah* v. *M.E.I.* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.).

CONCLUSION:

The application for judicial review shall be allowed. The decision of the Board shall be set aside and the matter referred back to a differently constituted panel for rehearing and reconsideration.

No question for certification was proposed.

Howard I. Wetston

Judge

Ottawa, Ontario
October 21, 1997