



IMM-4540-96

BETWEEN:

**KATHIRGAMALINGAM CHEHAR
PRIYANKA CHEHAR
ARUNTHATHY CHEHAR**

Applicants;

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent.

REASONS FOR ORDER

WETSTON J.:

The applicants are a male and female Tamil, ages 33 and 27, respectively, and a 6 year old minor. The Board found that they have a well-founded fear of persecution in northern Sri Lanka, but that an internal flight alternative (IFA) was available in Colombo.

The Board based its decision on its finding that the testimony of both adult applicants was not credible. The Board accepted that when the male applicant arrived in Colombo, he was detained for two days, and physically abused, as part of an identification check. However, the Board did not accept that he was also arrested at his lodge, shortly after the Sri Lankan Central Bank was bombed, detained for twelve days and tortured. The Board's primary concern with this aspect of the applicant's story was that his uncle, a 52 year old Tamil who was living in the same room as the applicant, was not questioned at the time of his nephew's arrest.

The Board also did not accept the applicant's testimony that he phoned his uncle at the same lodge over one month later, and received information that the police were looking for him. The Board did not accept the female applicant's testimony that she had been physically abused by the Colombo police, because it contradicted the story she provided on her personal information form. The Board

also noted that, even if she was the victim of extortion by the Eelam Peoples' Democratic Party and the Colombo police, such conduct did not constitute persecution.

At issue in this judicial review application is whether the Board ignored testimony, or relied on testimony that it failed to fairly explain at the hearing, in making its findings of credibility.

The Male Applicant:

The applicant has alleged, and the respondent has conceded, that the Board made errors in determining certain facts in this case. For example, the Board incorrectly concluded that the male applicant could speak English, which he clearly was unable to do. The applicant argues that this error alone is a sufficient ground for setting aside the Board's decision. While I do not necessarily agree with the applicant on this point, I nonetheless agree that the Board has committed sufficient errors to warrant a re-hearing, in the case of the male applicant.

Generally, the Board is in a better position than a reviewing Court to weigh the credibility of those who testified before it: *Aguebor v. M.E.I.* (1993), 160 N.R. 315 (F.C.A.). However, in arriving at its findings, the Board must be careful to afford the applicant the opportunity to address key issues upon which the Board intends to rely, and must not draw adverse inferences on findings of fact which are manifestly in error: *Gracielome v. M.E.I.* (1989), 9 *Imm. L.R.* (2d) 237 (F.C.A.).

In the male applicant's case, the Board based some of its findings of credibility upon inferences drawn from a misconstruction of the evidence, and failed to question the applicant about certain critical issues upon which it would base its decision.

While accepting his first arrest and detention, the Board concluded that it did not believe the male applicant had been detained and physically abused on a second occasion. It determined that the applicant did not have a rational explanation for why his uncle was not questioned when the applicant was arrested (on the second occasion) without addressing the applicant's explanation that the uncle was older, and travelled regularly to Colombo on business. When making findings of credibility, the Board must have regard for the totality of the evidence, and cannot ignore evidence of the claimant which would explain an apparent inconsistency: *Owusu-Ansah v. M.E.I.* (1989), 8 *Imm. L.R.* (2d) 106

(F.C.A.). More importantly, however, the evidence does not reveal that the applicant stated that the uncle was not questioned -- only that to the best of his knowledge his uncle was not arrested.

The Board also determined that it was implausible for the male applicant, once in Canada, to have telephoned the lodge where he and his uncle had stayed, and to have been able to reach his uncle on that occasion to receive news of a police search for the applicant. The Board incorrectly inferred from the applicant's testimony that he had stated that his uncle had been at the lodge for over a month since the applicant had fled the country, rather than that the uncle regularly stayed there when in Colombo. This misunderstanding was abetted by the Board's confusion of the male applicant's uncle with the female applicant's uncle from Killinochchi -- an error conceded by the respondent. Such erroneous conclusions cannot form the basis of the Board's credibility finding: *Frimpong v. M.E.I.* (1989), N.R. 164 (F.C.A.).

Moreover, the Board ignored the applicant's obvious explanation for his having called his uncle -- to inquire about the fate of his wife and child -- choosing instead to conclude that it would be incredible for someone who was only passing through Colombo -- *en route* to a safe haven elsewhere -- to have called back to the lodge at which he stayed, in order to satisfy his curiosity about whether the police were still looking for him. Further, the Board did not ask the applicant why he did not simply call his wife in Killinochchi to inquire about his family's welfare: *Owusu-Ansah, supra*.

The Board further noted that the applicant did not receive medical treatment for injuries sustained during his purported second detention, but it failed to question him at the hearing about whether he had received such medical treatment, and if not, why: *Gracielome, supra*.

Because the Board's credibility findings were erroneously made, the Board's finding of fact, that the second episode of arrest, detention and torture of the male applicant did not take place, cannot stand. As such, the Board's conclusion that the applicant did not have a subjective fear of future persecution, and that there was no serious possibility that he would be persecuted by the Sri Lankan authorities, upon his return to Colombo, must be reconsidered.

The Female Applicant:

The Board concluded that it was totally unreasonable for the female applicant to have omitted that she suffered a beating at the hands of the Colombo police in her PIF. In my opinion, neglecting to mention that she suffered a beating during an encounter with the police was more than a mere elaboration of the details of an incident reported by the applicant in the PIF; it was a serious omission. It was reasonable for the Board to draw an adverse inference about the credibility of her evidence, based on this omission: *Aguebor v. M.E.I.* (1993), 160 N.R. 315 (F.C.A.).

As such, the Board was entitled to find that the female applicant was not mistreated at all by the Colombo police, and therefore that there was not a serious chance that she would suffer persecution, if returned to Colombo: *Adjei v. M.E.I.* (1989), 57 D.L.R. (4th) 135 (F.C.A.).

Accordingly, the application for judicial review shall be allowed, in part. The decision of the Board with respect to the male applicant shall be set aside and returned to a differently constituted Board for rehearing and reconsideration. The application of the female applicant shall be dismissed.

No question for certification was proposed.



Judge

Ottawa, Ontario
October 20, 1997