

Date: 20071003

Docket: IMM-5085-06

Citation: 2007 FC 1013

Ottawa, Ontario, October 3, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NITHIYATHEEBA NITHIYANANTHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 17, 2006, which determined that the applicant was neither a Convention refugee nor a person in need of protection.

Background

[2] The applicant, Nithiyatheeba Nithiyananthan, is a Tamil woman from Vavuniya, northern Sri Lanka. She alleged having a fear of persecution on the basis of her race, membership in a particular social group and her political opinion. The circumstances which led to her claim for refugee status were set out in the narrative portion of her Personal Information Form (PIF).

[3] In July 1988, the applicant's father was killed in the cross-fire between the Indian Peace Keeping Force (the army) and the Liberation Tigers of Tamil Eelam (LTTE). Following his death, the applicant and her sisters were taken by their mother to Ukulamkulam, Vavuniya, where they stayed with an aunt and uncle. The LTTE was active in the area and pressured the applicant's older sisters to join them. The applicant's sisters entered into arranged marriages in order to avoid being recruited by the LTTE, who did not target married women.

[4] Militant groups such as the People's Liberation Organization of Tamil Eelam (PLOTE) were also active in the area. The applicant claimed that local girls were raped and murdered by the militants. In 1996, the applicant was allegedly stopped by a member of PLOTE and pulled toward their camp. She refused and screamed, causing the man to run back to his camp. The applicant became scared and moved to Thonikkal in January 1997.

[5] In May 2001, the LTTE came to the applicant's house during the night. They asked the applicant to join them in Vanni. Her mother paid the LTTE money in order to prevent her daughter

from being taken away. The applicant was sent to school in Colombo and lived in a boarding house with other Tamil girls. They were often interrogated and arrested by the police. The applicant was questioned by the police and warned not to have any contact with the LTTE. After the ceasefire in 2002, the situation in Sri Lanka seemed to improve. However, the LTTE began killing people in Colombo, and the police warned people not to help the LTTE.

[6] The applicant was approached by the LTTE twice in July 2005. Female LTTE recruits came to the boarding house and threatened the students if they refused to help the LTTE. In August 2005, the Foreign Minister, Lakshman Kadirgamar was killed by the LTTE, which prompted renewed arrests. Six girls, including the applicant, were arrested at the boarding house. They were questioned by the police and accused of supporting the LTTE. The girls were released the next day and warned not to contact the LTTE, or else they risked being detained indefinitely.

[7] The applicant's uncle came to Colombo and helped her flee Sri Lanka. An agent brought the applicant to Canada, where she claimed refugee status on October 9, 2005. The applicant's refugee hearing took place on July 19, 2006, and by decision dated August 17, 2006, her claim was refused. This is the judicial review of the Board's negative refugee decision.

Board's Reasons

[8] The Board noted the following inconsistencies and omissions in the applicant's evidence:

1. She testified that she had been asked to join TELO by one of its members in 1995. This fact was not mentioned in her PIF, and when asked to explain this discrepancy, she indicated that she had forgotten to include it.

2. Her PIF narrative stated that she was stopped by one member of PLOTE in 1996 and he tried to pull her into the camp. However, she testified that two PLOTE men asked her to go their camp. When asked about the discrepancy, the applicant explained that two men had approached her, and there must have been a translation problem.

3. Her PIF narrative stated that in May 2001, the LTTE came to her home and left after obtaining a bribe. The PIF did not indicate that the LTTE had returned to her home. The applicant testified that two LTTE members returned to her mother's home and asked when she would join them. The applicant explained that the omission was an error.

[9] The Board did not accept the applicant's excuses for the inconsistencies and omissions in her oral testimony and PIF, given that she had reviewed her PIF and could have amended it. The Board found that the applicant had concocted her story with respect to the LTTE's second visit and her encounter with the two PLOTE men in 1996.

[10] The Board noted other problems with the applicant's evidence, which affected her credibility:

1. In her PIF, the applicant stated that she was a student at Polytechnical Institute from January 2002 to June 2003, had studied at the Institute of Commerce from January 2003 until January 2004, and had obtained diplomas from both institutions. However, she testified that the

LTTE came to her boarding house in July 2005 and that she had stopped studying at the Institute in August 2005. The applicant explained that the discrepancy was a mistake and that she had not obtained a diploma.

2. There was no evidence corroborating the applicant's claim to have studied at the institutions from January 2002 until August 10, 2005.

3. The applicant testified that she saw other people beaten by the police while she was at the station. This information was not included in her PIF and she did not give a satisfactory answer for the omission.

[11] The Board concluded that the applicant's evidence with regard to her alleged detention, arrest and interrogation by the police in August 2005, and the beatings she had allegedly witnessed, lacked credibility. The Board found that the applicant had concocted incidents with regard to TELO, PLOTE, the LTTE, and the police, in order to bolster her refugee claim. There was no evidence that the applicant's family members who continued to live in Sri Lanka had been targeted.

Issues

[12] The applicant submitted the following issues for consideration:

1. Did the Board err in applying the Refugee Protection Division Rules too rigidly?
2. Did the Board err in failing to consider the basis of the applicant's claim to risk?

[13] I would restate the issues as follows:

1. Did the Board err in finding that the applicant lacked credibility?
2. Did the Board err in failing to consider the risk faced by the applicant should she return to Sri Lanka?

Applicant's Submissions

[14] The applicant noted that the Board both questioned her credibility on the basis of omissions in her evidence, and emphasized the fact that she had failed to amend the information prior to her refugee hearing. It was submitted that the existence of a hearing leads refugee claimants to believe that they can provide further information in the context of the hearing.

[15] The applicant submitted that the Board erred in applying the *Immigration and Refugee Protection Division Rules, S.O.R./2002-227* too rigidly, specifically, the rules allowing for the amendment of evidence prior to a hearing. It was submitted that the Board failed to consider that: (1) the testimony was given through an interpreter; (2) the process was fraught with the possibility of misunderstanding; (3) the claimant may have been nervous; (4) the claimant may have been testifying about traumatic events; and (4) there may have been cultural differences involved.

[16] The applicant submitted that the omission in her evidence with respect to the number of PLOTE members who approached her could be explained. It was submitted that although two men approached the applicant, only one man harassed her. The applicant noted that the Board drew an adverse inference with respect to her failure to provide documentation regarding her education. It

was submitted that it was still possible for a claimant to establish a refugee claim even if some areas of the evidence lacked credibility (see *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.)).

[17] The applicant submitted that the evidence showed that she was a young, unmarried Tamil woman from northern Sri Lanka. It was noted that the Board failed to consider whether an internal flight alternative (IFA) existed for the applicant in Sri Lanka. The applicant submitted that the Board erred in failing to consider whether the applicant faced a reasonable likelihood of persecution if she returned to northern Sri Lanka given the country conditions present in Sri Lanka.

Respondent's Submissions

[18] The Board found that the applicant's claim lacked credibility on the basis of numerous discrepancies in her story, which she could not explain. It was submitted that the Board's reasons demonstrate that all of the evidence before it was considered (see *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.)).

[19] The respondent submitted that the assessment of facts and credibility was within the heartland of the Board's jurisdiction, and was not the basis for judicial intervention (see *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 314 (F.C.A.)).

[20] The respondent noted that in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, the Supreme Court of Canada affirmed the very high level of deference owed to inferences of fact drawn by triers of fact who have had the opportunity to hear and question the witness offering the evidence. It was submitted that the applicant had not demonstrated that the Board had misapprehended the material element of her claim, or that she had been denied a meaningful opportunity to respond to its concerns.

[21] The respondent submitted that the applicant had not shown that the Board's factual findings were patently unreasonable (see *Rohm and Haas Can Ltd. v. Canada (Anti-Dumping Tribunal)* (1978), 22 N.R. 175, 91 D.L.R. (3d) 212 (F.C.A.)).

Analysis and Decision

Standard of Review

[22] It is well established that the Board's credibility findings are subject to review on the standard of patent unreasonableness (see *Aguebor*).

[23] I propose to deal first with Issue 2.

[24] **Issue 2**

Did the Board err in failing to consider the risk faced by the applicant should she return to Sri Lanka?

The Board in its reasons found that the applicant was a Tamil citizen of northern Sri Lanka, despite the fact that it found her not to be credible. The Board, however, did not do any analysis of the risk that could be faced by the applicant because she is a Tamil born in northern Sri Lanka. The tribunal record included documentary evidence indicating that Tamils in Sri Lanka are at risk of kidnap and murder.

[25] It is my opinion that regardless of the Board's negative credibility finding, it should have considered the applicant's claim on the basis of the risk she faced as a Tamil citizen originally from northern Sri Lanka, should she be returned to her home country given country conditions.

[26] For this reason, the application for judicial review must be allowed and the decision of the Board must be set aside. The matter is to be referred to a different panel of the Board for redetermination.

[27] Because of my finding on Issue 2, I need not deal with the other issue.

[28] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[29] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

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

<p>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,</p> <p>(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</p> <p>(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.</p> <p>97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of</p>	<p>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:</p> <p>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;</p> <p>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.</p> <p>97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au</p>
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Article 1 of the Convention
Against Torture; or

sens de l'article premier de la
Convention contre la torture;

(b) to a risk to their life or to a
risk of cruel and unusual
treatment or punishment if

b) soit à une menace à sa vie ou
au risque de traitements ou
peines cruels et inusités dans le
cas suivant:

(i) the person is unable or,
because of that risk, unwilling
to avail themselves of the
protection of that country,

(i) elle ne peut ou, de ce fait, ne
veut se réclamer de la
protection de ce pays,

(ii) the risk would be faced by
the person in every part of that
country and is not faced
generally by other individuals
in or from that country,

(ii) elle y est exposée en tout
lieu de ce pays alors que
d'autres personnes originaires
de ce pays ou qui s'y trouvent
ne le sont généralement pas,

(iii) the risk is not inherent or
incidental to lawful sanctions,
unless imposed in disregard of
accepted international
standards, and

(iii) la menace ou le risque ne
résulte pas de sanctions
légitimes — sauf celles
infligées au mépris des normes
internationales — et inhérents à
celles-ci ou occasionnés par
elles,

(iv) the risk is not caused by the
inability of that country to
provide adequate health or
medical care.

(iv) la menace ou le risque ne
résulte pas de l'incapacité du
pays de fournir des soins
médicaux ou de santé adéquats.

(2) A person in Canada who is a
member of a class of persons
prescribed by the regulations as
being in need of protection is
also a person in need of
protection.

(2) A également qualité de
personne à protéger la personne
qui se trouve au Canada et fait
partie d'une catégorie de
personnes auxquelles est
reconnu par règlement le besoin
de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5085-06

STYLE OF CAUSE: NITHIYATHEEBA NITHIYANANTHAN

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 26, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: October 3, 2007

APPEARANCES:

John O. Grant	FOR THE APPLICANT
Leena Jaakkimainen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rutman & Rutman Professional Corporation Brampton, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT