

**Date: 20080108**

**Docket: IMM-4558-06**

**Citation: 2008 FC 20**

**Ottawa, Ontario, January 8, 2008**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**SUTHA BALAKUMAR  
ARUMUGAM KANESA BALAKUMAR  
BALAKUMAR ABINAYA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. BACKGROUND**

[1] The Immigration and Refugee Board (Board) held that the principal Applicant was not credible and concluded that although she and her husband and daughter were Tamils from Sri

Lanka, they had a viable internal flight alternative (IFA) in Colombo. There was no specific analysis of the s. 97 claim for protection.

## II. FACTS

[2] The Applicants claimed that the LTTE had extorted money from their respective families since approximately 1984. Mr. Balakumar worked in the Middle East while Mrs. Balakumar worked in Batticaloa, Sri Lanka. They took turns visiting each other.

[3] Mrs. Balakumar and their daughter, who is deaf-mute, attended a special programme for the child's disability in India for 1½ years. Following that, they joined Mr. Balakumar in Qatar where they obtained U.S. visas so that their daughter could attend another programme. Prior to going to the U.S., Mrs. Balakumar and their daughter returned to Batticaloa in April 2004.

[4] The Applicants claim that in May 2004 representatives of the Karuna faction of the LTTE tried to extort money from them. Mrs. Balakumar informed her husband, who was still out of the country, and he told her to go to Colombo where he had arranged a place to stay. He subsequently joined them in Colombo and the family then left for the U.S. in early June 2004. It was not until mid-August 2004 that the family came to Canada.

[5] The Board found Mrs. Balakumar not to be credible on an important issue – the number of times she was visited by the LTTE.

[6] The Board found that Mr. Balakumar had not established a well-founded fear because he had not resided in Sri Lanka for a number of years, he had had no problem travelling back and forth to visit his family and he was not sought by either the government or the LTTE.

[7] As to the claims of Mrs. Balakumar and their daughter, there were two key components. Firstly, it was not credible or plausible that Mrs. Balakumar would have been targeted by or otherwise had problems with the LTTE in May 2004. Secondly, the family would not have to settle back in Batticaloa where she had worked because they could have remained in Colombo.

### III. ANALYSIS

[8] The Applicants take issue with the Board's credibility findings, on the IFA conclusion and with the absence of a separate s. 97 analysis.

[9] In respect of the standard of review, I accept the conclusions in *Sarker v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 353, that the findings of credibility and existence of an IFA are subject to a standard of patent unreasonableness. However, whether the Board applied the correct test in finding an IFA is a question of law subject to a standard of correctness (see *Ezemba v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1023). Likewise, whether there must, as a matter of law, be a separate s. 97 analysis is also a question of law and subject to the same standard of correctness.

[10] Given my conclusion in this matter, I will make no comment on the credibility findings. However, there are errors on other matters which justify referring this matter back to the Board.

A. *Separate Section 97 Analysis/IFA*

[11] The issue of a separate s. 97 analysis arose from the Board's finding that the subjective fear requirement was not met because it was not credible. The Applicants argue that the Board is nevertheless required to consider the objective and higher evidentiary burden of a s. 97 analysis.

[12] In *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, Justice Blanchard underscored the need for separate consideration of s. 96 and s. 97 even where the evidentiary basis is the same. Even where the subjective element of s. 96 is not credible, the Board is required to consider the objective evidence and the different test to be applied in s. 97 – that on a balance of probabilities, a claimant would be subject to the dangers and risks in s. 97.

[13] It is not necessary that there be a rigid bright line between the s. 96 and s. 97 considerations. A finding that the objective element of s. 96 had not been met could, depending on the circumstances, dispose of the s. 97 issue as well. However, the rejection of the subjective element of s. 96 does not entitle the Board to ignore the objective element of fear particularly in respect of s. 97. The form in which that consideration occurs is not one which the Court should direct – what is important is that it be done and appear to be done.

[14] A finding of a valid IFA would generally be sufficient to dispose of a s. 97 claim. However, as I held in *Gnanasekaram v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 297, the Board errs when it makes no analysis of risk (in that case, as here, the risk in Colombo) where the evidence of danger is advanced and not addressed.

[15] The Board, in the present case, simply stated that the family did not necessarily have to go back to Batticaloa but could arrive and remain in Colombo. It concludes: “In the current circumstances the panel does believe that that would be a viable option for the claimants”.

[16] The Board does not address the Applicant’s evidence and argument of the risk from the LTTE to Tamils living in Colombo. The Board ignored the fact that the LTTE group, which allegedly approached Mrs. Balakumar, was one linked to the government.

[17] In this case, the Board erred in failing to address the evidence which undermined the IFA finding. It would appear that the Board, having found the Applicants not credible, did not go on to conduct a proper s. 97 analysis. That would be an error of law. To the extent that the IFA finding is considered as addressing s. 97 issues, it was patently unreasonable and an error in law because it did not consider the evidence of risk in Colombo.

#### IV. CONCLUSION

[18] Therefore, this application for judicial review will be granted, the Board’s decision quashed and the matter remitted back to a differently constituted panel.

[19] The parties did not seek to have a question certified. I concur.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review will be granted, the Board's decision is quashed and the matter is to be remitted back to a differently constituted panel.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4558-06

**STYLE OF CAUSE:** SUTHA BALAKUMAR, ARUMUGAM KANESA  
BALAKUMAR, BALAKUMAR ABINAYA

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 13, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Phelan J.

**DATED:** January 8, 2008

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