

Federal Court



Cour fédérale

Date: 20111013

Docket: IMM-1933-11

Citation: 2011 FC 1158

Toronto, Ontario, October 13, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

RATHINI KANDIAH

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a claim for refugee protection made by a woman of Tamil ethnicity born in Colombo. The Applicant claims protection from persecution under s.96 and risk under s.97 from Sri Lankan government para-military forces in Sri Lanka. The Refugee Protection Division (RPD) rejected the Applicant's claim on a global finding of negative credibility due to perceived inconsistencies between the Applicant's statements at the port of entry, her Personal Information Form (PIF), and her evidence given during the hearing of her claim.

[2] Counsel for the Applicant's primary argument is that, not only is the global negative credibility finding fundamentally flawed, but also it is improperly used with respect to the determination under s.97. The RPD's findings on s. 97 are as follows:

I once again reject the claimant's explanation as unsatisfactory and from all of the omissions and inconsistencies that have not been satisfactorily explained I consequently draw a negative inference against the credibility of the claim. My analysis on credibility applies to Section 96 and 97 of IRPA. I reject this claim, finding a lack of credibility. I do not find a credible objective basis to her fear nor do I believe the existence of subjective fear. I find that the claimant failed to establish on a balance of probabilities that she has a reasonable chance of facing persecution for a Convention ground if returned to Sri Lanka.

I turned by mind to whether the claimant would be personally subject to risk to her life or to cruel and unusual treatment or punishment if returned to Sri Lanka and find she would not. I do not find the claimant to be more at risk of extortion or threats than other Sri Lankans. I find based on the foregoing analysis that it is not more likely than not that she will be personally subject to a risk to life or cruel and unusual treatment or punishment if returned to her country. As a result I reject the claim pursuant to Section 97 of IRPA.

[Emphasis added]

(Decision, paras. 11 and 12)

I agree with Counsel for the Applicant that, lack of credibility for an applicant pursuant to s. 96 is not determinative for the s. 97 test (see: *Bouaouni v. Canada (MCI)* 2003 FC 1211, para. 41).

[3] Counsel for the Applicant also argues that a factual finding, which is a major component of the global negative credibility finding, is erroneous. In reaching its negative global credibility finding, the RPD conducted a critical analysis of the Applicant's evidence with respect to her statements of employment in Sri Lanka. When the Applicant was first interviewed by immigration

authorities approximately a month after her arrival in Canada, to the requirement that she list all occupations that she held during the last ten years, she complied by reporting that between January 1, 1999 and November 11, 2009 she was “unemployed” (Tribunal Record, p.83). To the requirement in her PIF that she state her work experience “including full time, part time, temporary and self employment” she reported that “I have never worked outside of home” (Applicant’s Application Record, p. 22). Prior to the hearing conducted before the RPD, the Applicant’s PIF was amended to include the following entries in hand writings on the original: under the education entry she added that from March 1992 to September 1992 she attended the Charliament Institute in Colombo and received recognition as a Montosori [sic] Trainer; and under the work experience entry she added the statement that from 1993 to 2009 she listed her name of her employer as “home daycare” in Colombo, with the type of work being conducted as “daycare” (Applicant’s Application Record, p. 22). There is no issue that the PIF amendment was made in the course of ordinarily accepted practice before the RPD.

[4] Counsel for the Applicant makes the following argument with respect to the RPD’s finding:

It is submitted that the negative decision was based on erroneous credibility findings. At paragraph 8 of the reasons Member Lewis states that the Applicant never mentioned until giving oral evidence that she ran a daycare from her home for many years. That finding is completely erroneous. Starting at line 11 of her narrative in the Personal Information Form (hereafter “PIF”) the Applicant states:

After I finished in 1991, I did child care. I looked after many children of families from Jaffna and the Eastern Province. I got to know these people very well.

It is submitted that this evidence, presented in the PIF from the very first was ignored by Member Lewis. Her further analysis of this issue is an overzealous and microscopic search to justify a negative credibility finding. At question 7 of the PIF the Applicant stated “I have never worked outside of the home.” That is a correct statement. The response to the question was amended at the commencement of

the hearing to reflect that she ran a daycare from the home for sixteen years. It is submitted that there is no valid reason why Member Lewis can be justified in focusing on one part of the PIF to emphasize an omission and then ignore a very clear and unambiguous statement made in that same form. This was a finding central to the negative decision. Despite her lengthy discussion of the alleged omission, Member Lewis does not once refer to the Applicant's statement cited above clearly set out in the narrative to her PIF. Member Lewis has impugned the Applicant's credibility on an alleged material omission that exists only because Member Lewis ignored the clear statement in the Applicant's narrative.

(Applicant's Application Record, pp. 208 – 209)

[5] I agree with Counsel for the Applicant that the RPD made a critical error in fact on the daycare issue, and find that it is sufficient to undermine the whole of the global negative credibility finding.

[6] As a result, I find that that the decision is indefensible in law and in fact.

ORDER

For the reasons provided, I set aside the decision under review and refer the matter back to a differently constituted panel for re-determination, on the direction that all aspects of the Applicant's claim be re-determined including credibility and the engagement of s. 96 and s.97 of the *IRPA*.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1933-11

STYLE OF CAUSE: RATHINI KANDIAH v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: October 12, 2011

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: October 13, 2011

APPEARANCES:

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