

 [Selvakumaran v. Canada \(Minister of Citizenship and Immigration\), \[2002\] F.C.J. No. 842](#)

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

McKeown J.

Heard: May 22, 2002.

Judgment: May 31, 2002.

Court File No. IMM-5103-01

[\[2002\] F.C.J. No. 842](#) | [\[2002\] A.C.F. no 842](#) | [2002 FCT 623](#) | [2002 CFPI 623](#) | [114 A.C.W.S. \(3d\) 714](#)

Between Sivachelvam Selvakumaran, Vasanthi Selvakumaran, Nirosha Selvakumaran and Prasanth Selvakumaran, through their litigation guardian, Sivachelvam Selvakumaran, applicants, and The Minister of Citizenship and Immigration, respondent

(23 paras.)

Case Summary

Aliens and immigration — Admission, refugees — Grounds, political activity — Credible basis for claim — Appeals or judicial review, whether claim reasonable — Referral to board where decision quashed.

Application by the Selvakumarans for judicial review of a decision of the Convention Refugee Division they were not convention refugees. The Tamil family came to Canada from Sri Lanka, where the father claimed to have suffered persecution as a result of his political opinions. He claimed that he was detained, interrogated and mistreated by authorities in 1986 and 1987. He alleged further abuse and atrocities at the hands of various factions in 2000. Based on inconsistencies in his testimony, the Refugee Division found that he was not credible, and determined that he had not been persecuted. The board also noted that certain details appeared to be missing from his PIF documentation. Selvakumaran offered explanations for the inconsistencies, which the board did not consider.

HELD: Application allowed.

The Refugee Division had erred in failing to consider Selvakumaran's explanations for the minor inconsistencies. It was not open to the board to make adverse findings of credibility in the circumstances. The inconsistencies were not material, nor were any details perceived to be missing from his documentation. The decision was quashed and the matter was remitted for reconsideration.

Counsel

Lorne Waldman, for the applicants. Greg G. George, for the respondent.

[Quicklaw note: An amendment was released by the Court on October 30, 2002. The changes were not indicated. This document contains the amended text.]

REASONS FOR ORDER

McKEOWN J.

1 The applicants seek judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the "Board") dated October 4, 2001, wherein Sivachelvam Selvkumaran (the "applicant"), his wife, Vasanthi Selvakumaran, and his two children, Nirosha and Prasanth, were determined not to be Convention refugees.

2 The issue is whether the Board erred in its credibility findings.

FACTS:

3 The applicant is an adult male Tamil from Point Pedro, in the northern part of Sri Lanka. His claim is based on his fear of persecution based on his perceived political opinion, nationality and membership in a particular social group.

4 The applicant alleged that in July 1983, after his father's shop in Kandy was looted and burned in riots, his father returned to reside in Point Pedro. In 1986, he claims he was detained, interrogated, and ill-treated for two months by the SLA, and later released on August 1, 1987, on the intervention of the Indian Peace Keeping Force. The claimant alleges that he experienced two incidents of atrocities between 1987 and 1989. In July 1989, he and his wife went to Bahrain where he had secured a job.

5 The applicant returned to Sri Lanka in January 1995 to visit his mother. He alleged that on this visit he was taken by the LTTE to a camp at Puloly for interrogation. He was released when 300,000 rupees was paid to the Tigers. He returned to Bahrain. Upon learning in July 2000 that his contract would be terminated, he made arrangements for his family to precede him to Sri Lanka.

6 Upon arrival of his wife and children in Colombo, they stayed in a lodge from which he claims they were arrested. His wife was interrogated and slapped by the police. His wife claimed that her bag containing some documents was missing when she returned to the lodge. Three civilians came to the lodge demanding 50,000 rupees from the wife threatening to report her as a LTTE supporter. The applicant advised his wife to proceed to Singapore, where he later joined the family before leaving for Canada.

7 The Board found the applicant to lack credibility. The Board found several inconsistencies and implausibilities in the applicant's testimony, and did not believe that the applicant was from the North. The Board's reasons also state:

We also acknowledge that notwithstanding the lack of credibility, the claimant in his situation as a reasonably young Tamil, from the North must be assessed viz a viz similarly situated persons and the objective evidence. Based on our findings that we have no persuasive evidence that the claimant was in the north after 1978 he would have to be compared with Tamils who have lived elsewhere - Kandy and possibly Columbo for a number of years prior to leaving the country in 1989. The objective evidence does not indicate that Tamils residing for long periods outside the areas of conflict are targeted by either the SLA or the LTTE....

ANALYSIS:

8 The first inconsistency found by the Board is that the applicant, in referring to the burning of his father's store in Kandy, stated that "we lost everything", yet also claimed that he never lived in Kandy. In my view, the fact that the applicant never lived in Kandy is not inconsistent with him saying that his family lost everything. The applicant testified that his father went to Kandy to run the family business and he remained with his mother. I note as well that there was evidence supporting a contrary finding within the same paragraph. In the transcript the claimant stated:

CLAIMANT: Our shop was also burned down and we lost all our belongings and even our trucks were taken two miles away and burned down. My father took refuge in a Muslim friend's house and returned home.

The applicant did not state that "we" took refuge. He also stated that his father returned home after the rioting, lending support to his uncontradicted testimony that he resided in the north with his mother throughout that time.

9 A further inconsistency noted by the Board related to the applicant's testimony that between 1987 and 1989, his family was supported by proceeds from the sale of his father's store in Kandy. The Board found that this statement was inconsistent with his earlier statement that they had "lost everything" in the fire. This perceived inconsistency was put to the applicant at the hearing:

MEMBER: You stated earlier on in testimony that after the riots of 1983 your father's shop was burned down and he moved back home...so now you state...your father sold his business in Kandy. Which is which? I don't understand this, what business your father sold in Kandy?

CLAIMANT: Okay. The part of the store burned down, so he repaired the store and sold it to another person.

MEMBER: When did he sell it?

CLAIMANT: Somewhere in 1988.

The case law make clear that a Board cannot make an adverse finding of credibility while ignoring evidence given by the claimant that explains the apparent inconsistencies (*Owusu-Ansa v. Canada* (MEI) [\(1989\) 8 Imm.L.R. \(2d\) 106](#) (F.C.A.); *Frimpong v. Canada* (MEI), [\(1989\) 8 Imm.L.R. \(2d\) 183](#) (F.C.A.)). In my opinion, it was not open to the Board to reject the applicant's explanation on this point.

10 The Board also found an inconsistency in that the applicant's PIF states that his father returned to Point Pedro after the burning of his store in Kandy in 1983, but in oral testimony the applicant stated that he lived with his mother in Puloly from 1983 to 1987 and he never lived in Kandy even when his father was running the store. The Board called this a "blatant contradiction" and found that they could only conclude that the applicant's father had

never left Kandy. The relevant paragraph in the PIF reads as follows:

In July 1983, during the anti-Tamil violence, my father's business in Kandy was looted and burned. My father was assaulted by Sinhala thugs. Our delivery truck was also burned two kilometers away from Kandy. My father took refuge at a Muslim friend's house and returned to Point Pedro.

The applicant submits that it is clear the he was speaking about his father's movements immediately following the violence and tragic loss of his business. He returned to Point Pedro to be with his family. The PIF says nothing of where the applicant's father resided for the next four years. The applicant was not questioned as to how long his father remained in Point Pedro after the violence. The applicant submits that there is no inconsistency in the evidence on this point and the Board clearly misconstrued the evidence. Moreover, the applicant submits that this inconsistency was not put to the applicant for clarification.

11 This inconsistency raises the issue of whether perceived inconsistencies in the evidence must be put to the applicant if they are to be relied upon to draw adverse conclusions on credibility. Decisions of this Court have been divergent on this issue when the applicant is represented by counsel (see for example *Bayrami v. Canada* [1999] F.C.J. No. 1167 in support of a requirement to put the inconsistency to the applicant, and *Ayodele v. Canada* [1997] F.C.J. No. 1833 in opposition to the requirement). In *Ngongo v. Canada (MCI)* [1999] F.C.J. No. 1627, Tremblay-Lamer J. identified several factors that should be considered in deciding whether a perceived inconsistency in an applicant's testimony must be put to him. They included whether the applicant was represented, whether the inconsistency was obvious or arose out of a careful examination of the evidence, whether the claimant communicated through an interpreter and whether there was an actual contradiction.

12 For the Board to ground a credibility finding on a perceived inconsistency it has not put to the applicant it must be serious, obvious and must relate to matters relevant to the claim. In my view, the Board was not entitled in this instance to rely on the perceived inconsistency regarding the applicant's father's place of residence during those years without putting the question to the applicant who very well may have easily explained it.

13 The Board also found it implausible that the applicant's father would have "free reign" to travel to Kandy to have his damaged shop repaired and sold if he indeed resided in the north from 1983 to 1988. The Board gives no basis for this conclusion, however, and does not refer to any documentary evidence. As noted by the applicant, the period in question is five years and it is surely reasonable to assume that at some point it would have been possible for the applicant's father to return. In my view this finding is unreasonable.

14 The most material finding of the Board is that the applicant did not reside in the North during the time period in question. The Board stated:

He testified that the store in Kandy was first owned by his grandfather. He said he did not know when his father came into possession of the store. The principal claimant, according to his birth certificate issued at Point Pedro on November 24, 1977, was born in Puloly. His National ID card (NIC) was issued in 1978. We have no persuasive evidence before us that would indicate that he resided in the north thereafter.

With respect, I cannot understand the Board's reasoning on this point. The Board does not have any contradictory evidence with respect to the residence of the applicant during those years and the Board has identified no reasons for the finding that the applicant's evidence is not persuasive. The Board does note that the applicant's official documents were issued in the 1970's. The Board is not entitled to make an adverse credibility finding on the basis of the applicant's failure to produce identity documents issued during the 1980's. In *Attakora v. Canada* (1989) 99 N.R. 168, the Federal Court of Appeal held that the failure to produce supporting documentation cannot reflect adversely on a claimant's credibility unless there is evidence that contradicts the applicant's testimony. In this case, the Board has identified no such evidence, therefore, in my view, the finding is unreasonable. In order to justify this finding the Board has made other credibility findings which are patently unreasonable and which I have referred to above.

15 The applicant does concede that there was an inconsistency with regard to the date the applicant closed his shop. However, I do not believe the finding on this point was material.

16 The Board also found that the applicant could not satisfactorily account for his whereabouts between the time he closed the shop in 1987 and the time he departed for Bahrain in 1989. The Board then tied this finding with the earlier finding that by using the term "we" with respect to the loss of his father's store, concluding that the applicant actually lived in Kandy during this time. The applicant submits that his oral testimony described being constantly displaced as a result of the fighting that was going on during this time:

COUNSEL: ...After you closed the store in December '87 and until the time that you left Sri Lanka in August of '89 -- what did you do to support yourself during that period, if anything?

CLAIMANT: During that period, my father sold his business in Kandy and he had some savings and he supported the family and I usually be with my parents and...the fighting erupted between the LTTE and the Indian army during that period. And so we were displaced.

COUNSEL: Okay. So where were you living with your parents?

CLAIMANT: We were not living in one place at a time. Sometimes one day we will be in one place and the next day we will be moved to another location. And during that time, the fighting was so intense...

Again, the Board did not mention the applicant's testimony which offered an explanation for this gap in his employment history and his inability to specify a place of residence. The Board did not identify any contradictory documentary evidence which would cast doubt on the applicant's version of events. Accordingly, I am of the view that the Board erred in making an adverse credibility finding on this point.

17 The Board also found that it was implausible that the applicant would send his wife and children ahead of him to Sri Lanka since he later testified that he would fear for his wife's safety if his family were to live in Colombo. However, the applicant testified that when his contract ran out, the family decided they had no choice but to return to Sri Lanka. They decided that the safest place would be with the applicant's wife's family in Vanni. The applicant testified that his wife returned ahead of him to arrange lodging and schooling for the children. It was only after the threatening incidents that his wife experienced that he began to fear for her life. At that point, the family decided it was too dangerous to return to anywhere in Sri Lanka. I agree with the applicant that the Board has ignored evidence or misconstrued the evidence on this point. It is clear the applicant did not intend for his wife and children to remain in Colombo, but to travel to her family's village of Vanni. Further, it is the events that were occurring as his family arrived in Colombo that gave rise to his fear.

18 The Board also found it implausible that the applicant's wife would be harassed and detained by police upon her return to Sri Lanka. The reasons state:

The claimant and his wife...had been away for exactly eleven years when his wife returned. His claims that his wife was arrested from the lodge where she stayed because of reports of "Black Tiger Infiltration" is not believable. She had all the documents relating to her absence and whereabouts for the past eleven years at her disposal. She had no problems with the SLA prior to leaving for Bahrain. We do not believe the police would have any interest in arresting and detaining her....

The applicant submits that the Board acknowledged that Tamils who are perceived to be from the north would be at risk but Tamils from Columbo may not. Therefore, the applicant submits that the Board had no basis for finding this statement to be implausible. In my view this finding was unreasonable. The applicant's testimony on this point is uncontradicted and the panel did not point to any documentary evidence that would support their conclusion that Tamils from the north who have been absent from Sri Lanka for a number of years would not be subject to harassment, detention, and extortion.

19 The Board also found it implausible that the applicant's wife would give the hotel manager her money and passport yet hold on to other documents. However, there is no evidence before the Board as to the nature of the missing documents. I see nothing unreasonable in giving only one's most important document and money to a lodge manager for safekeeping, and keeping other documents.

20 The Board found a further inconsistency in the fact that the PIF did not mention that the applicant first told his wife to proceed to Vanni. The reasons state:

In oral testimony, the principal claimant said that when his wife told him on the telephone about her detention, he told her to organize a pass and go to Vanni as soon as possible...This account contradicts his PIF in which he claims that he advised his wife to arrange an agent through the lodge manager and go to Singapore where he would meet her and the children. The claimant is again being untruthful about these events. We are forced to conclude, on a balance of probabilities, that the reason his version of events is inconsistent is because they never took place.

However, the applicant did not contradict the statement made in his PIF. He simply provided more details when testifying orally. The PIF states:

On August 3, 2000, my wife and children left Bahrain. Upon arrival in Columbo they stayed in a lodge before making arrangement to proceed to Vanni.

On August 5, 2000, following a rumour that the "Black Tigers" had infiltrated into Columbo, the security forces conducted a search operation in lodges, hotels, and rooming houses. My wife and children were arrested by the police...

My wife further informed me on August 7, 2000, three young men in civilian dress came to the lodge and demanded 50,000 rupees. They threatened my wife that they would inform the police that she was an LTTE supporter...I advised my wife in a long distance telephone conversation to arrange an agent through the lodge manager and come to Singapore...

The PIF does not detail the telephone conversation that the applicant testified took place following the incident on August 3, 2000. This telephone conversation did not result in a change of the applicants' plans. The more significant conversation was the conversation detailed in the PIF, of August 7, 2000, in which the applicant and his wife decided to flee their country and meet in Singapore. The instructions on the PIF indicate that the claimant should briefly set out "all the significant incidents" that led him to seek refuge. Further, the case law has allowed that oral testimony may provide details not included in the PIF, and that this will not serve to impugn the applicant's credibility unless the incident omitted is a significant one to the claim. Therefore, I find that the Board erred with respect to this finding. Not only is the evidence in the applicant's PIF consistent with his oral testimony, but the missing details are not significant.

21 While individually these credibility errors may not have been sufficient to amount to reviewable error, I believe that the cumulative effect of these errors is that the decision must be set aside.

22 The respondent also argued that the Board found that the applicants have an internal flight alternative in Sri Lanka. However, I agree with the applicant that no finding of an internal flight alternative was made. The panel

stated:

It becomes important in Sri Lanka claims to be able to make a findings, on a balance of probabilities, relative to the claimants' recent residence. As earlier stated, we find that the claimant was not resident in the north for a lengthy period prior to leaving for Bahrain in 1989 and that he has not, on a balance of probabilities, ever been back to Sri Lanka since then. It is then our finding that there is no reason for the SLA to be interested in the claimant on the basis that he is coming from the north should he return to Sri Lanka.

The Board later stated in conclusion :

Based on the above referenced documentary evidence, the panel finds that the claimant could safely reside in Columbo or Puttulam or any area under government control, such as Kandy, where the panel finds, on a balance of probabilities, he resided prior to leaving Sri Lanka.

In my view the Board's finding that the applicant would be safe in the south was connected with its finding that the applicant was not from the north. It was not a finding of internal flight alternative irrespective of the applicant's identity.

23 The application for judicial review is allowed. The decision of the Board dated October 4, 2001 is quashed, and the matter is sent back to a differently constituted Board for redetermination.

McKEOWN J.