Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19980702

Docket: IMM-4788-97

98 208 040

BETWEEN:

JUL 27 1998

VATHSALA ARUNTHAVARAJAH
SINTHUJA ARUNTHAVARAJAH

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

REED, J.:

[1] This is an application for an order setting aside a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board. It is based on three grounds: (1) the Board failed in its obligations to ensure the applicants had a fair hearing when it decided to proceed after complaints were made about the quality of the translation; (2) the Board's implausibility findings were unreasonable; (3) the Board's finding that the applicants had an internal flight alternative ("IFA") in Colombo is

tainted because of its unreasonable implausibility findings, and because, in any event, the documentary evidence does not support a finding that an IFA existed for the applicant in Colombo. I will refer hereafter to the adult applicant only since the minor applicant's claim depends upon that of the former.

[2] I have come to the conclusion that the decision under review should be set aside because of the cumulative effect of the numerous difficulties that exist with the decision. I emphasize that it is not the role of a reviewing judge to rewrite the decision a tribunal made, either in favour of the tribunal or in favour of the applicant. A reviewing court considers the decision as it was written.

Translation

[3] The applicant's counsel raised the question of inaccurate interpretation in the course of the hearing. There was an off the record discussion, after which counsel for the applicant agreed that the hearing should proceed, and questions about the quality of the interpretation would be addressed when making submissions. In articulating what had been agreed upon the presiding Board member described the Board's position as being that the panel was of the view that "the claimant had been able to understand most, or perhaps all the major points of the hearing ..." (underling added).

[4] The test is not whether an applicant can understand "most" of the major points, but whether the applicant can adequately express himself or herself through the

interpreter; see *Xie v. Canada (Minister of Employment and Immigration)* (1990), 10 Imm.L.R. (2d) 284 (F.C.A.) at 292. Understanding "most" of the points of the hearing is too low a standard. Also, it has been recognized that the Board has some obligation to ensure that the translation is adequate even in the face of counsel's consent.

[5] The R.C.O. seemed somewhat surprised at the hearing being continued in the face of the complaints that had been made about the quality of the interpretation. It is useful to set out part of the transcript:

> RCO May I, just before we continue, if I may. You indicated, with the RCO's consent, but that's not really an issue, I don't give or withhold consent. I just, I made some comments about the issue. This is an unusual issue, of proceeding after the objection. My own view is that certainly the panel may make any judgment as to how to proceed.
>
> Because we did go off the record, I think counsel should state whatever he wishes to state on the record.
>
> ANTONIOU [Presiding Board Member] We do have it on the record.
>
> RCO On the break he said that there were gross problems with the interpretation. That was off the record. I don't do this to delay the hearing, I don't (inaudible).
>
> ANTONIOU Did you use that term "gross" mistakes in interpretation?
>
> SCHLANGER [Board Member] I think counsel can deal with that in his submissions.
>
> ANTONIOU That's right, that's another option.
>
> COUNSEL The interpretation?
>
> SCHLANGER Yes.
>
> (inaudible)
>
> COUNSEL I don't really fully understand what is on the record, on the tape.
>
> SCHLANGER Okay. State the concerns that you have regarding interpretation in your submission.

COUNSEL Generally speaking, if she was evasive, that's not because she was evasive, just because of the interpretation. If she was not straightforward (inaudible) (inaudible).

SCHLANGER (inaudible) that's right. Okay, we understand that, we need to say that.

COUNSEL Okay.

ANTONIOU You want to go into your submissions, then?

[6] After counsel for the applicant had made submissions, in which he said that his client had not been evasive in her answers, and that if it appeared that she had been so this was because of the inadequacies of the translation, the RCO made his submissions stating:

RCO Thank you. The two issues identified include credibility and internal flight alternative. And of course, as is obvious in examining credibility, one must consider whether or not the interpretation was accurate. And we know interpretation doesn't have to be absolutely perfect, but the question is, where there aspects of the interpretation that affected the panel's assessment of credibility.

And I don't know the answer to that, but it's something for the panel to keep in mind.

[7] The presiding member in concluding the hearing stated:

ANTONIOU I just had a brief conference with my colleague, here. We prefer to reserve at this point, because we've got all these points to consider. So (inaudible) the decision is that we are unable to give our decision at this point, we need to consider that in terms of the documentary evidence that we have.

We also need to consider the implications of the matter that your counsel raised (inaudible) the translation, so the, we are unable to give the decision right now. We will do so in the next two, three days, and will advise you in writing.

[8] The Board, in giving reasons for its decision, made no reference to the interpretation concerns that had been expressed.

[9] Thus one has: a Board that has assessed the quality of translation by an incorrect standard; counsel for the applicant agreeing to proceed despite the concerns expressed; the Board stating at the end of the hearing that it needed to consider the implications of the alleged translation difficulties, and no mention being made of them in its decision; no affidavit being filed in this application documenting any inadequacies in the translation.

[10] I am of the view that that set of circumstances alone would not justify an order setting aside the Board's decision although it does raise concern about the quality of the hearing the applicant received.

Implausibilities

[11] The applicant's story was that her husband had taken his mother from Mullaittivu to Kilinochchi to Vavuniya to obtain medical attention after she was injured in bombing that had taken place in Mullaittivu. The applicant's husband then disappeared. The applicant left her home in Mullaittivu to look for him. When she reached Vavuniya she was told that she was suspected by the LTTE in Mullaittivu of being an army supporter and that she should not return home.

[12] The evidence concerning who told her not to return home is confused. Her evidence seemed to be that an uncle who lived in Mullaittivu accompanied her to Vavuniya, where she stayed with another uncle (her husband's father's oldest brother) who lived in Vavuniya. At the same time she said there was only one uncle but, then, when she was talking about her mother-in-law who lived in Mullaittivu, the term she uses to refer to that person is translated as "auntie". In her PIF she says it was her uncle who found out the LTTE thought she and her husband were army supporters. In her oral evidence she appears to attribute this information as having come from relations visiting her mother-in-law in the hospital in Vavuniya.

[13] Another confusion appears in the Board's decision. It states that the applicant visited army camps and LTTE camps looking for her husband. As I read the evidence, it was not LTTE camps that she said she visited but Tamil militant camps, that is, those opposing the LTTE. The Board also appears to have misunderstood her evidence concerning the Red Cross letter she obtained. As I read the Board's decision it states that this was obtained in Kilinochchi, yet her evidence was that she obtained it in Mullaittivu.

[14] In any event, the applicant's evidence was that in Vavuniya she was told that her husband had been arrested by the Sri Lankan security forces and taken to Colombo for questioning. The evidence again is confusing. In her PIF she says she learned this information from a Tamil militant camp. In giving evidence she spoke of persons who

were visiting the injured at the hospital in Vavuniya (other injured persons besides her mother-in-law had also been taken there for medical treatment). The applicant indicates that she was told by them that a number of Tamils had been arrested in Vavuniya and taken to Colombo. She alternately spoke of assuming her husband was among those arrested and of being sure that he was.

[15] In any event, she states that in response to the information that her husband had been arrested by the army and taken to Colombo for questioning, she went to Colombo. She was arrested there and stated that she had to prove to the police that she was married and not a criminal. For this purpose, her uncle who had been travelling with her returned to Mullaittivu to get the applicant's 2½-3 year old daughter. He took the child to Colombo. The police, on being convinced that the applicant had a young daughter, and on being paid a bribe, let her go, on the condition that she report back in ten days. Once released she fled to Canada.

[16] The Board found this story not to be credible. It did not base its finding however on contradictions in the testimony, on evasive or unclear answers. It proceeded on the ground that the story was based on a number of implausibilities. The Board found it implausible that a young woman of this applicant's background would leave her home and her young child to go into strife-torn, dangerous territory to look for her husband. The Board found it implausible that she would have believed the statements of those visiting her mother-in-law in Vavuniya that she was suspected by the LTTE of being an

army supporter without confirming that information. The Board found it implausible that information would have been given to her that her husband had been arrested and taken to Colombo for questioning because it was only major suspects who were treated in this fashion and the evidence did not establish that he had this kind of profile. The Board did not believe that she had been given a letter by the Red Cross to help her search for her husband because she did not have it with her at the hearing and had not taken it with her to Colombo.

[17] Counsel for the applicant argues that there is nothing inherently implausible about a wife going to search for her husband who has disappeared even in a war torn situation. I note that the child she left in Mullaittivu while called by the Board an infant would have been about 2½ to 3 years old. I agree with counsel that there is nothing implausible about a wife going to look for her husband.

[18] Counsel argues that the Board's conclusion that it was implausible that she would not have confirmed that she was suspected by the LTTE of being an army supporter before deciding not to return to Mullaittivu is completely unreasonable. He interprets the Board's reasons as expecting her to have returned physically to Mullaittivu to confirm the information. He argues that if she believed the information that was given to her, why would she return and thereby place herself in a dangerous situation that she could avoid. Also, doing so would require her to traverse again the dangerous strife-torn territory that the Board doubted, in coming to its first implausibility finding, that she

would have traversed in the first place.

[19] I am not certain that the Board did mean a physical return to Mullaittivu when it wrote of confirmation but, if it did not, it is not clear that the evidence supports the finding that there was a failure to confirm. The applicant said in her PIF that she had received such information from her uncle and, when giving her evidence, she was told by the RCO that she should not repeat what was in her PIF. In the absence of a specific question being put to her as to whether she acted on the information of hospital visitors alone, the Board's conclusion that she did not confirm the information that was given to her is not supportable.

[20] With respect to the implausibility finding concerning information having been given to her that her husband had been taken to Colombo, counsel notes that the Board's statement that only major LTTE suspects are treated in that fashion comes out of the blue! There is no documentary reference cited by the Board for the statement that only major suspects are treated in that fashion, nor can documentary evidence be found to this effect in the material that has been included on the record. The assertion that only major LTTE suspects are treated in this way was not mentioned at the hearing. The applicant was not asked by the Board to comment on the Board member's concerns in this regard.

[21] Lastly, while the Board concluded that a Red Cross letter never existed, the

applicant gave an explanation as to why she no longer had it; she had given it to her uncle in Vavuniya because he was the person who was searching the camps for her husband. Also, although the Board concluded that it would have been useful for her to have had it with her in Colombo, her evidence was that this was not the case - its use was to get her through the check points between Mullaittivu and Vavuniya. She had a PLA pass to get from Vavuniya to Colombo.

[22] In *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238, the Federal Court of Appeal stated that a decision based on implausibilities is less immune from review than one based on demeanour or evasiveness or conflicting evidence because a reviewing court will often be in as good a position as the original trier of fact to assess implausibilities:

> ("the Board") chose to base its finding of lack of credibility here for the most part, not on internal contradictions, inconsistencies, and evasions, which is the heartland of the discretion of triers of fact, but rather on the implausibility of the claimant's account in the light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, if any better position than others to draw.

That decision of course must be read in the light of decisions such *as Aquebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A). It is this jurisprudence that I have applied in coming to the conclusion that the four implausibility findings are unreasonable.

[23] As noted, the Board chose to base its decision not on contradictions in the

evidence, nor on the applicant's demeanour, but on the four implausibilities set out above. The four implausibility findings on which the Board chose to base its decision do not stand up to scrutiny.

IFA

[24] Lastly, the Board found the applicant had an IFA in Colombo. This was in the face of documentary evidence to the contrary. As I read the documentary evidence, the easy flow of Tamils southward to Colombo, which existed at least prior to 1995, was stopped by the time the applicant made this journey. Thus, for at least some Tamils, Colombo was no longer a viable IFA. The Board does not appear to acknowledge this changed situation. One finds among the documents on the record, for example, a UNHCR Background Paper, dated March 1997, which contains the following:

> With the continuous hostilities in the Northern and Eastern regions of Sri Lanka, the issue of safe areas or internal flight alternatives for internally displaced Sri Lankans continues to concern governments and international and local human rights and refugee organizations (UNHCR, 26 May 1994). According to reports on the human rights situation in the country and the international jurisprudence which has developed, internal flight alternative may be difficult, and in many instances impossible to apply in the context of Sri Lanka, particularly for individual refugees or small families (the category of refugee and asylum seekers most common in the European context) (The British Refugee Council, February 1997). Jurisprudence has also established that an internal flight alternative does not exist if one is required to live in a refugee camp (Goodwin-Gill, 1996, 74).

[25] In information attached to a Research Branch, Immigration and Refugee Board document, dated June 9, 1997, the following is found:

> * Married women and women with small children are liable to be rounded-up during sweeps of lodges. There is no distinction between men and

> women with regard to arrest and detention. A number of women are rounded-up and there are cases of isolated arrests of women who are staying at lodges. Some are detained for a short-term (1 month), while some are detained for prolonged periods (1 - 2 years).
>
> * Women alone or alone with children who have limited education or work experience have difficulties resettling in Colombo. Single women and young women are more at risk of arrest and detention than older, married women, on the grounds that they might be members of the LTTE.

[26] In assessing the existence of an IFA for this applicant in Colombo I am of the view that some acknowledgement should have been made of the documentary evidence that indicates that an IFA in Colombo might not be available. It may be that a safe haven was available in Vavuniya but it is not appropriate for a reviewing Court to essentially rewrite the decision the Board made and to ignore the reasons the Board gave for its findings.

Conclusion

[27] I have come to the conclusion, for the reasons given above, that the Board's decision should be set aside and the applicants' appeal referred back for rehearing. An order will issue accordingly.

B. Reed
Judge

OTTAWA, ONTARIO
July 2, 1998

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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