IMM-2634-96

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant,

- and -

POOLOGAM VICKNESWARAMOORTHY,
NANDINI VICKNESWARAMOORTHY,
PARAN VICKNESWARAMOORTHY,
KARTHEKAN VICKNESWARAMOORTHY

Respondents

REASONS FOR ORDER

JEROME A.C.J.:

This application for judicial review of a decision of the Immigration and Refugee Board, Convention Refugee Determination Division ("CRDD"), dated July 19, 1996, came on for hearing before me at Toronto, Ontario, on August 19, 1997. I allowed the application for reasons given orally from the Bench and indicated that written reasons would follow.

Poologam and Nandini Vickneswaramoorthy are citizens of Sri Lanka. Of their children, Paran is a citizen of France while Karthekan is stateless, although his country of habitual residence is France. The adult respondents were accepted as Convention refugees by France in 1987 and 1988, respectively, and acquired permanent resident status there. The children were born in France. The respondents returned to Sri Lanka for a visit in August 1994. They came to Canada in September of that year and claimed refugee status on their arrival here.

The CRDD held hearings on June 14, October 10, and December 18, 1995, as well as July 19, 1996. On the final day of hearings, the CRDD determined that the adult respondents would be accepted as Sri Lankan refugees and that the children would be accepted as refugees from France. The CRDD found that the respondents were not among the class of people contemplated by section 46.01 of the *Immigration Act* (the "Act") and that they had a

legitimate fear of persecution should they return to Sri Lanka. The children were determined to be refugees because of the activity in France of the Liberation Tigers of Tamil Eelam ("LTTE") and the threats of violence which their family had received.

In my view, the CRDD committed reviewable errors in concluding that the adult respondents and their children should qualify for refugee status in Canada. In each case, the CRDD gave inadequate consideration to the claimants' relationship to France. These errors led the CRDD to inappropriately conclude that the adult respondents could not return to France and that the children could not avail themselves of state protection in France.

I will deal first with the adult respondents. The CRDD committed a reviewable error when it concluded that paragraph 46.01(1)(a) of the *Immigration Act* did not apply to the case at bar. That section provides:

> 46.01(1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person
> (a) has been recognized as a Convention refugee by a country, other than Canada, that is a country to which the person can be returned;

Thus, if a person has refugee status in another country and is eligible to return to that country, they may not be considered for refugee status in Canada. The CRDD determined that the adult respondents could not return to France because of a letter sent by the French Consulate in Toronto on November 13, 1995, to the respondents' counsel which contained the following information:

> your clients, having returned to Sri Lanka, have lost their refugee status in France. Should they wish to return to France, they would have to apply for a long-term visa at this office.

This letter was written in response to a letter from the respondents' counsel dated October 13, 1995, in which he sets out the facts surrounding the respondents' status in France. Counsel for the applicant pointed out that this letter does not make mention of the adult respondents' permanent resident status nor of their attempts to acquire French citizenship. An additional and more detailed letter was written by the respondents' counsel and sent to French officials at the end of May, 1996, but the CRDD came to its conclusion before an answer was received. As a result, the CRDD made its decision without the benefit of knowing whether French law regards permanent residence as being dependent on refugee status or whether permanent residents could enter and leave the country at will. The incomplete record with respect to the state of French law could not permit the CRDD to arrive at the legal conclusion which it did.

The CRDD further erred when it concluded that the children respondents are refugees from France due to their unwillingness to avail themselves of state protection from persecution in that country. The CRDD relied on the fact that the children's father was afraid to report the threats he had received from the LTTE in France to French authorities because the LTTE had said that they would destroy his family were he to do so. With respect, this is not the appropriate test.

The proper analysis was set out by the Supreme Court of Canada in *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689. Mr. Justice LaForest wrote that when the United Nations Convention Relating to the Status of Refugees was being drafted, the international community intended that persecuted individuals be required to seek the protection of their own countries before calling on other nations for assistance. The standard of proof required to demonstrate that the home country is unable to protect persecuted individuals was elucidated as follows:

> ... clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. (*supra* at 724)

In the case at bar, the CRDD did not conduct this stage of the analysis for persecution and thereby committed a reviewable error.

Therefore, for the reasons outlined above, I granted this application for judicial review and ruled that this matter should be sent to a freshly-constituted Board for redetermination in accordance with these reasons.

Counsel for the respondent brought a motion pursuant to Rule 324 shortly after my oral decision on August 19 asking that the judgement be reconsidered. Counsel alleged that he had not been given an adequate opportunity to address the issue of section 46.01 of the *Immigration Act* and that the Court would have ruled differently had it heard these arguments. That motion is dismissed. Counsel for the respondent will have an opportunity to address his arguments on section 46.01 to the newly-constituted Board, and indeed that is where they would be most appropriately dealt with.

O T T A W A
October 2, 1997

"James A. Jerome"
A.C.J.