

**Date: 20090506**

**Docket: IMM-4214-08**

**Citation: 2009 FC 467**

**Ottawa, Ontario, May 6, 2009**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**THANARAJAN SHANMUGALINGAM**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Thanarajan Shanmugalingam seeks judicial review of a decision refusing his application for a humanitarian and compassionate exemption from the requirements of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The H&C officer found that although the applicant would be subjected personally to a risk to his life or a risk to the security of his person if he were to return to Sri Lanka, he did not face undue, undeserved or disproportionate hardship.

[2] At the conclusion of the hearing of this application, I advised the parties that I was of the view that the officer's decision was unreasonable, and that I would be allowing the application. These are my reasons for so doing.

### **Background**

[3] The applicant is a male Tamil from the north of Sri Lanka. Many of his relatives have come to Canada, and a number of them have sought and obtained refugee protection. The applicant himself came to this country in 2000. However, his claim for refugee protection was refused because of the Immigration and Refugee Board's finding that he was excluded from the refugee definition under Article 1F(a) of the Refugee Convention, because of his membership in the Liberation Tigers of Tamil Eelam or "LTTE".

[4] The Board accepted that the applicant's involvement with the LTTE may initially have been involuntary. There was no evidence before the Board with respect to the applicant's position or rank within the organization. Nor was there any evidence that the applicant had personally committed any actions that would amount to war crimes or crimes against humanity. Indeed, the only evidence before the Board with respect to the applicant's activities with the LTTE was his testimony that he had been forced to work digging bunkers and cooking.

[5] The Board's exclusion finding appears to have been based solely on the fact that one of the applicant's brothers had based his own earlier refugee claim on the risk of persecution that he faced in Sri Lanka as a result of the applicant's membership in the LTTE. Given the Board's finding that

the LTTE was an organization dedicated to a limited brutal purpose, the Board's finding of membership was sufficient to bring the applicant within the exclusion provisions of the Convention.

[6] The applicant then sought an H&C exemption under section 25 of the *Immigration and Refugee Protection Act*. While the officer's decision addresses various considerations raised by the applicant in support of his application, including the extent of his establishment in Canada and the best interests of children affected by the refusal of the application, for the purposes of this application, I need only address the officer's treatment of the issue of risk.

[7] In this regard, the H&C officer reviewed the documentary information with respect to conditions within Sri Lanka for Tamils from the north and east of the country. In this regard, the Board found that individuals who are suspected of being affiliated with the LTTE are at risk of human rights abuses at the hands of the Sri Lankan authorities. Considering this evidence in light of the applicant's personal circumstances, the H&C officer concluded that the applicant "would be subjected personally to a risk to his life or a risk to the security of the person if returned to Sri Lanka".

[8] The officer then went on to state that:

Although I have found that the applicant does face a risk if returned to Sri Lanka, it is one factor to be considered in an H&C assessment. Exclusion under Article 1F(a) is a serious and exceptional finding. I am not making an inadmissibility assessment in this case; however, the applicant was determined to be a member of the LTTE which is an organization that the Government of Canada has designated as a

terrorist organization. I have weighed all the evidence in this case and find that the Article 1F(a) exclusion is a very serious and strong factor that is not overcome by the applicant's establishment in Canada.

[9] After then reviewing the relevant provisions of *IRPA*, the officer concluded that “[T]he applicant may face difficulties having to re-adapt to life in Sri Lanka; however, I am not satisfied it is hardship that is unusual and undeserved, or disproportionate”. Consequently, the H&C application was refused.

### **Analysis**

[10] In light of the documentary evidence before the officer, the finding that the applicant would be personally at risk of his life or to the security of his person if he were to return to Sri Lanka was entirely reasonable.

[11] However, after finding the applicant to be at risk, the officer then went on to find that the Board's Article 1F(a) finding was “a very serious and strong factor *that is not overcome by the applicant's establishment in Canada*”. That finding may well have been reasonable, if the only basis for the applicant's H&C application had been his establishment in Canada. That was not, however, the case.

[12] Despite the clear finding of risk that had been made by the officer earlier in the reasons, no consideration whatsoever appears to have been given by the officer as to whether the risk to the

applicant's life or to the security of his person in Sri Lanka outweighed the gravity of the Board's Article 1F(a) finding. This was simply perverse.

[13] Moreover, it is impossible to reconcile the officer's conclusion that the applicant "may face difficulties having to re-adapt to life in Sri Lanka" with the officer's finding that the applicant's life was at risk in his home country. With all due respect, to characterize a risk to life, or a risk to the security of the person, as 'difficulties re-adapting' was simply unreasonable.

[14] A fair reading of the officer's reasons suggests that the Board's Article 1F(a) finding effectively trumped all other considerations militating in favour of a positive outcome with respect to the applicant's H&C application. Given that the whole purpose of section 25 of the Act is to overcome findings, including exclusion findings, in appropriate cases, it was an error to effectively treat the exclusion finding as determinative of the applicant's application.

[15] Moreover, in weighing the significance of the exclusion finding, the officer does not appear to have given any consideration to the nature of the applicant's activities with the LTTE, or the extent of his personal culpability in that regard, in deciding whether the hardship that he faced in Sri Lanka was unusual and undeserved, or disproportionate.

[16] As a consequence, the officer's reasoning lacks the justification, transparency and intelligibility required of the decision-making process. Moreover, the decision does not fall within

the range of possible acceptable outcomes that are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47.

### **Conclusion**

[17] For these reasons, the application for judicial review is allowed.

### **Certification**

[18] Neither party has suggested a question for certification, and none arises here.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4214-08

**STYLE OF CAUSE:** THANARAJAN SHANMUGALINGAM v. MCI

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 29, 2009

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

**DATED:** May 6, 2009

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