

Federal Court



Cour fédérale

Date: 20101123

Docket: IMM-1852-10

Citation: 2010 FC 1172

Toronto, Ontario, November 23, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**N. MALCOLM MAYNARD ANANDA
KUMARA
FERNANDO KURUKULASOORIYA
MARIAN ANN RUKMALIE WARNAKULA
WEERASURIYA JAYATHILAKA
ANNE SAMODA FERNANDO
KURUKULASURIYA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are a husband, wife and minor daughter, all citizens of Sri Lanka and all of Sinhalese ethnicity. They came to Canada and claimed refugee protection. That claim was rejected in a decision of a Member of the Immigration and Refugee Board of Canada dated March 10, 2010. This is an application for judicial review of that decision. For the reasons that follow I have allowed this application for judicial review, set aside that decision and returned it for re-determination. No Counsel has requested certification of a question and I find no reason to do so.

[2] The Member found that the claimants' fear with respect to their continued presence in Sri Lanka not to be well founded on the basis of lack of credibility. As an alternative the Member found that the Metropolitan Colombo Region offered a safe Internal Flight Alternative.

[3] As to the first issue, whether a well founded fear had been established, the Member based the decision on five incidents found in the Record. The Member found that because of apparent contradictions there was reason to doubt the Applicants' truthfulness in respect of each of the incidents thus the fear could not be well founded. However at no time in respect of any of these incidents were the so-called contradictions put to the Applicants so that they could offer an explanation, if any; or clarify the matter. The Member simply lay in the weeds, waited till the hearing is over, then pulled out apparent contradictions and used them as the basis for disbelieving the Applicants' claim. As Justice Russell wrote in *Shaiq v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 149 at paragraph 77:

77 Although the RPD is not required to raise all concerns with an applicant that are related to the Act and the regulations, procedural fairness does require that an applicant be afforded an opportunity to address issues arising from the credibility, accuracy or genuine nature of information submitted. See, for example, Kuhathasan v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J.

No. 587 at paragraph 37. Consequently, I think the RPD in the present case should have provided the Applicant with an opportunity to address an issue that was central to its negative credibility finding.

[4] In a similar vein Justice Dubé in *Malala v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94 wrote at paragraphs 23 and 24:

23 A reading of the transcript leads me to believe that the applicant should have been given a better opportunity at the hearing to comment or explain the contradictions the Board saw in her testimony. Moreover, it appears that in certain instances the Board was over-zealous in discovering contradictions where none necessarily existed.

24 A review of the jurisprudence in the matter, as abridged above, reveals that it is not unanimous. It does however establish that, generally, contradictions must be put to the applicant at the hearing to enable him or her to provide all relevant explanations. The applicant must be afforded an opportunity to explain fully the alleged inconsistencies. Where the Board prefers the documentary evidence to the sworn testimony of an applicant, it must show clearly why it does so.

[5] While not every apparent contradiction has to be put to an applicant, where, as here, the decision was clearly and only based on five apparent contradictions, those matters should have been put to the Applicants. In respect of each of those instances the Record shows that the apparent inconsistency was never raised with the Applicants. In respect of the bribe allegedly paid by the brother, the Record shows that the Member overlooked the evidence that shows it was paid not by the brother but by a broker. With respect to the identification of a distant family member, the Record does not show, unlike the Member found, that such member was identified as an LTTE member. With respect to why the Applicants could not be found in a small town, the evidence shows that they were in hiding. Further, as will be discussed later, the Member made contradictory findings as to whether this was in fact a small town or teeming metro area. In brief, just on the face

of the Record, the Applicants should have been confronted with these matters before the Member jumped to negative conclusions.

[6] The second ground dealt with an Internal Flight Alternative. The Member, found at paragraph 14 of the Reasons, that the Town of Mariwala where the Applicants resided was “relatively small” and at paragraph 4 of the Reasons “50 kilometres north of Colombo” thus was a place where those who wished to harm the Applicants could track them down. Then at paragraph 20 of the Reasons the Member found that Colombo embraced a metro area of some 5.6 million people, including certain districts which, as pointed out in discussion with Respondent’s Counsel, included communities within 50 kilometres of Colombo. Mariwala was found to be within 50 kilometres yet the metro Colombo area Member found provided a viable Internal Flight Alternative.

[7] Which is Mariwala or Columbo then –a place where the Applicants can readily be found – or a teeming metropolis where the Applicants can presumably blend in?

[8] Further, while the evidence in the record shows that the main LTTE army has been defeated, the Record, as pointed out by Respondent’s Counsel, also shows that pockets of LTTE adherents remain who may wish to cause harm, particularly in Colombo.

[9] The decision must be set aside and returned for re-determination.

JUDGMENT

For the Reasons provided:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;
2. The decision of the Member of the Immigration and Refugee Board of Canada dated March 10, 2010 is set aside and the matter is returned for re-determination by a different Member;
3. There is no question to be certified;
4. No Order as to costs.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1852-10

STYLE OF CAUSE: N. MALCOLM MAYNARD ANANDA KUMARA,
FERNANDO KURUKULASOORIYA, MARIAN ANN
RUKMALIE WARNAKULA, WEERASURIYA
JAYATHILAKA, ANNE SAMODA FERNANDO
KURUKULASURIYA
v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 18, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** HUGHES J.

DATED: NOVEMBER 23, 2010

APPEARANCES:

Maureen Silcoff FOR THE APPLICANTS

Alex Kam FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maureen Silcoff FOR THE APPLICANTS
Barrister and Solicitor

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada