

Cour fédérale



Federal Court

Date: 20120524

Docket: IMM-8137-11

Citation: 2012 FC 628

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 24, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

VIJAYAKUMAR MARTHANDAN

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the Refugee Protection Division (the panel), according to which the applicant is not a Convention refugee or a person in need of protection.

FACTS

[2] The applicant, who is 36 years of age and a citizen of Sri Lanka, is of Tamil ethnicity. He operates a stationery business and owns a taxi car in Trincomalee, in eastern Sri Lanka.

[3] He claims the following facts in support of his application.

[4] In March 2009, the applicant was arrested and detained for a week by the Sri Lanka Army (SLA) after a receipt from his business was found in the possession of a member of the Liberation Tigers of Tamil Eelam (LTTE).

[5] On May 24, 2009, members of the Pillaiyan paramilitary group representing themselves as members of the LTTE went to the applicant's to take his taxi car, which he refused. They left the premises, but the SLA came back later that day and arrested the applicant. He was taken to Plantain Point Camp and tortured, but released after he paid a bribe of 150,000 Sri Lanka rupees.

[6] On June 10, 2009, the Pillaiyan group went back to the applicant's and robbed him. A few days later, the SLA arrested him and took him to their camp to interrogate him about his ties to the LTTE. According to him, the SLA's intention was to extort money from him and to steal his taxi car. After agreeing to give in to their demands, the SLA released him. He then escaped to Colombo.

[7] On June 22, 2009, he left Sri Lanka. He went through France and Spain, and stayed in the Dominican Republic from June 25 to July 6, 2009. He then went to New York state in the United

States, where he stayed for three months. He arrived in Canada on October 9, 2009, and filed a claim for refugee protection.

PANEL'S DECISION

[8] The panel is of the opinion that the applicant is credible and that his account is true.

[9] As for the applicant's allegations that he would be exposed to danger should he return to Sri Lanka on the grounds that he is a young man of Tamil ethnicity from the eastern part of the country and he is accused of having ties to the LTTE, the panel concluded that there is only a mere possibility that he would be persecuted in Trincomalee or elsewhere in the country. Since he has never had ties to the LTTE, the government has released thousands of members of the LTTE, and he is a relatively older businessman from a relatively safer region in the eastern part of the country, the panel is not convinced that the Sri Lankan authorities are still interested in him.

[10] Although the panel acknowledges that there are still problems in Sri Lanka, such as the forced registration of Tamils and an increase in the rate of violence in the northern part of the country, it notes that the civil war is now over and that its termination represents a durable change. It also indicated that the general conditions in the northern and eastern parts of the country have improved, which is particularly relevant in this case since the danger to which the applicant would be exposed is from the eastern part of the country. Since the applicant claims to be in danger of suffering extortion by the Pillaiyan group, which has become a criminal organization according to a report by the Danish Immigration Service and the US Department of State, and that the acts of the

SLA toward him were instigated by this group, the panel examined his claim for refugee protection under section 97 of the IRPA.

[11] The panel is of the opinion that there is an internal flight alternative (IFA) in Colombo, and that there was one even during the period following the military defeat of the LTTE prior to the 2010 elections. Since the forces of the Pillaiyan group were concentrated in the northern and eastern provinces following the civil war, and the applicant testified that the intention of that group was to extort money from him, the panel is of the view that the applicant would be safe in Colombo, outside the group's area of operation.

[12] The panel also notes that the applicant was able to obtain a Sri Lankan passport to leave the country, indicating that he was not pursued by government forces, despite the fact that the documentation indicates that the Tamils in the north and east are subject to heightened attention from the authorities.

[13] The panel concludes that there is less than a mere possibility of persecution were the applicant to return to Sri Lanka.

ISSUES IN DISPUTE

- (1) Did the panel err by concluding that there were changes in conditions in Sri Lanka without taking all the evidence into account?
- (2) Did the panel err by proceeding with an analysis under section 97 of the IRPA rather than under section 96, and in concluding that the applicant was not a person in need of protection?

- (3) Did the panel err by concluding that the applicant had an internal flight alternative in Colombo?

STANDARD OF REVIEW

[14] The standard of review applicable to issues involving an internal flight alternative (IFA) and a change in the conditions in the country is that of reasonableness (see *Kumar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 30, [2012] FCJ No 26 (QL) and *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2010 FC 908, [2010] FCJ No 1179 (QL)). The decisions of the panel on these issues must be given a substantial degree of deference (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

1. Did the panel err by concluding that there were changes in conditions in Sri Lanka without taking all the evidence into account?

[15] In this case, the applicant seeks a review of the “change in conditions” in Sri Lanka. Nonetheless, I am of the opinion that the panel took all the evidence on the situation in the country into account and that its conclusions fall within possible, acceptable outcomes. The panel noted that there are still problems in Sri Lanka but that the situation has improved since the end of the civil war in 2009:

The Sri Lanka documentation shows that although there are concerns that problems could fester if the Sri Lanka government does not seek political accommodation with the Tamil minorities. Of particular concern is the ‘forced registration of Tamil citizens’ and an apparent rise in ‘reports of violence’ in the north. The fact remains, however, that the military defeat of the LTTE is total such that there is little likelihood of an armed struggle resuming in the near future. With respect to the general situation in the north and east there is evidence that suggests that conditions have improved of late (fewer checkpoints and greater mobility). These changes are of particular relevance to this claim because ultimately the risk to the claimant emanates from the east and a paramilitary group Pillaiyan which,

according to the documentation, has essentially transformed itself into a criminal organization.

[16] This passage shows that the panel considered all aspects of the issue, whether favourable or not to the applicant's position. This is not a case where the panel disregarded contradictory evidence. It assessed the conditions in Sri Lanka on the basis of the latest national documentation package available at the time, i.e. that of April 13, 2011. The 2010 report of the Danish Immigration Service, which specifically deals with the conditions in the east of Sri Lanka where the applicant comes from, indicates that the situation is generally stable:

The Executive Director of the National Peace Council stated that the security in the towns Trincomalee and Batticalore is better than in the rural areas in the East. In the rural areas the local poor people feel vulnerable in the presence of the vast army.

The Norwegian Refugee Council (NRC) said that with regards to security, paramilitary presence has decreased in comparison to the conflict period. Army presence is still visible and there are still checkpoints on the way from Batticaloa to Colombo. Random checks are still being performed.

IOM considered that the security situation in the East is generally stable, that there are few checkpoints and that there are no longer reports of paramilitary groups operating.

[17] Unlike in the matter of *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537, [2004] FCJ No 659 (QL), in this case the panel did not reach a conclusion of past persecution, a condition for the possible application of subsection 108(4) (see paragraph 6 of the Federal Court of Appeal Decision in *Yamba v Canada (Minister of Citizenship and Immigration)*, 254 NR 388, [2000] FCJ No. 457 (QL)). Rather, it proceeded directly with a prospective examination of the question as to whether the applicant has reasonable fear of being persecuted upon his return to Sri Lanka, which it was at liberty to do. In *Alharazim v Canada (Minister of Citizenship and*

Immigration), 2010 FC 1044, [2010] FCJ No. 1519 (QL), at paragraph 36, Justice Crampton (now Chief Justice) reiterated that the Refugee Protection Division has an obligation to take paragraph 108(4) of the IRPA into account only once “it concludes that a claimant has suffered past persecution”.

2. Did the panel err by proceeding with an analysis under section 97 of the IRPA rather than under section 96, and by concluding that the applicant was not a person in need of protection?

[18] The applicant claims that the panel erred in its conclusion that he was not a refugee within the meaning of section 96 of the IRPA, on the grounds that he is part of a group targeted by the Sri Lanka Armed Forces, i.e. a young Tamil man from the east of Sri Lanka.

[19] A victim of criminal acts, such as a person targeted for purposes of extortion, may not qualify as a refugee within the meaning of the United Nations Convention because there is no nexus with the five grounds set out in section 96 of the IRPA (*Suarez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 227, [2009] FCJ No. 275 (QL)). In this case, the evidence shows that the Pillaiyan group abandoned its paramilitary activities and became a criminal organization. In fact, the group targeted the applicant on different occasions to extort money from him and to take his taxi car, not because of his ethnic background or the fact that he is a young man from the east of Sri Lanka. Furthermore, the SLA released him on several occasions, once he paid them a bribe or agreed to give in to their demands. The panel therefore did not err by proceeding with an analysis under section 97.

[20] To benefit from Canada's protection under section 97 of the IRPA, the applicant must show the probable existence of personal danger, i.e. danger to which other people from or in the country are generally not exposed (see *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No. 222 (QL) and *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] FCJ No 143 (QL)). The mere fact of being a young Tamil man from the east of Sri Lanka does not constitute personal danger. The panel found that the SLA's acts toward the applicant seemed to have always been instigated by the Pillaiyan group, and that he was able to obtain a Sri Lankan passport and leave the country, despite the fact that the Tamils in the north and east are subject to heightened attention from the authorities. By taking these factors into account, and considering that he has never had ties to the LTTE and that the Sri Lanka government released thousands of members of the LTTE, the panel concluded that the interest of the Sri Lankan authorities in the applicant, if there is any, is minimal and that there is only a mere possibility of his being persecuted in Trincomalee or elsewhere in the country. I am of the opinion that the decision of the panel falls within possible, acceptable outcomes.

3. Did the panel err by concluding that the applicant had an internal flight alternative in Colombo?

[21] The applicant has the burden to show, on the balance of probabilities, that there is a no internal refuge in the part of the country where, according to the panel, there is a flight alternative and that it is objectively unreasonable for him to avail himself of it (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, 140 NR 138 (FCA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, 163 NR 232 (FCA)).

[22] I am of the opinion that the applicant did not discharge this burden of proof. On the one hand, the panel found that the applicant was targeted for criminal purposes and that the real intention of the Pillaiyan group, whose forces are concentrated in the north and east of Sri Lanka, was to extort money from him. On the other hand, the panel noted that this group was responsible, on every occasion, for the applicant's arrest by the SLA. Furthermore, he was able to obtain a Sri Lankan passport to leave the country, despite the fact that the Tamils from the north and the east of the country are more likely to be subject to a more thorough inspection than the others. As a result, the panel reasonably concluded that the Sri Lankan authorities have no interest in the applicant and that he would be safe in Colombo, outside the Pillaiyan group's area of operation.

[23] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

“Danièle Tremblay-Lamer”

Judge

Certified true translation
Monica F. Chamberlain

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8137-11

STYLE OF CAUSE: VIJAYAKUMAR MARTHANDAN v
MINISTER OF CITIZENSHIP AND IMMIGRATION

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**REASONS FOR JUDGMENT
AND JUDGMENT:** TREMBLAY-LAMER J.

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