

Kanagalingam v. Canada (Minister of Citizenship and Immigration)

Between
Uthayakumari Kanagalingam, applicant, and
The Minister of Citizenship and Immigration, respondent

[1999] F.C.J. No. 243
Court File No. IMM-566-98

Federal Court of Canada - Trial Division
Toronto, Ontario
Blais J.

Heard: February 9, 1999
Judgment: February 10, 1999
(8 pp.)

Aliens and immigration — Admission, refugees — Grounds, well-founded fear of persecution — Refugee Division, determination by — Evidence — Appeals or judicial review, whether claim reasonable — Appeals or judicial review, grounds.

Application by Kanagalingam for judicial review of a decision of the Refugee Board that she was not a Convention refugee. Kanagalingam was a 39-year-old Tamil citizen of Sri Lanka. Her fiancé was forced to join a Tamil liberation group and he was killed one week later. Kanagalingam left her home and travelled to another area where she was taken into detention, photographed naked, and questioned about the liberation group. Upon her release the next day, she moved to Colombo but was raided by the police who sexually touched her and threatened to shoot her. She left Sri Lanka and claimed that she had a well-founded fear of persecution. The Board determined that there was not a serious possibility that she would suffer persecution upon her return to Sri Lanka since the sexual harassment incidents were isolated, the killing of her fiancé was indirect persecution, and the police had lost interest in her as a suspect given that they never arrested her in Colombo.

HELD: Application dismissed. The Board's conclusions were not manifestly unreasonable. The Board weighed the evidence of Kanagalingam's mistreatment in the context of all of the evidence and reasonably determined that there was no serious possibility of persecution should she return to Colombo.

Counsel:

Lorne Waldman, for the applicant.
Lori Hendriks, for the respondent.

1 **BLAIS J.** (Reasons for Order and Order):— This is an application for judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board, dated January 19, 1998 wherein the Refugee Division determined that the applicant was not a Convention refugee.

THE FACTS:

2 The claimant is a 39 year-old citizen of Sri Lanka who claims a well-founded fear of persecution in Sri Lanka based on her political opinion, race, nationality and membership in a particular social group, as a Tamil from the north of Sri Lanka.

3 The claimant was born in Kodday, Sri Lanka. Her brother and father were killed during the period when the IPKF, the Indian Peacekeeping Force, governed the security situation in the north of Sri Lanka.

4 In August 1995 the claimant's fiancé was forcibly conscripted into the LTTE, the Liberation Tigers of Tamil Eelam, and within a week's time his dead body was discovered in the area.

5 The claimant left the Jaffna Peninsula with her mother and her uncle Sivarajah and travelled with them to Omanthai where she remained from June 1996 to March 1997.

6 She travelled with her uncle to Vavuniya with the intention of settling there. She arrived with her uncle on March 28, 1997. She was taken into detention with two other Tamil females.

7 She was separated from these two women and endured the humiliation of being videotaped naked by an army officer from the Sri Lankan military, allegedly in order to ascertain if she had marks from LTTE training. She was questioned about her family's and her own associations with the LTTE and released on the following day, the 29th of March, 1997 once her uncle Sivarajah arranged for her release by bribing members of PLOTE (People's Liberation Organization of Tamil Eelam).

8 She and her uncle travelled on to Colombo on the 31st day of March 1997. On April 1, 1997 the claimant arrived in Colombo with her uncle. The same night as their arrival, police raided the lodge. One of the police officers questioned the claimant as to why she was not married after inspecting her identification. The same officer then proceeded to indecently touch the claimant. He allegedly told the claimant when she fell to the ground in tears that he would shoot her. The officer took her gold chain and left stating that the claimant should come to the police station the next day but he did not tell her which police station.

9 The claimant remained in Colombo with her uncle for another five or six days according to her report. The claimant left Sri Lanka on April 8, 1997.

10 The claimant alleges a well-founded fear of the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan government and its agents, the police and the military.

DECISION OF THE REFUGEE DIVISION:

The panel found the claimant's testimony at the refugee hearing generally credible. However, the issue the panel finds to be determinative of the claim is in regard to the first prong of the test of an IFA - whether there is a serious possibility or a reasonable chance that the claimant will suffer persecution upon return to Sri Lanka to the proposed IFA.¹ In this regard the panel has taken into account the documentary evidence and what is stated with respect to the Sri Lanka government's human rights record and its treatment of persons similarly situated to the claimant.²

11 The panel has also reviewed evidence on the payment of bribes for her release, sexual harassment in Vavuniya and Colombo.

12 The panel finds that the cumulative incidents of sexual harassment do not amount to persecution.³

THE ISSUES:

- 1 - Did the Refugee Division base its decision on an erroneous finding of fact made in a perverse or capricious manner, or without regard to the material before it?
- 2 - Did the Refugee Division Panel err in law in determining that the applicant is not a Convention refugee as she has an Internal Flight Alternative?

ANALYSIS:

13 The loss of the applicant's father, brother and fiancé constitute indirect persecution. As respondent noted, the Federal Court of Appeal in the case of Pour-Shariati overruled the case of Bhatti which recognized the concept of indirect persecution as a principle of our refugee law. MacGuigan J. wrote:

In the words of Nadon, J. in *Casetellanos v. Canada* (Solicitor General) (1994), 89 F.T.R. 1 (Fed. T.D.), 11, "since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed." It seems to us that the concept of indirect persecution goes directly against the decision of this Court in *Rizkallah v. Canada* (Minister of Employment & Immigration), A-606-90,

¹ In fact, however, the issue of IFA is determined upon a full consideration of both prongs as has been done in the body of these reasons.

² Page 3 of the IRB decision.

³ Page 6 of the IRB decision.

decided 6 May 1992, where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention grounds. One of these grounds is, of course, a "membership in a particular social group," a ground which allows for family concerns in an appropriate case.

14 Relating to the two incidents of sexual harassment, the panel has made an assessment of those incidents and found that they constitute isolated incidents and even the cumulative incidents do not amount to persecution. The Board weighed the evidence of these incidents against the applicant's ability to live in Colombo.

15 The identification of persecution beyond incidents of discrimination or harassment, is a mixed question of law and fact; the Panel has reached a conclusion after an analysis of the evidence before it and after having contemplated the various elements. This Court should not intervene unless the conclusion reached is unreasonable.

16 The Panel believed that the applicant could live in Colombo because she was employable and there was no restriction for her living there.

17 The Panel has considered the loss of the applicant's father, brother and fiancé as misfortunes that did not relate to her potential for resettlement in Colombo.

18 The evidence before the Panel in regard to these murders did not establish a personal nexus to the alleged persecution the male members of her family suffered.

19 The Panel also considered carefully the IFA; the Panel was required to be satisfied on a balance of probabilities that there was no serious possibility of the applicant being persecuted in Colombo and that in all the circumstances including circumstances particular to her, conditions in Colombo were such that it would not be unreasonable for the applicant to seek refuge there.

20 The applicant alleges that the Board dismissed or ignored relevant evidence and that it did not make the proper assessment. A review of the Board's decision and of the applicant's detailed argument, do not support such allegations.

21 The detailed analysis provided in the Board's decision demonstrates that it weighted the evidence of the applicant's mistreatment and threats made to her in the context of all the evidence and the authorities' obvious lack of interest in her as a suspect given that they never arrested her in Colombo, and reasonably determined there was not a serious possibility of persecution should she return to Colombo.

22 In this case, the Refugee Division did not err in finding an IFA in Colombo, nor in the way they weighed the evidence before it.

23 In view of the applicable law and the evidence that was before the Board, the conclusion of the Board that the applicant was not subject to persecution is not unreasonable.

24 The Board correctly applied the test for an available IFA and its conclusion cannot be said to be unreasonable.

25 This Court should not interfere with the Refugee Division's decision where the Refugee Division has had the advantage of seeing and hearing the witness unless the Court is satisfied that the Refugee Division based its conclusion on irrelevant considerations, or that it ignored evidence.

26 Therefore, I find that the Board did not err in a way that would warrant the Court to intervene.

CONCLUSION:

27 For these reasons the application for judicial review is dismissed.

28 No serious question of general importance will be certified.

BLAIS J.