

Date: 20081203

Docket: A-116-08

Citation: 2008 FCA 381

**CORAM: DESJARDINS J.A.
NADON J.A.
BLAIS J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

THEYASEELAN SELLAN

Respondent

Heard at Toronto, Ontario, on December 03, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on December 03, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

NADON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on December 03, 2008)

NADON J.A.

[1] This is an appeal from a judgment of Phelan J. of the Federal Court, dated February 12, 2008, whereby he granted the respondent's judicial review application of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated November 23,

2006, and returned the matter to a differently-constituted panel of the Board for a new determination.

[2] The Judge also certified a question, namely: where there is relevant objective evidence that may support a claim for protection, but where the Refugee Protection Division does not find the claimant's subjective evidence credible except as to identity, is the Refugee Protection Division required to assess that objective evidence under s. 97 of the *Immigration and Refugee Protection Act*?

[3] In our view, that question should be answered in the following way: where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[4] This leads to the question of whether there was in the record before the Board any evidence capable of supporting a determination in the respondent's favour. In our view, there was clearly no such evidence in the record. We are satisfied that had the Judge examined the record, as he was bound to, he would no doubt have so concluded. In those circumstances, returning the matter to the Board would serve no useful purpose.

[5] For these reasons, the appeal will be allowed, the judgment of the Federal Court will be set aside and the respondent's judicial review application will be dismissed.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-116-08

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE PHELAN
DATED FEBRUARY 12, 2008, NO. IMM-6516-06)**

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND IMMIGRATION v.
THEYASEELAN SELLAN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2008

**REASONS FOR JUDGMENT
OF THE COURT BY:** (DESJARDINS, NADON,
BLAIS JJ.A.)

DELIVERED FROM THE BENCH BY: NADON J.A.

APPEARANCES:

Kevin Lunney FOR THE APPELLANT

Michael Crane FOR THE RESPONDENT

SOLICITORS OF RECORD:

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