

Date: 20060629

Docket: IMM-5540-05

Citation: 2006 FC 836

Toronto, Ontario, June 29, 2006

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SWARNAKUMAR SELVANAYAGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, a male Tamil police officer from eastern Sri Lanka, seeks protection on the basis of his perceived political opinion, nationality and membership in a particular social group. The Applicant's wife and two sons filed a joint claim based on their membership in a particular social group, the family. Consequently, it is agreed that if the decision in IMM-5540-05 is set aside and referred back for re-determination, then the decision in IMM-5538-05 will also be set aside and referred back for re-determination.

[2] The Applicant testified that while serving as a police officer in Sri Lanka from 1985 to 2001 he received numerous threatening phone calls from the militant group, the Liberation Tigers of Tamil Eelam (LTTE) in which he was asked to quit his job. He claimed he was afraid to leave his position because he was accused of being a Tamil sympathizer and was harassed by the predominantly Sinhalese police force. He indicated that throughout his career with the Sri Lankan police force he was only assigned to administrative work and traffic duty, which involved moving dead bodies, brought to the police station as a result of the ongoing civil conflict within the country, to the hospital so that the coroner could investigate their manner of death. He also testified that he was only aware of two incidents in which the police tortured individuals and, while he did not witness the incidents, he reported them to the superintendent of the police station.

[3] At the hearing before the Refugee Protection Division (RPD) the Minister of Citizenship and Immigration appeared and argued that, in accordance with Article 1F(a) of the *Refugee Convention*, the Applicant is excluded from claiming

protection under s.98 of the *Immigration and Refugee Protection Act (IRPA)* because he was complicit in crimes against humanity as a result of his conduct as a member of the Sri Lankan police force. The Refugee Protection Division agreed with the Minister and made a finding of exclusion under s.98 of the *IRPA*.

[4] In challenging the RPD's decision, the Applicant makes the following principal argument:

It should be noted from the outset that the tribunal was careful to point out that the Sri Lankan police is not in itself an organization that has limited and brutal ends and that therefore the in-depth examination of the facts and circumstances is required. Having recognized this issue, the tribunal could be expected to conduct a thorough analysis of all the facts and whether they meet the test for a crime against humanity or complicity therein. It failed to do so.

(Applicant's Further Memorandum of Argument, IMM-5540-05, para. 6)

[5] During the course of the oral hearing of the present Application, Counsel for the Applicant emphasized that it was not admitted before the RPD that the police force, in which the Applicant was a member, committed crimes against humanity. Therefore, the onus was on the Minister to so establish, and the obligation rested with the RPD to make a specific determination on this issue. Therefore, a primary issue in the present judicial review is whether the RPD applied the evidence presented to the correct legal test in reaching its decision under s.98 of the *IRPA*.

[6] Section 98 of the *IRPA* provides that a person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection. Article 1F(a) of the *Refugee Convention* reads as follows:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

[7] To reach a conclusion under s.98, the RPD was required to apply the correct test for determining whether a "crime against humanity" has occurred. The elements of proof with respect to finding a crime against humanity are articulated by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship)*, [2005] S.C.J. No. 39 at 119:

[B]ased on the provisions of the *Criminal Code* and the principles of international law, a criminal act rises to the level of a crime against humanity when four elements are made out:

1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);

2. The act was committed as part of a widespread or systematic attack;
3. The attack was directed against any civilian population or any identifiable group of persons; and
4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[8] The RPD's attempt at applying the correct test for determining whether a crime against humanity was committed by the Sri Lankan police force is stated as follows:

In order to define Article IF(a) crimes, reference must be made to the international instruments that deal with these crimes. More specifically in this case it has to do with the human rights as they relate to the administration of justice.

[...]

The panel will begin by saying that although the Sri Lankan police force cannot be considered to be an organization with a limited and brutal purpose there is evidence that the police itself have been implicated in human rights abuses.

[...]

(RPD Decision, p.3)

[9] In my opinion, these statements do not constitute a finding of law that a crime against humanity had been committed as a precursor to determining whether the Applicant is complicit in such a crime. In particular, there is no precise finding that the evidence establishes that the Sri Lankan police force committed a widespread or systemic attack on a civilian population or any identifiable group of persons with respect to which the Applicant's conduct could be assessed. As a result, I find that the RPD's decision was rendered in error of law and is, therefore, patently unreasonable.

ORDER

Accordingly, for the reasons provided, I set aside the RPD's decision and refer the matter back to a differently constituted panel for re-determination.

"Douglas R. Campbell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-5540-05

STYLE OF CAUSE: SWARNAKUMAR SELVANAYAGAM v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: June 28, 2006

REASONS FOR ORDER

AND ORDER BY: CAMPBELL J.

DATED: June 29, 2006

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