

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5347
Summary Calendar

AJITH KUMAR SENANAYAKE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A36 930 038)

(April 13, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Ajith Kumar Senanayake challenges an order of the Board of Immigration Appeals, contending that he demonstrated his eligibility for asylum and for a waiver of deportability. His petition is **DENIED**.

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Senanayake, a native and citizen of Sri Lanka, came to the United States in 1978, and received lawful permanent resident status on February 19, 1981, on the basis of his marriage to a United States citizen. Shortly thereafter, on November 6 of that year, in the United States District Court for the Middle District of Louisiana, he pleaded guilty to conspiracy to possess with the intent to distribute opium, and was sentenced to ten years imprisonment. He was paroled in November 1984.

An order to show cause was issued on June 16, 1982, charging that Senanayake is deportable under § 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(B)(i), because of his conviction. At a hearing in August 1988, Senanayake conceded deportability and requested asylum, withholding of deportation, and a waiver of deportability. After an evidentiary hearing in December 1988, the Immigration Judge denied the requested relief and ordered Senanayake deported to Sri Lanka. In August 1993, the Board of Immigration Appeals sustained that order.

II.

A.

Section 208 of the Immigration and Nationality Act authorizes the Attorney General, in her discretion, to grant asylum to an alien if the Attorney General determines that the alien is a "refugee". 8 U.S.C. § 1158. A "refugee" is one who has demonstrated that he is unable to return to his native country "because of persecution or a well-founded fear of persecution on

account of race, religion, nationality, membership in a particular social group, or political opinion'". **Castillo-Rodriguez v. I.N.S.**, 929 F.2d 181, 184 (5th Cir. 1991) (quoting 8 U.S.C. § 1101(a)(42)). If the applicant fears persecution by a particular group, rather than the government, he must show that the group is one that "the government is unable or unwilling to control". **Adebisi v. I.N.S.**, 952 F.2d 910, 914 (5th Cir. 1992).

"The Attorney General's ultimate decision whether to grant or deny a refugee asylum ... must be upheld absent a showing that such action was arbitrary, capricious or an abuse of discretion". **Id.** at 912 (internal quotation marks and citation omitted). In order to obtain reversal, Senanayake "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution". **I.N.S. v. Elias-Zacarias**, ___ U.S. ___, 112 S. Ct. 812, 817 (1992).

In support of his asylum claim, Senanayake asserted that he feared that he would be killed by "Communist and Tamil rebels" if he returned to Sri Lanka. He presented evidence that his family had been associated "very strongly" with the United National Party, the governing political group in Sri Lanka; that, while campaigning to return to parliament in the 1970 elections, his father was assassinated by the Janatha Vimukthi Peramuna² (JVP), a communist terrorist group; that from 1969-1972, while attending college, he was the vice president of an anti-communist student organization that informed on JVP members, and was personally responsible for

² Sinhalese for "People's Freedom Party".

the apprehension of a JVP leader, who later was shot; and that he had received death threats because of his involvement in the student group and his family's political activities. Senanayake testified that in 1972, while riding in a van with a friend, "communists" shot at him. He believed that communists were responsible "because at that time they [were] right there", and because they attacked a police station that same evening. He also testified that in April, May, or June 1972, while on a hunting trip with a friend, he was kidnapped, held in a roofless bamboo cage for three to five days, interrogated, and tortured by the JVP. Senanayake testified that he escaped when the police attacked the camp.

Senanayake admitted that he remained in Sri Lanka until 1974, and had no further problems with the JVP, the Tamil rebels, or the communists. He maintained that the terrorists had been subdued by the Sri Lankan government and were dormant during the time he remained in Sri Lanka, after he escaped from his captors, but that they had regained power. Senanayake conceded that his three sisters, who still live in Sri Lanka, "are doing okay".

The Board concluded that, even assuming, *arguendo*, that the JVP targeted Senanayake on account of his political opinion, he had not shown that the Sri Lankan government was either unwilling or unable to protect him. The Board noted that government forces were successful in tracing him following his abduction, and that they had enabled him to escape by attacking the JVP camp. Noting that Senanayake had been away from Sri Lanka for 19 years, the Board

stated that he had not offered any evidence to support his allegation that the JVP had regained sufficient power to enable it to search out individuals such as himself.

Senanayake did not sustain his burden of presenting evidence "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution". Therefore, the Board did not abuse its discretion in denying his request for asylum.

B.

The Board also determined that Senanayake was not eligible for a waiver of deportability under § 212(c) of the Act, 8 U.S.C. § 1182(c). That section provides that "aliens admitted for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years may, in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other sections of the Act". **Ashby v. I.N.S.**, 961 F.2d 555, 557 (5th Cir. 1992). "Applicants for discretionary relief who have been convicted of serious drug offenses must show unusual or outstanding equities". **Dias-Resendez v. I.N.S.**, 960 F.2d 493, 496 (5th Cir. 1992) (internal quotation marks omitted). "[T]he Attorney General has unusually broad discretion in granting and denying waivers". **Ashby**, 961 F.2d at 557. Accordingly, "our review of the Board's decision is severely limited". **Id.**

The Board considered as "positive equities" the facts that Senanayake has lived in the United States since 1978, and was granted lawful permanent resident status in 1981; that he has

strong family ties in the United States, including a mother and sister who are lawful permanent residents and a child who is a United States citizen;³ that he has a history of employment and owns an interest in a gem business; that he served his prison sentence without incident, was employed during his imprisonment, and has abided by the terms of his parole; and that Sri Lanka is embroiled in a civil war. The Board found that these equities, considered cumulatively, "rise to the level of the unusual and outstanding".

The Board concluded, however, that the positive equities were outweighed by Senanayake's 1981 conviction, which it characterized as a "grave offense". Although the Board noted that Senanayake had sought to minimize his role in the opium conspiracy, it stated that it could not "ignore the fact that the United States district court judge who presided over the criminal proceedings saw fit to impose a stern 10-year prison sentence". And, the Board pointed out that Senanayake was arrested on the opium conspiracy charges in July 1981, only five months after being granted lawful permanent resident status.

The Board adequately considered the equities involved, "balancing the social and humane considerations in [Senanayake's]

³ The Board noted that Senanayake also is married to a United States citizen, but found that the weight of that factor is "undercut by the fact that he is separated from his spouse". (Senanayake states in his brief that he is divorced.)

favor against the adverse factors".⁴ **Ashby**, 961 F.2d at 557. It did not abuse its discretion.

III.

For the foregoing reasons, the petition for review is

DENIED.

⁴ Senanayake contends that the Immigration Judge failed to discuss the facts that his counsel did not advise him of the immigration consequences of pleading guilty, misrepresented to him the district judge's knowledge of his involvement in the conspiracy, and led him to believe that he would receive probation. We review only the decision of the Board, not the decision of the Immigration Judge. See **Adebisi**, 952 F.2d at 912. The Board's decision reflects that it considered these factors.