Federal Court  Cour fédérale

Date: 20150505

Docket: IMM-2864-14

Citation: 2015 FC 585

Toronto, Ontario, May 5, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

AMALAN THIRUCHELVAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Summary

[1] This is an application for judicial review by Amalan Thiruchelvam [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Ministerial Delegate of Case Determination [the Ministerial Delegate], dated February 14, 2014 and communicated to the Applicant on or about April 2, 2014, wherein the Ministerial Delegate rejected the Applicant's application for protection under sections 112 and

113 of the IRPA, a pre-removal risk assessment [PRRA] application where the Applicant had previously been found to be excluded on the basis of Article 1F of the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*]. The application is allowed for the reasons that follow namely that the Applicant's right to a timely restricted PRRA was breached.

II. Facts

[2] The Applicant was born on May 31, 1980. He is a citizen of Sri Lanka of Tamil ethnicity. His sister is in Canada as a refugee. On March 5, 1998, she sponsored their father's overseas family class application for permanent residence, which included the Applicant as a dependent. This application was refused on January 8, 2001. On January 3, 2002, the Applicant fled Sri Lanka by flying to Singapore on a false passport and then, with the help of an agent, going to Indonesia, then Somalia and finally to the United Kingdom, where he claimed refugee protection on August 22, 2002. Although his credibility was not questioned in the United Kingdom, the Applicant's claim was rejected on the basis of an ongoing cease fire in Sri Lanka at the time. The Applicant appealed this decision in August 2003 but the Appeal division refused his appeal in October 2003.

[3] The Applicant arrived in Canada on March 16, 2004 and claimed refugee protection, alleging fear at the hands of the army, the police, the Liberation Tigers of Tamil Eelam [LTTE] and other militant groups in Sri Lanka. The Applicant made the following allegations in support of his refugee protection claim:

1. He was forced to help the LTTE by digging bunkers and looking after their wounded, but refused to join their ranks although he was pressured to do so.

2. He was arrested by Sri Lankan army in October 1997 on suspicion of being involved with the LTTE but was released the same day when a member of the Tamil Eelam Liberation Organization [TELO] vouched for him.

3. He became a member of the TELO student organization around March 1998 and eventually became vice president.

4. There were disputes between the People's Liberation Organisation of Tamil Eelam [PLOTE] and TELO with accusations by PLOTE that TELO was involved with the LTTE.

5. Around the end of the year 2000, the army searched a TELO camp. The Applicant was arrested but was able to establish his identity and membership of TELO. He subsequently escaped abduction by PLOTE.

6. The Applicant helped a fellow student in October 2001 who was subsequently arrested on suspicion of being involved with the LTTE. On December 19, 2001, the Applicant was arrested by the Sri Lankan army on suspicion of helping the LTTE, namely by helping his friend back in October. There, he was detained for 7 days, where he was interrogated, tortured, beaten, given electric shocks and sexually assaulted. The Applicant was released with the help of TELO members and his uncle. Upon release, he hid at his uncle's house for 3 days, left for

> Colombo hidden in a lorry of dried fish, stayed in a Muslim home for 5 days and the left Sri Lanka for the United Kingdom.

[4] The Applicant was made the subject of an inadmissibility report pursuant to section 44 of the IRPA. Upon review of the inadmissibility report by the Minister's delegate, the Applicant was issued a departure order that was not in force at the time of its issue. On February 28, 2005, Canada Border Services Agency [CBSA] notified the Immigration and Refugee Board, Refugee Protection Division [RPD] of the Minister's intent to intervene on the grounds that the Applicant was a person described in Article 1F(a) and 1F(c) of the *Refugee Convention*, namely that he has committed a crime against peace, a war crime, or a crime against humanity or that he has been guilty of acts contrary to the purposes and principles of the United Nations.

[5] On October 11, 2006, the RPD found there were serious reasons to believe the Applicant was part of the terrorist wing of TELO. The RPD determined that the Applicant was a person described in Article 1F(a) and 1F(c) of the *Refugee Convention* and, accordingly, found him to be excluded from refugee determination in Canada. The departure order against the Applicant became in force on that date. The Applicant filed an application for leave and judicial review of the RPD's decision in this Court on November 1, 2006, but leave was denied on February 13, 2007.

[6] The Applicant applied for a PRRA on July 6, 2007, putting forward two new considerations. First, he argued that the changes in country conditions amounted to clearly defined risk to Tamils in Sri Lanka and that there was no internal flight alternative for Tamils in

Colombo or any other part of Sri Lanka. Second, the Applicant clarified his involvement with TELO while in Sri Lanka, alleging that he was involved with the Student wing of TELO and that he was not involved in any militant activity. The Applicant also cited risks as a returning Sri Lankan asylum seeker.

[7] On November 6, 2007, a PRRA officer formed the opinion that the Applicant may be a person in need of protection as described in section 97 of the IRPA due to his ethnicity and his previous involvement with TELO. However, because the PRRA officer was not delegated to make a final decision in this type of case, the risk assessment was forwarded to the CBSA. Almost six years later, an officer of CBSA completed a restriction assessment dated August 8, 2013 on the Applicant under paragraph 172(2)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. There is no explanation for this very lengthy delay. The PRRA opinion and CBSA's restriction assessment (both positive to the Applicant) were disclosed to the Applicant by letter dated September 6, 2013, which also included some updated country condition information from public sources. The Applicant replied to this information.

[8] In the interim, the Applicant has applied for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds on December 16, 2010. The outcome of this application is not known.

[9] Because the Applicant was a person excluded pursuant to Article 1F of the *Refugee Convention*, his PRRA was required to be assessed by a Ministerial Delegate appointed pursuant to subsection 6(2) of the IRPA. In this regard, the Ministerial Delegate reviewed but rejected the

restricted PRRA officer's report, and determined for herself that the Applicant would not be at risk of torture, risk to life or risk of cruel and unusual treatment or punishment if he was to be returned to Sri Lanka. Accordingly the Ministerial Delegate rejected the Applicant's PRRA application on February 14, 2014. The Applicant was informed at the same time that the removal order made against him was then enforceable.

[10] The Applicant filed an application for leave and judicial review of that decision in this Court on April 16, 2014. On May 14, 2014 this Court stayed the Applicant's removal to Sri Lanka, scheduled for May 19, 2014, pending the determination of his application for leave and for judicial review of the Ministerial Delegate's decision to reject his PRRA application. On January 28 2015, this Court granted leave to commence an application for judicial review of that decision.

III Decision under Review

[11] Because the Applicant was determined by the RPD to be excluded from refugee protection pursuant to Articles 1F(a) and 1F(c) of the *Refugee Convention*, he was found by the Ministerial Delegate to be a person described under paragraph 112(3)(c) of the IRPA, which provides the following:

Restriction (3) Refugee protection may not result from an application for protection if the person […] (c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention;	Restriction (3) L'asile ne peut être conféré au demandeur dans les cas suivants : […] c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

[12] The Ministerial Delegate consequently assessed the Applicant's application through the framework of paragraph 113(d) of the IRPA, which provides the following:

Consideration of application 113. Consideration of an application for protection shall be as follows: […] (d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and […] (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and	Examen de la demande 113. Il est disposé de la demande comme il suit : d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part : […] (ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

[13] The Ministerial Delegate therefore considered the Applicant's submissions, the PRRA officer's assessment, and the restriction assessment from CBSA and the Applicant's submissions on the two assessments (by CBSA and the PRRA officer). The Ministerial Delegate held that the PRRA officer's assessment "contain[ed] little by way of analysis regarding the risk [the Applicant] would personally face in Sri Lanka" and also found the PRRA officer's conclusions on risks were outdated. She reviewed the updated country condition material sent to the Applicant and in addition conducted her own analysis, citing other country condition material. She held that the cessation of hostilities in Sri Lanka following the defeat of the LTTE by government forces in May 2009 as the most significant recent developments relevant to the Applicant's case.

[14] The Ministerial Delegate noted that the Applicant was not a member of the LTTE, but instead a card carrying member of TELO, a group she described as "one of a number of non-state pro-government paramilitary groups operating in Sri Lanka and one of the groups to whom the Sri Lankan security forces have outsourced the work of controlling major Tamil towns." The Ministerial Delegate also noted that the Applicant was able, at least on one occasion, to establish his membership to the Sri Lankan Army in order to avoid arrest and detention, and was able on another occasion to effect his release from detention by the Sri Lankan authorities following the intervention by members of TELO and his uncle. To the Ministerial Delegate, this indicated that the Sri Lankan government did not have continued interest in the Applicant as a suspected member of the LTTE.

[15] Regarding the returning asylum seeker argument, the Ministerial Delegate noted that the documentation before her indicated evidence that Tamils who have been politically active abroad in peaceful opposition to the Sri Lankan government may be subjected to torture and other ill-treatment upon return. However, the Ministerial Delegate found that there was insufficient evidence before her to indicate that the Applicant had been politically active in opposition to the government of Sri Lanka either during his stay in the United Kingdom or in Canada.

[16] The Ministerial Delegate acknowledged that the evidence indicated that returning asylum seekers are identified by their travel documents, are taken out of the immigration queue and subjected to special questioning by the police and members of the Terrorist Investigation Department. However, the Ministerial Delegate noted that there is insufficient evidence to lead her to conclude that detainees in these circumstances are more likely than not to be tortured.

[17] In light of the evidence before her, the Ministerial Delegate was satisfied on a balance of probabilities that the Applicant was not likely to face personalized risks as identified in section 97 of the IRPA and consequently rejected his PRRA application.

IV Issues

[18] This matter raises the following issues:

A. Whether the Ministerial Delegate breached her duty of procedural fairness towards the Applicant?

B. Whether the Ministerial Delegate erred in her assessment of the evidence relating to the risks faced by the Applicant upon returning to Sri Lanka?

V Standard of Review

[19] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[20] Issues of procedural fairness are reviewable under the correctness standard of review: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 53-55. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view

> and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[21] The Ministerial Delegate's assessment of the evidence is to be reviewed on the reasonableness standard of review: *Muhammad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 448 at para at para 9. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI Submissions of the Parties and Analysis

[22] As a preliminary matter the Respondent opposes the Applicant's filing of evidence that was not before the Ministerial Delegate. It is established that new evidence is not to be considered on judicial review unless it falls within certain exceptions: *Ochapowace First Nation v Canada (AG)*, 2007 FC 920 at para 9, aff'd 2009 FCA 124, leave to appeal to SCC ref'd [2009] SCCA no 262. However, I do not need to make a finding on this issue because the matter before me is disposed of, as set out below, without relying of the new evidence.

A. *Whether the Ministerial Delegate breached her duty of procedural fairness towards the Applicant?*

[23] The Ministerial Delegate, in conducting a final assessment under paragraph 113(d) of the IRPA, was required by law to consider an assessment of risk by a competent decision-maker (the PRRA officer's risk assessment dated November 6, 2007), and to consider an assessment of whether the application should be refused because of the nature and severity of acts committed by the Applicant or because of the danger that the Applicant constitutes to the security of Canada (the CBSA's restriction assessment dated August 8, 2013).

[24] The Applicant submits that the Ministerial Delegate breached her duty of procedural fairness by rejecting the only risk assessment disclosed to the Applicant as being outdated and of little relevance without giving him the opportunity to comment on the actual risk assessment she conducted. According to the Applicant, the Ministerial Delegate had a duty to provide him with an opportunity to make submissions on the risk assessment on which her decision was based.

[25] The Applicant has no right to see the Ministerial Delegate's draft risk assessment, and there is no case law contrary to this proposition. However, in a case such as this, the statute itself requires that the Applicant be given a timely risk assessment for his comment. I accept the law stated in *Ragupathy v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370 at para 27 [*Ragupathy*] in this respect:

> [27] A timely risk assessment is Canada's safeguard against deportation to torture or similar treatment. Indeed, the performance of a risk assessment before removal is the mechanism by which effect is given to section 7 of the *Charter* and various international human rights instruments to which Canada is a party. An individual's rights under section 7 of the *Charter* would be

> rendered illusory, however, if the facts underlying the risk assessment did not correspond to the present reality in the country to which the individual is being deported.

[26] What is timely will depend on the circumstances including the relative stability of relevant country conditions and the length of delay. In some cases, it might be a relatively long time period of time between the assessment and the Applicant's opportunity to comment upon it. In other cases the delay may be shorter. It will be a matter of degree and circumstances in each case. This proposition is established by asking: what if the delay was not 6 years, but 10 or 15 years? In my respectful view, there comes a time when, in a case like this, a restricted PRRA assessment is so out of date as to be no restricted PRRA assessment at all, that is, the requirements of 113(d) of the IRPA have not met because the restricted PRRA is so out of date.

[27] The scheme of the legislation supports this conclusion. The Minister's delegate is duty bound to consider the restricted PRRA report and the CBSA report. These reports must be given to the Applicant and he has a statutory right to comment on them. That right of comment is rendered nugatory if the PRRA is so out of date as to be of no use to the Applicant or the Minister. That was the case here. Ultimately, it comes down to the legislator's intent. To ensure the Applicant's right to comment on the PRRA (and on the CBSA report for that matter), in my view, the legislator intended that such reports be timely. If it were otherwise, there would be no point in Parliament legislating on the rights of disclosure or comment.

[28] I am unable to agree with the argument that *Ragupathy* should be restricted to the circumstances of that case. PRRAs are extremely important, because they are the last chance to ensure that Canada, in discharging its treaty and international obligations, has got it right before

refusing its asylum, subject to the limited discretion of a removal officer. I see no reason why a stand alone PRRA, should be treated any differently from a restricted PRRA under paragraph 113(d) of the IRPA. Nor can I see any justification for why it might be acceptable for the Minister's Delegate to review an out of date restricted PRRA, but to require stand-alone PRRAs to be timely. A timely PRRA is important because it must be provided to an applicant who then has the statutory right to see and comment upon it. There is no point in providing out of date restricted PRRAs in cases like this, because to do so engages the Applicant in the futile exercise of responding to a departmental document which another official in the same department is bound to reject as out of date. An out of date PRRA empties the statutory right to have it disclosed in the first place, and likewise empties the Applicant's statutory right to comment on it.

[29] The question therefore becomes whether a restricted PRRA almost six years out of date meets the legal requirement that it be provided in a timely manner. In my view it does not. This is particularly the case given the situation facing Tamils from the North: in which respect see *Navaratnam v Canada (Minister of Citizenship and Immigration*) 2015 FC 244 at paras 13 to 16.

[30] I am unable to agree with the Respondent's submission that the Applicant is precluded from asking that the PRRA be provided in a timely manner. I do not agree that his right was waived, nor do I accept that he is estopped in this regard. The Applicant had a legal right to a timely restricted PRRA, but instead received a PRRA that could simply be rejected as out of date, which is exactly what the Minister's Delegate did. In doing so, a casualty was the Applicant's right to both receive and comment on a meaningful restricted PRRA.

[31] I agree with the Respondent that up to date country condition submissions may be filed within the context of the Applicant's (presumably, although I do not know its status) ongoing H&C. However, this missed the point. Filing an H&C does not result in the loss of the right to a timely restricted PRRA. The two procedures serve different purposes.

[32] Since a timely restricted PRRA was not provided, the Applicant was denied the statutory requirements and procedural fairness to which he was entitled, and the decision below must be set aside.

[33] Mechanically, the Applicant must be reassessed. That reassessment must involve the Applicant being given a fresh and timely restricted PRRA for his review and comment. Since there is to be fresh consideration of the matter, the Applicant will be at liberty to file fresh evidence in relation to the new PRRA.

[34] Given my finding on the issue of procedural fairness, I am not required to comment on the issue of whether the Ministerial Delegate erred in her assessment of the evidence. However, I do wish to note that various decision makers have dealt with the Applicant's membership in TELO with dramatically different results. The Applicant's membership in TELO led the RPD to exclude him from refugee protection in 2006 when it held TELO was a "terrorist organization". In 2014 however, the Ministerial Delegate found that the Applicant was not at risk if he returned to Sri Lanka because TELO is apparently today considered a "non-state pro-government paramilitary group". On that basis the Minister's Delegate rejected his request to remain in Canada. I also note that the original exclusion finding by the RPD is problematic given the

Supreme Court of Canada's recent decision in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40.

[35] In my view the issue of the Applicant's membership with TELO and the consequences of such membership on risk should be clearly analyzed and thoroughly assessed upon the re-determination ordered in this case.

[36] Neither party proposed a question to certify, and no question arises.

VII Conclusions

[37] The application for judicial review should be allowed and this matter is remitted for re-determination in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision of the Minister's Delegate is set aside, the matter is remitted to a differently constituted decision-maker for re-determination in accordance with these reasons in respect of which a new restricted PRRA is required and new evidence may be filed, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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