

Federal Court



Cour fédérale

**Date: 20150713**

**Docket: IMM-6875-14**

**Citation: 2015 FC 855**

**Ottawa, Ontario, July 13, 2015**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**KALEECHARAN KANDASAMY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is a judicial review of a Canada Border Services Agency [CBSA] officer's [Officer] decision to apply to the Immigration and Refugee Board [IRB] to cease refugee protection of the Applicant.

II. Background

[2] The Applicant is a Sri Lankan national, who came to Canada as a member of the country asylum in 2004 during the Sri Lankan civil war fearing persecution at the hands of the government and the LTTE.

[3] The civil war ended in 2009 and the Applicant returned to Sri Lanka in 2013.

[4] The Applicant alleges that he was questioned upon his return to Canada without being informed that the motivation for the questions was an investigation into cessation of protected person status.

[5] Of particular importance is that the Applicant was invited to an interview and/or to make submissions to the Officer before the decision to file a cessation application was made. He did neither.

[6] The Officer proceeded with the cessation application citing as grounds s 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The relevant provisions are:

**108.** (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(a) the person has voluntarily reavailed themselves of the protection of their country of

**108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

nationality;

(b) the person has voluntarily reacquired their nationality;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

(e) the reasons for which the person sought refugee protection have ceased to exist.

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

(3) If the application is allowed, the claim of the person is deemed to be rejected.

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to

b) il recouvre volontairement sa nationalité;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

e) les raisons qui lui ont fait demander l'asile n'existent plus.

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

(3) Le constat est assimilé au rejet de la demande d'asile.

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

such previous persecution,  
torture, treatment or  
punishment.

[7] The Officer's decision was based principally on the numerous trips the Applicant took back to Sri Lanka in the recent years. Having declined to attend an interview, the Officer concluded that based on the available evidence, the Applicant had voluntarily re-availed himself of the protection of the country of nationality and is a person described in s 108(1)(a).

[8] In post-hearing submissions, the Applicant asks that the Court follow Justice Mosley's decision in *Bermudez v Canada (Citizenship and Immigration)*, 2015 FC 639 [*Bermudez*], rather than Justice Strickland's decision in *Olvera Romero v Canada (Citizenship and Immigration)*, 2014 FC 671, 242 ACWS (3d) 389 [*Olvera Romero*]. The parties are at loggerheads about whether an officer is obliged to consider H&C considerations before making a decision to apply for cessation.

With respect, both decisions have only limited application here.

### III. Analysis

[9] The only real issue is whether the Officer's decision was reasonable (see *Olvera Romero*). The sub-issue is whether the Applicant was accorded procedural fairness.

[10] In my view, the Applicant's refusal to attend an interview or make submissions (which he could have done at the interview) is fatal to this judicial review.

[11] While in *Olvera Romero*, the Court held that participatory rights required by the duty of fairness did not call for an interview or oral hearing, the Court in *Bermudez* held that an applicant had at least the right to make submissions as to why an application to the Refugee Protection Division should not be made.

The two decisions are not in direct conflict on this point.

[12] Given the importance of the process to the Applicant, I adopt the reasoning of Justice Mosley – the rationale for imposing some level of participation in the process.

[13] The issue of whether an officer can or should take into account considerations of an H&C nature is academic on this record. The Officer never did because the Applicant did not exercise his “right to be heard” by attending the interview or filing submissions.

[14] An applicant has minimal procedural rights as noted by Justices Strickland and Mosley. I concur with Justice Mosley that these would include at least the right to make submissions to an officer, including those H&C considerations relevant to the grounds upon which an application for cessation may be based.

[15] The procedural rights are minimal, in part, because the same H&C matters may be raised at the IRB. Such a limitation on procedural rights is consistent with the two-stage process under s 108 – the decision by an officer to apply to the IRB and the decision by the IRB on the merits of the cessation application.

[16] Considering that the Applicant did not exercise his opportunity to address the matter before the Officer made the application to the IRB, I can find no error or unreasonableness in the Officer's decision.

IV. Conclusion

[17] For these reasons, this judicial review will be dismissed.

[18] While this case is markedly different from *Olvera Romero* and *Bermudez*, where questions have been certified, I will give the parties 10 days from the date of the issuance of these Reasons to make submissions (if any) on a certified question.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. the application for judicial review is dismissed; and
2. the parties are to have 10 days from the date of the issuance of these Reasons to make submissions (if any) on a certified question.

"Michael L. Phelan"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6875-14

**STYLE OF CAUSE:** KALEECHARAN KANDASAMY v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MAY 4, 2015

**JUDGMENT AND REASONS:** PHELAN J.

**DATED:** JULY 13, 2015

**APPEARANCES:**

Peter Edelmann FOR THE APPLICANT

R. Keith Reimer FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Edelmann & Co. FOR THE APPLICANT  
Barristers and Solicitors  
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Vancouver, British Columbia