Federal Court Cour fédérale

**Date: 20160427**

**Docket: IMM-4854-15**

**Citation: 2016 FC 473**

**Ottawa, Ontario, April 27, 2016**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**BETWEEN:**

**SELVARATNAM RAMASAMY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a pre-removal risk assessment [PRRA] decision dated September 15, 2015 by a Senior Immigration Officer [the Officer] where he determined that the Applicant would not be subject to risk of persecution, danger of torture, risk to life or risk to cruel and unusual treatment or punishment if removed to Sri Lanka.

## I. Facts

[2] The Applicant is a citizen of Sri Lanka of Tamil ethnicity and Hindu faith.

[3] He alleged the following facts in support of his claim:

In November 2010, the Applicant was abducted by militants who suspected him of having been injured in battle fighting for the LTTE because he was walking with a cane. The militants detained him for ten days and released him after his in-laws paid a ransom. In December 2010, the Applicant was stopped by soldiers in uniform who questioned him about his injury and beat him. In May 2011, he was again kidnapped by militants and released after six days and a ransom of 50 000 rupees. The Applicant then decided to leave Sri Lanka as to not further endanger his wife and three young children.

[4] On August 14, 2011, the Applicant arrived in Canada where he applied for refugee status. His claim was denied on October 5, 2012. His application for leave and judicial review of that decision in 2013 was also denied.

[5] The Applicant applied for a PRRA in October 2013 and filed an application for permanent residence on humanitarian and compassionate grounds [H&C] in April 2014. Both applications were denied on November 6, 2014.

[6] The Applicant filed an application for leave and judicial review of the PRRA decision and filed a motion to stay his removal pending the outcome of the application. The motion was discontinued after his removal was cancelled following a request from the United Nations Human Rights Committee. Leave was granted in March 2015.

[7] In April 2015, the Applicant's wife was visited by Intelligence Army officers who demanded to know when the Applicant would be returning to Sri Lanka and extorted 25 000 rupees from her.

[8] In May 2015, the Respondent consented to the redetermination of the PRRA application. The PRRA application was again refused in September 2015.

## II. Decision

[9] The Officer first noted that credibility had been the determinative issue before the RPD and that the panel had not found the Applicant's allegations to be true due to numerous plausibility problems and the fact that he had managed to leave Sri Lanka on his own passport.

[10] The Officer reviewed the new evidence adduced by the Applicant. He first considered two complaints made to the Human Rights Commission of Sri Lanka and Red Cross Sri Lanka, dated from 2011 and found that these complaints did not meet the criteria for new evidence because they were reasonably available at the time of the RPD hearing and that, in fact, counsel for the Applicant had been aware of these documents at the time and had deliberately chosen not to include them in their submissions before the RPD. The Officer also considered that the

Applicant's affidavit recounting the April 2015 events and a letter from his wife confirming the same did not qualify as new evidence because they essentially recounted the same facts that had been presented to the RPD.

[11] The Officer then assessed the evidence on country conditions, but found that it was of a general nature and could not be linked to the Applicant's personal circumstances. The Officer also assigned low weight to two letters from Sri Lankan officials, finding that although they attested to the events described by the Applicant and his wife, the events had been recounted to the authors by a third party and had not been independently verified.

[12] The Officer therefore concluded that there was overall insufficient objective evidence that would be indicative of new risk developments in either country conditions or the Applicant's personal circumstances since the RPD decision.

## III. Issues

[13] This matter raises the following issues:

1. What is the applicable standard of review?
2. Did the Officer err in not holding an oral hearing?
3. Did the Officer err in assessing risk under s 97?

## IV. Submissions of the Parties

### A. *Applicant's Submissions*

[14] The Applicant submits that the Officer erred in not considering how his profile put him at risk when the PRRA submissions specifically addressed this issue. The Officer used the wrong test while assessing risk under s 97 of the Act by finding that the evidence on country conditions did not address the Applicant's "personalized risk" and failed to acknowledge that the objective documentation provided portrayed a higher level of risk to the Applicant than what was described in the RPD decision.

[15] Finally, the Applicant submits that the Officer should have held an oral hearing to address the documents adduced to address the RPD's implausibility findings.

### B. *Respondent's Submissions*

[16] The Respondent notes that the RPD found the Applicant's allegations not to be credible and it is not the role of the Officer to sit on appeal of the RPD decision.

[17] While it is true that Tamil asylum seekers with links or perceived links to the LTTE are at risk in Sri Lanka, the Respondent submits that the Applicant does not fit this profile because he has not established links or perceived links to the LTTE. The Officer's decision was therefore reasonable.

## V. Analysis

### A. *Standard of Review*

[18] There is some dispute within the Court as to whether the decision to hold an oral hearing in the context of a PRRA application is a question of procedural fairness, or a question of mixed facts and law. In *Thirutchelvam v Canada (MCI),* 2015 FC 913 [*Thirutchelvan*] at para 3, Justice Annis noted that it appeared to be the dominant trend at the Court in recent years to consider the issue as a question of mixed facts and law reviewable under the standard of reasonableness. I agree that the right to an oral hearing set out in s 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] requires a careful analysis of the facts at hand and is, as such, better characterized as a mixed question of facts and law.

[19] The question of whether a PRRA officer applied the appropriate legal test is a question of law, and reviewable under the standard of correctness (*Navaratnam v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 244, para 5 [*Navaratnam*]). It is however well-established that an officer’s assessment of the evidence in the context of a PRRA application is also reviewable under the standard of reasonableness. The decision should only be interfered with if the decision is not justified, intelligible, or transparent and does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, para 47[*Dunsmuir*]).

B. *Did the Officer err in not holding an oral hearing?*

[20] I am of the opinion that the Officer did not err in deciding not to hold an oral hearing. It is understood that oral hearings in the context of a PRRA are exceptional and may be held only when the conditions set out in s 167 of the Regulations are met. The conditions are as follows:

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| (a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act; | a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; |
| (b) whether the evidence is central to the decision with respect to the application for protection; and | b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; |
| (c) whether the evidence, if accepted, would justify allowing the application for protection. | c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection. |

[21] The Applicant lists documentary evidence that, he argues, should have triggered the right to an oral hearing. However, he fails to address the fact that most of the cited evidence was properly dismissed by the Officer as inadmissible, because it did not meet the 'newness' requirement of s 113(a) of the Act. For example, the letters from the Applicant's wife and from the Members of Parliament only recounted the same facts that had been presented before the RPD.

[22] It is true that the Officer does not mention the confirmation of residence. However, while it is central to the question of the Applicant's credibility, it also fails at the 'newness' stage. The

confirmation of residence appears to have been obtained by the Applicant's step-brother, who declared that the Applicant resided at a particular address between 2007 and 2009 and asked the Divisional Secretary to certify that information. In his PRRA submissions, the Applicant explains that the confirmation could not be obtained in time for the RPD hearing because his representative had not made him aware of the need to obtain such documentation. Section 113(a) of the Act states that:

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| 113 Consideration of an application for protection shall be as follows: | 113 Il est disposé de la demande comme il suit : |
| (a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; | a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet; |

[23] Like the human rights complaints, the confirmation of residence could have been reasonably available at the time of the RPD hearing, but was not presented because of a deliberate choice on the part of the Applicant's representative. It is not a situation intended to be covered by s 113(a) of the Act. The Officer was therefore entitled not to consider the evidence in his decision.

[24] As to the remaining evidence, namely the letters from the Sri Lankan MPs, they do not raise a serious issue of the applicant's credibility.

[25] The Officer did not err by not holding an oral hearing in this case.

C. *Did the Officer err in assessing risk under s 97?*

[26] To establish risk of persecution, an applicant does not have to demonstrate a ‘personalized risk’, but can simply establish that he or she belongs to a group that is persecuted, or that is likely to be (*Salibian v. Canada (Minister of Employment and Immigration)*, [1990] FCJ No 454 (FCA); *Navaratnam*, para 12).

[27] In his decision, the Officer noted:

> While I have considered all of these documents in the context of assessing country conditions, they are generalized in nature and do not establish a linkage directly to the applicant’s personal circumstances. Evidence of general conditions within a country is not in itself sufficient to show that the applicant is personally at a risk of harm.

[28] I find that the Officer’s reasons are too succinct to determine whether he applied the wrong test, or whether he meant that the Applicant did not fit the profile of a person who would be persecuted in Sri Lanka, namely a male Tamil from the North with links or perceived links to the LTTE. Given the excerpt from the decision cited above and the wealth of evidence documenting the deterioration of country conditions in Sri Lanka, however, I find that the Officer applied the wrong test.

[29] Furthermore, I agree with the Applicant that the Officer err in not addressing the change in country conditions since the RPD decision. The Officer concluded that: “[…] the applicant has provided insufficient objective evidence that would be indicative of new risk developments in

either country conditions or personal circumstances which have arisen since the date of the RPD decision", which is not true. While the risks alleged in the PRRA are the same as those argued before the RPD, recent objective documentary evidence details how Tamils who have no confirmed LTTE affiliation are subjected to detention and ill treatment after having been returned to Sri Lanka following an unsuccessful refugee claim abroad. In fact, this Court has taken judicial notice of the deterioration in country conditions in Sri Lanka since 2012 (*Srignanavel v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 584, para 24 (Brown J.)). The reliance by the Officer on the RPD's conclusions based on outdated country conditions without any assessment of the more recent documentation constitutes a reviewable error.

[30] For these reasons, the application for judicial review is allowed. The matter is referred back for redetermination before a differently constituted panel.

## JUDGMENT

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

The application for judicial review is allowed and the matter is referred back for redetermination by a differently constituted panel. No question is certified.

"Danièle Tremblay-Lamer"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4854-15 |
| **STYLE OF CAUSE:** | SELVARATNAM RAMASAMY v MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | APRIL 21, 2016 |
| **JUDGMENT AND REASONS:** | TREMBLAY-LAMER J. |
| **DATED:** | APRIL 27, 2016 |

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| Me Arash Banakar | FOR THE APPLICANT |

**SOLICITORS OF RECORD:**

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