

Federal Court



Cour fédérale

Date: 20170505

Docket: IMM-2816-16

Citation: 2017 FC 457

Ottawa, Ontario, May 05, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

KOBIKRISHNA KANAKASINGAM

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Kanakasingam, is a Tamil from northern Sri Lanka. He arrived in Canada in 2009 and made a refugee claim on the basis of having been physically assaulted and interrogated on suspicion of involvement with the militant separatist Liberation Tigers of Tamil Elam [LTTE]. His refugee claim was denied on the basis that conditions in Sri Lanka at that time (2010) were improving, and therefore he would not be at risk. Unfortunately, the situation in Sri Lanka for those with a profile like that of the Applicant's has not improved.

[2] In this application, Mr. Kanakasingam seeks judicial review of the Removal Officer's [the Officer] decision, dated July 4, 2016 refusing to defer his removal from Canada. For the reasons that follow, this judicial review is allowed.

I. Background

[3] The Applicant is from Jaffna in the north of Sri Lanka. He came to Canada in October 2009 (entering through the United States) and made a refugee claim on the basis of a history of being arrested and detained by the authorities and pre-government paramilitaries as a young Tamil man from the north of Sri Lanka. He claimed to have also been physically assaulted and interrogated on suspicion of involvement with the militant separatist group LTTE.

[4] Mr. Kanakasingam's refugee claim was heard in September, 2010. In October 2010, his application was refused by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, on the basis that conditions in Sri Lanka at that time were improving, and that consequently, he would neither be a risk nor a target of special interest. His application for judicial review of the RPD's decision was dismissed.

[5] In November 2011, Mr. Kanakasingam made a Pre-Removal Risk Assessment [PRRA] application. His PRRA was refused in February 2012.

[6] In April 2012, Mr. Kanakasingam was ordered to be removed from Canada. He was scheduled to be deported on April 8, but he failed to appear for removal. The Canadian Border Services Agency [CBSA] issued a warrant for the Applicant's arrest. On June 20, 2016, Mr.

Kanakasingam turned himself in to the offices of the CBSA and was subsequently arrested and detained.

[7] Mr. Kanakasingam's removal from Canada was scheduled for July 5, 2016. He requested a deferral of his removal from CBSA until he could receive another PRRA, as four years had passed since his risk had been assessed. The request for a deferral was refused.

[8] Mr. Kanakasingam did receive a stay of removal by Order of this Court pending the outcome of this application for judicial review.

II. Decision under review

[9] The Officer acknowledged that he had little discretion to defer removal under subsection 48(2) of the *Immigration and Refugee Protection Act [IRPA]* and noted that his role was to assess whether there was compelling new evidence to justify the delay of his removal to Sri Lanka.

[10] After reviewing the documentation package submitted by the Applicant, the Officer was not satisfied that there was sufficient evidence demonstrating that the conditions in Sri Lanka had seriously deteriorated since the Applicant's previous PRRA assessment four years before.

[11] Mr. Kanakasingam filed a medical report from Dr. Paul Agarwal regarding his psychological and emotional functioning and potential impacts on his mental health if required to return to Sri Lanka. Dr. Agarwal had diagnosed the Applicant with Severe and Chronic Major Depressive Disorder. In considering this report, the Officer noted that the Applicant had not

brought any evidence showing that he had made any attempts to follow Dr. Agarwal's medical advice to mitigate the effects of his mental health condition.

[12] Overall, the Officer was not satisfied that the Applicant's evidence was sufficient to justify the deferral of his removal.

III. Issue

[13] While the Applicant has raised a number of issues in his application for judicial review, the determinative issue is the reasonableness of the Officer's decision.

IV. Analysis

[14] The Applicant argues that as a young male of Tamil ethnicity, he fits the profile of those likely to be targeted for mistreatment. He claims that the situation in Sri Lanka has not improved and that human rights violations continue to be perpetrated against Tamils and those who fled the country to seek safety. The Applicant argued that if returned to Sri Lanka, he would face a real risk of detention and torture.

[15] The Officer noted that he has limited discretion to defer removal and that he has an obligation under section 48 of the *IRPA* to enforce removal orders as soon as reasonably practicable. However, a deferral may be warranted in circumstances "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51).

[16] The Officer's role is not to assess risk, but rather, to assess whether there are special circumstances that could justify deferring the removal (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 741 at para 15).

[17] Here, the Officer was tasked with considering the evidence submitted in order to assess whether removal should be deferred until a PRRA application could be determined. In *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 774, this Court explained that an enforcement officer can defer removal to allow for a "fulsome risk assessment where an applicant facing removal adduces sufficient evidence of a serious risk in his or her country of origin, and that risk has not previously been assessed" (para 82).

[18] The Applicant argues that the evidence submitted to the Officer showed escalating and systemic violations of human rights in Sri Lanka towards young males of Tamil ethnicity in the north of Sri Lanka. However, the Officer found that the new evidence submitted by the Applicant did not lead to different conclusions than those made by the RPD (in 2010). Namely, the Officer stated that: "I am not satisfied that your submissions provide sufficient evidence that the conditions in Sri Lanka have seriously deteriorated since your last PRRA."

[19] The Officer failed to identify or to mention any of the evidence submitted, besides stating that the "submissions are rather voluminous and consist of reports relating to general conditions in Sri Lanka". Further, the Officer did not refer to the changes in country conditions in Sri Lanka over the recent years.

[20] Additionally, it was not reasonable for the Officer to require evidence of a personalized risk of harm. The Officer noted that the Applicant's submissions did not provide "any compelling evidence of the alleged personalized risk that [he] may face in Sri Lanka". However, there was no need for the Applicant to present direct evidence that he would in fact face such targeted risks if sent back to Sri Lanka; rather, it can be inferred by circumstantial evidence by the fact the Applicant is a member of a group that is being discriminated against. (see *Kanthisamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 53)

[21] Finally, this Court has accepted that the situation for Tamils returning to Sri Lanka appears to have deteriorated (*Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 244 [*Navaratnam*] at para 15). In *Navaratnam*, the Court explained that:

[15] In April, 2013 the Prime Minister of Canada's special envoy to Sri Lanka, after his investigation, reported that what was happening to Tamils in Sri Lanka was "soft ethnic cleansing". In October 2013, the Prime Minister of Canada boycotted the Commonwealth Heads of Government Meeting hosted by Sri Lanka because of Sri Lanka's human rights issues including treatment of Tamils. The Swiss ceased removals to Sri Lanka in later 2013. In terms of the position adopted by Canadian refugee authorities, I find it very noteworthy that on November 7, 2014 the RPD revoked its 2010 Tamil-related persuasive decision: see *Policy Note: Notice of Revocation of Persuasive Decision VA9-02166*. These are all matters of public record.

[22] Considering the seriousness of the potential consequences combined with the insufficient reasons provided by the Officer, the decision is unreasonable.

[23] In light of my conclusion that the Officer's decision was unreasonable, there is no need to determine whether or not there was a breach of procedural fairness.

[24] This judicial review is allowed and the matter is remitted for reconsideration by another officer.

JUDGMENT in IMM-2816-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the Officer is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2816-16

STYLE OF CAUSE: KOBIKRISHNA KANAKASINGAM v THE MINISTER
OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 20, 2017

JUDGMENT AND REASONS: MCDONALD J.

DATED: MAY 05, 2017

APPEARANCES:

Sarah Boyd FOR THE APPLICANT

John Loncar FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario