

Federal Court



Cour fédérale

Date: 20180411

Docket: IMM-2326-17

Citation: 2018 FC 393

Ottawa, Ontario, April 11, 2018

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

KUMAR VARATHARASA

Applicant

and

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

Respondent

JUDGMENT AND REASONS

[1] Kumar Varatharasa is a citizen of Sri Lanka who seeks judicial review of the decision of an enforcement officer refusing to defer his removal from Canada. Mr. Varatharasa sought to have his removal deferred to allow for the processing of his most recent application for permanent residence on humanitarian and compassionate grounds.

[2] Mr. Varatharasa asserts that the enforcement officer's decision was unreasonable, as the officer failed to consider the risk that he faced as a young Tamil male returning to Sri Lanka as a

failed asylum seeker. He further asserts that the officer erred in his or her treatment of the psychological evidence relating to his mental health.

[3] For the reasons that follow, I have concluded that the enforcement officer's decision was reasonable, particularly when regard is had to the submissions that were made to the officer in support of Mr. Varatharasa's request to defer his removal. Mr. Varatharasa has also failed to persuade me that the officer erred in dealing with the evidence regarding his mental health. Consequently, the application will be dismissed.

I. Mr. Varatharasa's Immigration History

[4] In order to put Mr. Varatharasa's arguments into context, it is helpful to have an understanding of his immigration history.

[5] Mr. Varatharasa arrived in Canada in December 2009, whereupon he made a refugee claim. In an October, 2012 decision, the Refugee Protection Division of the Immigration and Refugee Board dismissed the claim. The RPD found Mr. Varatharasa to be a generally credible witness, and it further accepted that prior to the end of the civil war in Sri Lanka in 2009, young Tamil men from the north of the country faced a serious possibility of persecution.

[6] Relying on a "persuasive decision", the Board was, however, satisfied that there had been a positive change in circumstances in Sri Lanka resulting from the fact that the Liberation Tigers of Tamil Eelam (LTTE) had been defeated by the Sri Lankan Army in May of 2009. The Board found that men with Mr. Varatharasa's profile no longer faced a serious risk of persecution, unless they were suspected of having links to the LTTE. Importantly, the Board found as a fact that the Sri Lankan government did not suspect Mr. Varatharasa of having any LTTE links.

Mr. Varatharasa sought leave to judicially review the Board's decision, but his application for leave was refused by this Court.

[7] Mr. Varatharasa submitted his first application for permanent residence on humanitarian and compassionate grounds in April of 2012. This application was refused. Mr. Varatharasa sought leave to judicially review this decision, but his application was discontinued after the Court dismissed his motion to stay his removal from Canada pending a decision being made in relation to his application for leave. Mr. Varatharasa then failed to report for removal, allegedly because he was too afraid of returning to Sri Lanka.

[8] In January 2015, Mr. Varatharasa's father died in Sri Lanka, and his brother died there the following month. Mr. Varatharasa's family believes that these deaths were linked to harassment on the part of the Eelam People's Democratic Party [EPDP].

[9] Mr. Varatharasa then submitted an application for a Pre-removal Risk Assessment. This application was refused in December of 2015, and Justice Gleeson dismissed his application for judicial review of the PRRA decision in January of 2017, finding that the PRRA officer's finding that Mr. Varatharasa would not be at risk in Sri Lanka was reasonable.

[10] On May 8, 2017, the Canada Border Services Agency informed Mr. Varatharasa that he would be removed from Canada on June 4, 2017. That same day, he submitted a third H&C application. This is the application that was outstanding at the time that Mr. Varatharasa sought a deferral of his removal from Canada.

[11] On May 20, 2017, Mr. Varatharasa submitted a request to defer his removal. This request was refused in a decision dated May 29, 2017. Following the refusal of his request to defer his

removal from Canada, Mr. Varatharasa's removal was stayed by order of this Court pending the hearing of this application.

II. Mr. Varatharasa's Request to Defer

[12] In order to assess the reasonableness of the enforcement officer's decision, it is necessary to understand the basis of Mr. Varatharasa's deferral request.

[13] The submissions filed in support of the request were some eight single-spaced pages in length, and were supported by 139 pages of additional material. This included information concerning current conditions in Sri Lanka, as well as a copy of Mr. Varatharasa's 2017 H&C application.

[14] In her introductory comments, counsel for Mr. Varatharasa noted that some of the documents provided with the request for deferral related to "the deplorable situation in Sri Lanka for people of Tamil ethnicity". After discussing the legal principles relating to the jurisdiction of enforcement officers to defer removals, counsel then identified three reasons as to why his request for a deferral of his removal should be granted. These were:

1. The fact that Mr. Varatharasa had an outstanding H&C application;
2. The serious negative impact that his removal would have on his cousin's children for whom he has become a caregiver; and
3. The impact that removal to Sri Lanka would have on Mr. Varatharasa's mental health.

[15] Over the next several pages, counsel discussed the availability of health care in Sri Lanka for people suffering from mental health conditions, and the stigma faced by the mentally ill in that country. Counsel concluded her submissions by noting that while removal from Canada does not technically nullify a pending H&C application, the reality is that it “is tantamount to cancellation”, given the low probability of such an application succeeding after an applicant has left the country.

III. Analysis

[16] Before addressing Mr. Varatharasa’s arguments, it is important to note that the discretion of an enforcement officer to defer the removal of a person is limited to cases where failure to defer “will expose the applicant to the risk of death, extreme sanction or inhumane treatment”: *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, at para. 51, [2010] 2 F.C.R. 311; *Al Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at para. 13, [2017] 1 F.C.R. 153.

[17] Absent “special considerations”, a request to defer based upon an outstanding H&C application “will not justify deferral unless based upon a threat to personal safety”: *Baron*, above at para. 51.

[18] An enforcement officer’s decision is, moreover, generally reviewable on the standard of reasonableness, except where questions of law arise, in which case the standard is correctness: *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 at para. 27, [2012] 2 F.C.R. 133. I understand the parties to agree that the reasonableness standard applies in this case.

IV. Did the Enforcement Officer Err in Relation to the Issue of Risk?

[19] Mr. Varatharasa submits that the enforcement officer's decision was unreasonable, as the officer failed to consider the risk that he would face in Sri Lanka as a young Tamil male from the north of Sri Lanka who was returning to that country as a failed asylum seeker, or as a vulnerable, mentally ill person whose illness related to his past experiences in Sri Lanka. I cannot accept this submission.

[20] In deciding whether or not to defer an individual's removal, enforcement officers are required to consider the request made, and the reasons offered by the individual as to why his or her removal should be deferred. The officer's reasons should then respond to the issues that were identified in the request to defer. That is what happened here.

[21] I accept that counsel for Mr. Varatharasa did provide the enforcement officer with documents relating to the current situation in Sri Lanka, and that there was a passing reference in the introductory portion of counsel's submissions to "the deplorable situation in Sri Lanka for people of Tamil ethnicity". There was, however, no further discussion of the conditions in Sri Lanka in counsel's submissions. Nor was there any attempt to tie the country condition information in the record to Mr. Varatharasa's personal situation.

[22] Mr. Varatharasa was represented by experienced counsel in relation to his deferral request. Counsel identified three specific reasons why his removal should be deferred. None of these reasons related to the risk that Mr. Varatharasa would face as a young Tamil male returning to Sri Lanka as a failed asylum seeker.

[23] The reasons given by the enforcement officer for refusing the deferral request address each of the three issues raised by Mr. Varatharasa's counsel. That was what was required in this case, and no reviewable error has been identified in this regard.

[24] Before moving to consider the second issue raise by Mr. Varatharasa, I would further observe that deferral requests are often made at the last minute, and enforcement officers are required to render decisions within significant time constraints. In some cases (including this one) applicants have a lengthy immigration history, and they provide enforcement officers with a substantial volume of material. Given the context in which deferral decisions are made, it is incumbent on counsel to specifically identify the considerations that they want the enforcement officer to take into account in deciding whether or not to defer an individual's removal. It is not reasonable to expect enforcement officers to comb through voluminous materials to determine whether there might be other reasons, beyond those cited by counsel, as to why the removal of an individual should be deferred.

V. The Enforcement Officer's Consideration of Mr. Varatharasa's Mental Health

[25] Mr. Varatharasa's second argument is that the officer erred in his or her treatment of the psychological evidence relating to his mental health.

[26] Counsel's submissions on the deferral request overwhelmingly focussed on the quality of mental health care that would be available to Mr. Varatharasa in Sri Lanka, and the stigma associated with mental illness in that country. Mr. Varatharasa did, however, also provide the enforcement officer with a 2015 report from a clinical psychologist in support of his request to defer his removal.

[27] This report (which was prepared after the psychologist saw Mr. Varatharasa on one occasion) stated that Mr. Varatharasa suffered from Post-traumatic Stress Disorder and from a major Depressive Disorder, both of which resulted from his experiences in Sri Lanka. The doctor further stated that the thought of returning to Sri Lanka was “genuinely terrifying” for Mr. Varatharasa, and that he faced an elevated risk of suicide, given his fear of returning to Sri Lanka and his family history of suicide.

[28] The 2015 psychologist’s report had already been considered in relation to both Mr. Varatharasa’s 2015 H&C application and his PRRA application. The enforcement officer was thus being asked to consider the same mental health evidence that had previously been considered in processes that allowed for more fulsome examinations of that evidence.

[29] The enforcement officer did, moreover, consider the psychologist’s report. The officer was concerned, however, as to whether the psychologist’s diagnosis was still valid, as no updates had been provided regarding Mr. Varatharasa’s current mental health situation.

[30] The enforcement officer further noted that when Mr. Varatharasa was arrested in October of 2015, he advised representatives of the Canada Border Services Agency that he had no health problems, and that he was not taking any medication. Mr. Varatharasa specifically denied suffering from any mental health conditions or having any suicidal thoughts.

[31] Mr. Varatharasa submits that the enforcement officer’s treatment of the psychologist’s report was unreasonable. He contends that in discounting the probative value of the psychological evidence because he had failed to seek follow-up treatment for the mental health concerns that had been identified by his doctor, and by failing to fully consider or appreciate the

risk of suicide that would be triggered by his removal to Sri Lanka, the enforcement officer committed the same errors that were identified by the Supreme Court of Canada in *Kanthisamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909. I cannot accept this submission.

[32] In *Kanthisamy*, the Supreme Court found that once an H&C officer accepted a psychiatric diagnosis, it was unreasonable for the officer to then discount a psychiatric report because the individual did not seek follow-up treatment for the mental health concerns identified in the report.

[33] It is apparent from a review of the enforcement officer's reasons in this case that the officer did not question the validity of the doctor's diagnosis *at the time that it was made*. What concerned the officer was whether that diagnosis was still valid, given that nearly two years had passed since the doctor had seen Mr. Varatharasa. This was an entirely reasonable concern, particularly in light of Mr. Varatharasa's claim in late 2015 that he was not suffering from any mental health conditions or experiencing any suicidal ideation.

[34] In the absence of any more recent evidence regarding Mr. Varatharasa's current mental health, the enforcement officer's finding that Mr. Varatharasa had not established that he would face a risk upon his return to Sri Lanka as a result of his mental health conditions was one that was reasonably open to the officer on the record before him or her.

VI. One Further Observation

[35] I would note that Mr. Varatharasa is not left without recourse in this case. Given the dismissal of this application, a new date will presumably be set for his removal (which, I note, is

the same outcome that would likely have resulted had his application for judicial review been granted). It will then be open to Mr. Varatharasa to bring a further deferral request – one that specifically identifies the current conditions in Sri Lanka for Tamils as a risk consideration requiring further assessment. It will also be open to him to provide the officer with updated information regarding his mental health. If this is done, it would then be incumbent on the enforcement officer dealing with his deferral request to consider this evidence, and to determine whether a deferral of Mr. Varatharasa's removal is warranted.

VII. Conclusion

[36] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case is fact-specific, and does not raise a question that is suitable for certification.

JUDGMENT IN IMM-2326-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2326-17

STYLE OF CAUSE: KUMAR VARATHARASA v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

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