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Dockets: IMM-931-08
IMM-932-08

Citation: 2008 FC 1312

Ottawa, Ontario, November 25, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ERNEST SIGMAN MARCELINE PILLAI,
LATECIA SWENTHINI JOACHIMPILLAI
AND STEFFI LETTITIA PILLAI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The applicants, in these two judicial review applications, are Christians (Catholics) of Tamil ethnicity and of Sri Lankan citizenship. The father, Ernest Pillai was born in Colombo; the mother, Latecia Joachimpillai in Jaffna and their 6 year old daughter Steffi in Colombo. Their two other children were born in Canada: a 4 year old son Emmanuvel on April 2, 2004 and a soon to be 3 year

old daughter Izabelle on November 30, 2005. The two decisions they challenge are both dated December 28, 2008 and were rendered by the same Immigration Officer: a negative Pre-Removal Risk Assessment (the PRRA) and a negative application for permanent residence in Canada based on H&C grounds (the H&C decision).

[2] The applicants arrived in Canada from Sri Lanka on May 8, 2003 where the parents had resided since 1993 in Mattakuliya which is close to Colombo. They made a refugee claim shortly thereafter which was refused on February 15, 2005. Mr. Pillai's testimony was found not to be credible; leave to appeal that decision was denied by a judge of this Court.

[3] In putting forward their refugee claim, Mr. Pillai advanced that in 1999 he had established a business in Mattakuliya – a communication center – which became the source of his future problems with the LTTE and the Sri Lankan authorities. In particular, many Tamils came to his communication center to make phone calls which attracted police interest and their suspicion these callers were linked to the LTTE and Mr. Pillai was supporting that organization. Mr. and Mrs. Pillai say they were both arrested and tortured by the Sri Lankan police in 2001 and another time in 2003 after allegedly Tamil Tigers asked him to distribute LTTE cassettes. For various reasons, the RPD concluded on Mr. Pillai's lack of credibility and ruled he never was the owner of that communication center and therefore his claim the couple had been arrested and tortured by the police could not be believed.

[4] On January 9, 2006, Citizenship and Immigration Canada (CIC) received from the applicants an application for permanent residence from within Canada; their application was a

request for an exemption from the normal requirement that a permanent residence visa to this country be obtained from outside Canada. One of the grounds advanced by the applicants justifying such exemption was their allegation, if required to obtain their permanent residence visas from Sri Lanka, they would be at risk because of their ethnicity. Another ground advanced was the best interests of their children.

[5] On April 11, 2007, the applicants made an application for a Pre-Removal Risk Assessment (PRRA); they provided submissions on April 27, 2007 and updated information on December 20, 2007.

[6] As noted, on December 28, 2007, PRRA Officer Jacques denied both applications giving rise to these two judicial review applications: IMM-931-08 with respect to their H&C application and IMM-932-08 with respect to the PRRA decision. Since the risk of return to Sri Lanka is at the centre of both applications and since the determinations of risk were made by the same decision maker on substantially the same risk analysis there existed, in my view, a sufficient basis to issue one set of reasons covering both refusals with appropriate nuances being made where different considerations arise in their separate applications.

[7] Counsel for the applicants at the hearing of the applications challenged the PRRA decision on the following grounds:

- The Officer erred in law in stating that the applicants must demonstrate a personalized risk of persecution conflating the criteria required under section 96 of

the *Immigration and Refugee Protection Act* (the *Act*) with those required under section 97 of that same *Act*;

- The Officer erred in fact when concluding the applicants did not face a risk of arrest, detention and torture or other forms of mistreatment during detention;

- The Officer erred in law in concluding that arbitrary detention is mere discrimination and was insufficient to warrant protection.

[8] Counsel for the applicants raised at the hearing two points with respect to the H&C decision:

- The Officer erred when concluding that the risks of detention the applicants faced in Sri Lanka being of Tamil ethnicity (which he himself acknowledged) did not constitute undue, undeserved or disproportionate hardship; and

- The Officer erred in providing only a cursory assessment of the children's best interests.

[9] I should add the respondent voluntarily stayed the applicants' deportation to Sri Lanka after the applicants had requested the United Nations Committee on Human Rights to review their case. At the date of these judgments that review appears to be on-going according to applicants' counsel.

The tribunal decisions

1) The risk factors

(a) The H&C decision

[10] The risk analysis described below speaks only to the risk the applicants would suffer from the Sri Lankan authorities and not from the LTTE since counsel for the applicants indicated to the Court their fear of the LTTE was not at issue. The tribunal acknowledged, since the IRB's decision in February 2005, both the Sri Lankan government and the armed opposition LTTE had undertaken in mid 2005 major military operations after agreeing to the 2002 ceasefire which, in the tribunal's view, had in 2006 effectively been abandoned. The Sri Lankan government had put into place its *Emergency Regulations* in August 2005. The tribunal noted the main incidents of insecurity were in the northern and eastern districts of Sri Lanka with the hostilities "causing a dramatic increase in serious human rights violations". Colombo is in the western part of Sri Lanka. It found there was indiscriminate shelling and aerial bombings by the Sri Lankan armed forces causing harm to civilians and large displacements of population.

[11] The crux of the findings, which counsel for the applicants takes issue with, are contained in the following paragraphs of the H&C decision:

> Emergency Regulations imposed since August 2005 allow for the arrest of individuals by members of the armed forces. Those detained must be turned over to the police within 24 hours but may be held for a period of up to one year without trial. Regular cordon and search operations continue to take place where there are pockets of Tamils in predominantly Sinhalese and Muslim areas. Although the majority of those arrested are Tamils, there was no evidence of torture in any previous cases investigated by the HRC[12].
>
> Those individuals who would be of continuing interest to the authorities will normally be high profile members of the LTTE. Such individuals may face prosecution for serious offences although there in no evidence indicated that they

> would be unfairly treated under Sri Lankan law. There continues to be no evidence that the authorities in Sri Lanka are concerned with individuals having provided past low-level support for the LTTE[13].
>
> Given the current state of alert, the possibility exists for the applicants to be temporarily detained by the Sri Lankan authorities in Colombo. However, the applicants' involvement in the LTTE was incidental and it is therefore unlikely that they would be subject to prosecution. While the applicants' Tamil origins make them a target for detention, the available evidence does not show that such discrimination has severe consequences.
>
> In terms of risk, I am not satisfied the applicants would face unusual and undeserved or disproportionate hardship in applying for permanent residence from abroad. I therefore assign little weight to risk elements in determining whether exceptional consideration is warranted in this case. [Emphasis mine.]

(b) The PRRA decision

[12] The PRRA officer stated the risks identified by the applicants were section 96 risks – a well founded fear of persecution and the Act's section 97 risks – the need for protection because of danger of torture, threats to their lives and cruel and unusual treatment or punishment. The applicants in their submissions expressed fears of both the Sri Lankan authorities and the LTTE. As noted, fear from the LTTE is not an issue in these proceedings. According to the PRRA officer, the applicants alleged they feared the Sri Lankan authorities because the authorities suspect Tamils of being sympathetic to the LTTE and because this perception is widespread Tamils do not have effective recourse to state protection. I reproduce in the Annex "A" to these reasons sections 96 and 97 of the *Act*.

[13] The applicants submitted 32 pieces of new evidence identified as P-1 to P-32. Counsel for the applicants did not take issue with the exclusion of 4 exhibits on the ground they predated the IRB's decision.

[14] The tribunal stated: “The risks invoked by the applicants in support of their PRRA request are substantially the same as those presented before the IRB. …”, adding: “They state furthermore that they face generalized risk given the state of conflict within Sri Lanka” and he also mentions they are Christian. The applicants did not take issue with the tribunal’s findings concerning their Christian faith.

[15] Under the heading “Generalized Risk faced by the Applicants”, the PRRA officer essentially replicated what he had written in his H&C decision about the outbreak of the civil war, the location of the fighting and the degradation to human rights that flowed from the conflict.

[16] The following two paragraphs were not contained in the tribunal’s H&C decision and is the basis of the argument by the applicants’ counsel the PRRA officer erred in his analysis under section 96 of the *Act* because that section, he advanced, does not require a demonstration they would be personally at risk :

> Overall the documentation demonstrates that the applicants face two sources of risk that are objectively identifiable. However, protection is limited to those who face a specific risk not faced generally by others in the country. There must be some particularization of the risk to those claiming protection as opposed to a random risk faced the applicants and others.
>
> In the present application, none of the evidence submitted supports the conclusion that the applicants are personally at risk from heightened conflict or religious persecution. While the civil instability has occurred in Sri Lanka since 2006, the applicants have not demonstrated that they would be at greater risk than the general population. For this reason, the applicants do not meet the common considerations prescribed by sections 96 or 97 of the LIPR regarding these threats. [Emphasis mine.]

[17] The PRRA officer then analysed the risk posed by the LTTE and, for reasons already given, I need not analyse the PRRA officer's findings on this point.

[18] He examined the risks posed by the Sri Lankan authorities writing: "The applicants fear ill-treatment amounting to persecution by the Sri Lankan authorities due to alleged LTTE involvement. Specifically, the applicants cite arbitrary detention and torture among threats posed by the government against those of Tamil origin."

[19] After describing Sri Lanka as a constitutional democracy, the PRRA officer mentioned the control of the 66,000-member police force was placed under the Ministry of Defence after the November 2005 presidential elections. It wrote: "The increased conflict in 2006 led to a sharp rise in human rights abuses committed by police including torture and detention without trial. Impunity is a severe problem, particularly in cases of police torture and of civilian disappearances in high security zones."

[20] The tribunal then repeated, in substantially the same terms, two paragraphs found in the H&C decision. These two paragraphs are the first two paragraphs quoted in paragraph 9 of these reasons which for convenience I reproduce once again here:

> Emergency Regulations imposed since August 2005 allow for the arrest of individuals by members of the armed forces. Those detained must be turned over to the police within 24 hours but may be held for a period of up to one year without trial. Regular cordon and search operations continue to take place where there are pockets of Tamils in predominantly Sinhalese and Muslim areas. Although the majority of those arrested are Tamils, there was no evidence of torture in any previous cases investigated by the HRC[12].

> Those individuals who would be of continuing interest to the authorities will normally be high profile members of the LTTE. Such individuals may face prosecution for serious offences although there in no evidence indicated that they would be unfairly treated under Sri Lankan law. There continues to be no evidence that the authorities in Sri Lanka are concerned with individuals having provided past low-level support for the LTTE[13].

[21] The tribunal continued:

> In the present case, the IRB did not assign any credibility to the applicants' allegations of mistreatment at the hands of the Sri Lankan authorities. Furthermore, the applicants have not submitted any evidence that they were detained by the police in connection with their imputed involvement in LTTE activities. Finally, documentary sources indicate that it is unlikely the applicants would be targeted by the Sri Lankan authorities given their limited involvement with the LTTE.
>
> Nevertheless, the available documentation indicates that security measures undertaken by the Sri Lankan government have intensified since the IRB decision. However, this evidence does not objectively demonstrate that the increased police action would cause the applicants serious harm beyond a certain level of discrimination. As a result, there remain insufficient grounds on which to conclude that the applicants face risk amounting to persecution from the Sri Lankan authorities. [Emphasis mine.]

2) The H&C considerations

[22] In its H&C decision, in addition to its consideration of the risk factors previously discussed in these reasons, the tribunal dealt with two additional matters the applicants had raised in their submissions to their H&C application: their links to Canada in terms of establishment and the best interests of the children.

[23] Counsel for the applicants did not challenge the tribunal's findings that:

> "Taken as a whole, the applicants have not provided evidence of links to Canada that if broken would warrant an exemption on humanitarian grounds. On this basis, I [*sic*] not satisfied that applying for permanent residence from outside Canada would cause the applicants unusual and undeserved or disproportionate hardship."

[24] The other additional attack on the H&C decision made by counsel for the applicants focussed on its analysis and findings concerning the best interests of the children as required by section 25 of the *Act* which reads:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[25] The tribunal began its discussion of the best interests of the children by stating that "Officers must be alert and sensitive to the interests of the children when examining applications made on humanitarian and compassionate grounds" noting that "… the best interests of a child do not outweigh the many other factors the officer must consider when making such a decision" which according to the tribunal will depend on the facts of the case with the burden of providing sufficient evidence to support their claim being on the applicants.

[26] The tribunal said there were three children affected by the outcome of his evaluation: Steffi and her Canadian born brother and sister noting, according to the parents' submission, their Canadian born children would accompany them if the family was obliged to return to Sri Lanka.

[27] The essence of the tribunal's findings and conclusions are contained in the following paragraphs of its H&C decision:

> In the event of return to Sri Lanka, all of the children affected by this application would commence living in an unfamiliar country. The resulting impact would differ according to the respective ages of the children. However, all three are still at an age where the family remains the centre of their social development.
>
> If the applicants were required to apply for permanent residence from Sri Lanka, the children would continue to benefit from contact with both parents. With such guidance, I am satisfied that they would be able to transition successfully into Sri Lankan society. As a result, I find that re-integration would not cause the children unusual and undeserved or disproportionate hardship.
>
> Sri Lankan law requires school attendance for children between ages five to 14 and approximately 85% of children under 16 attend school. The government has established extensive public education and health care systems to benefit children. Education is free through to the university level as is health care and immunization[14].
>
> While the government has demonstrated a commitment to child welfare, exploitation remains a serious problem for children without adequate support. However, the children in the present case will be accompanied by their parents if they are required to return to Sri Lanka. With the care of family members, I am satisfied that they will be provided access to healthcare and education without unusual, undeserved or disproportionate hardship.
>
> Conclusion
>
> The applicants have raised certain personal circumstances in support of their application for an exemption on humanitarian and compassionate grounds. I have considered and weighed all of the evidence submitted by the applicants, the information contained in their files, as well as the available documentation. I am not satisfied that the applicants would face unusual and undeserved or disproportionate hardship, if required to apply for permanent residence from outside of Canada. [Emphasis mine.]

Analysis

(a) The Standard of Review

[28] In its recent judgment in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada reformed its previous standard of review analysis in a number of ways and did so specifically by reducing from three to two the number of standards by eliminating the patently unreasonable standard and rolling it into the reasonableness standard. At paragraph 51 of the decision, Justices Bastarache and LeBel wrote that: " … questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness."

[29] At paragraph 57 in *Dunsmuir*, they added that an exhaustive review was not required in every case to determine the proper standard of review if existing jurisprudence has settled on the appropriate standard of review.

[30] In terms of the PRRA decision, counsel for the applicants proposed the officer's purely factual findings are to be reviewed on the standard of reasonableness but also noted that under section 18.1(4)(d) of the *Federal Courts Act* the Federal Court may quash a decision which is based on a finding of fact made in a capricious or arbitrary manner or without regard to the material before it. Errors of law are to be reviewed on the standard of correctness with questions of mixed fact and law attracting the reasonableness standard, he suggested. I agree with counsel for the applicants' view which was endorsed by the Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, at paragraph 3.

[31] What the reasonableness standard means was addressed by Justices Bastarache and LeBel in *Dunsmuir* at paragraph 47 where they wrote:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. 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. [Emphasis mine.]

[32] In terms of the H&C decision, counsel for the applicants, pointing to the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, submits the standard of review was reasonableness. He also referred to my colleague Justice Campbell's decision in *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165 to the effect that a failure by an Immigration Officer to demonstrate he/she was alert, alive and attentive to the best interests of the children was also reviewable on the reasonableness standard. I agree with those submissions and would add where an Immigration Officer erred in law by applying the wrong test the appropriate standard is correctness (see *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296).

(b) Discussion and conclusions

[33] In *Boulis v. Minister of Manpower and Immigration*, [1974] S.C.R. 875, Justice Laskin, as he then was, instructed the Courts on the proper approach in judicial review matters in terms of its

reasons. He wrote at page 885 that an administrative tribunal's reasons "are not to be read microscopically; it is enough if they show a grasp of the issues that are raised … and of the evidence addressed to them, without detailed reference. The Board's record is available as a check on the Board's conclusions."

[34] Justice Joyal put it this way in *Miranda v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 437; 63 F.T.R. 81:

> For purposes of judicial review, however, it is my view that a Refugee Board decision must be interpreted as a whole. One might approach it with a pathologist's scalpel, subject it to a microscopic examination or perform a kind of semantic autopsy on particular statements found in the decision. But mostly, in my view, the decision must be analyzed in the context of the evidence itself. I believe it is an effective way to decide if the conclusions reached were reasonable …
>
> I have now read through the transcript of the evidence before the Board and I have listened to arguments from both counsel. Although one may isolate one comment from the Board's decision and find some error therein, the error must nevertheless be material to the decision reached. And this is where I fail to find any kind of error.
>
> It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals. Yet we must always remind ourselves of what the Supreme Court of Canada said on a criminal appeal where the grounds for appeal were some 12 errors in the judge's charge to the jury. In rendering judgment, the Court stated that it had found 18 errors in the judge's charge, but that in the absence of any miscarriage of justice, the appeal could not succeed. [Emphasis mine.]

[35] In *Enbridge Gas Distribution Inc. v. Ontario (Energy Board),* (2006) 210 O.A.C. 4, the Ontario Court of Appeal stressed the importance of reading a decision as a whole to understand how an administrative tribunal used and understood certain phrases. A Court should not review phrases in isolation but in context and read them in such a way to ensure harmony and internal consistency.

Issue No. 1 – Conflating sections 96 and 97 of the *Act* in the risk assessment

[36] Under the heading "Generalized risk faced by the Applicants", the PRRA Officer wrote about the heightened levels of insecurity resulting from the renewed hostilities between the Sri Lankan authorities and the LTTE which was "causing a dramatic increase in serious human rights violations" and a pattern of enforced disappearances has re-started (in the northern and eastern regions) with similar incidents reported in other regions.

[37] It then went on to write:

> "… However, protection is limited to those who face a specific risk not faced generally by others in the country. There must be some particularization of the risk to those claiming protection as opposed to a random risk faced the applicants and others.
>
> In the present application, none of the evidence submitted supports the conclusion that the applicants are personally at risk from heightened conflict or religious persecution. While the civil instability has occurred in Sri Lanka since 2006, the applicants have not demonstrated that they would be at greater risk than the general population. For this reason, the applicants do not meet the common considerations prescribed by sections 96 or 97 of the *LIPR* regarding these threats." [Emphasis mine.]

[38] Focussing on the words "none of the evidence supports the conclusion that the applicants are personally at risk", counsel for the applicants argues the tribunal erred by conflating section 96 of the *Act* into section 97 of that same *Act*. He argues the jurisprudence is clear the applicants need not demonstrate they have experienced personal persecution in order to establish a well-founded fear of persecution referring to the Federal Court of Appeal's decision in *Salibian v. Canada (Minister of Employment and Immigration)*, (1990), 11 Imm. L.R. (2d) 165 (*Salibian*) and Justice Martineau's decision in *Fi v. the Minister of Citizenship and Immigration*, 2006 FC 1125 which relied on *Salibian*. Counsel for the applicants argues the applicants can establish a well founded fear

of persecution by pointing to similarly situated persons who have been persecuted (in this case members of the group they belonged – Tamils as a group).

[39] In *Salibian*, the Federal Court of Appeal concluded the Refugee Division had erred when it dismissed his application on the basis of a lack of evidence of personal persecution in the past. Justice Décary wrote:

> This conclusion is a twofold error: in order to claim Convention refugee status, there is no need to show either that the persecution was personal or that there had been persecution in the past. [Emphasis mine.]

[40] Justice Décary also stated it was settled law that:

> (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; [Emphasis mine.]

[41] With respect, I cannot agree with counsel for the applicants' submission. The PRRA Officer did not say that the applicants were obliged to show personal persecution in the past (which in any event they could not because the RPD's finding Mr. Pillai not credible on past persecution) but rather that in the future they were at risk from being persecuted as a result of the heightened conflict. This risk had to be particularized (personalized).

[42] I adopt the line of cases advanced by counsel for the respondent that in its context the use of such words as "personally at risk", a "personalized risk", "the risk must be individualized" does not mean section 96 is conflated into section 97. My colleague Justice Mosley put it this way in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385 (*Raza*), at paragraph 29:

> **29** The assessment of new risk developments by a PRRA officer requires consideration of sections 96-98 of IRPA. Sections 96 and 97 require the risk to be personalized in that they require the risk to apply to the specific person making the claim. This is particularly apparent in the context of section 97 which utilizes the word "personally". In the context of section 96, evidence of similarly situated individuals can contribute to a finding that a claimant's fear of persecution is "well-founded". That being said, the assessment of the risk is only made in the case of a PRAA application on the basis of "new evidence" as described above, where a negative refugee determination has already been made. [Emphasis mine.]

[43] Other cases making the same point as in *Raza* are *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459; *Canada (Minister of Public Safety and Emergency Preparedness) v. Gunasingam*, 2008 FC 181; *Hazell v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1323 and *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 CF 409 at paragraph 28.

[44] I conclude on this point by stating that it was open for the applicants to demonstrate they were similarly situated as other persons. As is seen later in these reasons the way to demonstrate similarly “situatedness” is through a risk analysis applying appropriate risk factors because not all Tamils are similarly situated when it comes to a well founded fear of persecution (section 96) or risk of torture or cruel punishment (section 97).

Issue No. 2 – Errors in the assessment of risks

[45] Counsel for the applicants argues the tribunal misread the evidence and to substantiate this point he refers to the statement in the PRRA decision that regular cordon and search areas are conducted in places where there are pockets of Tamils; that the majority of those arrested are Tamils

but then states "there was no evidence of torture in any previous cases investigated by the HRC" (meaning the Sri Lankan Human Rights Commission).

[46] He argues, by reference to the documentary evidence and particularly the Home Office reports from the UK in March and November 2007, where the statement is found, the Freedom House report on Sri Lanka (2007) and Amnesty International Report for 2007 on Sri Lanka shows this statement of no evidence of torture of persons arrested and detained by the police is an isolated statement which is contradicted by many passages of the same UK Home Office report as well as in other reports from other organizations and that it is particularly so when the status, legitimacy and independence of the Sri Lankan Human Rights Commission is called into question because of the manner its members were appointed by the President.

[47] I agree with counsel for the applicants, after reviewing the documentary evidence as a whole, it would appear that the PRRA Officer "cherry-picked" this statement and was wrong in relying on it while ignoring other evidence which impugned that statement although to be fair to the PRRA Officer, he did write the following in his PRRA decision in the paragraph immediately preceding the one where the objectionable statement is found:

> Following the November 2005 presidential elections, the government eliminated the Ministry of Internal Security. Control of the 66,000-member police force was placed under the Ministry of Defence[20]. The increased conflict in 2006 led to a sharp rise in human rights abuses committed by police including torture and detention without trial[21]. Impunity is a severe problem, particularly in cases of police torture and of civilian disappearances in high security zones[22]. [My emphasis.]

[48] As argued by counsel for the respondent, the real question is whether this error is material or central to the PRRA decision. Counsel for the Minister argues that it is purely hypothetical since the

PRRA Officer concluded the risk of their being arrested was only a possibility and not a probability. For the reasons expressed in the next issue, I agree that this finding was not material or determinative.

Issue No. 3 – No serious harm from increased police action and detention is only discrimination

[49] Counsel for the applicants built his submissions on the following findings made by the PRRA Officer:

- Regular cordon and search operations occur in Tamil areas in cities such as Colombo;
- Those arrested in those operations are mostly Tamils;
- The recognition of increased police action because of the renewed conflict;
- Given the current state of alert, the possibility exists for the applicants to be temporarily detained by the Sri Lankan authorities in Colombo;
- The recognition that the applicants' Tamil origins make them a target for detention.

[50] Counsel for the applicants argues, in the light of the documentary record, the PRRA Officer's conclusions that what the applicants face is not persecution but discrimination and that

detention is not “persecutorial” but discriminatory without serious consequences is unreasonable and perverse.

[51] Counsel for the Respondent argues that the documentary evidence read as a whole does not paint the picture counsel for the applicants says it does and he points to the following elements:

- There are 400,000 Tamils living in Colombo; they make up 10% of the population of that city;

- Not all Tamils are at risk of being detained;

- The record shows 528 persons were detained in 2006 under the *Emergency Regulations* and that 288 were released within 12 hours while much of the remainder released a day or so after leaving only 15 believed to remain in detention;

- The applicants were not at risk of being detained on arrival at Colombo’s airport or during the sweeps. They do not have the profile which makes them subject of interest to the Sri Lankan authority; they have a low profile; their detention is a mere possibility and an IRB report on failed refugees returning to that country from Canada shows that none have been arrested or detained at the Colombo’s airport;

- Even if the applicants are detained, it would be for a short period of time and the jurisprudence of this Court is to the effect such detention is not persecution and is

> not a breach of section 97 of this *Act* (see *Sinnasamy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 67), a decision rendered by my colleague Justice de Montigny who pointed out that in every case the personal circumstances of an individual such as age and gender must be taken into account. What my colleague was referring to was an identification of risk factors which is an accepted and recognized methodology to determine the degree of risk, if any.

[52] Counsel for the respondent put before me two cases where the identification of risk factors was the determining factors in the decision reached. These cases are: (1) *LP and the Secretary of State for the Home Department*, a decision of the three members Asylum and Immigration Tribunal of the United Kingdom reported at [2007] UKAIT 00076 and (2) a decision of the Fourth Section of European Court of Human Rights released on July 17, 2008 in the case of *N.A. v. the United Kingdom* involving a case of a failed Tamil refugee claim whom the UK was proposing to return to Sri Lanka. In that case the European Court considered and explicitly approved of the LP case and a judicial review thereof in the UK.

[53] I quote the following from the LP decision:

> (1) Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.

> (2) If a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport.
>
> (3) Otherwise, the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.
>
> (4) Tamils in Colombo are at increased risk of being stopped at checkpoints, in a cordon and search operation, or of being the subject of a raid on a Lodge where they are staying. In general, the risk again is no more than harassment and should not cause any lasting difficulty, but Tamils who have recently returned to Sri Lanka and have not yet renewed their Sri Lankan identity documents will be subject to more investigation and the factors listed above may then come into play.
>
> (5) Returning Tamils should be able to establish the fact of their recent return during the short period necessary for new identity documents to be procured.
>
> (6) A person who cannot establish that he is at real risk of persecution in his home area is not a refugee; but his appeal may succeed under article 3 of the *ECHR*, or he may be entitled to humanitarian protection if he can establish he would be at risk in the part of the country to which he will be returned. [Emphasis mine.]

[54] In coming to the conclusion LP's appeal is dismissed on asylum grounds, the tribunal came to the conclusion that "specific profiles of individual claimant's need to be considered and there is not a situation of real risk to large swathes of the Tamil population in Colombo or to returning failed asylum seekers". In particular, the tribunal found the risks to young male Tamils had increased as a result of the breakdown of the ceasefire.

[55] The European Court also concluded at paragraphs 125 and 126 of its decision that the deterioration of human rights conditions resulting from the breakdown of the ceasefire did not create a general risk to all Tamils returning to Sri Lanka. This is why it required specific risk profiles based on risk factors on an individual basis.

[56] The PRRA Officer came to the conclusion the applicants' profile did not expose them to a risk of persecution or torture or cruel or unusual punishment if returned to Colombo. That conclusion was not challenged by the applicants nor did they advance in argument the PRRA Officer ignored any relevant evidence relating to their risk profile.

[57] For these reasons, the applicants challenge to the PRRA decision in IMM-932-08 must be dismissed as must their challenge in the H&C decision as it relates to the alleged error advanced against the finding in the H&C decision the applicants were not at risk of return to Sri Lanka for the purpose of applying there for permanent residence in Canada. It now remains to be seen whether their argument as to the best interests of the children (Steffi, a citizen of Sri Lanka and her brother and sister born in Canada) was appropriately considered and analysed.

Issue No. 4 – The H&C decision – the best interests of the children

[58] Counsel for the applicants argues that the tribunal's assessment of the best interests of the children was defective. He argued, based on the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), at paragraph 75, the Officer had an obligation to "… consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them". He submitted the Officer did not meet his obligation for the following reasons which show his decision was flawed:

- The Officer's reasons fail to disclose an adequate analysis of the humanitarian and compassionate consideration underpinning the best interests of the children involved as there is no real identification and consideration of those interests nor a balancing

of those interests with public interest factors which would favour in the exercise of the Minister's discretionary power the removal of the family unit to Colombo;

- In particular, counsel for the applicants submits the Officer makes no mention of the fact the children would be returning to a country which is in the midst of a civil war or his previous finding their parents could be targets for detention because of their ethnicity and this without regard to the regularity of cordon and search operations in Tamil areas, arrests and detentions and the prevalence of acts of terrorism in Colombo itself. Moreover, the applicants argue nowhere does the Officer consider what might become of the children if, as the Officer seems to appreciate, their parents would be targeted for arbitrary arrest and detention much less what may occur if the children themselves are detained;

- Detention, in the circumstances of this case, is undue hardship.

[59] The jurisprudence of the Supreme Court of Canada in *Baker*, as explained in its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 and of the Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 (*Legault*), in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 (*Hawthorne*) and in *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 (*Owusu*) sets out the following principles governing the consideration of the best interests of the children in the context of the application of section 25 of the *Act*:

- The decision to grant or refuse an exemption under section 25 of the *Act* is highly discretionary which should not be disturbed unless the tribunal made some error in principle or has exercised its discretion in a capricious or vexatious manner. The Court will intervene, however, where "there is a failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors";

- The weighing of relevant factors is not the function of the reviewing Court;

- The obligation of an Immigration Officer to consider certain factors gives an applicant no right to a particular result. The presence of a child and the consideration of its best interests is an important factor but it is not determinative of the issue of removal. The interests of the children are a factor that must be examined with care and weighed with other factors such as public interest factors. The children's interests cannot be minimized;

- A consideration for an exemption is highly contextualized and fact specific. In the case at hand, the Officer was not dealing with family separation since, if removed, the entire family would travel to Sri Lanka.

[60] I reviewed the applicants' submissions (Certified Tribunal Record, pages 55 to 57) in support of their application for permanent residence on H&C grounds. Those submissions were sparse. They said they could not return to Sri Lanka to make an application for permanent residence because they would be at risk of death or torture. That submission has no substance in the light of

the Officer's finding of slight risk of arrest and detention not amounting to persecution because such detention would be temporary.

[61] In terms of the best interests of the children, the applicants did not raise any hardship if returned to Colombo. They submitted that two of their children were born in Canada and all their children have lived a Canadian life style and are studying in Canada.

[62] As mandated by the Federal Court of Appeal in *Owusu*, in these circumstances, the Officer cannot be faulted for not providing a more intensive analysis of the best interests of the children. His analysis was proportional to the applicants' submissions which were considered and dealt with. The Officer took into account the young age of the children and the cohesiveness of the family unit to transition successfully in Sri Lanka. In the circumstances, the Officer's decision cannot be said to be unreasonable and does not warrant my intervention.

[63] In this context, I refer to my colleague Justice de Montigny's recent judgment in *Barrak et al v. the Minister of Citizenship and Immigration*, 2008 FC 962 (*Barrak*) where he wrote the following at paragraphs 28, 36 and 37:

> **28** An applicant has the burden of adducing proof of any claim on which the H&C application relies and makes a scant application at his or her own peril. An officer is not obliged to gather evidence or make further inquiries but is required to consider and decide on the evidence adduced before him: see Owusu v. Canada (MCI), 2004 FCA 38, [2004] 2 F.C.R. 635 at para. 5; Selliah v. Canada (MCI), 2004 FC 872, 256 F.T.R. 53 at paras. 21-22, affm'd 2005 FCA 160. [Emphasis mine.]
>
> …
>
> **36** Counsel for the applicants also argued that the officer failed to engage in any substantive analysis of these children's best interests. It is true that the officer's

> reasons in that respect are rather sketchy, and consists in three short paragraphs describing their ages and schooling. But in fairness, the applicants presented little in the way of submissions or evidence to demonstrate why unusual and undeserved or disproportionate hardship would result if the children were to accompany their parents back to Lebanon.
>
> **37** In light of the limited submissions, the officer's assessment of the children's interests was entirely adequate. In particular, the officer noted the children's limited attachment to Lebanon, their time in the West since 1994, and their success in schooling, as well as the eldest child's recent marriage. Having weighed the factors, the officer determined that they were insufficient to demonstrate unusual and undeserved or disproportionate hardship. The officer was not obliged to conduct elaborate assessments of matters where the applicants themselves failed to.

[64] Finally, on my own motion, I examined whether the question the Officer had erred in applying the wrong test in assessing hardship since the test to be applied in the context of a PRRA is much more stricter than the one used for the purposes of an H&C application (see *Pinter v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 296).

[65] I examined the determination of the PRRA Officer in *Barrak* which led Justice de Montigny to quash that decision. The determination made by the Officer in the case before me reveals no such error.

[66] For these reasons, the applicants' challenge in IMM-931-08 must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the applicants' judicial review application in IMM-931-08 is dismissed. Similarly, the applicants' judicial review application in IMM-932-08 is also dismissed. No certified question was proposed. A copy of these reasons and judgment are to be placed on both Court files.

"François Lemieux"

_____

Judge

ANNEX "A"

Immigration and Refugee Protection Act (2001, c. 27)	*Loi sur l'immigration et la protection des réfugiés* (2001, ch. 27)
Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that	(i) elle ne peut ou, de ce fait, ne veut se

risk, unwilling to avail themself of the protection of that country,

réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Jared Will	FOR THE APPLICANTS
Alexandre Tavadian	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jared Will Lawyer Montreal, Quebec	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT