Date: 20090122

Docket: IMM-248-08

Citation: 2009 FC 65

Ottawa, Ontario, January 22, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

JOTHIRAVI SITTAMPALAM

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Jothiravi Sittampalam, is the subject of a Danger Opinion. He seeks judicial review of the opinion of the Minister's Delegate, dated January 11, 2008, in which the Delegate, following the order of Justice Snider in *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 687, (*Sittampalam 2007)*, determined that the Applicant would not be more at risk than other residents of Sri Lanka of torture or to a risk to life or cruel

and unusual treatment or punishment pursuant to s.96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

BACKGROUND

[2] In *Sittampalam 2007*, Justice Snider undertook the judicial review of the opinion of Mr. Aldridge, a Minister's delegate, dated July 6, 2006, in which the delegate determined that the Applicant:

- constitutes a danger to the public in Canada, pursuant to section 115(2)(a) of IRPA and;
- should not be allowed to remain in Canada based on the nature and severity of the acts committed, pursuant to section 115(2)(b) of the IRPA.

[3] The effect of the July 6, 2006, opinion was that the Applicant, despite a finding in 1990 that he was a Convention refugee, may be deported or *refouled* to Sri Lanka. Justice Snider allowed the judicial review in part. She found that the delegate's findings that the Applicant had been involved in serious criminality and poses a danger to the public in Canada and that he should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed in Canada should not be disturbed (*Sittampalam 2007*, at para. 68).

[4] The only error Justice Snider found was that the delegate erred in his assessment of risk to the Applicant if returned to Sri Lanka by failing to have regard to all the evidence before him. Justice Snider remitted the matter to the original delegate for a new risk assessment only (*Sittampalam 2007*, at para. 68). At the time of the re-assessment the original delegate was no

longer available. This Court permitted Ms. Stock, a Minister's Delegate (the "Delegate"), to undertake the re-assessment in accordance with the following order:

> 1. The application for judicial review is allowed with respect to the Delegate's finding that the Applicant's return to Sri Lanka would not expose him to a substantial risk of torture or to a risk to life or cruel and unusual treatment;
>
> 2. The opinion of the Minister's Delegate is set aside and the matter is remitted to the same Minister's Delegate for the sole purpose of re-assessing the risk to the Applicant if he were returned to Sri Lanka;
>
> 3. In the event that the Delegate concludes that the Applicant would be at substantial risk, the Delegate is to carry out a balancing exercise, as contemplated by *Suresh*; and
>
> 4. No question is certified.

Procedural History

[5] Justice Snider's decision in *Sittamplam 2007*, at paras. 5-9, outlines the procedural history related to the Applicant. I reproduce it below:

> **5** The Applicant, who is a citizen of Sri Lanka, has a lengthy history with immigration officials, the police and the Courts, including the Federal Courts. The most relevant portions of his background are as follows:
>
> - The Applicant arrived in Canada in February 1990 and made a successful Convention refugee claim. He became a permanent resident on July 17, 1992.
>
> - The Applicant has three criminal convictions: (1) Failing to Comply with a Recognizance, dated January 24, 1992; (2) Trafficking in a Narcotic, dated July 8, 1996; and (3) Obstructing a Peace Officer, dated February 1998.
>
> - The Applicant has also been investigated, but never convicted, for gang-related occurrences for his role in numerous offences which include Attempted Murder, Assault with a Weapon, Aggravated Assault, Possession of a Weapon Dangerous to the Public, Pointing a Firearm and Using a Firearm to Commit an Offence, Threatening, Extortion, and Trafficking.
>
> - The Applicant was identified by the Toronto Police as the leader of A.K. Kannan, one of two rival Tamil gangs operating in Toronto. The Applicant admitted his former involvement in the gang to police.
>
> - The Applicant was reported under s. 27(1)(d) of the *Immigration Act*, R.S.C. 1985, c. I-2 [repealed] (the former Act), by virtue of his drug trafficking conviction.
>
> - He was subsequently reported under s. 27(1)(a) and 19(1)(c.2) of the former Act as a person for whom there are reasonable grounds to believe is engaged in activity planned

and organized by a number of persons acting together to commit criminal offences. The allegation was that the appellant "is or was a member of an organization known as the A.K. Kannan gang".

- An inquiry under the former Act commenced in January 2002. When the IRPA came into force in June 2002, the inquiry continued under ss. 36 and 37 of the *IRPA*. The Applicant conceded that he was a person described in section 36 due to his drug trafficking conviction, but he disputed the allegations of organized criminality.

- In a decision dated October 4, 2004, a panel of the Immigration and Refugee Board (the Board) determined that the Applicant was inadmissible to Canada on grounds of serious criminality (*IRPA*, s. 36(1)(a)) and organized criminality (*IRPA*, s. 37(1)(a)).

- On judicial review, the Federal Court upheld the Board's determination regarding the Applicant's inadmissibility to Canada (*Sittampalam v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, [2005] F.C.J. No. 1485 (F.C.) (QL) (referred to as *Sittampalam I*)), which in turn was upheld by the Federal Court of Appeal (*Sittampalam v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1512 (F.C.A.) (QL) (referred to as *Sittampalam II*)).

6 Following the inadmissibility findings of the Board (but before the Court decisions in *Sittampalam I* and *Sittampalam II*), officials of Canada Border Services Agency (CBSA) began a process which, if successful, would allow the refoulement of the Applicant to Sri Lanka. That is, CBSA sought to obtain what is commonly referred to as a "danger opinion" from the Minister of Citizenship and Immigration (the Minister), pursuant to ss. 115(2)(a) and 115(2)(b) of the *IRPA*. A Notice, dated November 24, 2004, was served on the Applicant by CBSA, wherein CBSA advised the Applicant that it would be seeking an opinion of the Minister that the Applicant was both a danger to the public and/or a person who should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed. The letter described the evidentiary base upon which the Minister's opinion would be formed and invited the Applicant to make submissions.

7 The Applicant made submissions in response to this Notice. The next step taken was the preparation of a formal "Request for Minister's Opinion -- A115(2)(a) and A115(2)(b)". Once again, in a letter dated April 8, 2005, the Applicant was informed that he could make "such written representations or arguments as you deem necessary and submit any documentary evidence you believe relevant".

8 In response to this letter, the Applicant, through his counsel, made submissions on May 1, 2005. Those submissions were clearly considered by the Minister's Delegate when he formed his opinion.

9 After the initial submissions were made in May 2005, there was a gap in the procedure until the opinion was finally issued in July 2006. A second package of documents was forwarded to the Minister, under cover letter dated May 19, 2006. This second set of submissions was not contained in the Certified Tribunal Record. It appears to be accepted by the parties that, while this package was received at the Minister's offices, it was not received or considered by the Minister's Delegate.

[6] As discussed above, Justice Snider upheld the delegate's decision that the Applicant was danger to the Canadian public. However, Justice Snider did quash the delegate's decision with respect to his findings on risk of return to Sri Lanka because Justice Snider determined that the delegate erred in his July 6, 2006, opinion in finding that the Applicant would not be exposed to substantial risk of torture or to a risk to life or cruel and unusual treatment upon return to Sri Lanka. Justice Snider ordered that a new risk assessment be undertaken with regard to all of the evidence submitted. It is this new risk assessment which is the subject of this judicial review.

The Current Judicial Review

[7] In this application, the Delegate determined that the Applicant would not be at substantial risk of torture or risk to life or to cruel and unusual treatment or punishment if returned to Sri Lanka and therefore determined that he could be removed from the country (Reasons at 21).

STATUTORY FRAMEWORK

[8] The central tenet of refugee protection in Canada is that once a person is found to be a protected person, including a Convention refugee, the IRPA provides protection to that individual such that a protected person may only be removed, or refouled, to his country of origin in exceptional cases. Justice Snider stated at para. 11 of *Sittampalam 2007:*

> **11** One of the situations where refoulement is possible begins with a finding of inadmissibility. Of importance to the Applicant, s.36 of the *IRPA* applies to render a foreign national inadmissible on grounds of criminality and s. 37 applies in cases of organized criminality. The Applicant has been found inadmissible under both sections (see *Sittampalam I* and *Sittampalam II*, above).

[9] Deportation is not an automatic result for a protected person who is deemed inadmissible. The principle of non-refoulement which underpins refugee law applies. Section 115(1) of the IRPA codifies the non-refoulement principle and section 115(2) sets out the exception:

Protection	Principe
115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions	Exclusion
(2) Subsection (1) does not apply in the case of a person (*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or (*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire : *a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; *b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Canada.

[10] Justice Snider's decision in *Sittampalam 2007*, at paras. 15-17, provides the context for this application for judicial review. Justice Snider upheld the delegate's July 2006 finding that the Applicant "constitutes both a current and future danger to the public pursuant to section 115(2)(a) of the IRPA and should not be allowed to remain in Canada on that basis". Justice Snider also upheld the July 2006 finding that the Applicant was inadmissible to Canada on the basis of serious criminality and that he should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed.

[11] Pursuant to Justice Snider's decision, there is no dispute that the Applicant was found to be a person described in subsection 115(2)(a) and 115(2)(b) in July 2006. However, prior to being removed from Canada, it must be determined whether the Applicant would be at substantial risk of torture or risk to life or cruel and unusual treatment or punishment upon return to Sri Lanka. The July 2006 decision was quashed in part because the delegate did not undertake a risk assessment with regard to all of the evidence submitted. The decision under review, the January 2008 decision of the Delegate, was in response to Justice Snider's order that a new risk assessment be undertaken.

Preliminary Issue Raised by Applicant

[12] The Applicant in his supplementary memorandum of argument challenges the findings made by Justice Snider in *Sittampalam 2007*. Specifically, he challenges the conclusion of the

delegate that because of the nature of the acts committed he ought not be permitted to remain in Canada. The basis for this challenge is the recent change in jurisprudence as brought forward by *Dunsmuir v. New Brunswick*, 2008 SCC 9, and *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153.

[13] At the time of the July 2006 Opinion, the standard of review applied to assess whether the Applicant posed a danger to the public and ought to be removed from Canada because of the nature and severity of the acts committed was patent unreasonableness. *Dunsmuir*, has merged patent unreasonableness with reasonableness *simpliciter* into the reasonableness standard. The Applicant submits that on a reasonableness standard the delegate's decision on danger is not sustainable.

[14] I do not agree with the Applicant. While the language used for the standard of review has changed, I am of the view if the current reasonableness standard was applied, the decision of the delegate related to ss. 115(2)(a) and 115(2)(b) would still hold. As in *Sittampalam 2007*, the bulk of the Applicant's preliminary arguments are based on the allegation that the delegate in 2006 ignored, or selectively relied upon the evidence. Justice Snider's comments are dispositive of the Applicants arguments in this application. She stated at para. 26:

> **26** Most of the submissions of the Applicant are no more than a disagreement with the weight given to the evidence by the Minister's Delegate. I consider first the numerous assertions that the Delegate ignored evidence. Given that there were 14 large volumes of evidence before the Delegate, it is understandable that not every document received a specific reference in the opinion. On the facts before the Delegate, it was not an error to omit specific reference to evidence of Detective Fernandez, the trucking business established in 1999 or the evidence of co-operation with the police. Omission of these details does not mean that the

> Delegate did not consider and appreciate the evidence on these matters. I am satisfied that the Minister's Delegate had considered all of the evidence on these points when he concluded:
>
> > There is little evidence in the material before me that would support an inference that Mr. Sittampalam is serious about changing the pattern of behaviour resulting in his criminal convictions. Likewise, there is little evidence in support of a finding that he is taking active substantive steps to rehabilitate himself and become a productive member of society.

[15] At paragraph 48 of *Dunsmuir,* the Supreme Court of Canada held that the move towards a single reasonableness standard does not pave the way for a more intrusive approach to judicial review.

[16] A decision will be reasonable if it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. *Dunsmuir*, at para. 47. In my view, even if the *Dunsmuir* reasonableness standard was applied, the outcome would be no different.

DECISION UNDER REVIEW

[17] In conducting the risk assessment, the Delegate acknowledged that the Applicant is a Tamil from the north of Sri Lanka. The Delegate recapitulates the Applicant's submissions with respect to non-governmental organization (NGO) reports including:

a. Hotham Mission (an Australian NGO) October 2006 reporting a recent escalation of violence in the north and east, increased incidents of militia and state sanctioned torture, and persecution of Tamils based on their origin and perceived affiliation to the LTTE or other groups;
b. UNHCR December 2006 reporting a dismal state of human rights protection in light of the LTTE violence;
c. Human Rights Watch August 6, 2007, reporting on the Sri Lankan government giving its security force and army a green light for "dirty war tactics".

[18] The Delegate acknowledged counsel's submissions that the Applicant would be at risk for the following reasons: he is Tamil, from the north; he has no National Identity Card (NIC); if identified he would face forced removal from Colombo; he has been identified in the press; and he left Sri Lanka without proper documentation.

[19] The Delegate acknowledged the Applicant was found to be a Convention refugee 17 years prior and discussed the risk to the Applicant on return to Sri Lanka under a series of headings.

Country Conditions:

[20] The Delegate states:

> Despite that Counsel states: "although Sri Lanka officials from time to time try to give the impression that there is still some level of normalcy in the country or that the cease fire agreement remains in effect, what is happening on the ground belies such statements", there are articles in Daily News on tourism and other events that are more positive such as food supplies reaching a chosen destination or nationals being favourably "placed" after long term displacement.

[21] The Delegate goes on to refer to: a speech from the President; a Lankaweb news article covering the Secretariat co-ordinating the Peace Process response to Amnesty International statements; the Secretariat's Official Web Site; and a Sri Lankan Minister reporting a return to normalcy. The Delegate finds these sources present "quite a different perspective to what is documented in reports such as Amnesty, Hotham or the Human Rights Watch."

[22] The Delegate then considered reports criticizing the Sri Lanka Monitoring Mission (SLMM), and the US – Country Reports on Human Rights Practices 2006 reporting on a de facto breakdown of the ceasefire and a decline in the government's respect for human rights. The Delegate concluded: "Clearly, country conditions leave much to be desired."

Returning to Sri Lanka – Reception at the Airport

[23] The Delegate again recapitulates the Applicant's submissions concerning detention and reports of torture of returned asylum seekers. The Delegate notes there are also accounts by Dutch, Swiss and British authorities on the return of individuals which report a specific process to deal with returnees. The Delegate makes reference to the "U.K. Home Office, Border and Immigration Agency – the Country of Information Report – Sri Lanka May 11, 2007" to cite information from a September 26, 2005, letter from the British High Commission in Colombo.

[24] The Delegate reiterates the Applicant's submissions that chances of return asylum seekers being detained and tortured are high, and that the intervening years have not eliminated his well founded fear upon which he was found to be a Convention refugee. The Delegate refers to the U.K. Home Office report that references the Canada Response to Information (RIR) LKA102038.E dated December 22, 2006.

[25] The Delegate then referred to a decision from the European Court of Human Rights dated February 14, 2004, which commented on the treatment of returnee Sri Lankan asylum seekers in 2003.

[26] The Delegate gave little weight to the reference in the Hotham report of a person who died in detention because, in his view, while the Applicant could be questioned upon return, he had no criminal record in Sri Lanka and there was nothing to single him out as a member of a high risk group.

[27] The Delegate referred to an RIR - August 5, 2003, reporting that allegations of returnees to Sri Lanka being tortured on return were a fabrication.

[28] The Delegate stated:

> After considering many credible reports on record, there are many Sri Lankans who have returned or been returned to their country without difficulty. I am not aware of any failed asylum seeker or members known to be affiliated with gangs who are detained at the airport in Colombo upon arrival …

[29] The Delegate decided there was insufficient evidence that airport officials would have a record with the Applicant's name based on publicity from many years ago, specifically a French news story in 2006 which gave the history of Sri Lankan gangs in Canada with names and photos derived from a Toronto news story in 2002. The Delegate said there have been press reports in Canadian and Sri Lankan newspapers that have raised his profile but the reporting has not sustained a high profile that would adversely affect his return to Sri Lanka. Any high profile could decrease his personal risk since as the international and human rights community would be monitoring his status on return.

Travel Advisory

[30] The Delegate noted that the Applicant submitted that the Travel Advisory from Foreign Affairs warns against travel to the east and north of Sri Lanka, however, the Delegate took from the Travel Advisory that the country was not in total disarray and the country is still open to tourism in Colombo and coastal areas in the west and southwest.

Lack of National Identity Card and/or other appropriate documents

[31] The Delegate did not consider that the Applicant would be questioned about leaving the country 17 years ago with improper document. Nor did the Delegate see any difficulty for the Applicant in having to apply for NIC identification.

Risk of Death

[32] The Delegate acknowledged being presented with the case of *Fabian v. Canada (Minister of Citizenship and Immigration),* 2003 FC 1527. In that case, Fabian was alleged to be a leader of a Sri Lankan gang, the VVT gang and has been targeted.

[33] The Delegate referred to a letter from the President of the Tamil United Liberation Front (TULF) which reported rumours that the Applicant was reported as leader of the A.K. Kannan gang and had been collecting money for the LTTE and that another rumour linked him with PLOTE, another military group:

> I, Veersingham Anadasangaree Attorney-at-Law, Ex-Member of Parliament and the President of the Tamil United Liberation Front, state that Mr. Sittampalasm Sinnathamby who is a retired Principal of a school in Jaffna is known to me as a much respected person. It is very

> unfortunate that his son Mr. Jothiravi has been detained since October 2001. It is rumoured in his village that he is detained for being the leader of the A.K. Kannan gang and had been collecting money for the LTTE. It is also said that he is a supporter of the PLOTE another military group… With all types of rumours spread about him all over his area, I am personally of the view that if Mr. Jothiravi is sent back to Sri Lanka he will face grave risk to his life.

[34] The Delegate also referred to an affidavit from Mr. Sittampalam's father, dated January 27, 2005:

> The Toronto police Street Violence report states that my son Sittampalam Jothiravi is a leader of the gang formed by survivors of two political groups called the Peoples' Liberation Organization of Tamil Elam (PLOTE) and the Tamil Elam Liberation Organization (TELO) the rival groups of the Liberation Tigers of Tamil Elam (LTTE)….The VVT gang which has a strong link with the LTTE is a rival group of the A.K. Kannan Group and therefore if my son is deported to Sri Lanka, his life will be in danger…I come to understand that the Royal Canadian Mounted Police has informed that the Sri Lankan government that my son, Jothiravi is the fund raiser in Canada for the LTTE. If he is deported to Sri Lanka he will be immediately arrested by the Sri Lankan Police and his life will be in danger. His wife and two children will be made destitutes in Canada.

[35] The Delegate gave these two documents minimal weight because there was no corroborating evidence and because they were from two years ago. After some further discussion about the media coverage, the Delegate concluded:

> I have weighed Counsel's submissions on this issue against the totality of the evidence and on the balance I am not satisfied that his is now or would be a specific target if he returned and that he would be immediately arrested by the Sri Lankan police.

Mr. Sittampalam's Public News and Web Articles

[36] The Delegate noted the many articles submitted including: a BBC Report 2002; a Rap dictionary website; an article in the National Post; a story in Lankaeverything.com (which can be accessed internationally) and Lanka Web (April 2000); Now magazine; and a Toronto Police report on Tamil Gangs which was used in Project 1050. The articles referred to the Applicant's involvement as an alleged leader of the A.K. Kannan with links to the LTTE.

[37] The Delegate gave minimal weight to the Applicant's arguments because she was not satisfied on the balance of probabilities that the Applicant was of interest to the government due to his being mentioned in historical publicity. The Delegate found the case of *Fabian*, to be on point since Fabian, a leader of the rival VVT gang, was found to not be at a greater risk on return than other returnees.

Internal Fight Alternative

[38] The Delegate noted the Applicant's submission that he did not have an Internal Flight Alternative (IFA) based on the UNHCR report and the increased risk resulting from his publicity.

[39] The Delegate noted that in *Sinnathurai v. Canada (M.C.I.)*, 2007 FC 2003, Justice Hughes found Colombo was not an unreasonable flight alternative, as did Justice Lemieux in *Tharmaratnam v. Canada (M.C.I.)*, 2007 FC 1153. In *Tharmaratnam*,the Delegate specifically noted that Justice Lemieux did not see any error in the PRRA officer's finding that the evidence

did not indicate that the “members of Canadian gangs affiliated with the LTEE [sic] are being persecuted by either the LTEE in Sri Lanka or by the Sri Lankan government” in determining a viable IFA existed in Colombo.

[40] The Delegate found the Applicant had a viable IFA elsewhere in Colombo in the southern or eastern parts of the country.

Analysis under Section 97

[41] The Delegate directed herself to be mindful that in considering the issues in s. 97 of IRPA, that the risk must be one that is faced by the person in every part of the country and not generally by other individuals in that country. She noted that the Applicant left Sri Lanka as a young man 17 years ago. There is no warrant for his arrest and the evidence does not indicate that refugees are generally detained. The Delegate was not satisfied the Applicant would be targeted or sought out for any reasons the Applicant advances.

[42] The Delegate concluded that although there was some possibility of some generalized risk, she was not satisfied that the Applicant’s removal would expose him to a risk of persecution, torture, cruel or unusual punishment or treatment.

Balancing the Risk

[43] The Delegate concluded that the Applicant failed to establish a prima facie case that he would be subjected to a substantial risk of torture or risk to life or to cruel and unusual treatment

or punishment in returned to Sri Lanka. While there was some generalized risk that is the same as encountered by all Tamils, there was no indication that the Applicant would be more at risk than other residents of Sri Lanka or that he was wanted by either Sri Lankan authorities or the LTTE.

[44] The Delegate concluded that the danger opinion outweighs the possibility of any minimal risk to the Applicant.

[45] The Delegate concluded that the Applicant may be deported despite section 115(1) since removal to Sri Lanka would not violate his rights under section 7 of the Charter.

ISSUES

[46] The Applicant submits seven issues for review as set out below:

1. The Delegate's assessment of the evidence is flawed: her decision to give weight to some evidence over other evidence is unjustified in law and not supported by reasons;
2. The Delegate's assessment of the evidence is so imbalanced that a reasonable apprehension of bias is raised on the face of the record;
3. The Delegate erred in law and exceeded her jurisdiction in determining that the Applicant did not have a well-founded fear of persecution in Sri Lanka and in her failure to balance the risks he faced as a Convention refugee against danger;
4. The Delegate erred in fact and law in concluding that removal to Sri Lanka would not expose the Applicant to a substantial risk of torture or of cruel and unusual treatment or punishment:
    a. by concluding that the risk faced was generalized; and
    b. by concluding that the risk would not be faced in every part of the country;
5. The Delegate erred in law in ignoring or misinterpreting evidence;
6. The Delegate erred in law in treating judicial precedent as fact; and

7. The Delegate erred in law in her *pro forma* consideration of the best interests of the Applicant's children without providing adequate reasons.

[47] Issues 2 and 7 are not relevant in this application. Any analysis on reasonable apprehension of bias is subsumed in the analysis relating to the treatment of evidence. With respect to the best interests of the children, Justice Snider in *Sittampalam 2007*, found that the delegate had properly considered the best interests of the children and that that issue was not pursued in that hearing. In result, I will not address these two issues.

[48] Justice Snider's order is specific and limited to a determination of whether the Applicant would be at substantial risk on return, and if so, to undertake a balancing exercise as instructed by the Supreme Court of Canada in *Suresh*, (See *Sittampalam 2007*, at paras. 68-69).

[49] In my view, the issues relate to the Delegate's consideration of the evidence and whether the Delegate's decision, in light of the evidence, is reasonable. I would state the issues as follows:

1. Is the Delegate's assessment of the evidence flawed by giving weight to some evidence and not to other evidence in a manner unjustified and not supported by reason; and

2. Did the Delegate err in failing to assess the risks the Applicant faced upon refoulement and failing to balance the risks he faced as a Convention refugee against the danger he poses to the Canadian public?

STANDARD OF REVIEW

[50] This judicial review deals with whether the Applicant will face a substantial risk of torture or a risk to life or to a risk of cruel and unusual treatment or punishment upon deportation. The Supreme Court of Canada in *Suresh*, at para. 39, described the threshold question as primarily a fact-driven inquiry.

[51] In *Dunsmuir* at para. 62, the Supreme Court stated:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[52] In *Nagalingam*, at para. 32, the Federal Court of Appeal, after considering the decisions of the Supreme Court in *Suresh* and *Dunsmuir*, stated that a high degree of deference is to be afforded to a delegate's factual findings, such that the appropriate standard of review is reasonableness. I conclude that this standard applies in this case with respect to the treatment of evidence.

[53] Also in *Nagalingam*, at para. 32, the Federal Court of Appeal, held that the standard of review for the delegate's conclusion in a section 115(1) analysis is also on a standard of reasonableness. This same standard applies here.

ANALYSIS

Is the Delegate's assessment of the evidence flawed by giving weight to some evidence over other evidence in a manner unjustified and not supported by reason?

Applicant Submissions:

[54] The Applicant submits that the Delegate clearly preferred some sources of evidence over others. The issue lies in the lack of explanation for the preference. Specifically, the Applicant takes issue with the Delegate's preference over statements made by the Sri Lankan government over statements contained in reports from NGOs.

[55] Further, the Applicant submits the Delegate would rely on some dated evidence and conversely would not rely on other evidence because it was dated.

[56] In addition, the Applicant argues that where important evidence is not mentioned specifically and analyzed in the Delegate's reasons, the more willing a court should be to infer from the silence that the Delegate made an erroneous finding of fact "without regard to the evidence": *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, at para. 17 (F.C.).

[57] As a result, the Applicant contends that the Delegate failed to properly weigh the evidence and therefore her decision cannot be reasonable.

Respondent's Submissions:

[58] The Respondent submits that there is a high degree of deference afforded to a Minister's determination of whether the Applicant faces a substantial risk of torture upon deportation. "A reviewing court may not reweigh the factors considered by the Minister, but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors": *Suresh*, at para. 39.

[59] The Respondent argues that there is no basis to the claim that the Applicant improperly preferred some evidence over others. When looking at the decision as a whole, the Respondent submits that it is clear that the Delegate outlines the position taken on all of the Applicant's evidence; that the situation in Sri Lanka is poor. The Delegate then also notes other evidence which finds that while the situation in Sri Lanka is poor, the country still functions. The Delegate's conclusion was that the situation in Sri Lanka was one of generalized risk, with hostilities continuing in the north and east. However, the Delegate also noted that in other parts of the country, like Colombo, Sri Lankan life continues to function. The Respondent notes that the Delegate described that the country conditions "leave much to be desired".

[60] The Respondent notes that the Delegate discussed all of the evidence submitted by Applicant.

[61] The Respondent argues that there is a presumption that tribunals are assumed to have weighed and considered all of the evidence, unless the contrary is shown: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598, (F.C.A.).

[62] The Respondent argues that the Delegate clearly explained why she preferred certain pieces of evidence to others and why she chose to give some evidence lesser weight.

CASE LAW

[63] Justice Sexton, of the Federal Court of Appeal in *Via Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25, at para. 22 set out the requirements for adequate reasons. He stated:

> **22** The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.[8] Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based.[9] The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out[10] and must reflect consideration of the main relevant factors.[11] [reference omitted].

Reports from International Agencies

[64] Reports by Amnesty International, Human Rights Watch and the UNHCR are regularly used by tribunals and reviewing courts and are regarded as credibly reporting on human rights conditions in many different countries. Justice Tremblay-Lamer stated in her decision in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503:

> 72 The delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as AI and HRW is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country

> condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility (France Houle, "Le fonctionnement du régime de preuve libre dans un système non-expert: le traitement symptomatique des preuves par la Section de la protection des réfugiés" (2004), 38 *R.J.T.* 263, at pages 315-316 and at note 136).
>
> 73 This reputation for credibility has been affirmed by Canadian courts at all levels. The Supreme Court of Canada relied on information compiled by AI, as well as one of its reports, in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pages 829, 830, 839. That Court also cited AI in *Suresh*, above, at paragraph 11 in noting the use of torture in the context of that case.
>
> […]
>
> 81 I adopt the position of Justice Marshall Rothstein who stated in *Rosales v. Canada (Minister of Employment and Immigration)* (1993), 72 F.T.R. 1 (F.C.T.D.), at paragraph 7 that a reviewable error is committed when a decision maker "arrives at its conclusion by ignoring relevant and apparently overwhelming evidence to the contrary." (underlining added)

Reliance on Evidence from One Party to the Conflict

[65] In *Suresh*, at paras. 124-125, the Supreme Court of Canada commented with respect to assessing assurances provided by foreign governments. While the context relates to assurances that torture will not be inflicted on a returnee, in my opinion a similar approach may be considered to government statements where the state is a party to the conflict:

> **124** It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.
>
> **125** In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention

> refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported. (underlining added)

[66] I do not propose to extend the same standard to government pronouncements even where the government is engaged in a bitter conflict with an insurgent terrorist group. However, it does seem to me that a note of caution is appropriate in receiving such government statements where there is credible evidence to the contrary.

[67] In the section on country conditions, the Delegate acknowledges credible NGO documentary evidence of deteriorating country conditions but then refers to Sri Lankan government pronouncements on country conditions returning to normalcy to counter the NGO reports. The Sri Lankan government itself, on the documentary evidence, is involved in human rights abuses against northern Tamils in the prosecution of its conflict with the LTTE. Therefore, some caution is appropriate in considering such government pronouncements.

[68] The Delegate does not directly compare the two sets of reports nor give reasons why she appears to prefer the latter over the former. However, the Delegate concludes by referring to the US – Country Reports on Human Rights Practices 2006, which reports on a de facto breakdown of the ceasefire and a decline in the government's respect for human rights. The Delegate's conclusion that "Clearly, country conditions leave much to be desired" although somewhat understated is within the range supported by all the evidence.

Delegate's Treatment of Dated Evidence

[69] The Delegate relies on a 2005 report from the UK High Commission which states that Tamils are not experiencing problems upon return to Sri Lanka. She also relies on a judgment from the European Court of Human Rights, dated 2004, which stated that the situation in Sri Lanka is improving for Tamils; and a Request for Information Report from the Immigration and Refugee Board, dated 2003, which held that returnees were not likely to face problems at the airport. The Delegate accepts and makes use of these reports arising from the period 2003-2005.

[70] The Delegate was presented with an affidavit from the Applicant's father as well as a letter from the president of the TULF, a Tamil democratic party participating in the political process. Clearly, the evidence is of importance to the Applicant. Both the letter and affidavit indicate that if returned the Applicant would be at risk due to country conditions and his profile. The Delegate rejects both the affidavit and the letter in part because they were dated in 2005.

[71] The Delegate offers no explanation why the letter and the Applicant's father's affidavit were unacceptable because they were dated 2005, when earlier she accepted reports dated 2003 to 2005. This differential in treatment of the evidence is unsupported.

Lack of Corroboration

[72] Continuing with the Delegate's rejection of the Applicant's father's affidavit and the supporting letter, the other reason the Delegate gives for the rejection is the lack of corroborating evidence.

[73] In the documents considered and accepted by the Delegate on the question of risk on return and reception at the airport, the only contemporaneous evidence referred to by the Delegate was Canada Response to Information (RIR) LKA102038.E dated December 22, 2006. The Delegate quotes from the RIR:

> In December 2006 correspondence to the Research Directorate, an official at the Canadian high Commission in Colombo provided corroborating information [with regards to the letter from the British high Commission in Colombo dated 26 September 2005] on the return of failed asylum seekers in Sri Lanka, stating that returnees, if identified to the airlines as such by immigration authorities who are removing them to Sri Lanka, have an established process waiting for them upon arrival. First the Chief Immigration Officer (arrivals) documents the arrival of the person, takes a statement, and determines whether the returnee should be granted entry as a Sri Lankan national. Next, an officer of the State Intelligence Service (SIS) documents the arrival and takes a statement. Finally, an officer of the Criminal Investigation Department (CID) of the Lankan Police documents the arrival, checks for outstanding warrants and takes a statement. If there is an outstanding warrant for arrest, the returnee may be arrested. Otherwise [sic] the returnee is free to go.

[74] The Delegate found this to be evidence that supported her conclusion that "there was a process in place whereby a returning resident is only detained for processing purposes." The part quoted above certainly does support that conclusion.

[75] The Delegate does not make any reference to another part of the same December 22, 2006 RIR which corroborates the Applicant's evidence. This portion of the RIR belies the Delegate's conclusion about the reception the Applicant may face. That ignored part of the Canadian RIR states:

> **Persons with an affiliation to the LTTE or other political groups**

> The October 2006 Hotham Mission report cites information obtained during consultations with the Sri Lanka Monitoring Mission (SLMM), a body of international observers that monitors the ceasefire agreement between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) (SLMM n.d.), concerning the return of failed asylum seekers (47). The SLMM indicates that if a person returning to Sri Lanka has any previous affiliation with the LTTE, they may be targeted by the police (ibid.). The organization also notes that if a person has previous affiliations to certain individuals or political groups, they may be targeted by the LTTE (ibid.). The SLMM provides the example of persons who have been members of the People's Liberation Organisation of Tamil Eelam (PLOTE), an inactive Tamil militant organization (SATP n.d.), who were still being targeted by the LTTE in Sri Lanka at the time the Hotham …. (Note: the RIR ends here at p. 00307 of the Tribunal Record and does not continue on p. 00398) (underlining added)

[76] It is difficult to understand how the Delegate would not refer to this passage since it contained the very document the Delegate specifically references, has a clear heading in bold letters and is on point. Moreover, the source of the information is from the SLMM international observers which may be presumed to be a credible source. The Delegate offers no reasons for not referring to this passage as corroboration of the Applicant's father's affidavit and the supporting letter from the President of the TULF. Similarly, the Delegate offers no reason why she did not consider the above passage in the discussion on the treatment of returnees to Sri Lanka considering these reports about local knowledge of reported associations the Applicant had with the LTTE and with PLOTE.

[77] I find that the Delegate's treatment of the evidence is flawed. The Delegate fails to give reasons why she accepts some dated evidence while rejecting other evidence similarly dated. *Via Rail Inc.*, above. The Delegate also fails to refer to relevant documentary evidence clearly before her which was germane to the assessment of the Applicant's evidence and relevant to the

question of the reception the Applicant would receive on return to Sri Lanka. *Cepeda-Gutierrez*, above.

Did the Delegate err in failing to assess the risks the Applicant faced upon refoulement and failing to balance those risks he faced as a Convention refugee against danger he poses to the Canadian public?

[78] The Delegate's flawed treatment of the evidence leads to the possibility that the Delegate's assessment of the risk to the Applicant on return to Sri Lanka was not adequately evaluated. In this situation, the balancing exercise could not have proceeded properly.

[79] It is open to the Delegate to find that the Applicant may nevertheless be returned to Sri Lanka notwithstanding the risks he may face but this must be done after a proper assessment of the evidence of risk before a valid balancing exercise can be undertaken in accordance with the principles set out in *Suresh.*

CONCLUSION

[80] I find the Delegate's treatment of the evidence to be unreasonable. The Delegate's decision, finding that the Applicant would not be subjected to a substantial risk of torture or risk to life or to cruel and unusual treatment or punishment upon return to Sri Lanka, is quashed.

[81] I also find the Delegate's assessment in balancing the risk to the Applicant on return to Sri Lanka and the danger he presents to the public to be unreasonable since it is based on an erroneous assessment of the evidence of risk. The Delegate's decision on balancing the risk to the Applicant on return and the danger to the public is also quashed.

[82] This matter has a long and convoluted history. Justice Snider, in *Sittampalam 2007,* sought to return the matter to the same delegate which then came to the current Delegate. The current Delegate is familiar with the subject matter and the voluminous material involved. Accordingly, this matter will be returned for re-determination by the same Delegate.

[83] The Applicant proposes general questions of importance for certification.

1. Does a judge of the Federal Court have jurisdiction/discretion to rehear an issue that has already been determined by another judge of the Federal Court, if the factors set out by the Supreme Court of Canada in *Danyluk v. Ainswroth Technologies Inc.,* [2001] 2 SCR 460, warrant it?
2. Does a judge of the Federal Court have jurisdiction/discretion to rehear an issue that has already been determined by another judge of the Federal Court, if the issue is part of a larger matter that is still before the Court, the decision on the issue could not be appealed, subsequent binding case law establishes that the first decision on the issue was wrong in law, and the interests at stake involve fundamental human rights?

[84] Deciding as I have on the treatment of findings of fact, I do not propose any questions of general importance for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.

2. The matter is remitted back to the same Minister's Delegate for re-determination on the same terms as Justice Snider's Order being:

    1. The matter is remitted for the sole purpose of re-assessing the risk to the Applicant if he were returned to Sri Lanka;

    2. In the event that the Delegate concludes that the Applicant would be at substantial risk, the Delegate is to carry out a balancing exercise as contemplated by *Suresh.*

3. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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