Federal Court  Cour fédérale

Date: 20100625

Docket: IMM-5379-09

Citation: 2010 FC 699

Ottawa, Ontario, June 25, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KURANAGE SARATH PERERA
THENNAKOON HALUGE THENNAKOON

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a negative pre-removal risk assessment (PRRA) decision. The officer determined that the additional evidence provided by the applicants did not overcome the negative credibility finding made by the Refugee Protection Division of the Immigration and Refugee Board, and that the applicants were not at risk if returned to Sri Lanka even though the country conditions had changed.

[2] For the reasons that follow, this application is dismissed.

Background

[3] Kuranage Sarath Perera and Thennakoon Haluge Thennakoon are citizens of Sri Lanka. They are also Sinhalese.

[4] The applicants operated a farm in Sri Lanka where they employed two Tamil youths who, unbeknown to them, had deserted from the Liberation Tamil Tiger Ealam (LTTE). The applicants alleged that they faced persecution from the LTTE for harbouring these two deserters, and from the Sri Lankan security forces for supporting the LTTE. The applicants fled to Canada and claimed refugee status.

[5] The applicants' refugee hearing was held on January 10, 2008, where they were represented by counsel. The Board rejected the applicants' claim on May 30, 2008. It found that the applicants lacked credibility, that the events they alleged did not happen, and that the applicants did not have a well-founded fear of persecution. The Board also determined that the applicants had no credible basis for their claims, as defined under section 107(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Consequently, the Board rejected the applicants' claim. The applicants sought leave to judicially review that decision, but their request for leave was denied by this Court.

[6] In December 2008, the applicants submitted their PRRA application. In their application they included various documents that were not before the Board. These included: (1) a letter, dated November 5, 2008, from a lawyer in Sri Lanka stating that the applicants were still being sought by the police, (2) an affidavit of the principle applicant dated December 4, 2008, attesting that his brother had been shot at on August 22, 2008 when he went to take care of the principal applicant's property, by people he swears were looking for him; (3) a Diagnostic Ticket from Negonbo Base Hospital dated August 26, 2008, relating to his brother's gun shot wound; (4) an extract from the Police Report of his brother's shooting, dated November 10, 2008, (5) a summons issued to the principal applicant to appear as a witness, dated May 14, 2008, and (6) a Notice for the Appearance of the principal applicant to supply information regarding a special investigation, dated September 25, 2008.

[7] On September 15, 2009, the officer rejected the applicants' PRRA application.

[8] The officer reviewed the decision of the Board. The officer noted that the determinative issue there was credibility and that this Court had refused a request for leave to judicially review the decision.

[9] The officer considered the evidence submitted by the applicants and whether it constituted "new evidence" pursuant to s. 113(a) of the Act. The officer cited *Kaybaki v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 32, for the proposition that a PRRA application is not to become a second refugee claim. The officer noted that the new evidence submitted all post-dated

the refugee hearing date; however, the officer concluded that it did not constitute new evidence, stating: "I have however, reviewed this documentation and find that they [*sic*] do not provide any new information."

[10] Despite this finding the officer went on to consider the additional evidence submitted by the applicants.

[11] The officer cited *Raza v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385, for the proposition that the question is not whether the information post-dates the refugee hearing but whether it provides anything of substance that materially changes the determination made by the Board.

[12] The officer held that items (1) and (2) referred to "incidents [that] are not new evidence applicable to the particular circumstances of the applicants but, rather, it updates the evidence that was already presented and considered by the RPD." Additionally, the officer held that "these documents do not overcome the credibility concerns of the Board."

[13] The officer held that items (3) and (4), information detailing the fact that the principal applicant's brother was shot, did not contain any information on the reason why he was shot that would support a finding that the applicants were at risk.

[14] The officer held that items (5) and (6), the principal applicant's court summons and the notice to appear before the anti-terrorism unit, perplexed him as it was unclear how the principal applicant had promised to appear before the court in Sri Lanka given that he was in Canada. The officer may have been in error in the timing of these events. The officer noted that the police notice to appear did not indicate that the principal applicant was accused of any wrongdoing. The officer assigned both documents no weight and determined that they did not "overcome the serious credibility findings of the Board."

[15] The officer considered the documentation package submitted by the applicants on the country conditions in Sri Lanka. The officer acknowledged "that the Sri Lankan government has many challenges before it following the end of the civil war." However, the officer stated that there was "insufficient objective evidence before me that the government of Sri Lanka is subjecting its citizens to a sustained and systemic denial of their core human rights."

[16] The officer found that "the applicants have been outside of Sri Lanka for over 4 years and they have not provided sufficient objective evidence that they are at risk from either the government or the LTTE." The officer determined that the applicants do not face more than a mere possibility of persecution and that there were no substantial grounds to believe that they were at risk of torture or at risk to their lives or at risk of cruel and unusual punishment if returned to Sri Lanka.

[17] The officer concluded that "the applicants are not persons who are in need of protection as outlined in Sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA)."

Issues

[18] The issue raised by the applicants is whether the PRRA officer erred in his determination.

[19] The applicants submit that the officer committed a reviewable error in two respects: (1) by finding that the applicants' further submissions were not "new evidence," and (2) by misapprehending and ignoring evidence.

Analysis

[20] The applicants submit that the evidence provided constituted new evidence, that it post-dated the refugee hearing date, that it was capable of proving the applicants' previous allegations of risk, and that it should have been considered. The applicants contend that the officer failed to consider evidence that was contrary to the officer's determinative finding. They submit that "because the Officer erroneously dismissed the Applicants' evidence as not being new, then the Officer failed to accord any and or appropriate weight to it" and that this "constitutes ignoring of material evidence." The applicants contend that the officer failed to consider the documentary evidence *and* that he was selective in his consideration of the documentary evidence.

[21] The respondents cite *Mikhno v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 385, at para. 25, for the proposition that "a standing Board decision will act as a starting point from which an applicant may submit evidence of new developments" and that if the applicants' new evidence inadequately addresses this starting point a negative decision is likely. The respondents

say that the officer reasonably concluded that the information provided by the applicants did not provide any new information. They further say that notwithstanding this conclusion, the officer then considered the new information, and determined that it did not overcome the credibility concerns of the Board. They submit that the officer did not err in his assessment of the new information and that he afforded it appropriate weight. The respondents contend that the officer's assessment of the "new evidence" was reasonable, that he did not ignore evidence, and that he reasonably concluded that the applicants were not persons in need of protection.

[22] The question of whether the evidence submitted by the applicants was "new evidence," within the meaning of s. 113(a) of the Act, is a question of mixed fact and law reviewable on the reasonableness standard. The question of whether the officer properly assessed the evidence is a question of fact reviewable on the reasonableness standard.

[23] In my view, the officer did err in finding that the evidence submitted by the applicants was not "new evidence," but this error does not constitute a reviewable error in the circumstances at hand because the officer then went on to consider this evidence.

[24] The officer accepted that the evidence in question arose after the rejection of the applicants' refugee claim. In *De Silva v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 841, at para. 17, Deputy Justice Teitelbaum held that new evidence could include "evidence relating to old risks." He also cautioned, at para. 17, that PRRA officers "must be careful not to mix up the issue

of whether evidence is new evidence under subsection 133(a) [*sic*] with the issue of whether the evidence establishes risk." It is this error that the officer committed in this case.

[25] However, the officer's error is not a reviewable error, because the officer did not reject the evidence submitted by the applicants outright. Instead, the officer turned his mind to evaluating this evidence to determine whether it overcame the findings of the Board and whether it supported a finding that the applicants were persons in need of protection. The officer did exactly what the Court of Appeal has instructed PRRA officers to do in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, at para. 13, where the Court held that "[i]f the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material)."

[26] In *Mikhno* at para. 25, Justice O'Keefe held that:

> … a standing Board decision will act as a starting point from which an applicant may submit evidence of new developments. Deficiencies or concerns noted by the Board, if not adequately addressed with new evidence, leave the reviewing officer little choice but to render a negative decision.

[27] In spite of counsel's able and detailed submissions, and having read the reasons of the officer with a view to the new evidence that was tendered, I must conclude that the officer explained with transparent, intelligible, and sufficient reasons why the applicants' new evidence did not overcome the serious negative credibility finding made by the Board.

[28] The decision of the Board and its conclusion with respect to the credibility of the applicants is quite stark. Counsel for the respondents provided a summary of the Board's findings in this regard which was quite instructive. That summary included the following: 7 findings of implausibility, 6 inconsistencies, and 2 exaggerations. In the face of such findings, the new evidence required to overcome his lack of credibility would have to be significant. The officer found that it was not. On the basis of the record before me, that was not an unreasonable finding. Accordingly, the officer's finding with respect to the weight to be given to this new evidence and its relevance is determinative of the applicants' past allegations of risk.

[29] The applicants have failed to explain how the recent internal turmoil in Sri Lanka exposes them, as Sinhalese, to a risk based on either s. 96 or 97 of the Act, if returned. The applicants have not provided documentary evidence that supports a conclusion that they face risk irrespective of their previous allegations that were deemed not credible.

[30] In determining that the recent internal turmoil in Sri Lanka did not expose the applicants to persecution or risk if returned, the officer did not selectively consider the documentary evidence. The officer acknowledged that there were problems in Sri Lanka, but concluded that these would not pose a personalized risk to the applicants. I agree with the respondents' submission that the officer's "reasons evidence a carefully, well thought out and balanced review of the evidence before the PRRA officer and the Applicants have not demonstrated that there was an error in the officer's assessment."

[31] Neither party proposed a question for certification. In my view, there is no question on the facts before the Court that meets the test to be certified.

JUDGMENT

THIS COURT ORDERS that:

1. This application for judicial review is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	KURANAGE SARATH PERERA ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIRGRATION ET AL
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