Federal Court  Cour fédérale

Date: 20101103

Docket: IMM-1487-10

Citation: 2010 FC 1081

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 3, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

KAJENTHIRAN JEYAMOHAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), of an opinion of the Minister of Citizenship and Immigration issued under paragraph 115(2)(*a*) of the IRPA, dated February 17, 2010, that the applicant should leave Canada because he constitutes a danger to the Canadian public.

FACTS

[2] The applicant is a Ski Lankan national of Tamil origin.

[3] In 1997, he was arrested by soldiers and arrested and detained by police for two days. For that reason, he left Sri Lanka at the age of 16.

[4] He arrived in Vancouver on May 27, 1998, and claimed refugee status.

[5] On December 4, 1998, the Immigration and Refugee Board (the IRB) allowed his claim for refugee protection and granted him the protection sought.

[6] On May 28, 1999, in Montréal, he obtained permanent residence status.

[7] On July 28, 2003, he was found guilty of several counts of assault and sentenced to a term of imprisonment.

[8] On October 9, 2003, he became the subject of an inadmissibility report under section 44 of the IRPA on account of his criminal offence.

[9] On February 8, 2005, a removal order was made against him. The applicant appealed the order to the Immigration Appeal Division (the IAD).

[10] On June 12, 2006, he was found guilty of theft, uttering threats and fraudulent possession of a credit card. He was sentenced to another term of imprisonment.

[11] On August 7, 2006, owing to these newly committed crimes, he became the subject of a second inadmissibility report under section 44 of the IRPA.

[12] On October 20, 2006, a second removal order was made against him, and a warrant for his arrest and detention was issued under section 59 of the IRPA.

[13] On September 28, 2006, he was found guilty of assault causing bodily harm.

[14] On November 2, 2006, he became the subject of another inadmissibility report under section 44 of the IRPA.

[15] On February 9, 2007, after having served his prison sentence for his criminal offences, the applicant was arrested and detained by Canada Border Services Agency (CBSA) officers.

[16] On February 12, 2007, the IAD dismissed the appeal of his removal order on the ground that it lacked jurisdiction to hear the case.

[17] On September 26, 2007, the claimant was released from the CBSA detention centre with conditions, which included reporting to CBSA twice a month.

[18] On May 26, 2008, another report was issued under subsection 44(1) of the IRPA because the applicant was found guilty of two breaches of his probation order.

[19] On July 15, 2008, another report was issued against the applicant under subsection 44(1) of the IRPA because he was convicted, on January 17, 2008, of offences relating to public or peace officers, contrary to paragraph 129(*a*) of the *Criminal Code*.

[20] On January 12, 2009, the claimant was found guilty of robbery, forging or falsifying credit cards, possession of weapons for a dangerous purpose, disguise with criminal intent and two breaches of his probation order. He was sentenced to 24 months in prison.

[21] The applicant is currently serving his sentence for those most recently committed offences.

[22] On February 17, 2010, the Minister's delegate issued an opinion under paragraph 115(2)(*a*) of the IRPA, that the applicant constitutes a danger to the public in Canada on grounds of serious criminality.

[23] Since the applicant is not challenging the assessment that he constitutes a danger, the only question to be decided is whether the Minister's delegate erred in assessing the risk that the applicant would be exposed to if he were removed to Sri Lanka.

Applicant's position

[24] The applicant submits that the decision of the Minister's delegate that there was no serious possibility that the applicant would be arrested, detained, persecuted or subjected to ill treatment by the Sri Lankan authorities if he were to return to his country of origin was unreasonable and made in disregard of the evidence before her.

[25] In fact, the applicant has previously been detained by the Ski Lankan authorities. Although these periods of detention happened quite some time ago, they show that the applicant is a person of interest to the country's authorities.

[26] Contrary to the delegate's assertion, the documentary evidence shows that deported persons are subjected to special screening by the national authorities upon their return to Sri Lanka. The applicant will therefore undergo heightened screening when he returns to Sri Lanka and will have to explain the reasons he was granted refugee status in Canada.

[27] There is also a significant risk that the applicant will be detained after the initial questioning, either when it is discovered that he has previously been detained by the Sri Lankan authorities or because he is a young Tamil from northern Sri Lanka.

[28] Therefore, the finding by the Minister's delegate—that she is satisfied on a balance of probabilities that it is unlikely that the applicant will be arbitrarily detained after his arrival—is unreasonable.

Respondent's position

[29] The respondent submits that the findings in the report are reasonable and supported by the evidence in the file and that the decision contains no errors of fact or law.

[30] The Minister's delegate performed an exhaustive analysis of the risk the applicant could face if he were removed and of the documentary evidence concerning the treatment of Sri Lankan refugee protection claimants returning to their country of origin.

[31] She relied on the documentary evidence in the file to conclude that the Sri Lankan police only keep information on arrested persons for a period of five years.

[32] She also took into account the applicant's arrests and brief detention in 1997 and 1998. What is more, the applicant provided no evidence that he is currently wanted by the Sri Lankan authorities.

[33] This Court's intervention is not required because the danger opinion of the Minister's delegate has the necessary justification, transparency and intelligibility.

APPLICABLE STANDARD OF REVIEW

[34] The standard of review that applies to the issue of an administrative decision maker's assessment of the evidence is the reasonableness standard (*Dunsmuir v. New Brunswick*, 2008

SCC 9; *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 39; *Joseph v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 344).

[35] Therefore, this Court will not substitute its decision for that of the Minister's delegate unless it is satisfied that she made abusive or arbitrary findings without taking into account the evidence before her, and only if her decision does not fall within the range of possible, acceptable outcomes in respect of the facts and law (*Dunsmuir* (above)).

ANALYSIS

[36] Paragraph 115(2)(*a*) of the IRPA provides as follows:

Principle of Non-refoulement	**Principe du non-refoulement**
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	**Exceptions**
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(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	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
. . .	(…)

[37] In *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, at paragraph 18, the Federal Court of Appeal proposed a framework for the delegate to apply, once it has been established that a protected person is inadmissible on grounds of serious criminality and constitutes a danger to the public, in order for the delegate to formulate his or her opinion under paragraph 115(2)(*a*) of the IRPA:

> . . . If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains.

[38] In *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 355, Justice Blanchard concluded that the threshold for determining whether *refoulement* is possible is to ask whether it will expose the applicant to a serious risk of torture. This risk must be personal and present and be assessed on the basis of criteria that go beyond “mere theory” or “suspicion”:

> If the risk is not established, there is no need to pursue the analysis since the applicant is not entitled to the protection afforded by subsection 115(1) of the IRPA.
> (at paragraph 36).

[39] In her decision, the Minister’s delegate made specific references to the applicant’s concerns that if he had to return to Sri Lanka, he would be at risk of being arbitrarily arrested and detained because of the suspicion he was under before he left for Canada, his arrest in 1997 and brief detention in 1998 and the fact that the Sri Lankan authorities may have kept information on those matters.

[40] However, the delegate found that it is unlikely that the authorities kept information on those detentions:

> As police records are only kept for 5 years, there is unlikely to be any record of his brief arrest (2 days) in 1998 by Colombo police. And as, according to his PIF, he was never arrested by the SIS, it is unlikely that authorities would have a record of his brief encounter with the Sri Lankan military in 1997. It is also highly unlikely that authorities would have any record on his kidnapping by LTTE in 1995 or his forced labour for the LTTE in 1997 (Danger opinion, at page 25).

[41] It is also clear from the decision that the delegate was aware of the applicant's risk of being subjected to special screening by the Sri Lankan authorities when he returned to the country; however, she was of the opinion that this screening would not lead to further checks and that if he were arrested and/or detained, he would not be held for long:

> There is nothing before me to indicate that Mr. Jeyamohan is a high profile member of the LTTE, in fact he appears to have had no connection to the group over the course of his entire adult life, there is little reason to suppose he would be arrested on suspicion of being a member and if arrested and/or detained he would be kept for any length of time.

[42] Furthermore, in light of the documentary evidence in the file, the delegate noted, first, that the Sri Lankan courts ensure genuine monitoring of the exercise of power by the authorities and, second, that although some cases of torture in prison have been reported, there are measures in place to prevent those abuses.

[43] She also took into consideration the applicant's tattoos and scars which might draw the attention of the Sri Lankan authorities, but noted that the scarring occurred in Canada, which the applicant could explain to the Sri Lankan authorities. In that regard, he could also provide evidence of medical checkups in Canada.

[44] Last, the delegate was of the opinion that nothing suggests that CBSA authorities will share information with Sri Lankan authorities regarding the applicant's criminal activities in Canada. Therefore, she does not believe that the Sri Lankan authorities would treat him with greater suspicion.

[45] As for the fact that the applicant may be subjected to ill treatment because he is from the northern part of the country, the delegate noted that the applicant need not go to that part of Sri Lanka and can decide to remain in Colombo.

[46] Finally, relying on a recent piece of documentary evidence in the file, the delegate acknowledged that young men of Tamil origin may be subjected to discrimination but found that this discrimination has not reached the level of persecution.

[47] In summary, on the basis of the evidence in the file, the delegate performed a detailed analysis of the applicant's personalized fear, which resulted in the finding that the risk the applicant could face if he were to return is no more than a mere possibility and that, on a balance of probabilities, it is unlikely that he would face a personalized risk to his life, a risk of cruel or unusual treatment or a danger of torture.

[48] The case law is clear that the Court must show deference toward the delegate's decision and not substitute its own assessment of the facts.

The Federal Court of Appeal affirmed as follows:

> . . . In light of *Suresh*, and more recently *Dunsmuir*, I agree with Justice Kelen that a high degree of deference is to be afforded to

> the Delegate's factual findings (*Nagalingam v. Canada (Citizenship and Immigration)*, 2008 FCA 153, at paragraph 32).

[49] In this case, the delegate's finding falls within the acceptable findings in respect of the facts and law, and it is not for the Court to substitute its own findings for those of the delegate.

[50] For all of these reasons, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

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