Federal Court  Cour fédérale

Date: 20121204

Docket: IMM-3255-12

Citation: 2012 FC 1416

Ottawa, Ontario, December 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KASRON PARARAJASINGHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of a Senior Immigration Officer (Officer), dated 30 August 2011 (Decision), which refused the Applicant's application for a Pre-Removal Risk Assessment (PRRA).

BACKGROUND

[2] The Applicant is a 29-year-old Tamil male from Northern Sri Lanka. He has been in Canada since May, 2010. The Applicant left Sri Lanka in December, 2009. He originally left Sri Lanka using his own passport, but obtained a false passport from Belize which he used to enter Mexico, and then the United States. Upon entering the U.S., the Applicant filed an asylum claim. His claim was making progress – Immigration officials in the U.S. had determined he had a credible fear in Sri Lanka – but the Applicant abandoned that claim to come to Canada. The Applicant filed a refugee claim upon entering Canada in May, 2010.

[3] The Applicant's refugee claim was heard by a panel of the Refugee Protection Division (RPD) on 24 March 2011. The Applicant based his refugee claim upon a fear of persecution at the hands of the Sri Lankan police and army due to his profile as a young Tamil male from the North. He also stated that in February, 2009 he was questioned by the army and told not to leave the country. The RPD found the Applicant not to be credible based on discrepancies in his claim, a lack of documentation, and the abandonment of his U.S. claim. The RPD determined the Applicant was not personally at risk and denied his refugee claim.

[4] The Applicant filed a PRRA application on 30 November 2011. He did not submit any personal documents in support of his application, but did include a number of documents about country conditions in Sri Lanka. All of these documents post-date the Applicant's refugee hearing. Most of the documents submitted by the Applicant come from the US Department of State, Amnesty International, or the Immigration and Refugee Board of Canada (IRB). The consensus amongst these documents is that conditions in Sri Lanka have not changed much in recent years.

The IRB document LKA103782.E, dated 12 July 2011, states specifically that the situation in Sri Lanka has not changed since February, 2011.

[5] The Applicant submitted two documents that speak directly to the risks faced by failed refugee claimants: an Amnesty International document dated 16 June 2011 and IRB document LKA103815.E dated 22 August 2011. The Amnesty International document discusses the detention and torture of failed refugee claimants, and states that Tamil returnees may face safety risks. This is found on pages 111 and 113 of the Certified Tribunal Record (CTR). LKA103815.E (pages 232-233 of the CTR) discusses how officials are made aware of the impending arrival of failed asylum seekers and cites the same risks mentioned in the Amnesty International document. It also states, on page 239, that returnees are often portrayed in the media as "traitors" and may be particularly vulnerable to abduction and extortion.

[6] The Officer considered the Applicant's PRRA application and rejected it on 6 March 2012.

DECISION UNDER REVIEW

[7] The Decision in this case consists of a letter sent by the Officer to the Applicant on 6 March 2012, along with the Officer's notes on the file. The Officer rejected the PRRA application because he determined the Applicant would not face a risk of persecution if returned to Sri Lanka. He also found the Applicant would not face a risk to his life or a risk of torture or cruel and unusual treatment or punishment if returned.

[8] The Officer noted the main risk to the Applicant as being mistreatment due to his being a failed refugee claimant returning from the West, as well as a young Tamil male from the North of

Sri Lanka who may be suspected of having ties to the Liberation Tigers of Tamil Eelam (LTTE). Arbitrary detainment, torture, and extortion were also cited as potential risks. The Officer noted that all the materials submitted with the PRRA application were general in nature and did not refer specifically to the Applicant.

[9] The Officer stated that subsection 113(a) of the Act establishes that only evidence which arises after the refugee decision, or which was not reasonably available, can be presented on a PRRA application. He stated that the allegations of risk presented by the Applicant could have been raised before the RPD panel, but since the submissions post-date that time he proceeded to consider them.

Documentary Evidence

[10] The Officer started his evaluation of the documentary evidence by stating that although he had not mentioned each individual document, he had reviewed them all. He then made a quick review of the US Department of State and Amnesty International documents. As regards the Amnesty International document dated 16 June 2011, the Officer found that all it said was that "young Tamil men from Northern or Eastern Sri Lanka remain at particular risk of persecution." The Officer then discussed the IRB document LKA103782.E, dated 12 July 2011. That document states that the situation has not changed since February 2011, and that young Tamil males from Northern Sri Lanka continue to face harassment from security officers.

[11] The Officer then considered the IRB document LKA103815.E, dated 22 August 2011. He noted that it states that the risk of interrogation upon re-entry into Sri Lanka is faced primarily by those who left the country in an unauthorized way. The Officer found that because the Applicant left

the country in a permitted way and using his own passport he would not be perceived as having left the country illegally. There was also no personal documentation submitted to suggest he would be perceived as having ties to the LTTE upon returning to Sri Lanka. The document states that Tamils with a history of opposing the government may be targeted, but again there was nothing to suggest that this would be relevant to the Applicant.

[12] The Officer noted that LKA103815.E says that the Canadian High Commission in Sri Lanka had found only four cases of people being detained, and that the Ratmalana-based *Sunday Leader* had found no reports of mistreatment of returnees. The Officer further noted that a police spokesperson told the Colombo-based *Sunday Observer* that people are only detained for questioning if they have criminal records, and that all rejected asylum seekers made it safely to their homes.

[13] The Officer also noted that LKA103815.E identified returnees who do not successfully reintegrate into society after arrival as being particularly at risk. The Officer pointed out that the Applicant's mother, siblings, and extended family still live in Sri Lanka, and that he has been away for less than three years. The Officer found that there was no indication the Applicant would not reintegrate into society successfully, and that this particular risk was not relevant to the Applicant.

[14] The Officer then considered the publicly available IRB document LKA103663.E. This document states that returned Tamil asylum seekers are routinely questioned, as are Tamils flying into the Colombo airport who are not deportees. The Officer found the evidence as a whole indicated that Tamil returnees may face questioning upon their arrival in Sri Lanka, but it is those with criminal records or suspected LTTE links who are primarily at risk.

[15] The Officer then considered the publicly available UNHCR July 2010 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka* (UNHCR Guidelines). This document states that there is no longer a need for presumptive eligibility for Tamils from the North, and asylum-seekers should be considered on their individual merits. Five profiles are indicated as being particularly at risk, none of which are applicable to the Applicant.

[16] The Officer also noted that the Applicant has an 18-year-old brother who resides in Jaffna. The Applicant did not indicate that his brother or other siblings have been subject to mistreatment. Considering this, and the submitted materials about conditions in Sri Lanka, the Officer found the Applicant's profile does not put him personally at risk. The Officer stated that though harassment of young Tamil males from the North continues, in the case of the Applicant it does not amount to persecution as defined in sections 96 or 97 of the Act.

[17] The Officer found, based on the Applicant's submissions and the Officer's own research of publicly available documents, that there had not been a material change in country conditions in Sri Lanka since the RPD hearing. There was insufficient evidence presented to find the Applicant faces more than a mere possibility of persecution, and the Officer therefore refused the Applicant's PRRA application.

ISSUES

[18] The issues raised by the Applicant are:

1. Did the Officer err by using the wrong standard of proof when conducting the section 96 analysis?

2. Was the Officer's decision reasonable?

3. Were the Officer's reasons adequate?

STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] *Dunsmuir* states, at paragraph 55, that a pure question of law of central importance to the legal system and outside the decision maker's area of expertise will be decided on a standard of correctness. The Federal Court of Appeal determined in *Cyprus (Commerce and Industry) v International Cheese Council of Canada,* 2011 FCA 201 at paragraphs 18-19, that the applicable burden of proof is evaluated on a standard of correctness. Thus, this will be the standard of review applicable to the first issue.

[21] A PRRA decision is highly discretionary and fact-based, and one that *Dunsmuir* dictates is owed deference. In *Hnatusko v Canada (Minister of Citizenship and Immigration),* 2010 FC 18 at paragraph 25, Justice John O'Keefe held the standard of review applicable to a PRRA Officer's decision is reasonableness. Justice Maurice Lagacé made a similar finding in *Chokheli v Canada (Minister of Citizenship and Immigration),* 2009 FC 35 at paragraph 7, as did Justice Marie-Josée Bédard in *Marte v Canada (Minister of Public Safety and Emergency Preparedness),* 2010 FC 930

at paragraph 17. The standard of review applicable to the Officer's decision in this case is reasonableness.

[22] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[23] The Supreme Court of Canada recently addressed the issue of the adequacy of reasons in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. It held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The adequacy of the Officer's reasons will be analyzed along with the reasonableness of the Decision as a whole.

STATUTORY PROVISIONS

[24] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a	**96.** A qualité de réfugié au

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,

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;

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;

[…]

[…]

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

(i) elle ne peut ou, de ce fait, ne veut se 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.
[…]	[…]
112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
[…]	[…]
113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit:
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable,

have been expected in the circumstances to have presented, at the time of the rejection;	dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
[…]	[…]

ARGUMENTS

The Applicant

The Burden of Proof

[25] The Applicant states that he did not have to show that he would face persecution if returned to Sri Lanka, but only that there was more than a mere possibility that he would face persecution if returned. Cases such as *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593; *Ponniah v Canada (Minister of Employment and Immigration)*, (1991) 132 NR 32; *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA) establish that the appropriate standard of proof under section 96 of the Act is less than a balance of probabilities but more than a mere possibility of persecution.

[26] The Applicant concedes that the Officer stated the correct test in the Decision, but argues that the Officer misapplied the test and used shifting burdens of proof throughout the Decision. The Applicant says that the Officer used the incorrect burden of proof multiple times throughout the Decision, and cites the following statements of the Officer as examples:

a. The Applicant did not show that his profile is one that "would attract" undue attention or reprisal (CTR, page 6);

b. The Applicant did not show that he "would be perceived" as someone who had left the country illegally (CTR, page 7);

c. The Applicant did not present a satisfactory explanation for why he "would be detained" upon returning to Sri Lanka (CTR, page 7);

d. The Applicant did not present sufficient evidence to show that he "would be perceived" as a person with LTTE links or with a history of opposing the government (CTR, page 8);

e. The documentation did not show that the Applicant "will be arrested, harmed, or otherwise targeted" (CTR, page 8).

[27] The Applicant states that the Officer misunderstood the applicable burden of proof. The Applicant quotes Justice Yves de Montigny in *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 [*Sinnasamy*], where he said at paragraph 31:

> Of course, the mere use of the words "will" or "would" is not, in and of itself, sufficient to conclude that the officer applied the wrong legal test, especially if this is an isolated occurrence. Regard must be had to the decision as a whole, as this Court has made clear on a number of occasions: see, for example, *Nabi v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 325 (Fed. T.D.); *Sivagurunathan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 432 (F.C.). On the other hand, the mere recital at the very end of an assessment of a standard formula with respect to the correct threshold will not cure the deficiencies found elsewhere in the reasons.

The Applicant states that the wrong burden of proof was used multiples times throughout the Decision; it was not an isolated occurrence.

[28] The Applicant asserts that if the Decision demonstrates that more than one standard was used, or is unclear as to what standard was used, this is an error. See *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4. The Applicant says that if the Court cannot be certain as to whether the Officer properly understood the test then the Decision should be quashed, and cites *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 224 in support of this proposition.

[29] Post hearing, the Applicant has provided the Court with the recent decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*, 2012 SCC 55 and urges this Court to adopt the reasoning contained in paragraphs 84-87 of that decision.

The Reasonableness of the Decision

[30] The Applicant says that the Officer was selective in his evaluation of documents and that he ignored evidence. For example, in the Officer's evaluation of document LKA103815.E he focused on the Applicant's ability to reintegrate, but ignored the part of the document that said that returnees might be detained, tortured, and held in "brutal" conditions upon arrival.

[31] The Applicant asserts that by ignoring evidence the Officer failed to properly consider the issue of cumulative persecution. In *Divakaran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 633 [*Divakaran*], Justice John O'Keefe said at paras 23-28:

> The Federal Court of Appeal and this Court have both held that a series of discriminatory events which individually do not give rise to persecution, may amount to persecution when considered cumulatively (see *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 53 (Fed. C.A.); *Ampong v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 35 (F.C.) at paragraph 42).

> The respondent submits that in the PRRA application, the officer only found sufficient evidence to support the risk that the applicant may be subject to extortion at the airport and that this one incident cannot create cumulative persecution.
>
> I find that the officer failed to consider cumulative persecution. For example, in the H&C decision, the officer accepted that the applicant may have to register with police and may be questioned by state security agencies if he wishes to reside in Colombo, or, if he resides in Jaffna, the applicant might be required to proceed through security checkpoints and register with the police.
>
> These findings of fact were absent from the PRRA decision. As both decisions were made on the same day by the same officer, these findings should have formed part of the PRRA decision and the officer should have assessed whether the applicant would face more than a mere possibility of persecution on the basis of these discriminatory actions.
>
> I cannot know whether the officer would have found cumulative persecution in the PRRA analysis had he considered these other discriminatory events.
>
> As such, based on the errors of law above, I must allow the judicial review for both the PRRA and H&C applications. If the PRRA is faulty, then the same would follow for the H&C.

The Applicant states that this decision shows that the issue of cumulative persecution was not properly considered by the Officer.

[32] The Applicant claims that it was erroneous of the Officer to find that the risk is one that should have been raised with the RPD, but concedes that the Officer did assess the new allegation of risk.

Inadequate Reasons

[33] The Applicant further asserts that the reasons of the Officer are not adequate. The Officer found that the Applicant may be subject to discrimination but then concluded that the discrimination would not amount to persecution without elaborating as to why. The Applicant argues that the inadequacy of the reasons contributes to the unreasonableness of the Decision.

The Respondent

Correct Test

[34] The Respondent points out that the Applicant has conceded that the Officer articulated the test properly. When one considers the reasons as a whole they demonstrate that the correct test was applied. The Decision neither states nor implies that the decision was based on a balance of probabilities, as alleged by the Applicant.

The Reasonableness of the Decision

[35] The Respondent points out that the Applicant did not submit any personalized evidence to support the allegation that he fits the profile described in the general evidence. Justice de Montigny found in *Ventura v Canada (Minister of Citizenship and Immigration)*, 2010 FC 871 at paragraph 25 that "in the absence of evidence showing personalized risk, country conditions alone are not sufficient for a positive PRRA determination". See also *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 at paragraph 28.

[36] The Respondent points out that it is up to the Applicant to make the connection between country conditions and his personal circumstances; he failed to do so in this case. The Officer

considered the objective evidence submitted about conditions in Sri Lanka, but the burden was on the Applicant to provide evidence demonstrating that he personally would face the risks alleged (see *Mahendran v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1237 at paragraph 18; *Wage v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1109 at paragraph 102; *Kakonyi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1410 at paragraphs 28-29).

[37] The Officer noted the troublesome country conditions in Sri Lanka, but reasonably found that this alone was not enough to establish that the Applicant would face the risks alleged. For example, the Officer noted that the objective evidence said that people who leave Sri Lanka in unauthorized ways may face problems upon re-entry, but that the Applicant left the country on his own passport and in a permitted way, so there was no evidence demonstrating that this is a risk that the Applicant himself would face.

[38] The objective evidence also indicated that individuals suspected of having LTTE links, a history of opposing the government, or outstanding criminal charges were at risk of arrest or detention upon arrival in Sri Lanka. The Officer noted that the evidence did not indicate that failed refugee claimants or Tamil males from the North are generally considered to have LTTE links, and the Applicant did not provide any evidence that indicated that he would be perceived as having LTTE links or outstanding criminal charges. The Officer also noted that the Applicant's 18-year-old brother who resides in Jaffna – a similarly situated individual – had not been subjected to any mistreatment. The Officer's conclusion that the Applicant had not established that he fits the profile of people at risk described in the documentary evidence was reasonable.

[39] The Respondent submits that there was no need for the Officer to make an explicit finding in regards to cumulative persecution; whether the Applicant's past experiences amounted to persecution is not a relevant issue in this case. The proper approach to a claim of cumulative persecution is to assess the cumulative effect of past incidents that the Applicant has faced (see *Munderere v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84 at paragraph 41; *JB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at paragraphs 27-33). In this case, the RPD already determined that the Applicant's statements regarding past incidents that occurred in Sri Lanka were not credible. It was not the Officer's job to look into this finding.

[40] The Respondent submits that the *Divakaran* case, above, relied on by the Applicant, is distinguishable on the facts. In that case, the officer had acknowledged certain risks in the applicant's H&C application, but not in the PRRA application. Had all the risks been acknowledged in the PRRA application their sum would have amounted to persecution. In the case at hand, the Applicant simply has not established the risks alleged. The Applicant failed to demonstrate a link between his personal situation and conditions for Tamils returning to Sri Lanka, and thus it cannot be said that the Officer unreasonably ignored the issue of cumulative persecution.

[41] The Applicant concedes that the Officer assessed the newly claimed risks; thus it is clear that the Officer did not rely on whether or not the risk allegations could have been presented to the RPD in making his decision. The Officer's reasons demonstrate that he considered all of the Applicant's evidence and submissions as to risk (see *Cupid v Canada (Minister of Citizenship and Immigration)*, 2007 FC 176 at paragraph 12), but came to the conclusion that they were not sufficient to establish the risk alleged. The Respondent submits that the Officer applied the correct burden of proof and that the Decision is reasonable.

ANALYSIS

[42] The Applicant asserts that the "PRRA officer erred in part because the Applicant had not proven on the balance of probabilities that he would be subject to harm." [Emphasis added]. This is an assertion that the Applicant was subjected to a higher burden of proof in establishing his claim to protection than the law requires.

[43] Nowhere in the Decision does the Officer specifically say that the burden of proof on the Applicant is "balance of probabilities" as regards section 96 persecution. In fact, the Officer clearly states in the summary that the burden is "more than a mere possibility" for section 96 persecution and "more likely than not to face a danger of torture, or a risk to life, or a risk of cruel and unusual treatment or punishment" under section 97.

[44] The Applicant concedes that the Officer correctly states the test in the summary. The issue is whether, at other places in the Decision, the Officer applies some other test. The case law is clear that, in deciding this issue, "regard must be had to the decision as a whole." See *Sinnasamy*, above.

[45] In *Sinnasamy*, the case relied upon by the Applicant, the Court found that this issue was "borderline" and that "if the officer had made no other reviewable error, I do not think this would be sufficient to quash his decision."

[46] The law in this area was recently reviewed by Justice Leonard Mandamin in *Paramsothy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1000, at paragraphs 24-25 and 29-32:

> In my view, the RPD failed to clearly articulate and apply the proper legal test for the Applicant's section 96 Convention refugee claim. In *Mugadza* at paras 20-22 I stated:

[20] The legal test or standard of proof to be met by an applicant for refugee status asserting a fear of persecution was addressed by the Federal Court of Appeal in *Adjei*, [1989] F.C.J. No. 67, above. Justice MacGuigan, considering the proper interpretation of section 2(1)(a) of "Convention refugee" in the former *Immigration Act*, the forerunner to s. 96(a) IRPA stated:

However, the issue raised before this Court related to the well-foundedness of any subjective fear, the so-called objective element, which requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.

It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove the persecution would be more likely than not. Indeed, in *Arduengo v. Minister of Employment and Immigration* (1982) 40 N.R. 436, at 437, Heald J.A. said:

Accordingly, it is my opinion that the board erred in imposing on this applicant and his wife the requirement that they would be subject to persecution since the statutory definition supra required only that they establish "a well-founded fear of persecution". The test imposed by the board is a higher and more stringent test than that imposed by the statute.

[...]

We would adopt that phrasing, which appears be equivalent to that employed by *Pratte J.A. in Seifu v. Immigration Appeal Board*, [1983] F.C.J. No. 34 (A-277-822 (dated January 12, 1983):

... [I]n order to support a finding that an applicant is a convention refugee, the evidence must not necessarily show that he "has suffered or would suffer persecution"; what the evidence must show is that the applicant has good grounds for fearing

> persecution for one of the reasons specified in the Act.
> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be a more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.
>
> [21] The Board's reasons are to be taken as a whole. In *I.F. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1472 (CanLII), 2005 FC 1472 at paras. 24, Justice Lemieux in deciding whether the board erred in its application of the section 96 test by setting out two slightly different tests held:
>
> In this case, looking at the impugned decisions as a whole, I find the tribunal expressed itself sufficiently and did not impose an inappropriate burden on the applicants. The tribunal conveyed the essence of the appropriate standard of proof, that is,
>
> [22] In *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 (CanLII), 2005 FC 4 at paras. 6, Justice O'Reilly stated:
>
> [t]his is an awkward standard of proof to articulate. This Court has recognized that various expressions of this standard are acceptable, so long as the Board's reasons taken as a whole indicate that there the claimant was not put to an unduly onerous burden of proof.

In *Leal Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 154 at para 5, Justice Rennie stated:

> With respect to the second error, the applicant testified that she had been kidnapped and beaten by the FARC. The RPD insisted on "conclusive proof" of the allegation. The RPD also rejected Ms. Alvarez' claim as it was not satisfied "on the balance of probabilities, she was not or is not a target of the FARC." Neither of these findings are

> predicated on the appropriate legal standard. The principle applicant did not have the burden of providing either conclusive proof or proof on a balance of probabilities. The test is whether there was a serious possibility of persecution or harm. As O'Reilly J. noted in *Alam v Canada (Minister of Citizenship and Immigration)* 2005 FC 4, where the Board has incorrectly elevated the standard of proof, or the court cannot determine what standard of proof was actually applied, a new hearing can be ordered: see also *Yip v Canada (Minister of Employment and Immigration*) [1993] F.C.J. No. 1285. This too is, therefore a reviewable error.
>
> [Emphasis added]

…

While the RPD is tasked with examining the facts which the Applicant relies to hold a subjective well founded fear of persecution, it cannot put itself into the Applicant's shoes and apply the civil balance of probabilities to decide if the Applicant's subjective fear is well founded or not. By doing so, the RPD erred in imposing a stricter standard.

At paragraph 43 of its decision, the following conclusion of the RPD is a further illustration that it applied the incorrect standard of proof:

> For these reasons, the Panel finds on a balance of probabilities that the Sri Lankan government does not wish to arrest the claimant and does not perceive him to have ties to the LTTE, even though he is a young Tamil male from the northern and eastern regions of Sri Lanka.
>
> [Emphasis added]

The RPD's decision, however, contains two paragraphs that refer to the correct test:

> the Panel finds that there is no serious possibility that the claimant would be persecuted should he return to Sri Lanka and that his fear is not well founded.

> [Certified Tribunal Record - RPD Decision at para 63]
>
> As the claimant adduced no other evidence nor does the documentation support a finding that he would face a serious possibility of persecution should he return to Sri Lanka or that he will be persecuted or be subjected personally to a risk to his life, or a risk to cruel and unusual treatment or punishment or to a danger of torture by any authority in Sri Lanka, the claim for refugee protection must fail. [Certified Tribunal Record - RPD Decision at para 68]

In my view, these later statements do not salvage the RPD's decision since, at best, the RPD applies inconsistent standards of proof for its s. 96 analysis.

[47] The *Alam* case referred to by Justice Mandamin also had the following to say on point at paragraphs 7-9:

> By contrast, in cases where the Board seemed to be demanding too much proof from a claimant, the Court has ordered a new hearing. For example, Chief Justice Julius Isaac found that the Board had erred when it stated that it was "not convinced that the claimant faces a reasonable chance that he would be persecuted for his political opinions should he return to Bulgaria" (*Chichmanov v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 832 (C.A.)(QL); see also *Mirzabeglui v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 50 (C.A.) (QL)). In *Adjei*, above, Justice MacGuigan disapproved of the Board's expression of the standard of proof when it said that the evidence before it was "insufficient for it to conclude that there are substantial grounds for thinking that persecution would result...".
>
> The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context. Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a risk of persecution, it is inappropriate to require them to prove that

> persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance", "more than a mere possibility" or "good grounds for believing" that they will face persecution.
>
> The case law referred to above shows that where the Board has articulated the gist of the appropriate standard of proof (i.e. the combination of the civil standard with the concept of a "reasonable chance"), this Court has not intervened. On the other hand, where it appears that the Board has elevated the standard of proof, the Court has gone on to consider whether a new hearing is required. Further, if the Court cannot determine what standard of proof was applied, a new hearing may be necessary: *Begollari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1340, [2004] F.C.J. 1613 (T.D.) (QL).

[48] The specifics of the Applicant's complaint in the present case are as follows:

> 7. The PRRA officer erred in part because the Applicant had not proven on the balance of probabilities that he would be subject to harm. See Record, page 12 (the Applicant did not show that he "would attract undue attention or reprisal"); page 13: the Applicant did not show that "he would be perceived" as someone who had left illegally; that he "would be detained upon a return"; page 14: the Applicant did not show that he "would be perceived as a person with LTTE links or with a history of opposing the government"; page 14: the Applicant did not show that "he will be arrested, harmed, or otherwise targeted". These are not isolated occurrences (see *Sinnasamy*, below)
>
> 8. The Applicant did not have the legal burden to show that he would face persecution. The PRRA Officer was required to take a further step beyond whether the Applicant would face persecution and determine whether there was more than a mere possibility of persecution. The Applicant (*sic*) that the appropriate standard of proof under s. 96 of IRPA is less than a balance of probabilities but more than a mere possibility of persecution upon return (*Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), *Chan v. Canada (Minister of Employment and Immigration)*, [1995] S.C.R. no. 593 at para. 120, *Ponniah v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 32, [1991] F.C.J. No. 359 (C. A.) (QL)).

[49] The Respondent argues that, in each of these instances, the Officer is simply applying the civil standard of proof to the facts upon which the Applicant seeks to rely for his fear of section 96 persecution or section 97 risk. It is my view that, in assessing and deciding this issue, each case must be examined on its particular facts, and the decision must be reviewed as a whole, in order to determine whether the wrong standard of proof has been applied. I cannot simply adopt the reasoning in *Opitz*, above, as the Applicant urges. In my view, there are significant factual and semantic differences between *Opitz* and the present case. Also, the essence of the problem in *Opitz* was a reversal of the onus of proof; that is not at issue here. When I read the Decision as a whole, I believe it reveals that the RPD required the Applicant to establish the facts upon which he relied (i.e. his profile) on a balance of probabilities, but that the RPD applied the correct standard (as stated in the Decision) in assessing whether these facts regarding his profile placed the Applicant at risk of persecution. Consequently, I am unable to accept the Applicant's position that the Decision contains a reviewable error.

[50] I believe the Applicant is taking the words he cites out of context. Read in context, the instances cited by the Applicant reveal the following:

a. As a general proposition, the "new evidence does not establish that there are new risk developments affecting the applicant, or that the applicant's profile is one that would attract undue attention or reprisal from militant organizations or security forces if he returns to Sri Lanka." In other words, the Applicant has not provided any evidence of new risk or of a profile at risk. This is a comment upon the absence of relevant evidence; it is not a statement about the burden of proof that the Applicant has to satisfy to establish risk under section 96 of the Act;

b. The RPD finds that the Applicant "has not established that he left Sri Lanka illegally" or that he would be perceived as having left illegally. Once again, this is a comment about the absence of evidence on a risk raised by the Applicant. It is not about the burden under section 96 of the Act. In addition, the RPD says that "the applicant does not present a satisfactory explanation for why he would be detained upon a return to Sri Lanka, considering the finding of the RPD panel that he was allowed to leave." This is just another way of saying that the Applicant has not provided an evidentiary basis to support his allegation that he would be detained. It is not about the burden under section 96 of the Act;

c. The RPD finds that "the applicant has not established with sufficient objective or otherwise persuasive new evidence that he would be perceived as a person with LTTE links or with a history of opposing the government." Once again, in my view, this is a comment about the deficiencies in the new evidence presented by the Applicant; it is not a statement about the degree of risk he needs to establish under section 96 of the Act. The same applies to the RPD's comments that the documentation put forward by the Applicant does not satisfy the RPD that he will be "arrested, harmed, or otherwise targeted as a person with suspected LTTE links, by reason of being a failed asylum claimant because he is a Tamil male from the north, or for any other reason that would warrant a positive decision in this case." In my view, all the RPD is saying is that there is no satisfactory evidence to support the risks put forward by the Applicant. It is not a comment upon the degree of risk that the Applicant must satisfy;

d. The RPD once again comments that "the applicant has not established with sufficient new evidence that his personal profile warrants a positive decision in this case." The RPD then goes on to say that it also finds that "the new evidence does not satisfy me that the country conditions have deteriorated since the rejection of the RPD, or that the applicant's personal circumstances have changed to such an extent as to warrant a finding of risk." In other words, the Applicant has not provided an evidentiary basis that suggests he has a profile of someone at risk.

[51] Having assessed the quality of the Applicant's new evidence, the RPD then applies the established test for the degree of risk and concludes that the Applicant "does not face more than a mere possibility of persecution in Sri Lanka…." A full reading of the RPD's words in context does not persuade me that the RPD applied a higher burden of proof than the law requires.

[52] In my view, then, the RPD does not apply the wrong test, the Decision is reasonable and the reasons are adequate.

[53] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

3. The style of cause is amended to remove the "Minister of Public Safety and Emergency Preparedness" so that the sole Respondent will be the "Minister of Citizenship and Immigration."

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3255-12
STYLE OF CAUSE:	**KASRON PARARAJASINGHAM**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 9, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	December 4, 2012

APPEARANCES:

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Sharon Stewart-Guthrie	**RESPONDENT**

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