Federal Court

Cour fédérale

Date: 20130213

Docket: IMM-6508-12

Citation: 2013 FC 154

Ottawa, Ontario, February 13, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

AMBIHAIBAHAN VILVARATNAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a pre-removal risk assessment (PRRA) officer (the officer) dated June 14, 2012, wherein the applicant's PRRA application was refused. The officer's decision was based on the finding that the applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka.

[2] The applicant requests that the officer's decision be set aside and the application be referred for redetermination by a different officer.

Background

[3] The applicant is a citizen of Sri Lanka of Tamil ethnicity. He arrived in Canada in January 1988. He made a refugee claim which was refused by the Convention Refugee Determination Division of the Immigration and Refugee Board on August 31, 1990. He was considered for permanent residence based on humanitarian and compassionate (H&C) grounds in 1990, but was not successful. An exclusion order was issued against him on June 6, 1992.

[4] The applicant was convicted of operating a motor vehicle while impaired under section 253 of the *Criminal Code*, RSC 1985, c C-46 on May 30, 1996. He submitted an application for permanent residence via a spousal sponsorship on February 9, 1999, which was approved in principle in July 2001. He was convicted of failure to comply and uttering threats on December 11, 2003. His application for permanent residence was refused on October 18, 2004 based on criminal inadmissibility.

[5] He was permitted to stay in Canada on work permits pending eligibility for a pardon. He is the father of three Canadian children and the sole financial support for them and his wife.

[6] He applied for a pardon, which was refused on February 3, 2009, due to his failure to pay a $50 surcharge. The waiting period for a pardon thus began anew from the date of paying that charge, making January 26, 2012, his new date of eligibility.

[7] Mere months before that date, he reported to the Canada Border Services Agency and was given the PRRA application form on September 14, 2011. He submitted that application on September 20, 2011. He also filed an H&C grounds application on November 25, 2011.

[8] In January 2012, the applicant applied for a police clearance to submit with his new pardon application. While he awaited this clearance, amendments to the *Criminal Records Act*, RSC 1985, c C-47, came into force, changing the waiting period to five years. His eligibility therefore begins on January 26, 2014.

[9] On June 14, 2012, he was served with his rejected PRRA application. While a removal date was set for July 21, 2012, Mr. Justice Russel Zinn granted a stay on July 18, 2012.

Officer's PRRA Decision

[10] The officer's decision is dated May 14, 2012, although the respondent's affidavit indicates it was served on the applicant on June 14, 2012.

[11] The officer summarized the risks identified by the applicant, including substantial excerpts from his counsel's submissions. The officer acknowledged fifty-five country conditions articles

provided as evidence. The applicant's position was that as a Tamil male from the northern part of Sri Lanka, a failed refugee claimant with a criminal record and someone with no support network in that country, was at risk due to being falsely suspected by the Sri Lankan government as being a member of the Liberation Tigers of Tamil Eelam (LTTE). The excerpted counsel's submissions summarized the country conditions evidence relating to the Sri Lankan government's human rights record and particularly for Tamil men. The submissions also indicated anyone returning to Sri Lanka from Canada would be presumed to be wealthy and therefore at heightened risk.

[12] In assessing the applicant's risk, the officer began by summarizing the applicant's immigration status history. The officer concluded that the country conditions evidence was general in nature and did not contain sufficient objective evidence of personalized risk. The officer relied on *Kaba v Canada (Minister of Citizenship and Immigration)*, 2007 FC 647 at paragraph 46, [2007] FCJ No 874, for the requirement that assessment of an applicant's risk must be individualized and concluded that the evidence did not identify the specific circumstances of the applicant or demonstrate evidence of risk that is personal to the applicant.

[13] The officer excerpted the 2010 United State Department of State's (DOS) report on Sri Lanka which outlined serious human rights problems. While the officer accepted that the government and citizens of Sri Lanka in general continue to deal with very serious issues, the officer concluded there was insufficient objective documentary evidence of a personal nature to demonstrate the applicant fell within sections 96 or 97 of the Act.

Issues

[14] The applicant submits the following points at issue:

1. Whether the officer erred by requiring the applicant to establish a personalized risk and by failing to conduct a proper assessment of whether the applicant has a well founded fear of persecution with his accepted profile.

2. Whether the officer erred by selectively relying on evidence and ignoring relevant evidence that directly contradicted his or her determination.

3. Whether the officer breached the duty of fairness by failing to provide adequate reasons.

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in denying the application?

Applicant's Written Submissions

[16] The applicant submits the officer either misunderstood *Kaba* above, to mean that risk can never be established on country condition documentation alone or conflated the tests for sections 96 and 97 of the Act. It is trite law that refugee protection can be afforded on the basis of persecution of similarly situated individuals, without any individual experience of past persecution or personalized documentation. An applicant must face a risk that is greater or different from that of the general

population, but this is not incompatible with the idea that some or even many other people face a similar risk.

[17] In *Kaba* above, the applicant provided general documentary evidence on the political and economic situations in that country and the Court found that he had not established a connection to the evidence because his identified profile had been fully assessed and rejected by both the Refugee Protection Division and a PRRA officer. In this case, there has been no risk assessment of the applicant since 1990, no credibility finding against him and vastly changed circumstances in his homeland. The applicant submitted extensive evidence relating to risks someone of his profile would face upon removal and there is no indication the officer ever considered these risks.

[18] The applicant argues that in concluding that all Sri Lankans suffer a generalized risk, the officer failed to differentiate between Sri Lankans generally and the Tamil minority specifically. The officer quoted a passage from the 2010 DOS report while providing no reason for not considering more recent country conditions evidence. The officer's own research contradicted the finding that all Sri Lankans face a similar risk. The officer failed to engage with the applicant's evidence and a mere statement all the evidence has been considered does not suffice when the evidence appears squarely to contradict the findings.

[19] The applicant also argues the officer breached the duty of fairness by failing to provide adequate reasons.

Respondent's Written Submissions

[20] The respondent argues that the standard of review is reasonableness. An applicant must establish a personalized or specific risk that is personalized to the individual applicant or shared by members of a group who are similarly situated to the applicant. The officer did not err in relying on *Kaba* above, and the fact that some evidence mentioned mistreatment of the applicant's ethnic group is not sufficient where the evidence also mentions specific distinguishing factors not possessed by the applicant.

[21] Decision makers are presumed to have considered all of the evidence before them without the need for each document to be expressly mentioned. The officer's decision directly addressed the applicant's submissions and evidence. Some of the evidence indicated that returnees to Sri Lanka of all ethnicities are treated similarly. The officer's reasons were adequate and show that the decision was reasonable. Much of the evidence did not relate to a forward looking risk. The officer did not make a finding of generalized risk, but rather acknowledged the challenges of the post-war period for all. The balance of risks identified by the applicant were not linked to him.

Analysis and Decision

[22] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[23] It is trite law that the standard of review of PRRA decisions is reasonableness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, [2010] FCJ No 980 at paragraph 11 and *Aleziri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 38, [2009] FCJ No 52 at paragraph 11).

[24] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[25] Adequacy of reasons is no longer a matter of procedural fairness or an independent ground of review (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*

(Treasury Board), 2011 SCC 62, [2011] 3 SCR 708). I therefore consider the applicant's arguments on this point as part of the general reasonableness review described above.

[26] **<u>Issue 2</u>**

<u>Did the officer err in denying the application?</u>

The Refugee Convention was drafted at a time when mass killing based on religion and ethnic identity lay fresh in the world's memory. It is difficult to understand why an officer who applies the Convention definition could dismiss evidence of ethnic persecution on the basis that it was not sufficiently "individualized".

[27] Even the most cursory reading of the Convention definition reveals that the very problem it responds to is the persecution of individuals based on their membership in a group. The officer's reasoning would see Canada remove refugee claimants to states with open animus towards its minorities on the basis that such persecution was insufficiently connected to individuals. This approach must be rejected, as indeed it has been numerous times by this Court.

[28] The applicant rightly points to the decision of Madam Justice Eleanor Dawson in *Surajnarain v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165 at paragraph 12, [2008] FCJ No 1451 and the quote it contains from Professor James Hathaway:

> Thus, in the context of a refugee claim, advanced under what is now section 96 of the Act, the Federal Court of Appeal accepted that a generalized risk may fall within the definition of a Convention refugee if the applicant is personally subject to serious harm that has a nexus to one of the five grounds enumerated in the United Nations Convention Relating to the Status of Refugees. In *Salibian v. Canada (Minister of Employment and Immigration),* [1990] 3 F.C. 250 at

page 259, the Federal Court of Appeal adopted the following from Professor Hathaway's book "The Law of Refugee Status":

> In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. <u>In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status</u>. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee. [emphasis in original]

[29] This point is acknowledged by the respondent in his memorandum at paragraph 19, where the necessary risk is described as "a risk personal to the individual Applicant <u>or a risk shared by members of a group who are similarly situated to the Applicant</u>" (emphasis added). The officer, however, did not adhere to such a definition.

[30] I do not take the words of Mr. Justice Michel Shore in *Kaba* above, to mean that evidence of persecution based on membership in an ethnic group would be insufficiently individualized. Indeed, he rejected the country conditions evidence in that case on the basis that "the connection between that evidence and the applicant himself has not been made" (at paragraph 1). In the decision under review, it is unclear to me why being a member of the Tamil minority, to say nothing of the more specific factors enumerated by the applicant, does not establish that connection and the officer's reasons do not aid in that inquiry. The applicant's evidence did not merely speak to the fact that "the

human rights situation in a country is problematic" (as described in *Kaba* at paragraph 1), but that the human rights of people like him were in jeopardy.

[31] It also seems that the "connection" referred to in *Kaba* above, in the second half of paragraph 1, is concerned with the connection between objective and subjective fear. This was the meaning I drew from it in *Robles v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1134 at paragraph 50, [2012] FCJ No 1219:

> As mentioned above, the officer was not required to rule on every document in question (see *Kaba* above, at paragraph 1). In addition, as the applicants were required to demonstrate both an objective and a subjective fear of persecution, documentary evidence of country conditions alone was insufficient to establish their PRRA submissions (see *Kaba* above, at paragraph 1). [Emphasis added]

[32] In the decision under review, the officer gave no indication of doubting the applicant's subjective fear, whose credibility has not been questioned.

[33] Finally, I would note that Mr. Justice Shore's analysis pertained to the analysis of irreparable harm under the test from *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, [1988] FCJ No 587. While irreparable harm often overlaps with the type of analysis done under section 96, they are not necessarily coterminous.

[34] The concern regarding individualized risk could be due to the officer's conflation of the jurisprudence of section 97, which is concerned with the distinction between generalized and individual risk. Regardless of the source of the error, the officer's analysis of the applicant's evidence regarding the treatment of people in Sri Lanka similarly situated to him is unreasonable.

[35] The respondent's counsel goes to great lengths to salvage the officer's decision, including pointing to details in the country conditions evidence the officer made no mention of. However, the officer's decision was not justified in terms of such nuances as inter-ethnic comparisons of treatment of returnees or questions relating to criminal records (as discussed at paragraphs 27 to 29 of the respondent's memorandum). Rather, the officer made blanket statements dismissing the country conditions evidence:

> I have considered the extensive package of media articles and reports provided by counsel in connection with the application for protection. I find the articles and reports are general in nature and do not contain sufficient objective evidence of personalized risk.
>
> …
>
> While I accept this documentation in the context of assessing country conditions in Sri Lanka as they relate to human rights violations, I find that the evidence does not identify specific circumstances of the applicant nor does it demonstrate evidence of risk that is personal to the applicant.
>
> …
>
> Although I accept that both the government and the citizens of Sri Lanka in general continue to deal with several very serious issues, I find that I have been provided with insufficient objective documentary evidence of a personal nature to demonstrate that the applicant will likely face more than a mere possibility of risk as per section 96 and 97 of the IRPA because of the current country conditions. As per Kaba, documentary evidence on a country is insufficient to warrant a positive risk assessment since the risk must be personal.

[36] This was the sum total of the officer's analysis of the evidence. While I acknowledge that I am required to supplement a tribunal's reasons before rejecting them (see *Newfoundland Nurses* above, at paragraph 12), in this case, the officer's rationale for rejecting the evidence was based on a

misunderstanding of its relevance, as described above. Supplementing that rationale would not help it survive reasonableness review.

[37] The officer's decision was outside the range of defensible outcomes. The judicial review is therefore granted and the matter should be returned to Citizenship and Immigration Canada for redetermination.

[38] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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.

FEDERAL COURT

SOLICITORS OF RECORD

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