Federal Court  Cour fédérale

Date: 20130529

Docket: IMM-7862-12

Citation: 2013 FC 564

Ottawa, Ontario, May 29, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PRADEEP RATHNAVEL

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 March 30, 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 and his family fled the country due to the attempts by the Liberation Tigers of Tamil Eelam (LTTE) to recruit the applicant and his son. The applicant went into hiding on November 14, 2006 to escape this recruitment.

[4] He arrived in Canada on June 5, 2010 and claimed refugee protection. The Refugee Protection Division (RPD) dismissed his claim on March 1, 2011.

[5] The applicant's wife and children have been accepted by Canada as Convention refugees and became permanent residents in June 2008. The applicant's wife omitted him in her application for permanent residence as she was not aware of his whereabouts.

[6] His spouse submitted a sponsorship application on July 8, 2011. The applicant expects it to be granted, as their marriage is genuine and he is employed.

[7] The applicant submitted the PRRA application on June 10, 2011.

Officer's PRRA Decision

[8] In a letter dated March 30, 2012, the officer informed the applicant his application had been rejected. The officer's notes to file serve as reasons for the decision.

[9] The officer's notes summarize the applicant's background and indicated that the country conditions articles that post-dated the applicant's RPD hearing would be considered.

[10] The officer noted the RPD had rejected the applicant's claim on the basis of a lack of credibility and that the risks he alleged were the same as he had presented to the RPD. The officer concluded that the evidence submitted concerning the Sri Lankan government's failure to punish those who committed abuses during the war did not help him overcome the RPD's credibility concerns. Indeed, the officer found that the articles provided evidence of improvements in the situation and assistance to refugee claimants returning to Sri Lanka.

[11] The officer noted the extract from a Sri Lankan immigration statute provided by the applicant, but found no link to the applicant or his claim for protection. The officer concluded the applicant had presented no new evidence that overcame the RPD's finding and that the risks identified were the same and therefore there were no grounds to make a positive determination.

[12] The applicant was scheduled for removal from Canada on August 11, 2012. Madam Justice Elizabeth Heneghan of this Court granted a stay of removal pending the disposition of this judicial review.

Issues

[13] I would phrase 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

[14] The applicant argues the officer did not fully consider the applicant's evidence. The officer failed to analyze the link between the applicant's evidence that he came to Canada, used false documents and his evidence concerning the Sri Lankan immigration statute.

[15] The officer failed to consider the applicant's profile as a suspected LTTE supporter and the effect this would have on his treatment upon return to the country at the Colombo airport. The officer failed to consider documents in the RPD's National Documentation Package which discussed the repercussions for failed refugee claimants who had left the country without proper government authorization. The failure to consider this evidence constitutes a reviewable error, or in the alternative, bias. The officer's conclusion that the country conditions evidence made no reference to returnees being harassed, tortured or killed is patently wrong.

[16] The applicant submits that the officer was almost exclusively focused on credibility in his seven paragraphs of reasons. The applicant argues a hearing would have been appropriate given the officer's concern with credibility. The applicant furthers argues that Citizenship and Immigration

Canada's policy of not considering sponsorship applications made after a PRRA application is unfair and argues this process should be stayed until the sponsorship application is disposed of.

Respondent's Written Submissions

[17] The respondent argues that reasonableness is the applicable standard of review and that the officer's decision meets this standard. The officer noted the risks identified by the applicant and considered the new evidence. It is not necessary for the officer to refer to every piece of documentary evidence and there is a presumption the officer has considered all such evidence. The respondent further argues that no oral hearing was required and the applicant has not made out a reasonable apprehension of bias.

Analysis and Decision

[18] **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).

[19] 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). Similarly, the weighing, interpretation and assessment of evidence are reviewable

on a reasonableness standard (see *Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733, [2011] FCJ No 924 at paragraph 5; and *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[20] 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).

[21] **Issue 2**

Did the officer err in denying the application?

A negative credibility determination is not the end of the analysis of whether a claimant is a Convention refugee under the Act, whether such analysis is performed by the RPD or by a PRRA officer. The claimant's risk must be analyzed based on any facts that have been accepted, even if the bulk of a claimant's narrative is rejected.

[22] In this case, the RPD accepted that the applicant was a Sri Lankan citizen and did not question his Tamil ethnicity. It was also accepted by the officer that the applicant would obviously be a failed refugee claimant if returned. The officer was clearly wrong then to disregard the

evidence submitted by the applicant concerning the risks faced by Tamil men and failed refugee claimants on the basis that it did not overcome the RPD's negative credibility determination.

[23] The officer was similarly wrong to reject such evidence on the basis that it spoke to the same risk that was alleged before the RPD; the entire point of new evidence is that it requires a fresh determination, even if it relates to the same issue that was before the Board.

[24] The officer devoted a single paragraph of analysis to the issue of new evidence concerning the applicant's risk profile, but only spoke to his status as a failed refugee claimant. The officer did not address the risk the applicant alleged he faced as a suspected LTTE sympathizer based on his ethnicity. The Department of State report consulted by the officer, which post-dated the RPD hearing, indicated that there were reports of suspected LTTE sympathizers having been detained, tortured and killed.

[25] The officer is presumed to have considered all of the evidence before him (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that the tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[26] Failing to consider evidence relevant to the risk alleged goes to the heart of the PRRA process. This omission rises to the level described in the cases above. Given that omission, the officer's decision is unreasonable.

[27] Because of my finding, I need not deal with the issues of bias or the oral hearing argument.

[28] The application for judicial review is granted and the matter is referred to a different officer for redetermination.

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

[30] The affidavit of the applicant sworn on March 4, 2013 insofar as it contains information not before the PRRA officer was not considered.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed 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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