Federal Court  Cour fédérale

Date: 20150225

Docket:IMM-7429-13

Citation: 2015 FC 244

Toronto, Ontario, February 25, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SIVASHANKAR NAVARATNAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Sivashankar Navaratnam [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a decision by an immigration officer [the Officer] of Citizenship and Immigration Canada, dated August 28, 2013, wherein the Officer refused the Applicant's pre-removal risk assessment application [PRRA] and determined that he was not a Convention Refugee or a person in need of protection.

[2] This application is granted for the following reasons:

[3] The Applicant was born on June 23, 1979 in Sri Lanka (Jaffna), and raised in Mannar, which is situated in the north of the country. He is a Citizen of Sri Lanka of Tamil ethnicity and Hindu faith. He came to Canada on September 6, 2010 and claimed refugee protection on September 8, 2010. His claim was refused by the Refugee Protection Division [RPD] on August 4, 2011. The Applicant applied for judicial review of the RPD's decision, but leave was dismissed November 30, 2011 (IMM-6071-11). The Applicant made an application for permanent residence on humanitarian and compassionate grounds [H&C]. His H&C application was refused by Citizenship and Immigration Canada [CIC] on March 23, 2013. He applied for a PRRA which was rejected (by the same CIC Officer) on August 23, 2013. The Applicant filed an application for leave and judicial review of the PRRA on November 20, 2013, subsequent to which this Court ordered a stay of the Applicant's removal on December 10, 2013 pending the outcome of this application. On November 21, 2014 the Court granted leave to apply for judicial review.

[4] I mention these facts to emphasize that the PRRA Officer's decision of August, 2013 was given some 18 months ago, and that the decision on the underlying refugee claim of August 2011 to which the PRRA Officer referred, was rendered 44 months ago.

[5] As to the standard of review, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of

deference to be accorded with regard to a particular category of question." The question of whether the PRRA Officer applied the right legal test is a question of law that should be reviewed on the correctness standard of review: *Williams v Canada (AG)*, 2010 FC 701 at para 10; *Mcdonald v Canada (Minister of Human Resources and Skills Development)*, 2009 FC 1074 at para 6. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[6] The question as to whether or not the PRRA decision is reasonable is a question of mixed fact and law and should be reviewed on the reasonableness standard: *Micolta v Canada (Minister of Citizenship and Immigration)*, 2015 FC 183 at para 13. In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[7] The Applicant submitted in his PRRA application that he was at risk of persecution or harm in Sri Lanka from the Sri Lankan army, government and paramilitary groups associated

with the government for the following reasons: (1) he is a Tamil from the North of Sri Lanka; (2) he will be perceived to be a supporter or a member of the Liberation Tigers of Tamil Eelam [LTTE]; (3) his age profile as a young Tamil male from Jaffna; (4) past allegations and persecution he experience; (5) he will be returning as a failed asylum claimant. I emphasize that the Applicant identified, and the Officer acknowledged as a ground for his PRRA, that the Applicant would be returning as a failed asylum claimant if his PRRA was rejected.

[8] After surveying key findings of the 2011 RPD decision, the PRRA Officer said that the Applicant had simply restated his case without addressing the credibility concerns raised by the RPD. In substance, the Officer said, the risks identified by the Applicant in his PRRA application were the same as those heard by the RPD. The Officer explained that a PRRA application is not an appeal of the RPD decision, which is final "subject only to new, different or additional risk developments that could not have been contemplated by the RPD". The PRRA Officer also found that the Applicant's past treatment, in and of itself, did not warrant a granting of protection which finding is not controversial.

[9] However, the Officer found that the new evidence filed by the Applicant for the PRRA, namely a police report and a letter by the Applicant's father regarding threats following his departure for Canada, did not lead to a different conclusion than that of the RPD. The Officer rejected and thereafter ignored both the father's letter and the police report from Sri Lanka. The Officer gave three reasons for rejecting both the father's letter and the police report. The Court's comments follow each:

(1) the letter was rejected because of several matters the Officer wanted information on, including police progress in the matter, no threatening visits since the date of the letter, why other than not paying ransom the perpetrators of the threatening visits are interested in the Applicant, lack of corroboration of the visits, the letter's failure to specifically identify the perpetrators, and an explanation of how the perpetrators would kill the Applicant if they did not know where he was;

Court comment: Several errors are made in the assessment of the letter and police report. It is well established that a demand for documentary corroboration is not warranted without valid grounds to do so, which were absent in this case: *Ahortor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 705; *Zheng v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 1267. It is an error to focus exclusively on what is not submitted in documents and fail to undertake any meaningful analysis of written testimony, as happened here: *Botros v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 1124 [*Botros*] and cases cited therein. It is an error to dismiss evidence (as the Officer appears to have done) based on the fact that other evidence would have been more desirable: *Botros*; *Mui v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020. In asking the father to "identify" the extortionists, the Officer demanded too much; few if any criminals identify themselves to their victims. To ask how they would kill the Applicant is to show how unreasonable that line of complaint is – extortionists operate on fear and it is obvious they can only carry out their threat if they had the Applicant's whereabouts. And it is unclear what additional reasons the panel expected the extortionists to have for seeking the Applicant, and

equally unclear why the absence of additional reasons is relevant. It is clear that the extortionists wanted to be paid.

(2) The letters were copies and missing original envelopes;

Court comment: this finding is reasonable. Counsel for the Applicant advised that counsel routinely send copies and keep the originals on file, suggesting some sort of fairness procedure was warranted before the Officer rejected this new evidence on this ground. I am not prepared to rule against this finding or on the alleged practice of filing copies and not originals. I note the duty of counsel to put their best foot forward and to comply with the applicable rules regarding documents. I recognize that lawyers tend to keep originals on file and perhaps they should tell the PRRA Officer the originals are in their files where there is a concern that critical originals might go missing if the originals are filed. Perhaps parties must change their practice and give the originals to the RPD if that is indeed the RPD's practice, but I make no ruling in this regard.

(3) The two documents predated the H&C but had not been submitted at that time the Officer conducted the previous H&C;

Court comment: Counsel noted *S.M.S. v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 1647 for the position that Officers considering both an H&C and PRRA must consider the totality of the evidence in both determination in making the decision in each, a proposition with which I might agree, but it does not appear that these decisions were made at the same time albeit they were made by the same Officer. That said, I know of no rule that renders inadmissible or allows an Officer to ignore new

> evidence, on the basis that it could have been but was not filed previously, and I am not prepared to adopt such a rule in this case.

[10] Overall and read as a whole, the Officer acted unreasonably in rejecting the father's letter and the police report because one cannot discern which of the three stated reasons was determinative, although likely the first ground disposed of both documents. In my view, the PRRA Officer improperly excluded relevant new evidence, and therefore the decision must be set aside.

[11] Additional concerns were raised by the Applicant which reinforce the decision to order a redetermination, the principal one being the Officer's failure to deal with the Applicant's profile as a failed asylum seeker. The Officer identified this as a ground of review. However other than mentioning this ground at the outset, the PRRA Officer does not assess or even mention that the Applicant is a failed asylum seeker anywhere else in the decision. Therefore this case is similar to *Suntharalingam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 987 [*Suntharalingam*] in which the RPD failed to assess the implications of returning Tamils from the north who are failed asylum seekers, notwithstanding there was evidence on the record, as there is in the case at bar, that failed asylum seekers are at material risk. In *Suntharalingam* at paras 50-51 I ruled:

> [50] On review of the record before the RPD there was evidence that failed refugee claimants returning to Sri Lanka have been both detained and tortured (*Freedom from Torture Report* at 7; UNHCR Guidelines at 8; *Risk of failed asylum seekers of Tamil ethnicity upon return to Sri Lanka*,). The RPD did not refer to this issue not to any specific documents in this regard. Nor does it address the specific concern of a returning failed refugee claimant. In my

> respectful view, the RPD had a duty to consider whether there is a serious possibility of persecution of the applicant as a failed refugee returnee.
>
> [51] As a result, I find the RPD's conclusion does not meet the *Dunsmuir*, above, requirements of "justification, transparency and intelligibility" (at para 47). Given the seriousness of the potential consequences and the absence of both consideration and reasoning on this point, in my view the RPD's decision is unreasonable and must be set aside.

[12] There is a further reason to set aside the decision below. In assessing persecution, the Officer ruled that "the evidence before me does not support that the applicant faces a personalized risk of harm there as a result". This was the wrong test. The Federal Court of Appeal rejected "personalized risk of harm" as the legal test some time ago, stating "the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future…" It is sufficient, and the Federal Court of Appeal stated, that persecution is established if it is "committed or likely to be committed against members of a group to which he belonged": *Salibian v Canada (Minister of Employment and Immigration)*, [1990] FCJ No 454 (FCA). Applying the wrong legal test requires the decision to be set aside.

[13] I raised with both parties at the hearing the Court's concern about relying on outdated decisions in deciding this judicial review. I appreciate the general rule is that judicial review is conducted on the record subject to the filing of admissible new evidence. And while the RPD makes a comprehensive assessment under sections 96 and 97, the PRRA Officer on his or her subsequent review must also assess risk. But it is well known that the situation in Sri Lanka is changing. The original RPD decision was made in what might be called the after-glow of the peace. On December 17, 2010 the PRD identified a persuasive decision relaxing its position

concerning the return to Sri Lanka of Tamil males from the North. However, this early optimism was misplaced as evidenced by Canadian and other refugee authorities. In December 2012 the UNHCR replaced its 2010 Guidelines for Tamils returning to Sri Lanka because the circumstances for Tamils returning to Sri Lanka had deteriorated. In the case at bar, the RPD's 2011 decision relied on the 2010 UNHCR Guidelines which while then current, are now no longer current.

[14] The PRRA Officer also relied on the 2010 UNHCR Guidelines to the extent he relied on the earlier RPD country condition findings, although by then they no longer applied. I must add that the PRRA Officer was under a duty to consult up to date country condition documents. The fact that the PRRA Officer failed to identify, assess or even mention the 2012 UNCHR Guidelines requires that this decision, made as it was in August 2013, be set aside.

[15] Since the change in the UNHCR Guidelines, the situation for Tamils returning to Sri Lanka appears to have deteriorated further. In April, 2013 the Prime Minister of Canada's special envoy to Sri Lanka, after his investigation, reported that what was happening to Tamils in Sri Lanka was "soft ethnic cleansing". In October 2013, the Prime Minister of Canada boycotted the Commonwealth Heads of Government Meeting hosted by Sri Lanka because of Sri Lanka's human rights issues including treatment of Tamils. The Swiss ceased removals to Sri Lanka in later 2013. In terms of the position adopted by Canadian refugee authorities, I find it very noteworthy that on November 7, 2014 the RPD revoked its 2010 Tamil-related persuasive decision: see *Policy Note: Notice of Revocation of Persuasive Decision VA9-02166*. These are all matters of public record.

[16] I appreciate that all these new developments were not before the PRRA Officer. However, a major point of a PRRA is to make sure Canada has got its risk assessment right before a claimant is deported. The PRRA Officer is the last line of risk assessment, subject to the removal officer's limited decision. There is no point in having a PRRA if it is to proceed on information known to be incorrect. Given this and the fluid situation in Sri Lanka concerning Tamils generally and returning failed asylum seekers specifically, in remitting the matter for redetermination by a different PRRA officer, in my view it is appropriate that new evidence be filed.

[17] Neither party proposed a question for certification, and I see no question to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision of the PRRA Officer is set aside and remanded to a different officer for redetermination, the Applicant is at liberty to file new evidence on the redetermination by the new PRRA Officer, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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