Federal Court  Cour fédérale

Date: 20150707

Docket: IMM-7904-14

Citation: 2015 FC 829

Montréal, Quebec, July 7, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NUWAN DILUSHA JAYAMAHA MUDELIGE DON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

> ... Being unconvinced by the evidence before him or her because of its low probative value is not the same as a PRRA Officer questioning an applicant's credibility: *Ferguson* at paragraph 33. It is well-established that oral hearings in PRRA applications are required only in exceptional circumstances: *Sufaj* at paragraph 41; *Khatun v Canada (Citizenship and Immigration)*, 2012 FC 997 at paragraph 22; *Tran v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 175 at paragraph 28. [Emphasis added.]
>
> (*Aboud v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1019 at para 35 [*Aboud*])

II. Introduction

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the Applicant challenges a negative pre-removal risk assessment [PRRA] decision rendered by a Senior Immigration Officer [officer] on August 29, 2014, whereby the officer found that the Applicant would not be subject to risk of persecution or torture, risk to life or risk of cruel and unusual treatment or punishment upon return to Sri Lanka.

[2] For the following reasons, the application for judicial review is dismissed.

III. Factual and Procedural Background

[3] The Applicant is a 33-year-old citizen of Sri Lanka who claims that he is persecuted by the police, government and armed groups of Sri Lanka on the basis that he is an eyewitness to a police shooting leading to the death of Roshan Chanaka at a peaceful protest of a government proposed private pension bill on May 30, 2011, which led to the condemnation of the Sri Lankan government for its use of violence against protestors.

[4] The Applicant left Sri Lanka and worked aboard a cargo ship as a crew member on the M/V Lake Ontario, which arrived in Oshawa, Ontario, on November 27, 2011.

[5] On December 1, 2011, the Applicant deserted the ship and traveled to Montréal. The next day, a Notice of Desertion was filed against the Applicant.

[6] On December 13, 2011, the Applicant was issued an exclusion order under subsection 44(2) of the IRPA on the ground that he failed to comply with the requirement that he leave Canada within 72 hours after ceasing to be a member of a crew, provided in subsection 184(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[7] On December 16, 2011, the Applicant claimed refugee protection but was later advised that he could not claim refugee status because of the exclusion order made against him in December 2011.

[8] On January 3, 2013, the Applicant successfully challenged the removal order before the Federal Court (*Don v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1); however, the decision was overturned by the Federal Court of Appeal on January 10, 2014 (*Don v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 4 [*Don*]).

IV. Impugned Decision

[9] In its reasons dated August 29, 2014, the officer first addresses the new evidence adduced by the Applicant.

[10] The officer attributes little weight to the letters from the Applicant's lawyer in Sri Lanka, from Mr. A. Siritunga Silva, from Rev. Fr. B.L.D. Amon Premala, and from A.D.A.C. Jayakody of the Negombo Municipal Council, by finding that the letters lack detail in respect to the Applicant's alleged risks. Moreover, the officer questions the genuineness of the letters, of which only copies were provided.

[11] The officer also attributes little value to the medical note by Dr. J.M. Weerasundara Bandara attesting to injuries sustained by the Applicant, due to its lack of detail in respect of the observed injuries and their potential causes. The officer also observes that the Applicant failed to explore the options available to him in order to obtain his medical records, such as contacting the clinic directly.

[12] The officer then analyzes the letter from the Applicant's mother and concludes that it lacks sufficient detail and it does not stem from an objective source. As to the photographs, the officer concludes that the individuals portrayed are not formally identified, nor is it apparent that the injuries result from targeted attacks stemming from the Applicant's persecution.

[13] The officer then considers the articles detailing the police shooting of Roshan Chanaka which took place on May 30, 2011, during the Katunayake Free Trade Zone protest. The officer acknowledges that the protest took place and that Roshan Chanaka died as a result of violence used by the police; however, the officer finds that the articles fail to link the Applicant to Roshan Chanaka, to the protest itself, or to the subsequent lawsuit launched against the Sri Lankan government. In addition, the evidence does not support the finding that the Applicant was an eyewitness to Roshan Chanaka's death or that he provided a testimony in this respect.

[14] The officer also considers the evidence pertaining to the risk alleged by the Applicant upon his return to Sri Lanka, which includes country reports and news articles in respect of human rights violations in Sri Lanka. The officer finds that the evidence does not demonstrate

the risk alleged by the Applicant is due to his imputed political opinion or his involvement in the lawsuit against the government.

[15] Moreover, the officer concludes that the Applicant failed to demonstrate persecution on the basis of his membership in the social group of returning refugee claimants or that he is part of one of the categories of persons at risk characterized in the updated *United Kingdom Home Office Operational Guidance Note*, dated July 2013.

V. Legislative Provisions

[16] Subsections 112(1) and 113(*a*) of the IRPA govern the officer's PRRA determination:

Application for protection	**Demande de protection**
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).
Consideration of application	**Examen de la demande**
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 have been expected in the circumstances to have	*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, dans les circonstances, de s'attendre à

presented, at the time of the rejection;	ce qu'il les ait présentés au moment du rejet;

VI. Issues

[17] The Applicant submits the following issues before the Court:

a) The Applicant was denied the right to a hearing for his claim to protection, which is a breach of procedural fairness;

b) The officer made an unfair, discriminatory and unreasonable assessment of the evidence;

c) The officer failed to adequately consider the risk faced by the Applicant upon return to Sri Lanka.

[18] It is the Court's view that the two first issues can be merged into one issue and that the issues raised by the application are as follows:

a) Did the officer breach his duty of procedural fairness by refusing to hold a hearing?

b) Is the officer's decision in respect of the evidence reasonable?

VII. Applicant's Position

[19] First, the Applicant submits that the officer had a duty to hold a hearing insofar as credibility was a key issue in the officer's determination of the Applicant's PRRA and as the Applicant was not afforded a hearing before the Refugee Protection Division [RPD].

[20] Second, the Applicant contends that the officer's decision failed to follow the guidelines established in the *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, and in particular, paragraph 196, which provides as follows:

> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

[21] In particular, the Applicant submits that the officer ignored the inherent difficulties in obtaining evidence in a climate of fear of reprisals and reviewed the Applicant's evidence with skepticism and with a lack of sensibility.

[22] Third, the Applicant submits that the officer failed to adequately assess the objective country condition evidence exhibiting the climate of disappearances, terrorism, political crimes and prevailing impunity in Sri Lanka. The Applicant contends that the threats to his life arising from his outspokenness against the government were not seriously considered by the officer.

VIII. Standard of Review

[23] The standard of review applicable to the officer's determination of the Applicant's PRRA application is that of reasonableness (*Aboud*, above at para 17; *Kovacs v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 1241 at para 46; *Aleziri v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ 52 at para 11).

[24] The Court's inquiry must be deferential and focus on the "existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[25] Issues of procedural fairness and natural justice, including the right to a hearing, are reviewable on the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

IX. Analysis

A. *Procedural fairness*

[26] The Applicant argues that the officer breached his duty of procedural fairness by refusing to hold a hearing.

[27] In accordance with section 113 of the IRPA and subsection 161(1) of the IRPR, a PRRA is ordinarily made on the basis of written submissions; however, an oral hearing may be held

when the factors established in section 167 of the IRPR are met (*Islam v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 1614 at para 8).

[28] The Applicant contends that he was not afforded an opportunity to be heard because an exclusion order was made against him before he had the opportunity to claim refugee status.

[29] This issue has been settled by the Federal Court of Appeal in a previous proceeding involving the Applicant, wherein the Federal Court of Appeal found that the issuance of a removal order pursuant to subparagraph 228(1)(*c*)(v) of the IRPR before a member of a crew subject to a removal order has had the opportunity to claim refugee status does not constitute a breach of procedural fairness. The Federal Court of Appeal further stated that the Applicant's behaviour was incompatible with the exercise of the right to be heard:

> [44] There is no question that the Minister's delegate was entitled to issue a removal order on December 13, 2011 since more than 72 hours had elapsed from the time when the respondent deserted his ship, and in these circumstances, subparagraph 228(1)(*c*)(v) of the Regulations expressly provides for the issuance of a removal order. It is also uncontested that the respondent thereby lost his eligibility to claim refugee status since subsection 99(3) of the Act so provides.
>
> [45] The only issue therefore is whether the Minister's delegate could issue the removal order on December 13, 2011, without having first given the respondent an opportunity to be heard or attempting to contact him. In disposing of the question, I am willing to accept that, as the Federal Court judge found, the respondent was entitled to be notified of the subsection 44(1) report and be given an opportunity to object to the issuance of a removal order (reasons, para. 33). However, in order to benefit from these rights, it was incumbent upon the respondent to place himself in a position where he could be notified.
>
> [46] Upon deserting the ship, the respondent ceased to have any status in Canada and had the obligation to leave within 72 hours. Failing this, he had the obligation to report for examination before

> an immigration officer in order to regularize his status (subsection 184(1) of the Regulations and subsections 29(2) and 18(1) of the Act). As noted, he did not do so until fifteen days had passed.
>
> [47] Beyond remaining outside the reach of immigration officials from the time he deserted until December 16, 2011, the respondent had no known address in Canada. The evidence reveals that he travelled from Oshawa to Montreal on December 1, 2011, where he remained until he made contact with the authorities, but there is no indication as to his whereabouts in Montreal during that period.
>
> [48] In my view, a person in the position of the respondent who challenges a decision on the basis that it was rendered without prior notification must be able to show that he was capable of being notified. At minimum, this requires that the person provides immigration authorities with some means of being reached in Canada. The decision of this Court in *Cha* on which the Federal Court judge placed great reliance must be read in light of the fact that the coordinates of the person concerned in that case were known and therefore the person was capable of being notified.
>
> [49] In the present case, not only were no such means provided, but the respondent was intent on remaining undetected by the immigration authorities until he was satisfied that the ship which he deserted had left Canada. This is incompatible with the exercise of the right to be heard. Given the respondent's behaviour, I do not see how the Minister's delegate can be held to have issued the removal order in breach of his right to be heard.
>
> [Emphasis added.]
>
> (*Don*, above, at paras 44 to 49)

[30] While recognizing that the Applicant did not benefit from an oral hearing before the RPD, in light of the decisions of *Don* and *Aboud*, above, the Court does not find that the Applicant was denied procedural fairness by the PRRA officer's refusal to grant him an oral hearing.

B. *Reasonableness of the officer's assessment of the evidence and decision as a whole*

[31] It is apparent from the officer's decision and reasons that his findings and ultimate refusal of the Applicant's PRRA is anchored in the evidentiary record. The impugned decision is reasonable and does not merit the Court's intervention.

[32] First, the Court does not find that the officer erred in his findings of fact, which lie at the very core of the officer's expertise (*Jaouadi v Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] FCJ 1934 at para 21).

[33] Second, in his reasons, the officer directly considers and weighs the subjective and objective documentary evidence submitted by the Applicant, including evidence pertaining to country conditions, human rights abuses, and the treatment of individuals who speak out against police brutality in Sri Lanka.

X. Conclusion

[34] Having carefully considered the parties' written and oral submissions, the Court concludes that the application for judicial review must be dismissed.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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