Federal Court  Cour fédérale

Date: 20150828

Docket: IMM-7170-13

Citation: 2015 FC 1025

Ottawa, Ontario, August 28, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ARAVINTHAN SUNTHARALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's pre-removal risk assessment (PPRA) was denied by a senior immigration officer at Citizenship and Immigration Canada [the officer]. The applicant now applies for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different officer for redetermination.

I. Background

[3] The applicant is a citizen of Sri Lanka. He was born in Jaffna on April 29, 1986.

[4] The applicant claimed to have been detained and then released several times between 2001 and 2006 by Sri Lankan authorities. The most recent incident was in 2006 when he was questioned following a bombing. He was told to report again in three days. Instead, believing this to be dangerous, he travelled to Colombo where he obtained a passport and a visa for India. The applicant travelled to India in 2006 and remained there for approximately three years.

[5] In 2009, the applicant travelled from India to Thailand on a false Indian passport. In May 2010, he boarded the *MV Sun Sea* as a passenger.

[6] On August 13, 2010, the applicant arrived in Canada. He made a refugee claim. He was initially detained and then released on conditions in March 2011.

[7] The applicant's Refugee Protection Division [Board] hearing took place on June 6, 2012. In a negative decision dated August 10, 2012, the Board rejected the applicant's claim on the basis of credibility and changed country conditions. It found an internal flight alternative and a generalized rather than personalized risk. It also rejected the claim that the applicant was a refugee *sur place* and would be at risk based on his temporary stay and refugee claim in Canada.

Further, it found that the applicant would not be perceived to have ties to the Liberation Tigers of Tamil Eelam (LTTE) and would therefore not be at risk on return to Sri Lanka.

[8] In November 2012, the applicant enrolled in the Assisted Voluntary Return and Reintegration (AVRR) program, but later withdrew from it in January 2013. He requested a deferral of his removal. He alleged that the army had visited his parents' home three times in 2012 to look for him.

[9] On April 4, 2013, the Canada Border Services Agency [CBSA] denied his request to defer removal.

[10] On April 5, 2013, the applicant brought a motion to stay his removal on the ground that the waiting period under paragraph 112(2)(b.1) of the Act is unconstitutional. This Court granted his motion and no reasons were given.

[11] In September 2013, the applicant applied for a PRRA. The application was rejected. The applicant was scheduled to be removed on December 23, 2013.

[12] On November 7, 2013, the applicant filed for judicial review of the negative PRRA decision.

[13] On, December 9, 2013, the applicant brought a motion for an order staying the execution of the removal order.

[14] On December 20, 2013, Mr. Justice Richard Mosley granted the applicant's stay motion.

> The PRRA officer's analysis is thorough. For the purposes of this motion, I am satisfied that no serious issue arises on the substantive merits of the decision. References, however, to a "dubious letter from his father" and to the implausibility of the applicant's claim that the Sri Lanka authorities would become interested in the applicant immediately prior to his removal from Canada could be construed as a veiled credibility finding requiring an interview under the regulations. Considering the low threshold that applies, I accept therefore that the applicant has met the first conjunctive requirement of the *Toth* test.

II. Decision Under Review

[15] In a decision dated October 22, 2013, the officer made a negative PRRA decision, finding that the applicant would face less than a mere possibility of persecution should he be returned to Sri Lanka.

[16] The officer summarized the applicant's history and the findings from the Board. The Board rejected the applicant's claim on the basis of credibility and changed country conditions. The Board found an internal flight alternative and a generalized rather than personalized risk. The Board also rejected the claim that the applicant is a refugee *sur place* and would be at risk based on his temporary stay and refugee claim in Canada. Further, the Board found the applicant would not be perceived to have ties to the LTTE and would therefore not be at risk on return to Sri Lanka.

[17] The officer first noted that the applicant's submissions are confusing. The officer summarized the applicant's submissions as the following: the applicant is at risk because of

deterioration in country conditions since the Board decision and the applicant is at risk because persons similarly situated to him are at risk.

[18] Subsection 113(a) of the Act provides that the PRRA officer may only assess new evidence, which is evidence that dates after the Board decision or evidence that the applicant could not have reasonably presented at the refugee hearing. The officer's function is to determine if new evidence supplied by an applicant demonstrates either that the applicant is at risk or that there has been a significant enough change to the conditions in the home country such that the analysis conducted by the Immigration and Refugee Board is no longer valid.

[19] Regarding country conditions, the officer found that the Board's findings stand. He determined that the new evidence shows that trends identified by the Board have continued, but not significantly deteriorated. The officer noted that, although the applicant asserted deteriorating conditions, there is no supporting evidence that conditions had changed since the Board decision. The officer acknowledged the serious human rights problems in Sri Lanka, but disagreed with the applicant that he now fits a different profile such as that of a human rights worker, LTTE supporter, journalist, or anti-government protestor.

[20] With respect to the risk that the applicant may be perceived to be linked to the LTTE, the officer found on a balance of probabilities, the Sri Lankan government is not interested in the applicant. The officer acknowledged the positive and negative aspects of the government's treatment of Tamils. For example, on one hand, the government is starting to hire Tamils for the police force and there has been a decrease in police checkpoints; on the other hand, some Tamils

who are forcibly returned to Sri Lanka are arrested and the use of torture continues. Further, the officer stated that the alleged visits by the Sri Lankan army to the applicant's parents' home in 2012 were likely fabricated to delay the applicant's return.

[21] With respect to the risk of having travelled on the *Sun Sea*, the officer found that it is merely speculative on a balance of probabilities. The officer determined that travelling on the *Sun Sea* did not create a new source of risk that was not assessed by the Board. The officer observed that in applications from other *Sun Sea* and *Ocean Lady* passengers, some had links such that Sri Lanka might perceive them as having LTTE membership or sympathies. However, the mere fact that the applicant travelled on the *Sun Sea* did not, in itself, put him at risk. The officer also noted that the applicant failed to establish how Sri Lanka might learn of his date or manner of arrival.

[22] In conclusion, the officer reiterated that "[r]isk by definition is forward-looking to the possibility of loss, peril or injury." The officer found that the applicant had not demonstrated that "such changes have been wrought in Sri Lanka, or in his personal situation that he would now face a risk of persecution, a risk to life, a risk of torture, or of cruel and unusual treatment or punishment."

III. Issues

[23] The applicant raises one broad issue for my review:

> The PPRA Officer conducted a curt and highly-selective analysis of the applicant's personalized risk in Sri Lanka; the Officer failed to support all critical findings with a clear evidentiary basis,

> misapplied the principal of "generalized risk" and perversely disregarded remaining credible, recent, objective evidence supportive of the risk to the applicant as a refugee *sur place* by virtue of his arrival to Canada aboard the M.V. Sun Sea, a ship labeled as owned and operated by the former Liberation Tigers of Tamil Eelam (LTTE). The Officer also focused on, and raised the issue of the applicant's "credibility", yet failed to convoke an interview or hearing so as to afford him an opportunity to address those concerns.

[24] The respondent raises two issues:

1. Was the finding that the applicant was not at risk reasonable?
2. Should the officer have convened an interview to address issues regarding the applicant's credibility?

[25] I would rephrase the issues as follows:

A. What is the standard of review?

B. Was the officer's assessment of the new evidence reasonable?

C. Should the officer have convened an interview to address issues regarding the applicant's credibility?

IV. Applicant's Written Submissions

[26] The applicant submits that the applicable standard of review in the present case is that of reasonableness.

[27] The applicant concedes that he had credibility issues and lied to boost his refugee claim. Then he submits that if the officer found his counsel's submissions confusing, he should have

taken steps to clarify them. The officer had all the information in front of him and did not have to guess or assume, as he suggests in his reasons. The applicant reiterates his submission that his membership in the particular social group, *Sun Sea* migrants or refugees, was based upon his ethnicity and perceived political opinion as an individual who will be suspected of possible links to the former LTTE.

[28] Subsection 113(b) of the Act gives discretion to PRRA officers to convoke an in-person interview in cases where issues of credibility may arise in considering new evidence. Here, the officer did not convoke an interview, despite raising the issue of the applicant's credibility. In particular, the officer emphasized the various lies that the applicant had told upon his arrival to Canada and to the Board. The officer failed to convoke an interview and hence breached the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], (*Ferguson v Canada (Minister of Citizenship and Immigration*), 2008 FC 1067, [2008] FCJ No 1308; *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, [2004] FCJ No 1134; and *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, [2010] FCJ No 458).

[29] In addition, the officer's statement that the applicant's arguments are confusing, raises the issue of the applicant's credibility and whether the officer understood his arguments. The applicant cites Mr. Justice Sean Harrington's comment in *Canada (Minister of Citizenship and Immigration) v A011*, 2013 FC 580 at paragraph 10, [2013] FCJ No 685, that it is a great injustice that passengers on the *Sun Sea* and *Ocean Lady* are treated so differently in their refugee claim, depending on the member of the Board who decides the case.

[30] The applicant submits that in order to determine whether a person is a member of a particular social group, the officer has to consider the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at page 739). Here, the officer was unreasonable to find that the applicant had failed to establish that the Sri Lankan authorities would learn of his arrival to Canada on the *Sun Sea*. Since the officer acknowledged that persons fitting the applicant's profile will be "screened" at the country's international airport upon arrival, the applicant will surely be asked about his past whereabouts, mode of travel and activities in Canada. Therefore, the Sri Lankan authorities will learn of his connection to the *Sun Sea*.

[31] The applicant submits that he is similarly-situated to the applicant in *Canada (Minister of Citizenship and Immigration) v B272*, 2013 FC 870, [2013] FCJ No 957. In that case, the Board held that the applicant would be perceived as a suspected LTTE member or an associate of the LTTE by virtue of being onboard the *MV Sun Sea* and his involvement with the LTTE.

[32] The applicant submits that because the officer wrote the question, "[s]o how would he come to the attention of Sri Lanka?" at page 10 of the decision, the officer fettered discretion by relying on the reasons of the CBSA when considering the applicant's deferral request. He argues that the jurisdiction and discretion of the officer relate to inclusion and protection. The reasoning of CBSA in refusing the deferral request ought not to play any role within the PRRA.

[33] Also, the applicant submits the officer was unreasonable to find that, because the applicant enrolled in the AVRR program on November 27, 2012, it can be inferred that he felt "safe" to return to Sri Lanka at that time. The applicant submits that this is sheer speculation and that the issue was dealt with during the April 2013 stay motion.

[34] Further, the applicant submits that the officer's assessment that things have improved in Sri Lanka was based on a highly-selective analysis of the objective evidence and ignored more recent available credible evidence which supported the personalized risk to the applicant. He references *Sebastiampillai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 394 at paragraph 49, [2009] FCJ No 493, one of my earlier decisions, which held that the officer's decision was unreasonable because it did not refer to and deal with evidence that went to the issue raised by the applicant. In the present case, the applicant submits that country conditions have deteriorated and the human rights situation has worsened for persons fitting his profile.

[35] The applicant submits, therefore, that the officer's decision was unreasonable.

V. Respondent's Written Submissions and Further Memorandum

[36] The respondent submits that the question of whether or not the officer should have convened an interview is a question of procedural fairness. It is reviewable on a standard of correctness. As for the remainder of the applicant's arguments addressing the officer's assessment of the facts, the respondent agrees with the applicant that the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[37] First, the respondent submits that the officer was reasonable to find that the applicant is not at risk. It submits that the officer assessed the submitted evidence and made a reasonable finding that the evidence did not point to a conclusion different from that of the Board.

[38] In making this determination, the officer did not ignore or selectively review the evidence. While the applicant made that assertion, he failed to show what evidence was allegedly ignored. In addition, the officer did not make a finding that things have improved in Sri Lanka. Rather, the officer found that the new evidence adduced by the applicant did not show that the situation had deteriorated since the Board rendered its decision.

[39] The officer also did not make findings of generalized risk. Any reference to generalized risk in the officer's reasons was in his summary of the reasons of the Board.

[40] Further, the officer did not disregard evidence of a *sur place* claim. Here, this claim was already assessed by the Board. The officer did not find that travel on the *Sun Sea per se* was a risk factor for other applicants; rather, he found that, in other cases where *Sun Sea* passengers were found to be at risk, there were other factors that would lead authorities to conclude that those applicants had LTTE ties or sympathies. In addition, the officer was reasonable to conclude that the applicant's manner of travel would not come to the attention of the Sri Lankan authorities because neither the section 44 report nor the detention release order identifies the date or manner of his arrival in Canada. The applicant's assertion that he would reveal his manner of travel to the Sri Lankan authorities was not made in his submissions to the PRRA officer.

[41] The claim that the officer failed to consider the applicant's risk as a Tamil returnee is without merit. The Board had already rejected this allegation. The officer found that the new evidence adduced by the applicant does not show that he would be at risk.

[42] The respondent submits, therefore, that the officer's determination was thorough and reasonable.

[43] Second, the respondent submits that the officer was not required to convene an interview. It argues that the officer only made reference to the credibility findings of the Board and the CBSA officer, but did not make an independent assessment of the credibility of the evidence. It was not incumbent on the officer to convoke an interview to address those credibility findings if the new evidence did not overcome those credibility findings. The respondent submits that the officer is entitled to find that the evidence is insufficient without making a credibility finding (*Selduz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 583 at paragraph 31, [2010] FCJ No 689; and *Sayed v Canada (Minister of Citizenship and Immigration)*, 2010 FC 796 at paragraphs 35 to 37, [2010] FCJ No 978).

[44] Here, the tribunal record shows that the applicant did not allege during his PRRA that Sri Lankan authorities had been looking for him in 2012. There was also no evidence filed to show that Sri Lankan authorities visited the applicant's family in 2012. Since there was no evidence filed, section 167 of the Regulations was not triggered and no hearing was required.

[45] The respondent further submits that even if this Court finds that the officer made a veiled credibility finding, that finding was not determinative of the decision. What was determinative was the officer's finding that the applicant had not established a change in his personal situation or the general country conditions such that he would now be at risk. This, despite any statements regarding the applicant's credibility, was determinative of the applicant's PRRA.

[46] Therefore, the respondent submits that the officer's decision was reasonable.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[47] The officer's assessment of new evidence is a question of mixed fact and law, which is reviewable on a standard of reasonableness (*Dunsmuir* at paragraphs 47 and 51). This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339 [*Khosa*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

[48] The jurisprudence on the standard of review for a decision granting an oral hearing pursuant to section 167 of the Regulations and section 113 of the Act is mixed (*Bicuku v Canada (Minister of Citizenship and Immigration)*, 2014 FC 339 at paragraph 16, [2014] FCJ No 346). Here, I agree with the respondent's submission that the standard of correctness should be

applied. I have mentioned in prior decisions that in my view, the issue of whether to grant an oral hearing is a question of procedural fairness (*Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 at paragraph 24, [2010] FCJ No 307; and *Ullah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 221 at paragraphs 20 and 21, [2011] FCJ No 275). A review of procedural fairness typically triggers the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502; and *Khosa* at paragraph 43). The Court must determine whether the process followed by the decision-maker achieved the level of fairness required in all of the circumstances (*Khosa* at paragraph 43).

[49] I wish to first deal with Issue 3.

B. *Issue 3 - Should the officer have convened an interview to address issues regarding the applicant's credibility?*

[50] The officer's decision states:

> The alleged change in this situation is that the army or CID visited his family home in 2012 looking for him or his whereabouts.
>
> Given Mr. Suntharalingam's
>
> - Numerous misrepresentations,
> - His father's statements that no one had looked for Mr. Suntharalingam as of 2011,
> - His own statements (January 18, 2011) that no one had asked about him,
> - Lack of links or perceived links to the LTTE (according to the RPD),
> - Voluntary enrollment in AVRR – after the alleged visits,
> - Dubious letter from his father (as assessed by CBSA), and

> - His extremely implausible idea that the army or CID would suddenly become interested in him immediately prior to his removal from Canada, when they were not interested in the six years beforehand,
>
> I find, on a balance of probabilities, the army, CID or other agencies of the Sri Lankan government are not in fact interested in him. I find the alleged visits were fabricated by unknown persons (perhaps his father) to prevent or delay Mr. Suntharalingam's return to Sri Lanka rather than to describe a significant s. 96 or 97 risk to him.
>
> (applicant's record, page 25)

[51] These statements of the officer concern me. It appears that the officer did not believe that there were visits by the army or CID in 2012, looking for the applicant. Even if the officer raised this concern on his own, this, in my view, is a credibility finding which may have contributed to his denial of the applicant's claim.

[52] As such, it is my view that the officer should have convoked an oral hearing concerning this matter.

[53] The officer did not and, as a result, his decision is unreasonable and must be set aside and referred to a different officer for redetermination.

[54] Because of my finding, I need not deal with the other issue.

[55] 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 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.
…	…
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 presented, at the time of the rejection;	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 ce qu'il les ait présentés au moment du rejet;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(d) in the case of an applicant	d) s'agissant du demandeur

described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

(e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:

e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa d)(i) ou (ii) :

(i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and

(i) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans et pour laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée,

(ii) an applicant who is determined to be inadmissible on grounds of serious

(ii) celui qui est interdit de territoire pour grande criminalité pour déclaration de

criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.	culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

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