

Federal Court



Cour fédérale

Date: 20190125

Docket: IMM-2008-18

Citation: 2019 FC 111

Toronto, Ontario, January 25, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HARISKANNA THIYAGARASA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

Overview

[1] This is an application for judicial review of the decision of a Senior Immigration Officer [the Officer], dated April 16, 2018, refusing the Applicant's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds [the Decision].

[2] As explained in more detail below, this application is dismissed, because I have considered the Applicant's arguments and have found that the Decision is reasonable.

Background

[3] The Applicant, Hariskanna Thiagarasa, is a 30-year-old citizen of Sri Lanka of Tamil ethnicity. He was born in Jaffna, Northern Sri Lanka and grew up during the Sri Lankan civil war. He submits that his family was affected by the war: they were displaced; his father was detained for three days and assaulted by the Sri Lankan army on suspicion of supporting the Liberation Tigers of Tamil Eelam [LTTE]; he was injured by shrapnel from a bomb explosion in 2006; the family home was searched by the army on the suspicion that they were LTTE supporters; and his aunt and uncle (who he says were LTTE supporters) were killed in a different bomb explosion.

[4] The Applicant fled Sri Lanka in 2012 and travelled through several countries before arriving in Canada in April 2013 and claiming refugee protection.

[5] The Applicant's application for refugee protection was refused by the Refugee Protection Division [RPD] on October 4, 2013, which refusal was upheld by the Refugee Appeal Division and the Federal Court on judicial review. His application for a Pre-Removal Risk Assessment [PRRA] was refused in March 2017. He then applied for permanent residence on H&C grounds on March 15, 2017.

[6] In his H&C application, the Applicant cited as reasons for his application his establishment in Canada, his family connections, psychological and emotional hardship, hardship

arising from his profile as a young Tamil man with perceived links to the LTTE and a failed asylum seeker, and hardship from discrimination against Tamils in Sri Lanka.

Reasons for the Officer's Decision

[7] In the Decision that is the subject of this judicial review, the Officer refused the Applicant's application for permanent residence from within Canada on H&C grounds. The Officer considered the following factors: establishment, family ties, best interests of the child [BIOC], country conditions in Sri Lanka, and emotional and psychological hardship. The following summary employs the same headings as the Decision.

Establishment

[8] The Officer noted that the Applicant has resided in Canada for five years, "a relatively short period." The Officer further noted that the Applicant took six months of English classes and began working in a factory in Canada in 2014. He went on to study for a CompTIA A+ certificate (a certification in the tech support and IT field) from NetPLUS College and began working at Ohm Computers in December 2014. The Officer accepted that the Applicant was earning some income.

[9] The Officer also accepted that the Applicant has formed some friendships in Canada and that he has some level of community involvement through volunteering activities.

[10] The Officer concluded that the Applicant's establishment in Canada should be accorded some positive weight, but that his establishment, on its own, is not exceptional and does not justify granting an exemption on humanitarian and compassionate grounds.

Family Ties

[11] The Officer noted that the Applicant's sister, brother-in-law, niece, and nephew reside in Montreal and that the Applicant stated that being separated from them would cause him hardship. The Officer acknowledged that the Applicant would suffer some emotional difficulties if he is separated from these family members. However, the Officer also explained that the sister was in Sri Lanka when the Applicant initially left and that they would be able to maintain their relationship by phone and internet if they are separated. The Officer found it reasonable to believe that the Applicant could live with his parents and brother in Sri Lanka were he to return, as he had done so before he departed the country. It was also noted that they would provide emotional support.

Best Interests of the Children

[12] The Officer accepted that the Applicant is involved in the lives of his young niece and nephew and that they benefit from this involvement. However, the Officer found that there was little evidence that the Applicant was a caregiver or provider of financial support for them or that they would suffer from his absence. The Officer also noted that the Applicant's aunt in Canada has three children (his cousins) with whom he has become close. However, the Officer found that the lack of detail about their ages or lives made it difficult to assess the BIOC in relation to the Applicant's cousins.

[13] The Officer was not satisfied that there is a sufficient level of dependency between the children and the Applicant that his departure would compromise the BIOC.

Country Conditions

[14] The Officer canvassed country condition documents [CCD] for Sri Lanka as they relate to the Applicant. The Officer noted that the Applicant alleged that, were he to return to Sri Lanka, he would face persecution and violence due to his profile as a young Tamil man with perceived links to the LTTE and as an individual returning to Sri Lanka with a temporary travel document whose refugee claim in Canada was refused. It was further observed that the Applicant stated that he would face economic hardship and difficulty finding employment in Sri Lanka.

[15] The Officer noted that the Applicant did not provide any documentary evidence to show that he or his family members were suspected supporters of the LTTE and that he provided little evidence that he or his family were targeted by Sri Lankan authorities or the Eelam People's Democratic Party. The Officer gave little weight to the Applicant's own statements given the lack of corroborative evidence. The Officer further noted that the Applicant gave conflicting stories about why he failed to disclose his deceased aunt and uncle's involvement with the LTTE when entering Canada.

[16] The Officer found that it was reasonable to believe that the incidents described by the Applicant at his 2013 RPD hearing pertaining to why he fears he would be viewed as an LTTE member are the same risks he fears now. The Officer noted that the RPD's refusal of his claim was based on credibility and the well-foundedness of his allegations. The Officer therefore gave strong weight to the negative credibility findings of the RPD. The Officer found the Applicant's evidence to be insufficient to overcome the RPD's findings and that it is not likely that the Applicant would be perceived as an LTTE supporter and/or targeted or harassed because of his

profile as a young Tamil man. Little weight was given to his statements that he would face hardships in Sri Lanka on that basis.

[17] The Officer noted that the Applicant submitted country documentary evidence and accepted that members of the Tamil community with perceived LTTE links have been targeted and harassed. However, the Officer found little evidence that the Applicant fits this profile.

[18] The Officer considered the documentary evidence relating to returning asylum seekers but found little evidence that the Applicant would be targeted and no evidence that those returning from Canada are specifically targeted. The Officer found that there was no more than a mere possibility that the Applicant would be targeted.

[19] The Officer then considered the documentary evidence relating to the Applicant's claim that he would be affected by discrimination based on his Tamil ethnicity and would have trouble finding work. Having conducted further research via publicly-available sources, the Officer acknowledged that Tamils face some economic hardships, but found little evidence that the Applicant would find it impossible to find a job. The Officer noted the Applicant's previous employment in Sri Lanka and his brother's employment there.

[20] The Officer also concluded that there continue to be issues with discrimination against Tamils, as the Sri Lankan government's remedial efforts in that regard have produced mixed results, although noting that the government is attempting to address such issues and that avenues for redress exist.

Emotional and Psychological Hardship

[21] The Officer addressed the Applicant's submissions that he would experience psychological stress if he were to return to Sri Lanka and considered his submitted psychological assessment. This assessment stated that the Applicant has an Adjustment Disorder with Mixed Anxiety and Depressed Mood with features of Post-Traumatic Stress Disorder. The Officer gave the report diminished weight because of the RPD's credibility concerns and a lack of corroborative evidence for the claims in the assessment. The Officer also noted that there was no indication of current treatment or of any treatment plan going forward. It was found that this demonstrated that the Applicant was not suffering psychological impairment to the degree that he requires assistance from mental health professionals.

[22] Nevertheless, the Officer accepted that the Applicant would likely feel anxiety upon returning to Sri Lanka and that this may negatively impact his psychological state. The Officer stated that this was given significant weight, but nevertheless found that the Applicant would be able to receive emotional and other support from his family and noted that the Applicant has shown an ability to move to another country, learn a new language, and find employment. The Officer found that the Applicant would face some barriers to mental health care in Sri Lanka, but also found little evidence that he required treatment or medication or that he would be unable to access mental health services in Sri Lanka.

Conclusion

[23] In conclusion, the Officer gave some positive weight to the Applicant's establishment and family ties in Canada but was not satisfied that his level of establishment was exceptional. The Officer found that the BIOC would not be affected if the Applicant were to return to Sri Lanka.

[24] In connection with the Applicant's mental health, the Officer was not satisfied that he would be unable to access mental health services in Sri Lanka if required in the future and was not satisfied that he would not be able to apply for permanent residence from outside of Canada. The Officer was also not satisfied that the Applicant would be perceived as an LTTE supporter and targeted, or that he would experience discrimination to such a degree that he would have severe difficulty finding employment to financially support himself.

[25] The Officer therefore concluded that the H&C considerations did not justify granting the Applicant's application.

Issues and Standard of Review

[26] The Applicant raises the following issues for the Court's consideration:

- A. Did the Officer err in considering the Applicant's establishment in Canada?
- B. Did the Officer err in assessing the adverse country conditions the Applicant would face in Sri Lanka as a result of his profile?

[27] The parties agree, and I concur, that the applicable standard of review is reasonableness.

Analysis

Did the Officer err in considering the Applicant's establishment in Canada?

[28] The Applicant's argument, that the Officer erred in considering his establishment in Canada, turns on the Officer's use of the word "exceptional" in two places in the Decision. In the course of the Officer's analysis of the Applicant's level of establishment, the Officer states the following:

The applicant has demonstrated some establishment during the 5 years he has spent in Canada and I accord some positive weight to the applicant's efforts; however, I do not find that the applicant's establishment, in and of itself, is exceptional and justifies granting an exemption on humanitarian and compassionate grounds.

[29] Subsequently, in the Conclusion portion of the decision, the Officer again uses the term "exceptional":

I give some positive weight to the applicant's establishment and family ties to Canada and I find that it would be somewhat beneficial for his niece, nephew, and cousins for the applicant to remain in Canada. However, I am not satisfied that the applicant's level of establishment in Canada is exceptional.

[30] In support of his argument, the Applicant relies on authorities where the Court has found it to be a reviewable error for an officer considering an H&C application to require an applicant to demonstrate an exceptional level of establishment. In *Apura v Canada (Minister of Citizenship and Immigration)*, 2018 FC 762, Justice Ahmed explained at paragraph 23 that, when a decision maker's H&C analysis suggests that the absence of exceptional circumstances forms the basis of a decision to deny relief, this represents the imposition of an incorrect legal standard. Stating the objectionable sort of analysis somewhat differently, Justice Boswell explained in

Ndlovu v Canada (Minister of Immigration, Refugees and Citizenship), 2017 FC 878 at paras 12-15, that it is unreasonable for an officer to discount an applicant's degree of establishment merely because it was, in the officer's view, not greater than what would be expected of other individuals attempting to adjust to a new country, particularly without explaining what the officer considered would be an adequate level of establishment.

[31] In my view, the Officer's use of the term "exceptional", particularly when considered in the context of the Decision as a whole, does not support a conclusion that the Officer engaged in the objectionable form of analysis identified by applicable authorities. I read the use of that term as descriptive, capturing the Officer's assessment of the Applicant's level of establishment after reviewing the relevant evidence. The Officer did not adopt an exceptional level of establishment as a legal threshold required to be met for the application to succeed and therefore reject the application on that basis. Nor did the Officer discount the Applicant's degree of establishment because it did not rise to an exceptional level. On the contrary, the Officer afforded positive weight to the Applicant's establishment and considered that factor, in conjunction with the other H&C factors raised by the Applicant, but concluded that the H&C considerations did not justify an exemption from the requirement to apply for permanent residence from outside Canada.

[32] I find the Officer's analysis of the Applicant's establishment to have been conducted reasonably and that it therefore demonstrates no reviewable error.

Did the Officer err in assessing the adverse country conditions the Applicant would face in Sri Lanka as a result of his profile?

[33] The Applicant submits that the Officer erred in three respects in assessing the evidence in the CCD applicable to Sri Lanka.

Hardship as a Returning Refugee Claimant

[34] First, in analysing hardship that the Applicant argued he would face if he returned to Sri Lanka as a failed asylum seeker, the Applicant submits that the Officer erred in considering the CCD on this subject. In particular, he submits that the Officer ignored contradictory evidence in finding that there was no evidence of failed asylum seekers being targeted.

[35] In assessing this argument, it is important to place the impugned finding (underlined in the paragraph below) in the context of the Officer's full analysis of this issue:

I consulted the IRB's response to information request "Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)," which states that there are 'watch lists' of individuals considered to be of interest to the Sri Lankan security forces and individuals on these lists are monitored upon return to Sri Lanka. The report quotes from a number of sources who indicate that those arriving with temporary travel documents and those who have made a refugee claim in another country may be detained and undergo investigative processes to determine whether there are any identity, criminality, or security concerns; however, I find little documentary evidence demonstrating that the applicant would likely be considered a person of interest to the Sri Lankan authorities or that he would be mistreated by authorities upon returning to Sri Lanka due to his profile as a failed refugee claimant from Canada. I also find no documentary evidence that

individuals returning from Canada are specifically targeted by Sri Lankan authorities as perceived LTTE supporters. Based on the evidence before, I find that there is no more than a mere possibility that the applicant may be targeted and harassed due to his particular profile if he were to return to Sri Lanka.

[Emphasis added]

[36] I note that, as submitted by the Respondent, the Applicant has not referred the Court to any documentary evidence which directly contradicts the statement by the officer highlighted above. The Applicant relies on portions of the CCD relating to the experiences of failed asylum seekers returning to Sri Lanka from other countries and argues that these are countries comparable to Canada. However, none of this evidence relates specifically to Canada, and therefore it does not contradict the Officer's statement that there is no documentary evidence that individuals returning from Canada are specifically targeted by Sri Lankan authorities as perceived LTTE supporters.

[37] I have nevertheless considered this issue more broadly, to assess whether the evidence on which the Applicant relies (highlighting, in particular, an August 2015 report by Freedom from Torture and a March 2016 report by Asylum Research Consultancy) supports a conclusion that the Officer's analysis is unreasonable. That evidence refers to failed asylum seekers returning to Sri Lanka and being subjected to detention and ill-treatment. While the Respondent points out references in these reports to these being the experiences of returnees with suspected links to the LTTE, the Applicant notes that not all references in the reports read in this manner and highlights in particular the comment in the Freedom from Torture report that, for some returnees, the association with the LTTE was wrongly imputed to them by the authorities.

[38] The analysis of this issue reproduced above must be placed in the context of the Officer's preceding consideration of the Applicant's claim that he would be perceived as an LTTE supporter. The Officer noted the RPD's findings, based in part on its adverse credibility determinations, that the Applicant does not have the profile of a perceived LTTE supporter and therefore does not have a personal risk if he were to return to Sri Lanka. The Officer also found that the evidence provided by the Applicant in support of his H&C application did not overcome the RPD's findings.

[39] Against that backdrop, I read the Officer's conclusion to be that the Applicant would not face more than a mere possibility of being targeted or harassed upon returning to Sri Lanka as a failed refugee claimant, because he would not be perceived as supporting or being associated with the LTTE. I do not find the evidence relied upon by the Applicant to contradict this conclusion in a manner that requires it to have been expressly addressed by the Officer to make the decision reasonable. While the Freedom from Torture report refers to authorities wrongly imputing LTTE associations, this is the same consideration which was expressly addressed by the Officer, i.e. whether the Applicant would be perceived, albeit wrongly, to have an LTTE association. I find the Officer's treatment of this issue reasonable, giving rise to no reviewable error.

Hardship Finding Employment

[40] The Applicant submits that the Officer erred, in analysing the CCD evidence surrounding discrimination faced by persons of Tamil ethnicity in Sri Lanka, by finding that there was little evidence it would be impossible for him to find employment in his hometown or elsewhere in the country. Similar to the argument canvassed earlier in these Reasons, that the Officer erred by

adopting a legal threshold requiring the Applicant to demonstrate an exceptional level of establishment in order to succeed in his H&C application, the Applicant submits that the Officer improperly adopted a threshold requiring the Applicant to demonstrate that it would be impossible for him to find employment.

[41] However, as with the argument related to the establishment factor, I do not read the Decision as adopting impossibility of securing employment as a legal threshold or test. First, I note that elsewhere in the analysis, the Officer employs terms other than “impossible” in analysing the effect of discrimination upon the Applicant’s employment prospects. The Officer refers to finding little evidence that Tamil speakers are discriminated against to such an extent that finding employment is extremely difficult or impossible, and in the Conclusion portion of the Decision it is stated that the Officer is not satisfied that the Applicant would experience discrimination to such an extent that he would have severe difficulties in finding employment to financially support himself.

[42] More significantly, the Decision demonstrates that these findings by the Officer are based not only on consideration of the CCD, but also on the Applicant’s particular circumstances and those of his family. The Officer notes that the Applicant was previously employed at a computer store in Sri Lanka and that his brother (who, like the Applicant, is a young Tamil male from the North-East region of Sri Lanka) is financially supporting his parents and therefore is employed. I agree with the Respondent’s characterization of this portion of the Decision as demonstrating a conclusion by the Officer that, given the particular experiences of the Applicant and his family, the Applicant was overstating the difficulties he would experience in securing employment.

[43] The Applicant also submits that the Officer unreasonably assessed the evidence surrounding his family circumstances, which he argues demonstrates that they have suffered significantly, including financially, from the discrimination faced by persons of Tamil ethnicity. However, it is not the role of the Court in judicial review to reassess the evidence. The Officer's treatment of this evidence falls within the range of acceptable outcomes and is therefore reasonable.

Availability of Avenues of Redress against Discrimination

[44] The Applicant notes that the Officer's analysis of the impact of discrimination includes a finding that there are avenues of redress available to victims of discrimination in Sri Lanka. The Applicant submits that the Officer erred by failing to analyse the effectiveness of such avenues of redress, particularly given CCD evidence that they are not effective. The Applicant notes in particular evidence stating that the Human Rights Commission of Sri Lanka, to which the Decision refers, has insufficient authority, independence and resources and has not been capable of remedying impunity for human rights violations.

[45] The Applicant relies on *Francis v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1507 [*Francis*] at paras 9-12, which identifies that it is the effectiveness of avenues of redress which must be considered and that it can represent a reviewable error to conclude that such avenues are effective without mentioning evidence contradicting that conclusion.

[46] Reading this portion of the Officer's analysis as a whole, I find no reviewable error. After reviewing the applicable CCD evidence, the Officer concludes not only that the government is attempting to address issues of discrimination and that there are avenues of redress, but also that

conditions for the Tamil population are far from ideal, that the approach of the government toward the Tamil population has produced mixed results, and that there continue to be concerns with respect to discrimination. In my view, the Decision does not demonstrate that the Officer failed to consider evidence as to the shortcomings in avenues of redress available to victims of discrimination.

[47] I appreciate that the Decision may fall short of the level of detail that would be required to analyse the effectiveness of state protection in the context of a refugee claim, such as was being considered in *Francis*. A finding of state protection is determinative of entitlement to refugee protection and therefore may require detailed analysis of its effectiveness. In contrast, in the case at hand, the availability of redress against discrimination forms a component of one of many factors to be taken into account in assessing whether the Applicant's circumstances justify an exemption on H&C grounds. Applying the standard of reasonableness applicable to the Court's review of the Decision, I find no error arising from this component of the Officer's analysis.

[48] Finally, the Applicant submits that the Officer did not acknowledge the ongoing militarization of Tamil areas, which he argues represents one of the most serious issues facing the country. However, the Officer is presumed to have considered all the evidence submitted, in the absence of a sufficient contradiction between the evidence and the Officer's conclusion to rebut that presumption (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157 F.T.R. 35 (Fed. T.D.)) at para 17; *Csoka v Canada (Minister of Citizenship and Immigration)*, 2017 FC 651 at para 27). The evidence of militarization upon

which the Applicant relies does not serve to rebut the applicable presumption in this manner and therefore does not undermine the reasonableness of the Decision.

Conclusion

[49] Having considered the Applicant's arguments and having found that the Decision is reasonable, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2008-18

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

No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2008-18

STYLE OF CAUSE: HARISKANNA THIYAGARASA V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 21, 2019

JUDGMENT AND REASONS SOUTHCOTT, J.

DATED: JANUARY 25, 2019

APPEARANCES:

Meghan Wilson FOR THE APPLICANT

Catherine Vasilaros FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT