Federal Court  Cour fédérale

Date: 20130417

Docket: IMM-3545-12

Citation: 2013 FC 386

Montréal, Quebec, April 17, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

PACKIYARAJAH PONNIAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, a Sri Lankan citizen, seeks judicial review of a decision by a pre-removal risk assessment officer (PRRA Officer) finding that he was not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The Applicant argues that the PRRA Officer (i) misinterpreted and misapplied paragraph 113*(a)* of the *IRPA* in refusing new evidence, (ii) was obliged to provide the Applicant with notice of credibility concerns and an opportunity to respond to those concerns, and (iii) ignored or failed to assess submissions and evidence.

[2] For the reasons that follow, I find that this application for judicial review ought to be dismissed.

Background

[3] The Applicant, a Sri Lankan citizen and ethnic Tamil, was born in 1963.

[4] In the 1980s, the Liberation Tigers of Tamil Eelam (LTTE) allegedly asked the Applicant to join them and, on his refusal, took produce from his farm by force.

[5] In 1985, the Sri Lankan armed forces allegedly detained and tortured the Applicant. The Applicant claims that he was injured so badly that, on his release, a doctor wanted to amputate his leg, but that medical documentation of this injury was lost in the 2004 tsunami.

[6] In 1988, the Applicant states that he was arrested and beaten by the Indian Peace Keeping Force that had been deployed in the area. They asked him why he had come to Jaffna and about his ties to the LTTE. He also alleged that he was arrested and detained by the Sri Lankan armed forces on December 24, 1996, and questioned about his ties to the LTTE.

[7] In August 2008, a paramilitary group named Karuna allegedly demanded money from the Applicant, threatening to kidnap him and his children if he did not pay. The Applicant's brother-in-law deposited part of the money in the Karuna group's bank account.

[8] In May 2009, the Applicant states that he relocated to Vaddavan but the Karuna group kidnapped him on November 12, 2009 and threatened to harm his family if he did not pay the balance of the money. The Applicant states that he was released after three days, and was told that his entire family would be killed if he did not pay the balance of the money soon.

[9] The Applicant felt that he could not live safely in Vaddavan any longer and he returned to Colombo alone in February 2010. He and his wife had apparently talked about him leaving, as she was very concerned for his safety. When he left, the Applicant says that he did not tell his wife that he was going or where he was going, in the hope that the Karuna group would then leave his wife and children alone.

[10] The Applicant departed Sri Lanka on May 7, 2010 and arrived in Canada on June 5, 2010, crossing the border at Montreal. He made a refugee claim in Toronto four days later, on June 9, 2010.

[11] The RPD rejected the Applicant's claim as it had concerns about his inability to provide consistent dates for recent significant events. The RPD was also concerned that the Applicant provided three different descriptions of the same phone call regarding the demand from the Karuna group. The Applicant explained that he had "memory loss and forgot things and dates". The RPD was not convinced.

[12] The RPD was particularly concerned with the Applicant's activities after his alleged abduction. Despite claiming to have been kidnapped and to have faced threats that his entire family

would die if he did not pay the money claimed, the Applicant took no apparent steps to protect his wife and two sons, remained in his village for five or six months after the alleged kidnapping, travelled to Colombo alone, and left the country for Canada without his wife or two sons.

[13] The Applicant tried to explain this behaviour by stating that he could not secure the funds to pay the extortionists. The RPD found this unconvincing given that he was able to secure the funds to travel to Canada, nearly double what the extortionists allegedly sought.

[14] The RPD found that the Applicant's status as a 48-year-old Tamil male from eastern Sri Lanka was not sufficient to ground a refugee claim. The RPD considered the country conditions and found that since the LTTE had conceded defeat in May 2009, the situation for Tamils in Sri Lanka has generally improved.

[15] The RPD found that there was insufficient evidence that the Applicant was, or would be seen by Sri Lankan authorities to be, an LTTE supporter or operative. Indeed, there was insufficient evidence that he has had any problems with the Sri Lankan government since 1996 in relation to alleged LTTE involvement. The Applicant has had no apparent trouble with customs: he obtained a passport in 2000; he travelled for work to Qatar in 2002; he returned to Colombo in 2004; and he left Sri Lanka for Canada legally. While the UNHCR had recommended that those with links to the LTTE be protected, there was no credible evidence that the Applicant had such links.

[16] An application for leave to judicially review the RPD decision was refused on October 3, 2011.

[17] The Applicant claims that he did not speak to his spouse from February 2010 until after his RPD hearing on April 28, 2011. In July 2011, according to the Applicant, a group came to his spouse's home in search of him, threatened to kill his children, and stole his spouse's jewellery from her body. The Applicant claims that his spouse has been harassed and threatened at other times by persons seeking him.

[18] On December 19, 2011, the Applicant was provided with a PRRA application. In support of his PRRA application, the Applicant submitted new evidence, both of a personal nature and objective country documentation. He submitted his own sworn statement setting out new developments since the hearing of his refugee claim. He also submitted a letter from his wife and a letter from his sister, respectively dated November 20 and December 30, 2011, allegedly describing events following his RPD hearing. He further submitted a page from the Diary of Complaints of Grama Niladhari, a political officer, indicating that the Applicant's older sister had lodged a complaint in 2008 against those responsible for her brother's extortion and the risk he faced to his life. Finally, the Applicant filed some fifty-seven articles (some post-dating the RPD decision) showing the worsening situation of the Tamils in Sri Lanka.

[19] The PRRA application was dismissed on March 13, 2012. The Applicant was scheduled to be removed to Sri Lanka on April 26, 2012, but on April 23, 2012, this Court granted a stay of removal pending the outcome of this application for judicial review.

Decision under review

[20] The PRRA Officer determined that the Applicant would not be subject to more than a mere possibility of a risk of persecution if returned to Sri Lanka. Neither, according to the PRRA Officer, would the Applicant be likely to face a risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka.

[21] The PRRA Officer determined that a hearing was not required under paragraph 113*(b)* of the *IRPA* on the basis of the factors listed in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*). In particular, the PRRA Officer reasoned that the majority of the fifty-seven articles about human rights violations in Sri Lanka did not constitute new evidence because they pre-date the decision of the RPD; the balance of the articles post-dating the RPD's decision were not new evidence because the Applicant did not explain how they were relevant to his personal circumstances or how they rebutted the RPD's decision. The PRRA Officer also found that the sister's 2008 complaint was not new evidence because it pre-dated the RPD's decision and because the Applicant did not explain why it was not made available to the RPD for its consideration. Finally, the letters from his wife and his sister did not constitute new evidence because they were related to the same risks assessed by the RPD and did not identify any new developments since the RPD's decision; nor did they rebut many of the RPD's findings.

Issues

[22] As previously mentioned, this application for judicial review raises three questions:

a. Did the PRRA Officer misinterpret and misapply paragraph 113*(a)* of the *IRPA* by refusing new evidence?

b. Did procedural fairness require the PRRA Officer to interview the Applicant or to provide notice of or an opportunity to respond to credibility concerns?

c. Did the PRRA Officer breach the duty of procedural fairness by ignoring or failing to assess submissions, the Applicant's sworn statement, and country conditions evidence?

Analysis

[23] The PRRA Officer's rejection of the sworn statement, letters, 2008 complaint, and country conditions evidence as new evidence under paragraph 113*(a)* is a question of mixed fact and law reviewable on a reasonableness standard (*Selduz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 361). Whether the PRRA Officer applied the appropriate test for paragraph 113*(a)* is reviewable on correctness standard (*Franco v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1087).

[24] The jurisprudence of this Court is divided on the standard of review for oral hearings under paragraph 113*(b)*. I recently reviewed this question in *Adetunji v Canada (Citizenship and Immigration)*, 2012 FC 708, and I can do no better than repeat what I wrote there (at para 24):

> That being said, there is a controversy in this Court as to the standard of review to be applied when reviewing an officer's decision not to convoke an oral hearing, particularly in the context of a PRRA decision. In some cases, the Court applied a correctness standard because the matter was viewed essentially as a matter of procedural fairness (see, for example, *Hurtado Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 (available on CanLII); *Sen v Canada (Minister of Citizenship and Immigration)*,

> 2006 FC 1435 (available on CanLII)). On the other hand, the reasonableness [standard] was applied in other cases on the basis that the appropriateness of holding a hearing in light of a particular context of a file calls for discretion and commands deference (see, for example, *Puerta v Canada (Citizenship and Immigration)*, 2010 FC 464 (available on CanLII); *Marte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 930, 374 FTR 160 [*Marte*]; *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647 (available on CanLII) [*Mosavat*]). I agree with that second position, at least when the Court is reviewing a PRRA decision.
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> See also: *Rajagopal v. Canada (Citizenship and Immigration*), 2011 FC 1277; *Silva v. Canada (Citizenship and Immigration)*, 2012 FC 1294; *Brown v. Canada (Citizenship and Immigration)*, 2012 FC 1305.

[25] Whether the PRRA Officer ignored or failed to assess evidence is reviewable on a reasonableness standard: *Manouchehrnia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1021. Under the reasonableness standard, courts may only intervene if a decision is not "justified, transparent or intelligible". To meet the standard, it must also be in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

i) Did the PRRA Officer misinterpret and misapply paragraph 113*(a)* of the IRPA by refusing new evidence?

[26] The Applicant submits that the PRRA Officer misinterpreted and misapplied paragraph 113*(a)* of the *IRPA*, which describes when new evidence may be presented in the PRRA context. In the Applicant's view, his sworn statement, the letters, the 2008 complaint and the country conditions evidence were not before the RPD, referred to new developments in the risk faced, corroborated his well-founded fear of persecution, and contradicted key RPD findings (including

the adverse credibility findings). The Applicant contends that the PRRA Officer did not analyze this evidence and simply rejected substantive portions of it as not being new or not containing new grounds of risk.

[27] It is well established that a PRRA application is not an appeal or reconsideration of the negative decision of the RPD; it is meant to assess new risk developments between the hearing and the removal date: see *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] at para 12; *Kaybaki v Canada (Minister of Citizenship and Immigration)*, 2004 FC 32 at para 11; *Nam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1298 at para 22. This is precisely why paragraph 113*(a)* of the *IRPA* limits the evidence that may be presented to the PRRA officer to "new evidence" that arose after the rejection of the refugee claim or that was not reasonably available or that the applicant could not reasonably have been expected to have presented before the Refugee Board. That section reads as follows:

Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows: (*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;	**113.** Il est disposé de la demande comme il suit : *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;

[28] The PRRA Officer rejected the 2008 complaint because it pre-dated the RPD decision and the Applicant did not explain why it had not been made available to the RPD. This accords with paragraph 113*(a)* and with the ruling in *Raza*, above, at para 13, that evidence of events or circumstances occurring before the RPD decision should only be admitted if it was not reasonably available to present to the RPD or an applicant could not have been reasonably expected in the circumstances to have presented it to the RPD.

[29] In *Chang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 584, this Court held that it would be reasonable to require an applicant to explain why circumstances "prevented him from obtaining" a document (at para 13). Although the Applicant states that he did not contact his wife after leaving Sri Lanka in order to protect her, it was his sister who filed the 2008 complaint. Even if the Applicant did not want to endanger his sister by contacting her, he could have been reasonably expected to present the 2008 complaint to the RPD by obtaining a copy with the assistance of his friend Arasaratnam, who was a point of contact between the Applicant and his family after he left Sri Lanka (see the Affidavit of the Applicant, Applicant's Record, p 17).

[30] As for the country conditions evidence, it was rejected because it was not relevant to the Applicant's personal circumstances and did not rebut the RPD's findings. Once again, such a finding is consistent with *Raza*, according to which new evidence must be relevant and material in order to be considered. It is well established that country condition documentation cannot be relied on to establish a personalized risk. The RPD determined that the Applicant did not provide sufficient credible and trustworthy evidence to support his fear of returning to Sri Lanka. It also had a number of serious credibility concerns with the Applicant's allegations regarding what has

happened to him and his family since 2008. The RPD concluded the Applicant did not establish that Sri Lankan authorities perceived him to be associated with the LTTE because he and his family were permitted to travel from Jaffna to Colombo, he secured a passport in 2000, he had previously returned from work abroad in March 2004, and he appeared to have departed from Sri Lanka in 2010 with a legitimate passport. Given this reasoning, the Applicant needed to rebut the RPD's finding that he was not perceived to be an operative of the LTTE. The country conditions documents could not be used to achieve that result; they could only show that persons perceived to be associated with the LTTE are possibly at risk of persecution.

[31] Finally, the Applicant's personal affidavit and the letters from his sister and spouse referred to the same alleged risk that was before the RPD and that had not been found to be credible. Of course, the Applicant rightly points out that new evidence cannot be rejected solely on the basis that it relates to the same risk. That being said, *Raza* made it clear that such evidence can be properly rejected "if it cannot prove that the relevant facts as of the date of the PRRA application are materially different from the facts as found by the RPD" (at para 17). This is precisely why the PRRA Officer rejected the Applicant's affidavit and the letters from his sister and spouse.

[32] The Applicant submits that his affidavit and the letters pertain to new developments in the forward-looking risk he will face if returned to Sri Lanka and that they corroborate his prior evidence of risk. In particular, the letters indicate that the Applicant continued to be pursued and threatened, and that his wife was threatened and had her jewellery forcefully snatched from her body as part of the extortion, all of which allegedly shows that he was truthful with respect to his ordeal.

[33] It is improbable, however, that the Applicant's refugee claim would have succeeded even if the letters and the Applicant's sworn statement had been made available to the RPD. The RPD found that the Applicant had not been consistent on dates and locations of various significant events or the content of the telephone calls with the alleged extortionists, and that the Applicant's actions were not always consistent with his alleged subjective fear. To accept that he continued to be threatened by the Karuna group, the RPD would have had to conclude that he had already been threatened. This is not the case. As my colleague Justice Barnes stated in similar circumstances, *Raza* does not open "the PRRA process to a re-examination of evidence that was already before the IRB or that could have been put to the IRB but was not. A PRRA is not an appeal from the IRB and it does not afford an opportunity to argue that the IRB misinterpreted the evidence before it": *Kadjo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1050 [*Kadjo*] at para 12.

[34] Moreover, the Applicant has not established that the letters were not reasonably available to him for presentation at his RPD hearing, or that he could not reasonably have been expected, in the circumstances, to have presented the evidence at the RPD hearing. The fact that the letters post-date the RPD's decision is immaterial. As for the complaint, the Applicant could have secured the evidence through his friend Arasaratnam without endangering his spouse or his sister.

[35] For all of the foregoing reasons, I find that the PRRA Officer did not err in interpreting and applying paragraph 113*(a)* of the *IRPA*.

ii) Did procedural fairness require the PRRA Officer to interview the Applicant or to provide notice of or an opportunity to respond to credibility concerns?

[36] Counsel for the Applicant claims that the PRRA Officer's failure to interview the Applicant or provide an opportunity to respond to credibility concerns breaches the duty of procedural fairness. According to the Applicant, acceptance of his new evidence would necessarily have led to a positive decision.

[37] There is discretion for a PRRA Officer to hold a hearing under subsection 113*(b)* of the *IRPA* if certain prescribed factors are met. The prescribed factors are set out in section 167 of the *IRPR*. It is settled law that the three factors in section 167 must be satisfied to justify a decision that the Officer ought to convoke an oral hearing. Even if these three factors are met, it only raises a presumption in favour of an oral hearing under section 113*(b);* it does not create a statutory obligation on a PRRA Officer to hold a hearing. These two sections read as follows:

Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows: (*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**113.** Il est disposé de la demande comme il suit : *b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following: (*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise : *a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97

related to the factors set out in sections 96 and 97 of the Act; (*b*) whether the evidence is central to the decision with respect to the application for protection; and (*c*) whether the evidence, if accepted, would justify allowing the application for protection.	de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur; *b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; *c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[38] It is often difficult to distinguish between a finding of insufficient evidence and a negative credibility determination. In the present case, however, there is no such difficulty. Since the PRRA Officer found that the country conditions evidence, the 2008 complaint, the letters and the sworn statement were not new evidence that could be presented under paragraph 113*(a)*, it clearly follows that the Officer's decision was based not on a lack of credibility but on the insufficiency of the evidence. To that extent, the first factor in section 167 was not engaged and an oral hearing was not required.

[39] Even if the new evidence filed by the Applicant were to be accepted and was considered to meet the test for new evidence under paragraph 113*(a)*, and even if it could be said to relate to the Applicant's credibility, it would still not be sufficient to justify an oral hearing. First of all, the letters and the complaint originate from third parties, and it is not clear what the Applicant could have added with respect to that evidence:

> Apart from restating some of Mr. Kadjo's history in Cote d'Ivoire, the only new information contained in these letters indicated that since his departure from the country, the authorities continued to seek out Mr. Kadjo for the stated purpose of arrest and torture.

> Mr. Kadjo was in no position to speak to the reliability of this evidence because he was not privy to the information it contained. In the context of a PRRA application, an oral hearing is only required where the conditions of s. 167 are met and only where "there is evidence that raises a serious issue of the applicant's credibility". This must be evidence that the applicant is in a meaningful position to address, which will rarely be the case where the new information comes from a third party and involves matters that cannot be directly attested to by the applicant. In this context, the failure to conduct an oral hearing did not breach a duty of fairness nor was the Officer required to explain why an oral hearing was not convened.
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> *Kadjo*, above, at para 19.

[40] Moreover, a careful reading of the RPD decision shows that the Applicant's refugee claim was dismissed as a result of a number of credibility concerns. I do not find that the evidence filed by the Applicant before the PRRA Officer, even if accepted as true, would be sufficient to lead to a positive disposition of his PRRA assessment. As noted in *Selduz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 583 at paras 28-31, where an applicant's allegations were rejected by a PRRA officer, the applicant would need to respond to the totality of the RPD's findings in order to obtain a positive PRRA application. Here, the letters merely show continuing interest in the Applicant, but do not address the various discrepancies and inconsistencies in his testimony and the fact that he had no trouble travelling and obtaining a passport. When combined with the fact that the letters were written by interested parties and that no explanation was provided as to why they were not submitted to the RPD, I cannot but find that this "new" evidence would not justify allowing the application for protection and therefore does not justify a hearing.

[41] Accordingly, I am of the view that the PRRA Officer did not err in not granting an interview to the Applicant.

iii) Did the PRRA Officer breach the duty of procedural fairness by ignoring or failing to assess submissions, the Applicant's sworn statement, and country conditions evidence?

[42] The Applicant submits that the PRRA Officer ignored counsel's submissions, his sworn statement, and the country conditions evidence post-dating the RPD decision in his refugee claim. These materials set out and describe an additional ground of risk that the Applicant would face as an ethnic Tamil returning from Canada (a class of persons that Sri Lankan authorities associate with the LTTE), recent encounters between Sri Lankan security forces and the Applicant's spouse and children, and the rapidly deteriorating situation of Tamils in Sri Lanka. The Applicant argues that this constitutes relevant and contradictory evidence and that the PRRA Officer was required to explain why it was not satisfactory.

[43] I do not agree that the PRRA Officer disregarded the country conditions evidence post-dating the RPD decision. The PRRA Officer specifically stated that the articles post-dating the RPD decision could not be considered new evidence as the Applicant had not explained how they were relevant to his personal circumstances or how they rebut many of the findings made by the RPD less than a year before. It is well established that one needs more than country conditions evidence to establish a personalized risk.

[44] As for the allegation that the Applicant was particularly at risk because he is a failed refugee claimant from Canada, it was not made before the RPD, it was only briefly mentioned in four lines of the 23-page submission filed by his counsel as part of his PRRA application, and it was not substantiated. In that context, the PRRA Officer cannot be faulted for not having dealt with this claim.

[45] I find, therefore, that the PRRA Officer's consideration of the evidence was reasonable.

[46] As a result, this application for judicial review ought to be dismissed. No question is certified.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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