Federal Court  Cour fédérale

Date: 20140623

Docket: IMM-7417-13

Citation: 2014 FC 601

Ottawa, Ontario, June 23, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SIVAEESAN THAVACHCHELVAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 25-year-old Sri Lankan Tamil. On April 10, 2012, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected his claim for Convention refugee status. The Court denied his application for judicial review on January 28, 2013. His applications for Pre-Removal Risk Assessment [PRRA] and an exemption on the basis of humanitarian and compassionate grounds were also rejected on September 16, 2013.

[2] The applicant promptly filed an application for leave and judicial review of the decision rendered on September 16, 2013 by Thierry Alfred N'kombe, Pre-Removal Risk Assessment Officer [PRRA officer or Officer], wherein the applicant's PRRA application was dismissed because he was not deemed to be a person who faced a risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if he were to return to Sri Lanka.

[3] In the meantime, the applicant's removal was scheduled for December 20, 2013 and his request for a deferral of removal was denied on December 11, 2013 by Law Enforcement Officer, Henry Kwan [removal officer]. However, on December 18, 2013 Justice Noël allowed the applicant's motion to stay his removal pending the judicial review of the removal officer's decision (Docket IMM-7938-13).

[4] Justice Noël stated in his Order that "it is in the interest of justice that the […] application [against the decision of the removal officer] be dealt with by a judge of the Court with complete records" (Docket IMM-7938-13). By Order made on March 20, 2014, the present application for judicial review of the PRRA officer's negative decision was heard by the Court on June 11, 2014 concurrently with the judicial review application challenging the legality of the refusal to defer by the removal officer (Docket IMM-7938-13).

[5] It is well-settled that the assessment of evidence by a PRRA officer is reviewable on the standard of reasonableness. In essence, the PRRA officer rejects the applicant's claims that he was at risk by virtue of being a Tamil from the north or east of Sri Lanka, and by virtue of being a failed refugee claimant. The applicant's counsel submits that the PRRA officer's reasons for

discarding highly relevant evidence of risk are capricious and arbitrary, that he made a selective reading of the documentary evidence and that his conclusion of absence of personalized risk is otherwise unreasonable.

[6] The respondent's counsel agrees that the documentary evidence is contradictory but denies that the Officer undertook a selective reading of it. He submits that the Officer did not act unreasonably in concluding that there is insufficient information establishing that the applicant will be personally at risk upon return to Sri Lanka. While he acknowledges that some Tamils are singled out for questioning or are even detained upon arrival, this is done on suspicion that the returnees are LTTE supporters or sympathizers. There was no evidence on record that the applicant is a person of interest to security forces. In particular, the PRRA officer referred to the applicant's testimony before the RPD that he is not suspected of being an LTTE supporter.

[7] I accept the arguments made in this case by the applicant.

[8] The PRRA officer's reasoning for discarding the totality of the most contemporary evidence of risk submitted by the applicant is essentially based on the sole opinion of certain Officials of the UK Border Agency [UKBA], who "explained that based on the limited and anonymous information provided by [Human Rights Watch] and [Freedom from Torture], … did not consider this sufficient evidence to change its policy on Sri Lankan returns." Reference is also made in the UKBA report of December 2012, to an Upper Tribunal decision of the Immigration and Asylum Chamber in the UK which also states that the allegations from Human Rights Watch and Freedom from Torture lacked substance. The Officer also assesses Canada's

own National Documentation Package, rejecting the Response to Information Request LKA104245.E (February 12, 2013) again because the allegations that Tamil returnees are arrested or detained are "mostly based on foundations that were proven to be unreliable." Relying on the observations by the UKBA and other UK officials, he states that "I give very little weight to the allegations of detention and torture as reported in LKA104245.E."

[9] There is a fundamental problem with the outright dismissal of all relevant information provided by Human Rights Watch, Freedom from Torture and response to Information Request included in Canada's own National Documentation Package for the sole reason that it is "anonymous". These are very credible and internationally recognized organizations. Protecting the sources of their information is central to their mandate of exposing human rights violations. Peoples' lives could be put at risk if there was personal information which could be used to identify the people who reported abuse, including Tamil returnees and failed refugee claimants, as well as their friends and family members.

[10] In June 2013, Freedom from Torture made submissions to the Foreign Affairs Committee in the UK on this issue, saying that the organization:

> […] has repeatedly explained that we are not in a position to disclose identifying details because this would breach our confidentiality and data protection obligations and, in any case, as an expert witness, or potential expert witness, in adversarial proceedings against the Secretary of State for the Home Department involving the individuals whose cases were included in our research, it would not be appropriate for us to discuss directly case details with the UKBA.
>
> A wider point […] is the danger that this approach could be construed as supportive of efforts by other governments to undermine human rights research by challenging methods of presenting research, including anonymisation and aggregation,

> aimed at protecting the identities of human rights victims and highlighting patterns of abuse.

[11] The fact that the identities of sources are often concealed is even apparent in the documentation relied upon the Officer to reject the applicant's claim. In particular, he cites the letter from the British High Commission in Colombo, issued in December 2012, which merely identifies people as "a spokesperson for the Swiss Embassy", "a spokesperson for the Australian High Commission", "a caseworker in Sri Lanka", "an international agency", "an international agency" "a Colombo based independent organization" and so forth.

[12] Similarly, the Danish Immigration Service, in a 2010 report entitled "Human Rights and Security Issues concerning Tamils in Sri Lanka", notes that in consulting Sri Lankan authorities, diplomatic missions, international organizations, local NGOs and the media, some sources refused to be cited by name "because they had concerns for both their own security and (possibly) the security of those they were assisting." (At 5)

[13] Moreover, the UKBA's own Country Policy Bulletin: Sri Lanka from March 2013 indicates that the Freedom from Torture report has not been entirely dismissed by UK Courts or authorities despite the anonymous sources. The Bulletin identifies a 2012 UK High Court decision recognizing an interim relief application on the basis that "[i]t is a combination, both of residence in the UK and an actual or perceived association on any level with the LTTE which places individuals at risk" (*R (on the application of Qubert) & Ors v Secretary of State for Home Department*, [2012] EWHC 3052 (Admin) at para 10, cited in the UKBA, Country Policy Bulletin: Sri Lanka (March 2013). The Court notes that "there has come to light significant new

material, specifically in the form of a number of reports, but also particularly in the form of a report from Freedom From Torture, dated 13 September, which it is said on behalf of the claimants, makes it clear that there is a sufficient risk that any Tamil being removed from the UK and being returned to Sri Lanka would be at risk of torture."

[14] The UK High Court goes on to assess whether the Freedom from Torture report justifies suspending all returns pending reconsideration of the policy "in light of what is revealed from that report and the report of other similar organisations." (at para 8) The Court finds that although "this report is insufficient as a basis for adopting a generic approach and, therefore, granting claims for interim relief across the board so as effectively to cause this flight to be abandoned", the report nonetheless "require[s] the individual claims to be looked at on an individual basis in order to see what evidence there is which reveals that any or all of the individuals may fall within that category which puts them at risk." (at para 10)

[15] In passing, the PRRA officer also seems to attach great importance to the fact that there are "sign[s] that the government of Sri Lanka is focused on rebuilding", including lifting the state of emergency in August 2011 and releasing many but not all suspected LLTE members who had been detained, while also noting that voluntary returns continue. The problem is that torture, continues in Sri Lanka, as attested in numerous recent documents, and that such resettlement is taking place under the auspices of the UNHCR and does not include failed refugee claimants like the applicant.

[16] The applicant also submits that a number of reports and news releases are not addressed by the Officer, including "Le règne de l'arbitraire – Étude du phénomène tortionnaire au Sri Lanka" (Action des chrétiens pour l'abolition de la torture [ACAT], June 2012) and "Lankan deported from Canada tortured in Colombo" (Lankasri news, October 10, 2012). The applicant also provides a number of other contemporary documents, including the article, "Too late, the Federal Office of Migration suspends the repatriations to Sri Lanka" (Forum Asile, September 3, 2013), which says that the Swiss government halted the deportation of failed Sri Lankan refugee claimants because of reports of their arrest and torture.

[17] The Court recently reiterated that "failure by a tribunal to take into account material evidence amounts to a reviewable error, and that the Board has an obligation to refer to important evidence regarding country conditions that goes to its ultimate findings: *Polgari v Canada (MCI)*, (2001) FCT 626 (FCTD)" (*Suppaiah v Canada (Minister of Citizenship and Immigration*, 2013 FC 429 at paragraph 30).

[18] Despite the differing views one may entertain with respect to the level of risk based on ethnicity or based on-being a failed refugee claimant, the documentation clearly and univocally indicates that persons with perceived connections to the LTTE are targeted and can be arrested and tortured (sometimes even many months after their return to Sri Lanka). For example, the ACAT report states that:

> En 2011 et 2012, des Sri Lankais d'ethnie tamoule, renvoyés dans leur pays, parfois après avoir été déboutés de leur demande d'asile, ont indiqué avoir été torturés et soumis à des mauvais traitements à leur retour au Sri Lanka, pour leur faire avouer des liens présumés avec les Tigres tamouls. Un Tamoul renvoyé du Royaume-Uni et arrêté le 29 décembre 2011 allègue avoir été frappé et brûlé avec

> des cigarettes par des militaires pendant son interrogatoire. On lui aurait plongé la tête dans du kérosène. Il aurait été également suspendu par les pieds et la tête immergée dans un seau d'eau et du piment lui aurait été appliqué sur la tête et sur le torse. Ces méthodes auraient visé à lui faire avouer qu'il était membre des LTTE. Une note de la Commission d'immigration et du statut de réfugié du Canada corrobore ce type d'informations et fait état de mauvais traitements et de tortures pour des personnes détenues à l'aéroport et soupçonnées d'avoir des liens avec les LTTE. (At 16, emphasis added)

[19] The applicant also submits that the Officer has erred in not using the most recent UNHCR Eligibility Guidelines for assessing the International Protection needs of Asylum-seekers from Sri Lanka, from December 21, 2012 [Guidelines], and has rather has used the 2010 Guidelines. The applicant specifically points out that the Guidelines state that arbitrary detention is practiced widely post conflict and that the majority of returnees are visited at home by the military or police for further registration.

[20] The Guidelines state at page 27:

> … previous (real or perceived) links that go beyond prior residency within an area controlled by the LTTE continue to expose individuals to treatment which may give rise to a need for international refugee protection, depending on the specifics of the individual case. The nature of these more elaborate links to the LTTE can vary, but may include people with the following profiles:
>
> > 1) Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
> >
> > 2) Former LTTE combatants or "cadres";
> >
> > 3) Former LTTE combatants or "cadres" who, due to injury or other reason, were employed by the

> LTTE in functions within the administration, intelligence, "computer branch" or media (newspaper and radio);
>
> 4) Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
>
> 5) LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE;
>
> 6) Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles. [emphasis added]

[21] The Guidelines go on to state that "[p]ersons of the above profile are, depending on the individual circumstances of the case, likely to be in need of international refugee protection on account of their (perceived) political opinion, usually linked to their ethnicity. The same is likely to apply to family members and other dependants of individuals with the above profiles. " (At 28, emphasis added) The Guidelines also state that "[i]nformation has been published documenting cases of mistreatment and torture of women and men in detention (police custody or other forms of detention), for reason of their or their family members' alleged former links with the LTTE." (At 27)

[22] Similarly, the Guardian cites Keith Best, chief executive of Freedom from Torture, that "[w]e have shown that those with even low-level LTTE links, whether real or perceived, are at risk of torture, but our writings have not been acted upon." ("Sri Lankans expelled from UK allege torture after deportation to Colombo", February 12, 2013") The Swiss Refugee Council

report also notes that "[t]he authorities also extend their suspicions to acquaintances and relatives of former members of the LTTE." ("Sri Lanka: Current Situation", November 15, 2012 at 12).

[23] There is another and special reason to intervene in this case. Though no fault of the applicant, it turns out that because of the sole negligence of his former immigration consultant, not all evidence connecting him with a convicted LTTE member, was presented to the PRRA. In his two affidavits (stay motion and application), the applicant explains that when he came to Canada he could not speak English. His Tamil interpreter who helped him prepare his PIF told him not to mention his cousin's ongoing legal issues since he would be labelled an LTTE supporter and his case would be refused. The applicant also disclosed the information to the consultant who prepared his PRRA application, Mr. Surendra Sivagnanam, who said he was going to do work with a lawyer from Mr. Joseph Allen's office. The applicant gave him the relevant Court documents concerning his cousin as well as a petition to the President of Sri Lanka made on August 12, 2012 by his uncle asking for the release of his son.

[24] The applicant's request for an administrative stay to the removal was based on this new fact unmentioned by the PRRA officer in the impugned decision: the conviction of the applicant's first cousin for terrorist activities in July 2012 in Sri Lanka. This key information was not raised in his application for refugee status before the RPD since his cousin had not yet been convicted. Unfortunately, it now appears that the post IRB information in support of the PRRA application made on May 1st, 2013 was never submitted by the immigration consultant. On December 6, 2013, Justice Noël decided to stay the removal order, because the new documentation submitted to the removal officer who refused to defer the removal "was

incompletely submitted to a Pre-Removal Risk Assessment Officer and could have been at least in part presented to the Refugee Protection Division". In view of the case law of the Court (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 25), Justice Noël's grant of a stay constitutes a very strong indication that the removal officer has made a reviewable error, rendering the refusal to defer unreasonable.

[25] The applicant's new evidence was highly relevant and could have changed the PRRA officer's conclusion that the applicant does not come within the category of persons being suspected of having links with the LTTE. The new evidence directly relates to the applicant's cousin arrest, charges and conviction. For example, the cousin's detention orders specify that "there are reasons to suspect that he is involved in the commission of the offences under [*the Emergency (Miscellaneous Provisions and Powers) Regulations*, No 1 of 2005] viz having connections with the LTTE International Intelligence Network" and that he is "an active member of the LTTE organization" while the indictment brought before the High Court of the Colombo Judicial Zone, dated February 23, 2012, states that the cousin "planned … to create or bring about heinous act during the period between 5 July 2006 and 5 December 2006 in Kelaniya … where on the instruction of Shanmugasundaram Kanthaskaran, a person involved in the LTTE an anti-state movement, he has purchased 10 tractors for the LTTE movement."

[26] Moreover, the applicant states that the authorities have a paper-trail linking him to his cousin: namely, he lived with his cousin's father in Colombo from December 2007 until his departure, and he also visited his cousin in prison. The applicant registered himself with the police when he arrived, including stating that he was living with his uncle at the specific address.

The applicant visited his cousin twice at the Magazine prison in Colombo. Each visit was allegedly recorded. At the risk of repeating myself, as the documentary evidence above suggests, an individual may be personally at risk as a result of a connection with a family member connected to the LTTE.

[27] For these reasons, the present application is allowed. The impugned decision made on September 16, 2013 is set aside and the matter returned for reassessment and redetermination by another Pre-Removal Risk Assessment Officer. Accordingly, the application for judicial review of the removal officer's refusal to defer the removal of the applicant to Sri Lanka has become moot and the Court has dismissed same today (2014 FC 602).

[28] The present application is allowed.

[29] Counsel agree that there is no question of law of general importance warranting certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The impugned decision made on September 16, 2013 is set aside and the matter returned for reassessment and redetermination by another Pre-Removal Risk Assessment Officer. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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