IMM-1187-09

IMM-1185-09

2009 FC 885

Sathiyakrishna Pathmanathan (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: PATHMANATHAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.)

Federal Court, Kelen J.—Toronto, September 2; Ottawa, September 9, 2009.

Citizenship and Immigration — Exclusion and Removal — Removal of Refugees — Judicial review of two decisions by immigration officer denying applicant's pre-removal risk assessment application, humanitarian and compassionate application for permanent residence under Immigration and Refugee Protection Act, s. 25 — Applicant, young Tamil male from northern Sri Lanka, unsuccessful refugee claimant — Immigration officer relying on U.K. Asylum and Immigration Tribunal decision, concluding applicant would not be at risk if relocating to Colombo — Officer also relying on new sources of information describing major changes in Sri Lanka's country conditions, i.e. end of civil war, reduction of risk to Tamils — Officer breaching procedural fairness by failing to notify applicant of reliance on new information sources, provide applicant opportunity to respond thereto — Officer also breaching procedural fairness by failing to give applicant opportunity to respond to officer's reliance on U.K. Asylum and Immigration Tribunal decision — Tribunal decision constituting significant, prejudicial development affecting applicant's case — Case law should not be used as evidence of country conditions — Also unreasonable for officer to make decisions until war in Sri Lanka over — Applications allowed.

Administrative Law — Immigration officer relying on U.K. Asylum and Immigration Tribunal decision as evidence in denying applicant's pre-removal risk assessment application, humanitarian and compassionate application for permanent residence — Administrative tribunal's decision not constituting evidence but rather judicial, quasi-judicial consideration of evidence produced by witnesses.

These were applications for judicial review of two decisions of an immigration officer denying the applicant's pre-removal risk assessment (PRRA) application and his humanitarian and compassionate application (H&C) for permanent residence under section 25 of the *Immigration and Refugee Protection Act*. The applicant was a young Tamil male from the north of Sri Lanka whose refugee claim was denied. In his applications, which were initially submitted in 2004 but which were periodically updated, the applicant claimed that he would be at risk from the Liberation Tigers of Tamil Eelam, pro-government militias and the government in Colombo given his previous detention by the government. The immigration officer rendered her decisions in early 2009. In making her decisions, she relied on a decision of the U.K. Asylum and Immigration Tribunal, which held that non-governmental organizations assisted northern Tamils who relocated to Colombo after failing to claim asylum in the U.K. The officer therefore concluded that the applicant would not be at risk or suffer undue hardship if he relocated to Colombo and that the city met the two-pronged test as a viable internal flight alternative.

The issues were whether the immigration officer breached her duty of fairness by not allowing the applicant an opportunity to respond to the significant events in Sri Lanka that occurred in late 2008 and early 2009 and by

relying on a U.K. Asylum and Immigration Tribunal decision that was not disclosed to the applicant, and whether she considered all the evidence.

Held, the applications should be allowed.

Procedural fairness required the officer to notify the applicant of the reliance, in making her findings, on new sources of information, such as three British Broadcasting Corporation articles from early 2009 describing major changes in Sri Lanka's country conditions. Those articles showed the impending end of the civil war and reduction of risk to a Tamil like the applicant. The officer should have provided the applicant with an opportunity to respond to this information and her failure to do so constituted a breach of the duty of fairness.

The officer breached the applicant's right to procedural fairness by failing to give him the opportunity to respond to the officer's reliance on a U.K. Asylum and Immigration Tribunal decision that was not disclosed to the applicant. That decision was held by the English High Court of Justice not to be an authoritative statement on risk for Tamils in Sri Lanka. The decision was a "significant and prejudicial development affecting the applicant's case". The risk assessment conclusions therein reduced the risk of detention upon return to Sri Lanka in the officer's view. Case law should not be used as evidence of country conditions. An administrative tribunal's decision is not evidence but rather a judicial or quasi-judicial consideration of evidence produced by witnesses, which witnesses may not be the most authoritative on a particular subject.

It was unreasonable for the immigration officer to make the PRRA and H&C decisions in February 2009 when the war in Sri Lanka had just started three months before. Given that the war conditions there, particularly involving Tamils, were volatile and dangerous, it was unreasonable to make these decisions until the war was over.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25 (as am. by S.C. 2008, c. 28, s. 117).

CASES CITED

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173; *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461, 161 D.L.R. (4th) 488, 45 Imm. L.R. (2d) 131 (C.A.).

CONSIDERED:

Ramanathan v. Canada (Minister of Citizenship and Immigration), 2008 FC 843, 74 Imm. L.R. (3d) 85; *AN & SS (Tamils – Colombo – risk?) Sri Lanka CG*, [2008] UKAIT 00063; *NA v. United Kingdom* (2009), 48 E.H.R.R. 15 (E.C.H.R.); *SS (Sri Lanka), R (on the application of) v. Secretary of State for the Home Department*, [2009] EWHC 223 (Admin).

REFERRED TO:

Sketchley v. Canada (Attorney General), 2005 FCA 404, [2006] 3 F.C.R. 392, 263 D.L.R. (4th) 113, 44 Admin. L.R. (4th) 4; *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 964; *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, 72 Imm. L.R. (3d) 201.

APPLICATIONS for judicial review of two decisions of an immigration officer denying the applicant's pre-removal risk assessment application and his humanitarian and compassionate application for permanent residence under section 25 of the *Immigration and Refugee Protection Act*. Applications allowed.

APPEARANCES

Micheal T. Crane for applicant.

Judy Michaely for respondent.

SOLICITORS OF RECORD

Micheal Crane, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

[1] KELEN J.: These two applications are for judicial review of two decisions rendered by an immigration officer who denied the applicant's pre-removal risk assessment application (PRRA) in a decision dated February 3, 2009 and the applicant's humanitarian and compassionate (H&C) application for permanent residence under section 25 [as am. by S.C. 2008, c. 28, s. 117] of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) in a decision dated February 4, 2009.

FACTS

Background

[2] The applicant is a 33-year-old citizen of Sri Lanka. He has no children. The applicant lives with his brother and his brother's wife and their two children.

[3] The applicant entered the United States on January 15, 2000 and claimed refugee protection. Then, the applicant entered Canada on April 15, 2000, before his application for refugee status could be completed in the U.S. The applicant proceeded to claim refugee protection in Canada.

[4] On May 22, 2001, a panel of the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) heard the applicant's claim for refugee protection. The basis of the applicant's claim for refugee protection was fear of persecution for reasons of race, imputed political opinion, and membership in a particular social group. The applicant claimed that the Sri Lankan army, the police, and the Liberation Tigers of Tamil Eelam (LTTE) persecuted him because he was a young Tamil male from the north of Sri Lanka.

[5] On July 11, 2001, the Board denied the applicant's claim for refugee protection. The Board found that the applicant was not credible, trustworthy, and not able to produce credible evidence that he lived in the north, thus the applicant could not be found to be a "young Tamil male" from the north of Sri Lanka, which was the basis of the applicant's refugee claim (Board reasons, at page 4).

[6] On November 6, 2001, this Court denied leave to judicially review the Board's decision.

[7] The applicant filed an H&C application for permanent residence under section 25 of the IRPA on March 19, 2004. No affidavits were submitted at the time of the initial H&C application in 2004. Instead the applicant referred the officer to the narrative in his Personal Information Form (PIF) and the submissions of his representative. His submissions stated that his H&C application was based on his solid employment record, volunteer activities, family ties in Canada, and the risks of returning to Sri Lanka.

[8] The applicant filed a PRRA application on April 8, 2004. The PRRA application was based upon the applicant's risk in Sri Lanka as a young Tamil male from the north of the country. The applicant filed an affidavit in support of his PRRA application in 2004. In his affidavit he states his fear of being detained,

arrested, and tortured by government forces, pro-government militias, and the LTTE. The applicant's fear of detention by the government is based upon an incident in 2000 where he was detained by the government for five days. The applicant also states his fear of being a target for extortion and kidnapping for having lived in Canada for several years and having a brother that is established here.

[9] The applicant filed updates to both applications on May 22, 2007 and September 23, 2008.

[10] The applicant submitted new affidavits in his May 22, 2007 PRRA and H&C updates. His affidavit stated that he was seeking to be granted admission to Canada on the grounds of establishment, risk, undue hardship, and family reunification. The applicant's affidavit describes the poor security and human rights conditions in Colombo and the risks of arrest and extortion he could face upon return.

[11] In his 2007 update, the applicant submitted an affidavit by his brother, who stated that the applicant would have no one to turn to upon return to Sri Lanka and that his identity as a young Tamil male from the north would require him to hide and subsist without meaningful work. The applicant's brother further stated that it would be undue hardship for the applicant to be separated from his family because he is an uncle to his two young nieces and has been living with them for about six years.

[12] On September 23, 2008, the applicant filed new affidavits by himself and his brother to update his PRRA and H&C applications.

[13] In his 2008 update affidavit the applicant explained that he would be at risk from the LTTE, pro-government militias, and the government in Colombo because he was detained in the past by the government and he could not show a valid reason for living in Colombo. The applicant also stated that he could not live or work anywhere else other than the volatile north because one requires a valid reason for being anywhere in Sri Lanka if one is not originally from that area.

[14] In his 2008 update affidavit the applicant's brother echoed the applicant's concerns over the inability to relocate to anywhere in the south or centre of Sri Lanka without having a valid reason.

[15] The immigration officer rendered the PRRA decision on February 3, 2009 and the H&C decision on February 4, 2009.

Decisions under review

PRRA decision

[16] The immigration officer states at page 4 of the PRRA decision that the applicant was unable to rebut the negative credibility findings of the Board with respect to his alleged profile as a young Tamil male from the north of Sri Lanka who lived in Jaffna.

[17] The officer then considered Sri Lanka's current country conditions. The officer reviewed a variety of country reports and news items. The officer relied upon a decision of the U.K. Asylum and Immigration Tribunal which held that non-governmental organizations offered assistance to northern Tamils who relocated to Colombo after failing to claim asylum in the U.K. (PRRA decision, at page 4).

[18] The officer concluded at page 7 of the PRRA decision that the applicant would not be at risk if he relocated to Colombo and that the city meets the two-pronged test as a viable internal flight alternative [IFA]:

> It is determined that a reading of current, objective documentary evidence supports that the applicant would not be subject to a serious possibility of persecution in Colombo, nor would it be unreasonable or unduly harsh for him to relocate to that city. Evidence informs that should it be required by the applicant, police protection is available in Colombo, and that NGOs and other organizations are available to assist the applicant with his relocation upon his return to that city.

H&C decision

[19] The H&C decision relied on the same objective evidence that was cited in the PRRA decision. The officer concluded that it would not constitute undue hardship for the applicant to avail himself of his internal flight alternative to Colombo. The officer states at page 4 of the H&C decision that there is no evidence that supports the applicant's argument that he could not relocate to Colombo or that the government will be detaining him upon return.

[20] The officer concluded that the hardships associated with the risk of returning to Sri Lanka are not unusual and undeserved or disproportionate to the applicant.

ISSUES

[21] The applicant raises the following issues in this application:

1. Did the officer err in law or make a mistake of fact or an error in fairness or exceed jurisdiction?

2. Did the officer err in law or make a mistake of fact or an error in fairness or exceed jurisdiction in relation to the finding that there is an IFA based on a United Kingdom refugee tribunal decision?

[22] I have reformulated the list of issues as follows:

a. Did the immigration officer breach her duty of fairness by not allowing the applicant an opportunity to respond to the significant events in Sri Lanka that occurred in late 2008 and early 2009?

b. Did the immigration officer breach the duty of fairness by relying on a United Kingdom Asylum and Immigration Tribunal decision that was not disclosed to the applicant?

c. Did the immigration officer have proper regard to all the evidence?

STANDARD OF REVIEW

[23] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada reconsidered the number and definitions to be given to the various standards of review, as well as the analytical process employed to determine the appropriate standard in a given situation. As a result of the Court's decision, the standard of patent unreasonableness has been eliminated, and reviewing courts must focus on only two standards of review, reasonableness and correctness. In *Dunsmuir*, the Court also held that where the type of decision being reviewed has been thoroughly assessed in the preceding jurisprudence, subsequent decisions may rely on that standard.

[24] The first two issues relate to procedural fairness. It is trite law that questions of procedural fairness are reviewed on a standard of correctness (see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392).

[25] The third issue concerns the reasonableness of the officer's decision and whether the officer had proper regard to all the evidence when reaching a decision. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 62, the Supreme Court of Canada established that reasonableness is the appropriate standard of review for H&C application decisions.

[26] It is clear as a result of *Dunsmuir*, above, that such questions are to be reviewed on a standard of reasonableness: see *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 964;

Ramanathan v. Canada (Minister of Citizenship and Immigration), 2008 FC 843, 74 Imm. L.R. (3d) 85; and *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, 72 Imm. L.R. (3d) 201.

[27] In reviewing the officer's decisions using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

ANALYSIS

Issue No. 1: <u>Did the immigration officer breach the duty of fairness by not allowing the applicant an opportunity to respond to the significant events in Sri Lanka that occurred in late 2008 and early 2009?</u>

[28] In the PRRA decision, the officer commented on recent developments in the Sri Lankan civil war. The officer stated as follows at page 5 of the PRRA reasons:

> Since the beginning of January 2009, the rebels have lost their de facto capital, Kilinochchi, Elephant Pass, a land bridge that links the Jaffna peninsula with the mainland and recently the coastal town of Mullaitivu, which acted as one of their key military bases. (BBC, Winning war and peace in Sri Lanka, 2009) This marks a new phase in the fighting between the security forces and the Tamil Tiger rebels. Along with the help of international donors, the capture of Kilinochchi has helped to rebuild some of the public buildings destroyed by years of intense fighting. New shops have opened, produce from surrounding areas has started coming to the local market and the reopening of the A9 highway has linked the town with the rest of the country. (BBC, *Key loss will test Tiger Tamils*, 2009) With its advances in the east of the country in 2007 and the progress in the north in 2008, most of Sri Lanka is now under government control (BBC, Q&A: Sri Lanka Crisis, 2009).

[29] The applicant states in his affidavit that there was no communication from the PRRA officer until he received the final decision. The applicant disagrees with the findings of the officer about current conditions, specifically the status of the A9 highway and the condition of Tamils in Sri Lanka, which he states have deteriorated since the late 2008 phase of the fighting started.

[30] The applicant argues that the officer erred in failing to give the applicant the opportunity to make submissions and file evidence regarding the "new phase" of the Sri Lankan Civil War, which refers to the events in late 2008 and the beginning of 2009. The applicant submits that the duty of fairness was breached when the officer took into account the weakened state of the LTTE in concluding that the risk to the applicant has subsided. Had the applicant been informed of the officer's inclinations to reach the conclusion on recent developments, it is submitted that the applicant would have filed evidence to show that the risk to Tamil males and Tamil civilians remains the same or is in fact heightened.

[31] The applicant relies on *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.). In *Mancia*, Décary J.A. refined the law as it relates to the obligation to inform applicants of new developments at paragraph 27:

> (a) with respect to documents relied upon from public sources in relation to general country conditions which were available and accessible at Documentation Centres at the time submissions were made by an applicant, fairness does not require the post claims determination officer to disclose them in advance of determining the matter;
>
> (b) <u>with respect to documents</u> relied upon from public sources in relation to general country conditions which became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the post claims determination officer where <u>they are novel and significant and where they evidence changes in the general country conditions that may affect the decision</u>. [Emphasis added.]

Décary J.A. held that in deciding whether fairness required disclosure, regard must be had to the following factors (*Mancia*, above, at paragraph 23):

> … (a) the nature of the proceeding and the rules under which the decision-maker is acting; (b) the context of the proceeding; and (c) the nature of the documents at issue in such proceedings.

[32] In my view, *Mancia*, above, requires disclosure of documents produced after the applicant's updated submissions, which evidence changes in the general country conditions that affect the PRRA and H&C decision.

[33] The officer relied on three BBC [British Broadcasting Corporation] articles from early 2009 which describe major changes in Sri Lanka's country conditions that affected the officer's decision. The applicant submits that the officer found that the near collapse of the LTTE reduced the risk to the applicant. It was submitted that disclosure would have allowed the applicant to respond by filing additional evidence that shows that the risk to Tamil males or Tamil civilians has not decreased and that the main highway to Jaffna, the A9 highway, has not in fact reopened.

[34] The applicant is correct in indicating that the impugned articles evidence a major change in Sri Lanka's country condition. The Civil War appeared to be drawing to a close according to the new BBC materials. The shift of Sri Lanka from a country embroiled in a decades-long civil war to normalcy is a significant and novel change in country conditions. Procedural fairness required the officer to notify the applicant of the reliance upon these new sources of information, which showed the impending end of the civil war, and reduction of risk to a Tamil like the applicant, and provide the applicant with an opportunity to respond. This is a breach of the duty of fairness.

Issue No. 2: Did the immigration officer breach the duty of fairness by relying on a United Kingdom Asylum and Immigration Tribunal decision that was not disclosed to the applicant?

[35] The officer relied on a United Kingdom Asylum and Immigration Tribunal decision of *AN & SS (Tamils – Colombo – risk?) Sri Lanka CG*, [2008] UKAIT 00063 to support both the H&C and PRRA decisions. The officer reproduced parts of this decision at pages 6–7 of the PRRA decision and at page 4 of the H&C decision. The officer quoted the risk assessment in *AN & SS* which held that relocation to Colombo, even without a family network, was not difficult and that the risk of detention is minimal for low profile or grassroots activists and even if detained, such detention is likely to be short.

[36] The H&C and PRRA decisions indicate that the officer relied on *AN & SS* to support the conclusion that appears at page 4 of the H&C decision and at page 7 of the PRRA decision, namely that the risk of persecution in Colombo is not serious and that relocation to Colombo will not be unreasonable or unduly harsh if the applicant will avail himself of the local police protection and the NGOs [non-governmental organizations] that assist relocating returnees.

[37] The applicant submits that the officer erred in relying on this decision and erred in failing to allow the applicant an opportunity to respond to the officer's reliance upon it before the decisions were made.

[38] There is real doubt as to the validity of the *AN & SS* decision, which was released on June 10, 2008, as an authoritative statement on the risk of detention to Tamil returnees.

[39] The European Court of Human Rights (E.C.H.R.) came to a different conclusion than the tribunal in a decision released on July 17, 2008. In *NA v. United Kingdom*, (2008) Application No. 25904/07) [(2009), 48 E.H.R.R. 15], the E.C.H.R. held at paragraph 145 that the greatest possible caution should be taken when the returnee was previously detained because records of past detention may be accessible to Sri Lankan airport authorities and their interest in past detainees may shift with time:

> However, the Court considers that the greatest possible caution should be taken when, as in the applicant's case, it is accepted that a returnee has previously been detained and a record made of that detention.… Equally, in light of its observations at paragraphs 130–136 and 142 above, the Court finds the passage of time cannot be determinative of the risk

to the present applicant without a corresponding assessment of the current general policies of the Sri Lankan authorities …. Their interest in particular categories of returnees is likely to change over time in response to domestic developments and may increase as well as decrease.…the Court considers that there is a real risk that the applicant's record will be available to the authorities at the airport.

[40] On January 19, 2009, the Honourable Mr. Justice Lloyd Jones of the High Court of Justice, Queen's Bench Division, Administrative Court in London delivered a substantial judgment on a judicial review of decisions of the United Kingdom Secretary of State with respect to a claim for asylum involving a national of Sri Lanka. (See *SS (Sri Lanka), R (on the application of) v. Secretary of State for the Home Department*, [2009] EWHC 223 (Admin)). This judgment held that the European Court of Human Rights overruled the U.K. Asylum and Immigration Tribunal decision of *AN & SS*. Without providing more detail, suffice to say that the U.K. decision relied upon by the immigration officer has been held by the English High Court of Justice to not be an authoritative statement on risk for Tamils in Sri Lanka.

[41] In my view, the officer breached the applicant's right to procedural fairness by failing to give him the opportunity to respond to the officer's reliance upon *AN & SS*.

[42] The *AN & SS* decision was a "significant and prejudicial development affecting the applicant's case" (see my decision in *Ramanathan v. Canada (Minister of Citizenship and Immigration)*, at paragraph 25). The risk assessment conclusions in *AN & SS* reduced the risk of detention upon return to Sri Lanka in the eyes of the officer.

[43] The Court also considers that jurisprudence should not be used as evidence of country conditions. An administrative tribunal's decision is not evidence. It is a judicial or quasi-judicial consideration of evidence produced by witnesses, which witnesses may not be the most authoritative or expert on a particular subject. This in fact turned out to be the case because the High Court of Justice in England subsequently found that the administrative tribunal was not an authoritative statement of the current risk.

Issue No. 3: Did the immigration officer have proper regard to all the evidence?

[44] On a reasonableness standard, the Court finds it unreasonable for the immigration officer to make this PRRA decision and this H&C decision in February 2009. In this month, the war had just started three months before, and with hindsight, we know that the war concluded three months later. The war conditions in Sri Lanka, particularly involving Tamils, were volatile and dangerous. It was not reasonable to make these decisions until "the smoke had cleared" and the war was over. Then the immigration officer could assess the risks and determine the level of "hardship" for the applicant to return to Sri Lanka, provide the applicant with any new documents or reports upon which the immigration officer was going to rely, and provide the applicant with an opportunity to respond before making the decisions.

[45] For these reasons, these two applications for judicial review are allowed and the matters are referred back to a PRRA officer and to an H&C officer for redetermination.

CERTIFIED QUESTION

[46] Both parties advised the Court that these applications do not raise any serious questions of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

These applications are allowed and the matters are referred back to another immigration officer for redetermination.