Federal Court  Cour fédérale

Date: 20150126

Docket: IMM-5562-13

Citation: 2015 FC 101

Toronto, Ontario, January 26, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THEEPAN KULANAYAGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the decision of a Senior Immigration Officer [Officer] of Citizenship and Immigration Canada refusing the Applicant's pre-removal risk assessment [PRRA]. I dismiss the application for the following reasons.

II. Facts

[2] Theepan Kulanayagam [the Applicant] is a Tamil male, originally from Sri Lanka. He claimed before the RPD that members of the Eelam People's Democratic Party [EPDP] and the army extorted him three times while he was running his uncle's store alone. He also claimed that the third time these groups approached him, he was unable to give them more money. As a result, they thought he was also providing money to the Liberation Tigers of Tamil Eelam [LTTE], and abducted and detained him for three days, during which time they beat him. He claimed that since his departure to Canada, the EPDP and army continued to make specific enquiries about him and threaten him through his uncle and father.

[3] The RPD denied the Applicant's refugee claim on February 2, 2012, on the basis that the Applicant lacked credibility. The Board acknowledged country condition documents reporting EPDP abductions and extortion, but did not believe that the extortion alleged by the Applicant occurred and/or that his family had been questioned about his whereabouts since his departure.

[4] The Board acknowledged country condition documents reporting the LTTE resurgence that had taken place outside of Sri Lanka, including in Canada, but found the claimant was not a person who would be targeted on suspicion of LTTE affiliation.

[5] The Applicant applied for leave and judicial review of the RPD decision, but was denied leave.

[6] The Applicant thereafter submitted a PRRA application, with which he submitted (1) a statutory declaration in which he states that EPDP members and army soldiers came to search for him at his father's house and his uncle's store; (2) letters from his father and a neighbour (also a close relative) indicating that unknown persons had inquired into his whereabouts and activities in mid-January 2013; and (3) country condition documents published since the date of the RPD decision.

[7] On July 10, 2013, the Officer rejected the Applicant's PRRA Application [the Decision].

III. Decision

[8] The Officer refused the PRRA application on the basis that the Applicant had provided insufficient objective evidence that would be indicative of new risk developments in either country conditions or personal circumstances since the date of his RPD decision. The Officer checked the box indicating that the Applicant had not submitted any new evidence (Applicant's Record, p 8).

[9] The Officer found that the statutory declaration of the Applicant and letters of his father and neighbour reiterated the same material facts that were before the RPD and were not capable of rebutting the RPD's findings, specifically the findings that the Applicant was not a victim of extortion by members of the EPDP and army, and that the Applicant's family was never questioned about his whereabouts since his departure from Sri Lanka.

[10] The Officer then assessed the Applicant's claim that he would be at risk as a failed asylum seeker from Canada. He acknowledged the country condition evidence regarding screening protocols at Sri Lankan airports and the incidents of detention and harassment of returnees, noting that one of the principal areas of concern for authorities in Sri Lanka are returnees that are suspected of having ties with the LTTE. However, the Officer found that: the Applicant had failed to establish that he currently had or had had in the past any affiliation with the LTTE; the country condition documents submitted were generalized in nature; and the country condition documents did not establish a link to the Applicant's personal circumstances.

IV. Issues

[11] This matter raises the following issues:

a) Did the Officer err by refusing to accept the evidence submitted by the Applicant as "new evidence"?

b) Was the Decision reasonable?

c) Did the Officer err by failing to hold an oral hearing?

V. Relevant Provisions

[12] Section 113 of *IRPA* and subsection 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] are annexed below.

VI. Submissions of the Parties

[13] The Applicant submits that the letters he submitted should have been accepted as "new evidence" as they described events that occurred after the Applicant's refugee hearing, namely that Sri Lankan paramilitary personnel had approached and harassed both his family and neighbours with regard to his whereabouts since the RPD hearing. He further submits that the country condition documents submitted were "new evidence" as they post-dated the RPD decision and described changing country conditions in Sri Lanka. The new evidence also expanded the risks he faced.

[14] Further, the Applicant submits that the Officer erred by failing to conduct a hearing. He argues that although the Officer stated that there was "insufficient evidence" to establish risk, credibility was in fact central to the Officer's decision, and the three factors in section 167 of the Regulations were met, thereby requiring a hearing under paragraph 113(b) of *IRPA*.

[15] Finally, the Applicant submits that the Decision was unreasonable on the basis that the Officer erred in: (i) finding the Applicant had simply reargued the facts and in placing too much emphasis on the RPD's credibility finding; (ii) finding there was insufficient evidence to support the claimed risk; (iii) failing to evaluate whether the Applicant's specific profile would put him at risk if he returned to Sri Lanka; and (iv) dismissing the extensive objective country documentation because it was "generalized" in nature, when the documentation spoke directly to the risks faced by individuals with similar profiles to that of the Applicant. The Applicant submits that any one of these errors on its own is sufficient to send the matter back.

[16] The Respondent, on the other hand, submits that the Officer's finding that there was no "new evidence" was reasonable. Even if they occur after the RPD decision, new events must be "materially different" than those events earlier dismissed by the RPD. The threats described in the letters are simply more of the same sort of evidence already rejected by the RPD. Similarly, the Applicant does not show in his submissions how the country condition documentation paints a materially different picture than what was before the RPD. While the Applicant argues that his evidence showed an expanded risk in that it showed that he was perceived as being wealthy, that his family was harassed about his whereabouts, and that he had evaded authorities in coming to Canada, all three of these facts either were or could have been put before the RPD.

[17] The Respondent submits that the Officer was not required to provide the Applicant with a hearing. It is clear from the Officer's reasons that the Officer did not refuse the PRRA on the basis of credibility findings, but rather because the evidence of continued visits by the EPDP and army was not new evidence. Furthermore, even if all of the Applicant's evidence had been accepted, the evidence was insufficient to ground a positive PRRA determination.

[18] Finally, the Respondent submits that the Decision was reasonable. Contrary to what the Applicant claims, the Officer: did not require objective corroboration of the Applicant's evidence; clearly assessed the Applicant's profile as a failed asylum seeker; and reasonably found that the country condition documents did not indicate any link to the Applicant's personal circumstances.

VII. Standard of Review

[19] A PRRA Officer's rejection of evidence on the grounds that it is not new evidence under paragraph 113(a) of *IRPA* is a question of mixed fact and law, and is reviewable on a reasonableness standard: *Ponniah v MCI*, 2013 FC 386 at para 23; *Perera v MCI*, 2010 FC 699 at para 22.

[20] Although there has been some disagreement in the treatment of the standard of review with respect to whether the PRRA Officer erred by failing to conduct an oral hearing, the recent jurisprudence of this Court has held that it is also the deferential standard of reasonableness: Ibrahim v Canada (Minister of Citizenship and Immigration), 2014 FC 837 at para 6; *Bicuku v Canada (Minister of Citizenship and Immigration)*, 2014 FC 339 at paras 16-20; *Ponniah v Canada (Minister of Citizenship and Immigration)*, 2013 FC 386 at para 24; *Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647 at para 9.

[21] The appropriate standard of review for the Officer's findings of fact, issues of mixed fact and law, and whether the Officer had proper regard to all the evidence when reaching his or her decision is reasonableness: *Alvarez v MCI*, 2014 FC 564 at para 19.

[22] Having established that all three issues in this matter are to be reviewed on a standard of reasonableness, this Court will review whether there is "the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The standard is deferential because the Court should only intervene if the Decision falls outside of the range of possible, acceptable outcomes which are

defensible in respect of the facts and law: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14.

VIII. Analysis

A. *Did the Officer err in finding the statutory declaration, affidavits, and country conditions documentation were not new evidence?*

[23] It is well established that a PRRA is not supposed to be an appeal or reconsideration of an RPD decision (*Raza v MCI*, 2007 FCA 385 at para 12; *Singh v MCI*, 2014 FC 11 at paras 22-24; *Aboud v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1019 at para 20). Rather, the purpose of a PRRA is to assess new risk developments between the RPD hearing date and the removal date, in order to ensure that Canada does not remove people to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment (*Raza* at para 10; *Ponniah*, above, at para 27).

[24] To mitigate the risk of wasteful and potentially abusive relitigation, PRRA officers are expected to respect negative refugee determinations by the RPD unless there is new evidence of facts that might have affected the RPD's determination (*Raza* at para 13; *Aboud* at para 20; *Singh* at paras 22-24).

[25] Paragraph 113(a) of *IRPA* limits the evidence that may be presented to a PRRA officer to new evidence that arose after the rejection of the refugee claim or was not reasonably available at the time of the hearing, or evidence that the applicant could not reasonably have been expected to have presented before the RPD (*IRPA*, s 113(a)).

[26] In *Raza*, the Federal Court of Appeal held that paragraph 113(a) of *IRPA* requires PRRA officers to only consider "new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD" (*Raza* at para 13). Accordingly, PRRA officers are to consider all the evidence presented to them, except where the evidence is excluded on one of the following grounds:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

   If not, the evidence need not be considered.

4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.

5. Express statutory conditions:

   (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that

> he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
>
> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).
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> (*Raza* at paras 13, 15)

In this case, the Applicant submitted, with the PRRA Application: (i) his own statutory declaration; (ii) a letter from his father; (iii) a letter from a neighbour (and "close relative"); and (iv) some 1400 pages of country condition documentation. The statutory declaration, letters, and some of the country condition documents, were written after the rejection of his RPD claim.

[27] The Officer found that the personal documentation, i.e. items (i) through (iii), fit into the *Raza* exception #3(c), thus concluding that they were not "new evidence". He states at page 3 of the Decision:

> In reviewing these items, I find the applicant is essentially rearguing the facts that were before the RPD. The information described in these aforementioned documents is materially consistent with that already considered by the RPD and not capable of overcoming any of its findings. Namely, that the applicant was not a victim of extortion by members of the army and the EPDP and as a result, his family was never questioned about the applicant's whereabouts since his departure from Sri Lanka (para. 15, RPD).

[28] The RPD had found (a) that the testimony of the Applicant was inconsistent on various points, and (b) that he was not credible given that he changed his story and was evasive on more

than one occasion. As alluded to by the Officer, the Board simply did not believe that the Applicant had been extorted or that his family members had been threatened after his arrival in Canada.

[29] The Officer did not reject the evidence outright. Rather, he turned his mind to evaluating the evidence and explained why the statutory declaration and two letters failed to overcome the findings made by the Board. The Officer summarized the reasons behind the Board's negative credibility findings, found that the new facts established in the documents were not substantially different from those presented at the RPD, and explained that because the facts were materially consistent with the ones already considered by the RPD, they could not rebut the RPD's findings. In its decision, the Board had considered the alleged threats against the Applicant from the paramilitary, and rejected them. The letters and Affidavit simply provided further details regarding these same risks that had already been litigated.

[30] The RPD's finding that the Applicant's family had not been threatened by the EPDP and the army flowed out of its finding that the Applicant had not been extorted or detained in the past. Thus, to rebut the Board's conclusion on the threats, the evidence would have had to have been sufficient to rebut the Board's credibility finding or its finding that the Applicant had not been extorted by the EPDP and the army. The Board's credibility findings were based on a number of factors, including that it found the Applicant to be evasive and lacking in credibility when he was examined at the airport, and that there were several material omissions and inconsistencies between the Applicant's PIF narrative and what he told Immigration authorities regarding his fears and alleged experiences in Sri Lanka. In order for the Officer to have found

the documents compelling (or sufficient) enough to overcome the RPD findings, in my view they would have had to have show something more compelling than simply another visit from paramilitary forces, or belief that the Applicant would be at risk at the airport upon re-entry.

[31] It fell short of this, according to the Officer. The role of this court is not to reweigh the evidence – but rather to determine whether the Officer's decision was one that could reasonably have been arrived at. I find that it was.

[32] This Court considered a similar situation in *Ponniah*, above, in that the claimant alleged he had been kidnapped and beaten by a paramilitary group, and was to be at risk from the LTTE should he return to Sri Lanka. The RPD rejected the claims, raising credibility concerns and instances of inconsistent testimony of the Applicant. The Applicant produced new evidence – both of a personal nature and objective country documentation. The new evidence, like in this case, included his own sworn statement, as well as letters from family members (spouse and sister). Justice de Montigny wrote:

> [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.
>
> [Emphasis added]

[33] In other words, the evidence was simply more of the same, even though it related to new events. One must be reminded of the words of Justice Mosley on this point in the lower Court's decision in *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 22, that in assessing new evidence, "it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided" [Emphasis added].

[34] In *Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 at para 5, Justice Judith Snider held:

> It is well-established that a PRRA is not intended to be an appeal of a decision of the RPD [...].The purpose of the PRRA is not to reargue the facts that were before the RPD. The decision of the

> RPD is to be considered as final with respect to the issue of protection under s. 96 or s. 97, subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision.
>
> [Emphasis added]

[35] On the basis of the record before me, the Officer's finding that the statutory declaration and letters were insufficient to overcome the negative credibility findings of the Board, on the basis of the *Raza* criteria, was reasonable.

[36] Finally, with respect to this first issue of "new evidence", the Applicant states that the 1400 pages of country documentation submitted with the PRRA, were also unreasonably rejected. Again, in my view, the Officer reasonably found that they were not indicative of a new risk development in either the country conditions, or the Applicant's personal circumstances.

[37] Again, the Officer's findings in this regard were consistent with *Raza* and the case law regarding relevancy and materiality of "new evidence". As with the Officer's conclusion regarding the personal documentation, his finding that the documentation did not raise new risks or risk developments from those considered by the RPD, was a conclusion open to the Officer, and meets the legal test set out in *Dunsmuir*. This included a consideration of the risk that the Applicant would face as (a) a failed Canadian asylum seeker, and (b) a perceived supporter of the LTTE.

B. *Was the Decision reasonable?*

[38] I now turn to the overall reasonableness of the Decision.

[39] The officer concluded that, "Overall, the applicant has provided insufficient objective evidence that would be indicative of new risk developments in either country conditions or personal circumstances which have arisen since the date of the RPD decision" (Decision, p 3).

[40] Similar to my conclusion on the Officer's treatment of the documents submitted with the PRRA, I find the Officer's overall conclusion to be within the acceptable range of outcomes, and consistent with PRRA jurisprudence: See, for instance, *Aboud*, above; *Santheesan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1196; *Khatun v Canada (Citizenship and Immigration)*, 2012 FC 997.

[41] Contrary to the Applicant's assertion, I find that the Officer did not disregard the country condition documents submitted by the Applicant. The Officer specifically addressed the Applicant's claimed fear on the basis of being a failed asylum seeker from Canada. The Officer noted the country condition documentation in this regard, acknowledging that: screening protocols are in place at airports for returnees; returnees with certain profiles may be subject to harassment by Sri Lankan authorities; and returnees with suspected ties to the LTTE are at a higher risk of increased scrutiny upon arrival. The Officer found, however, that the Applicant had not established that he has ever had an affiliation with the LTTE.

[42] As country condition documents are insufficient on their own to establish a personalized risk (*Ponniah*, above, at para 43), it was reasonable for the Officer to find that since the

Applicant had not established an affiliation with the LTTE, his profile did not bring him within the group of failed asylum seekers that would attract the adverse interest of authorities upon their return.

[43] Finally, I disagree with the Applicant's assertion that the Officer failed to properly assess his risk profile. The Officer assessed the risk to the Applicant as a failed asylum seeker from Canada (with any perceptions of wealth that brings), just as the RPD had already assessed this issue at the Board level. It would certainly not be the first case where the Board has decided that it is no longer enough to fit the profile of a young male Tamil from the north or east of Sri Lanka to be accorded refugee status. Numerous decisions of this Court have so found. See, for instance, *Velummayilum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 742 at para 8.

[44] I quoted Justice Snider in *Perez* above. In another leading decision of hers the following year, she wrote in *Cupid v Canada (Minister of Citizenship and Immigration)*, 2007 FC 176:

> [4] […] Canada has taken steps to ensure that a claimant is provided with a process whereby changed conditions and circumstances may be assessed. It follows that, if country conditions or the personal situation of the claimant have not changed since the date of the RPD decision, a finding of the RPD on the issue of state protection - as a final, binding decision of a quasi-judicial process - should continue to apply to the claimant. In other words, a claimant who has been rejected as a refugee claimant bears the onus of demonstrating that country conditions or personal circumstances have changed since the RPD decision such that the claimant, who was held not to be at risk by the RPD, is now at risk. If the applicant for a PRRA fails to meet that burden, the PRRA application will (and should) fail.
>
> [Emphasis added]

[45] Here, the Officer's conclusions that the new evidence was insufficient to overcome the findings of the Board and that the Applicant had not established a risk by virtue of being a failed asylum claimant from Canada, were reasonable.

C. *Did the Officer err by failing to conduct an oral hearing?*

[46] The Applicant submits that the Officer breached his right to procedural fairness by failing to hold an oral hearing, since the Officer effectively challenged the credibility of the Applicant's evidence. I disagree.

[47] First, I cannot agree with the Applicant that the Officer's decision was effectively one of credibility. His decision was based on insufficiency of evidence, as he stated in his concluding paragraph cited above. I do not find the Officer to have made veiled credibility findings. He simply stated that certain evidence was not new evidence, based on materiality, and found that the other (country condition) evidence did not provide a linkage to the Applicant's personal circumstances and was insufficient to show new risk developments in country conditions or personal circumstances.

IX. Conclusions

[48] I find that the Officer's conclusions lay within a range of acceptable outcomes, and the Decision was justifiable. It therefore fell within the purview of reasonability. It is not the role of this Court to reweigh evidence to arrive at a conclusion different from that which was

legitimately open to the administrative decision-maker. Furthermore, I find that an oral hearing was not required in this case. The application is dismissed.

X. Judgment

[49] The Application is dismissed.

[50] The parties have not proposed a question for certification, and none arises.

JUDGMENT

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

There are no certified questions.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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