

Federal Court



Cour fédérale

Date: 20150521

Docket: IMM-1528-14

Citation: 2015 FC 653

Ottawa, Ontario, May 21, 2015

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

SELVATHTHURAI SUREEKUMARAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Toronto, Ontario on May 12, 2015)

[1] The Applicant has applied for judicial review of a decision of a Senior Immigration Officer [the Officer], dated January 30, 2014, [the Decision] wherein the Officer refused the Applicant's Pre-Removal Risk Assessment [PRRA] application.

[2] This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[3] The Applicant is a sixty eight year-old Tamil citizen of Sri Lanka. For the majority of his life, he resided in a village at the northern tip of the Jaffna peninsula. In 1990, the Liberation Tigers of Tamil Eelam [LTTE] gained complete control of this area, and began a campaign of forced recruitment among young Tamils, including the Applicant. He was required to dig bunkers in and around LTTE bases, but was not required to fight.

[4] After the Sri Lankan government regained control of the peninsula in 1996, the Applicant claims he was subject to frequent stops and questioning by the members of the Sri Lankan army [SLA], who demanded information about his involvement with the LTTE.

[5] In 2005 and 2007, the Applicant was detained overnight and questioned about being a LTTE member or sympathizer. In 2008, he was twice detained for periods of approximately one week. He was tortured both times and on the second occasion, was flown to Colombo for further questioning. He was released on the payment of bribes, but required to report monthly. These incidents will be referred to collectively as the "Detentions".

[6] Because the Applicant feared reporting to the SLA, his uncle paid an agent to take him to Singapore and on to Canada where he made a claim for refugee protection.

[7] The Refugee Protection Division [RPD] heard the Applicant's claim on May 20, 2010, and rejected it because the Applicant failed to establish his identity. At the time, he only had a photocopy of his Sri Lankan birth certificate. This meant that his risk of being perceived by the SLA as having links to the LTTE was not assessed before he applied for a PRRA.

[8] The Applicant sought new counsel to submit his PRRA application and retained John O. Grant [Second Counsel] who filed submissions setting out the Applicant's risks on February 22, 2011 [the Submissions]. A copy of the Applicant's Personal Information Form [PIF] was enclosed with the Submissions and it was read by the Officer.

[9] Three years later the Applicant's PRRA was refused.

[10] The Applicant then retained a third lawyer. He has alleged negligence on the part of Second Counsel. In making the allegation, the third lawyer has followed the Federal Court's Procedural Protocol, dated March 7, 2014, which concerns allegations against counsel in immigration cases.

[11] There are several allegations of negligence on the part of Second Counsel, but the one that is determinative is his failure to include in the Submissions specific references to Applicant's PIF and the Detentions, and a clear description of an alleged risk based on the SLA's perception that he was associated with the LTTE [the LTTE Risk]. Instead, the Submissions only identified the risks as extortion and a fear of arrest for being:

- i. a failed refugee claimant;
- ii. the subject of an outstanding arrest warrant; and
- iii. a person who had left Sri Lanka illegally.

I. Issues

[12] There are two issues:

1. Were Second Counsel's Submissions negligent?
2. Was the Applicant prejudiced by the negligence and was he therefore denied procedural fairness?

II. Issue I - Negligence

[13] In my view, the fact that the Submissions did not mention the PIF or the LTTE Risk is negligence [the Negligence]. I accept the Applicant's submission that Second Counsel had a duty to identify, develop and advance his Detentions and torture and the LTTE Risk as an independent ground of risk in the Submissions. The simple fact that the PIF was enclosed with the Submissions was insufficient to alert the Officer to the fact that it identified the LTTE Risk.

III. Issue II - Prejudice

[14] On page 7 of her Decision, the Officer stated:

I have not been provided with sufficient objective evidence to satisfy me that the applicant is ...suspected of being an LTTE supporter by the authorities

[15] The Respondent says this statement shows that the Officer did assess the allegation that the Applicant was suspected of ties to the LTTE.

[16] However, I cannot agree because the Officer referred neither to the content of the PIF nor to the Detentions anywhere in her Decision. In my view, this shows that the Officer simply read the PIF as a background document without appreciating that it alleged a specific ground of risk.

[17] For this reason, I have concluded that the Negligence caused prejudice in that the LTTE Risk was not considered. This risk is recognized by the UNHCR as a risk for Tamil males in its document dated December 21, 2012 titled *UNHCR Eligibility Guidelines For Assessing The International Protection Needs of Asylum-Seekers From Sri Lanka*.

[18] I am also persuaded that there is a reasonable probability that but for the Negligence, the outcome of the PRRA would have been different.

[19] No question was posed for certification for appeal pursuant to section 74(d) of the IRPA.

JUDGMENT

THIS COURT ORDERS that the application is allowed and the PRRA application will be referred back for reconsideration by a different Officer. Fresh submissions about risk may be filed.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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