Federal Court  Cour fédérale

Date: 20160329

Docket: IMM-3528-15

Citation: 2016 FC 352

Toronto, Ontario, March 29, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

PAKEERNATHAN THAMOTHARAMPILLAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review a negative decision of a Pre-Removal Risk Assessment ("PRRA") conducted by a senior immigration officer ("PRRA Officer") pursuant to s 112 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 ("IRPA").

Background

[2] The Applicant is a citizen of Sri Lanka and has a long immigration history. In 1991 he arrived in Canada, with his family, as a permanent resident. In 1996 he was convicted of possession of a narcotic for the purposes of trafficking and lost his permanent residence status. After serving his sentence, he was found to be inadmissible for serious criminality. In November 2003 his application for permanent residence on humanitarian and compassionate ("H&C") grounds was refused. On January 12, 2004 the Applicant made his first PRRA application, which was refused, and on May 27, 2005 his application for judicial review was dismissed. He was deported in 2004.

[3] The Applicant claims that upon arrival back in Sri Lanka he was detained, threatened and accused of being a member of the Liberation Tigers of Tamil Eelam ("LTTE"). Once released, he was frightened to use his real identification due to the association of Northern Sri Lanka with LTTE leaders. He procured false identification to return to his family's home in the north. Frightened of being discovered there, he returned to Colombo and, when passing through a LTTE checkpoint, he was accused of being wanted by the LTTE. The officers checked their list for his name but, because he was travelling using a false identity, that name was not on the list.

[4] Once in Colombo, he decided to leave Sri Lanka again. In 2006 he claimed refugee protection in France and was deported back to Sri Lanka. Shortly thereafter, the Applicant left Sri Lanka again and entered Canada on a fraudulent passport on June 28, 2006. He was found to be inadmissible to Canada because he was not in possession of a valid passport, because of his

past criminal conviction and because he had not received authority to return following his previous deportation. And, because his claim had been determined to be ineligible on grounds of serious criminality, pursuant to s 101(1)(f) of the IRPA, he was not eligible to have a refugee claim determined by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada.

[5] While in immigration detention for illegal entry, the Applicant submitted a second PRRA application. The application was allowed by a PRRA officer on March 15, 2007, but was denied upon Ministerial review on July 14, 2010. The Federal Court allowed an application for leave and judicial review of that decision and ordered that there be a redetermination of the PRRA application. On August 6, 2012 the redetermination of the Applicant's second PRRA application also resulted in a negative decision ("2012 PRRA"). The Applicant's application for judicial review was denied on August 21, 2013.

[6] On March 26, 2014 the Applicant applied for a third PRRA which again resulted in a negative decision. The present application for judicial review arises on the basis of this negative decision.

Decision Under Review

[7] The PRRA Officer reviewed the Applicant's immigration history and quoted extensively from his statutory declaration dated March 26, 2014 including the Applicant's claim that, even though the war in Sri Lanka has ended, the situation there is worsening in many ways and that, if

returned, he would face discrimination and harassment due to his ethnicity and would be targeted because he has family overseas.

[8] The PRRA Officer noted that because the Applicant was inadmissible for serious criminality pursuant to s 36 of the IRPA, consideration of his request for protection was, pursuant to s 112(3)(b) of the IRPA, restricted to the grounds set out in s 97 of the IRPA. The PRRA Officer also quoted from Citizenship and Immigration Canada's ("CIC") Protected Persons Manual which states that the new evidence rule contained in s 113(a) of the IRPA does not apply to repeat PRRA applications. However, the doctrine of *issue estoppel* could apply to limit a subsequent PRRA application if the same question was decided in a prior PRRA. The Protected Persons Manual stated that a subsequent PRRA could be limited to a re-examination of the evidence in light of any changes that occurred since the previous PRRA decision. Applying this guide, the PRRA Officer stated that because the Applicant's claim was not heard by the RPD, the new evidence rule was not applicable. He decided, therefore, that he would "consider the evidence submitted with respect to the administrative law principle of *issue estoppel*".

[9] The PRRA Officer stated that in addition to the documentary evidence submitted by the Applicant, he had considered his own country condition research, which was listed in the decision under sources consulted, the previous PRRA 'Notes to File' dated August 3, 2012, which were quoted in part and which outlined the Applicant's submissions at that time, as well as counsel's submissions for the previous PRRA dated June 10, 2011. The PRRA Officer determined that the Applicant was submitting essentially the same risks as he had in his previous PRRA. The information provided in the statutory declaration as well as the documentation

submitted regarding his stated risks upon return in 2004 had previously been presented and considered in his prior request for protection and had been decided. The PRRA Officer concluded that a re-examination of the Applicant's evidence did not indicate any changes had occurred and/or new risks that had developed since the initial decision and, therefore, "the evidence does not meet the requirements of the administrative law principle of *issue estoppel*".

[10] The PRRA Officer also noted Applicant's counsel's letter, dated January 20, 2015, stating counsel's intention to amend the Applicant's submissions to include recent developments in Sri Lanka resulting from a snap election. However, that at the time of the PRRA Officer's decision, on April 15, 2015, updated submissions had not been received. Regardless, the PRRA Officer had conducted his own country conditions research reviewing the US Department of State Human Rights Practices Report Sri Lanka 2013 ("US Report – Sri Lanka 2013") and three internet news articles (dated January and March 2015) on the newly elected president of Sri Lanka.

[11] The PRRA Officer concluded that the documentary evidence he consulted established the existence of human rights violations, corruption, crime and discrimination against minorities, including Tamils. However, he found that country conditions in Sri Lanka are similar to the conditions that existed prior to the determination of the Applicant's 2012 PRRA. And, although there had been recent changes, namely the newly formed government, there was insufficient objective evidence to demonstrate that those changes would, more likely than not, result in a s 97 risk to the Applicant should he return to Sri Lanka. The PRRA Officer found that there had not

been significant changes since the first PRRA decision so as to constitute risk factors that arose subsequent to the refusal of the last PRRA.

[12] Although the PRRA Officer's decision was rendered on April 15, 2015, it was not communicated to the Applicant. On April 21, 2015 the Applicant's counsel submitted three packages of documentary evidence totalling 589 pages. On May 5, 2015 Applicant's counsel wrote to advise of a delay in a further submission and, on June 2, 2015, a further package of documentary evidence comprising 444 pages was submitted. The Applicant's counsel also indicated that still further submissions would be made by the end of that week.

[13] On June 29, 2015 the PRRA Officer provided his April 15, 2015 decision together with an addendum dated June 29, 2015. In the addendum he stated that he had reviewed and assessed the documents included in the above submissions with a view to determining whether they provided evidence of risk. However, he concluded that the documentary evidence consisted of information speaking to general country conditions in Sri Lanka. Further, he found that the majority of the documents pre-dated the 2012 PRRA and that the Applicant had not provided an explanation for why they could not have been presented during the previous PRRA.

[14] The PRRA Officer also found that the most recent of the documents provided indicated that Sri Lanka has seen some recent political changes, including an election, and that there is continued debate over investigations into the allegations of human rights violations during the 30 year conflict. He identified four articles that spoke to these issues from Applicant's counsel's June 2, 2015 submissions. The PRRA Officer accepted, based on the documentary evidence,

that several outstanding issues continue to afflict Sri Lanka. Ultimately, however, the PRRA Officer concluded that the evidence demonstrated that the country conditions in Sri Lanka are similar to those that existed prior to his April 15, 2015 decision and that he had not been provided with sufficient objective evidence to establish that recent changes, particularly the January 2015 election, would more likely than not result in a risk to the Applicant should he return to Sri Lanka. Further, that there had not been significant changes to constitute risk factors arising subsequent to his initial PRRA decision.

Issues

[15] The Applicant submits that three issues arise:

1) Did the PRRA Officer err in law with respect to *issue estoppel*?
2) Was the decision of the PRRA Officer reasonable in light of the evidence?
3) Did the Officer fail to observe principles of fundamental justice and procedural fairness?

[16] However, in my view, the sole issue is whether the PRRA Officer's decision was reasonable.

Standard of Review

[17] The Applicant submits that he has raised errors of law, fact and mixed errors of law and fact. The standard of review in immigration cases is reasonableness on questions of fact or mixed fact and law, but correctness on questions of law. The Respondent submits that the standard of review of a PRRA decision, when considered in its entirety, is reasonableness and

that a high degree of deference is owed to the findings of fact and assessment of the evidence by the officer.

[18] In my view, the standard of review applicable to the PRRA Officer's decision is that of reasonableness (*Belaroui v Canada (Citizenship and Immigration)*, 2015 FC 863 at paras 9-10; *Kandel v Canada (Citizenship and Immigration)*, 2014 FC 659 at para 17; *Wang v Canada (Citizenship and Immigration)*, 2010 FC 799 at para 11).

Was the decision reasonable?

[19] The Applicant submits that *issue estoppel* does not apply but, even if it does, the PRRA Officer erred in applying it to the facts in the present case.

[20] The Applicant submits the following reasons for this conclusion: the evidence in the present PRRA differs from that submitted in the previous PRRA and demonstrates that conditions in Sri Lanka for Tamils have significantly worsened; the PRRA Officer erred by requiring the Applicant to present new risks, rather than simply new evidence (*Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240 at paras 38-39; *Christopher v Canada (Citizenship and Immigration)*, 2008 FC 964; *Djordevic v Canada (Citizenship and Immigration)*, 2014 FC 13 at paras 17-21); there is no bar on filing multiple PRRA applications and the PRRA Officer is an administrative officer whose decision is not final; and, the Applicant did not submit his current PRRA in an attempt to review the previous PRRA as the PRRA Officer implies, while he relied on previous evidence and submissions, he also presented new and more current evidence.

[21] The Applicant provides no authority for his view that *issue estoppel* has no application to a repeat PRRA. However, the Applicant does refer to the Supreme Court of Canada decision in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 (at para 23), which describes *issue estoppel* as a branch of *res judicata*, precluding the re-litigation of issues previously decided in court in another proceeding. There the Supreme Court also stated that for *issue estoppel* to be successfully invoked, three preconditions must be met: the issue must be the same as the one decided in the prior decision; the prior decision must have been final; and, the parties must be the same (also see *Casseus v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 472 at para 22).

[22] The Respondent made no submissions concerning the PRRA Officer's application of the principle of *issue estoppel* but submits that the PRRA Officer considered all of the evidence and that the decision was reasonable.

[23] In this case the PRRA Officer relied on and quoted from the CIC Protected Persons Manual, which states that s 113(a) of the IRPA does not apply to repeat PRRA applications, but that the principle of *issue estoppel* may be applied, specifically:

> Although the A113(a) new evidence rule does not apply to repeat PRRA applications, the administrative law principle of issue estoppel applies to subsequent PRRA applications as a matter of binding Federal Court and Supreme Court of Canada jurisprudence. Issue estoppel is a form of res judicata—a rule by which a final judgement by a court is conclusive upon the parties in any subsequent litigation involving the same cause of action. If the same question has been decided in a previous PRRA decision that is final, the officer may limit the subsequent PRRA to a re-examination of the evidence in light of any changes that have occurred since the initial decision. However, the officer has discretion to decline to apply estoppel in appropriate, though

> limited, circumstances if it would be in the interests of justice to do so. For example, the officer may consider reasons why, with reasonable diligence, evidence that was available when the previous PRRA application was made could not have been presented at that time. The officer must state whether or not issue estoppel is being applied to the subsequent PRRA (or what issues are subject to the principle) and provide reasons.

[24] However, recent decisions of this Court have held that s 113(a) is applicable to evidence submitted in repeat PRRAs. In *Aboud v Canada (Citizenship and Immigration)*, 2014 FC 1019 [*Aboud*], not cited by the parties, the applicant's refugee claim had been rejected by the RPD, his first PRRA was also rejected as was a redetermination of a second PRRA. The PRRA officer assessing the second PRRA had rejected most of the submitted evidence as inadmissible on the basis that it had not been put forward by the applicant either at the RPD hearing or prior to the first PRRA, as was required by s 113(a) of the IRPA and the doctrine of *issue estoppel*.

[25] Justice Roy noted that it is well established that a PRRA is not an opportunity for an applicant to appeal or seek reconsideration of an RPD decision that rejected his or her claim for refugee protection (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 12 [*Raza*]; *Singh v Canada (Citizenship and Immigration)*, 2013 FC 201 at para 15; *Escalona Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 at para 5) and that the Federal Court of Appeal in *Raza* at para 13, stated that the outcome of a negative refugee determination "must be respected by the PRRA officer" in the absence of new admissible evidence that might have affected that outcome. Justice Roy also noted that s 113(a) of the IRPA prescribes the evidence which an applicant can submit, essentially limiting the applicant to new evidence that was not available or was not reasonably available to him or her at the time the

claim to refugee protection was rejected, or to evidence that the applicant could not reasonably have been expected to present at that hearing.

[26] Having determined that the PRRA officer had not erred in rejecting evidence arising prior to the RPD decision under s 113(a) of the IRPA, Justice Roy then addressed the issue of the admissibility of evidence on a second or subsequent PRRA:

> 31 The question remains as to whether evidence submitted by the applicant is admissible where that evidence was not available or reasonably available at the time of the RPD hearing but was available or reasonably available at the time of the applicant's first PRRA application. I find that the decision to reject this evidence was reasonable. In *Li v. Canada (Minister of Citizenship & Immigration)*, 2010 FCA 75, [2010] 3 F.C.R. 347 (F.C.A.) at paragraph 41, the Federal Court of Appeal was clear that "an application for protection under section 112 is an application for refugee protection." As such, a prior PRRA meets the statutory language of subsection 113(a); it is a "claim to refugee protection [that] has been rejected." Indeed, this Court has applied subsection 113(a) to limit the admissibility of evidence submitted in subsequent PRRA applications: *Narany v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 155 (F.C.) at paragraph 7; *Moumaev v. Canada (Solicitor General)*, 2007 FC 720 (F.C.) at paragraph 27.

[27] I see no reason why this reasoning would not also apply in this circumstance where there was no determination by the RPD but where the decision under review is the third PRRA. Further, although the PRRA Officer relied on CIC's Protected Persons Manual, this Court has consistently held that policies, operational manuals and guidelines may offer guidance to the decision-maker, but should not be treated as a binding precedent or checklist; the decision-maker must first have regard to all of the facts and circumstances before them (*Smith v Canada (Citizenship and Immigration)*, 2014 FC 929 at paras 42-46; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 12).

[28] Regardless of whether or not *issue estoppel* is applicable, in my view the PRRA Officer conflated the concept of *issue estoppel* with the admissibility of the evidence.

[29] In the April 15, 2015 decision the only documentary evidence submitted to the PRRA Officer was the March 26, 2014 statutory declaration of the Applicant, and various other documents, but no country condition information. The covering facsimile transmission sheet from his counsel states that the Applicant relies on all previous evidence and submissions in both his H&C applications and the new PRRA application and that updated information would follow. Thus, the PRRA Officer compared the content of the statutory declaration to the previous PRRA notes to file and to counsel's submissions and concluded that the same risks were being advanced as had been decided by the prior PRRA. The PRRA Officer states that "re-examination" of the Applicant's evidence did not indicate that any changes had occurred or new risks had developed since the initial decision and "as a result, the evidence does not meet the requirements of the principle of issue estoppel". I would note, however, that the principle of *issue estoppel* applies to the question of whether the same risks were previously considered and decided, not to the admissibility of the new evidence.

[30] The CIC Protected Persons Manual appears to require a re-examination of the evidence in light of any changes that occurred since the initial decision. In this situation, however, the Applicant had not submitted new country conditions evidence prior to the decision being written. As a result, the PRRA Officer could only compare the risk the Applicant claimed in the context of the prior country conditions as described in the 2012 PRRA and his own independent research, being US Report – Sri Lanka 2013. Therefore, while he may have misstated how the

evidence before him was to be assessed, the manner in which he applied *issue estoppel* in the April 15, 2015 decision, if applicable, was not improper and, in any event, his conclusion was reasonable.

[31] The PRRA Officer also considered his own country condition research concerning the impact of the recent election in Sri Lanka. As described above, based on that review, he concluded that the evidence did not demonstrate that the Applicant would be at risk, pursuant to s 97, if returned to Sri Lanka. Again, I can find no error in that conclusion.

[32] However, subsequent to the April 15, 2015 decision being prepared but before it was communicated, the Applicant submitted a great volume of country condition documentary evidence.

[33] These submissions were acknowledged by the PRRA Officer in the addendum in which he stated that he had reviewed and assessed the documents to determine if they provided evidence of risk. He found that the majority of the documents spoke to the general country conditions and pre-dated the 2012 PRRA and that no explanation was provided as to why this had not been submitted previously. It is possible that by this comment the PRRA Officer was considering whether to exercise his discretion not to apply *issue estoppel.* As an example of when this could be done, the CIC Protected Persons Manual noted circumstances when the Applicant explained why, with reasonable diligence, evidence that was available could not have been presented at a prior time. However, it is unclear exactly what the PRRA Officer was considering. It is also possible that the PRRA Officer was considering the admissibility of those

new documents the same basis of availability, as would be the case in the context of an analysis under s 113(a) of the IRPA.

[34] On this point it is significant that the certified tribunal record ("CTR") does not contain the country condition document submissions. This may have been by oversight or it may mean that the PRRA Officer considered the documents not to be admissible. It was not explained. The Applicant's Record contains lists of the updated country conditions that were, presumably, submitted. All of the 26 documents listed in package 13 of 15 submitted on April 21, 2015 are dated 2014, thus, they in fact all post-date the 2012 PRRA. Similarly, all of the 51 documents listed in package 14 of 15 are 2014 documents. And, package 15 of 15, lists 64 documents, all dated 2014 or 2015. The June 2, 2015 submission lists 52 documents and, while many of those are quite dated, eight of them are dated 2014 or 2015. Four of these eight documents from the June 2, 2015 submissions are referenced by the PRRA Officer in the addendum. The PRRA Officer described these four documents as "the most recent of the documents provided", states that they indicated that Sri Lanka had seen some recent political change, and quoted from one of them.

[35] The problem is that, while the PRRA Officer states that the majority of the submissions pre-date the 2012 PRRA, as seen from the above, this would not appear to be accurate. This is supported by the fact that, in addition to the lists of documents, portions of the 1000 pages of submissions are also contained in the Applicant's Record and these do post-date the 2012 PRRA.

[36] There is no reference to or analysis of any of the many documents that post-date the 2012 PRRA in the PRRA Officer's decision to explain why they do not establish new or heightened risk or why the PRRA Officer afforded them no weight. Nor does the PRRA Officer compare the content of any of those documents to those submitted in support of the 2012 PRRA to determine whether the risks described in the new evidence were sufficiently dealt with in 2012. Put otherwise, even if he were attempting to limit the PRRA based on *issue estoppel*, he did not re-examine the prior evidence in comparison to the Applicant's further submissions to determine if any new or changes to risk had occurred since the determination in the 2012 PRRA. The only aspect of risk which was considered was the impact of the 2015 election. Indeed, based on his reasons, it is possible that the PRRA Officer only assessed risk from his April 15, 2015 decision to the June 29, 2015 addendum.

[37] For these reasons, the PRRA Officer's conclusion that there had been no change in country conditions since 2012 is not reasonable. This Court is unable to determine whether the PRRA Officer was alive to the content of the other documents in assessing the Applicant's risk, and without a complete CTR, it cannot assess the reasonableness of the conclusion. Put otherwise, the PRRA Officer's decision is not justifiable, transparent and intelligible and is not defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[38] For these reasons, the application is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of PRRA Officer is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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