

Federal Court



Cour fédérale

Date: 20171030

Docket: IMM-859-17

Citation: 2017 FC 970

Ottawa, Ontario, October 30, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

PIRATHEEPAN KAILAJANATHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a young male Tamil from northern Sri Lanka who came to Canada in 2010. A Pre-Removal Risk Assessment [PRRA] Officer [the Officer] determined that the Applicant would not be at risk if he returned to Sri Lanka despite his profile and despite country conditions evidence to the contrary. A stay of his removal to Sri Lanka was granted in March 2017 pending the hearing of this application for judicial review of the PRRA decision. For the reasons that follow, this application is allowed.

I. Background

[2] The Applicant was born in the Jaffna district of Sri Lanka. During the 1995 civil war, he fled to another area of Sri Lanka. He returned to Jaffna in 1996 and after completing school, worked for his father in a repair shop. In 2008, the Liberation Tigers of Tamil Eelam [LTTE] pressured the Applicant to join their group. In 2010 he was pressured to join the Eelam People's Democratic Party [EPDP]. After refusing, he was allegedly taken to an army camp and tortured, only to be released after his father paid a bribe.

[3] The Applicant fled Sri Lanka and arrived in Canada in August 2010. His refugee claim was denied by the Refugee Protection Division [RPD] due to negative credibility findings. The Applicant did not produce identity documents and the RPD did not believe his explanation of how he arrived in Canada via Switzerland. The leave application of the RPD decision to the Federal Court was denied in May 2013.

[4] The Applicant's PRRA application was dismissed on December 19, 2016. He applied for permanent residence in Canada on humanitarian and compassionate grounds on March 2, 2017 and a motion for a stay of his deportation was granted by Justice Manson on March 23, 2017.

II. PRRA Decision

[5] The PRRA is intended to address the current country conditions of the Applicant's country of origin and whether the Applicant would be at risk if returned.

[6] Here the Officer considered the evidence submitted by the Applicant, which included documentary evidence pertaining to the conditions in Sri Lanka. The Officer put significant weight on a UK Home Office Report [the Report], which outlined significant risks for Tamil returnees, and the Officer concluded from this report that being Tamil without significant connections to the LTTE would not render the Applicant worthy of international protection. The Officer also considered a number of reports on the significant human rights issues in Sri Lanka including information that Tamils returning from abroad are still at a significant risk of arrest on suspicion of prior LTTE involvement. The Officer reiterated the RPD's findings that the Applicant did not have sufficient evidence to prove that he was wanted by any of the groups in Sri Lanka, or by the authorities regarding any past LTTE involvement.

[7] The Officer assigned little weight to a letter from the Applicant's brother from May 2016. In the letter, the brother wrote that a police officer and two army men came to his house and asked about the Applicant's whereabouts. The Officer concluded that the letter was self-serving. Relying on the RPD's credibility findings, the Officer concluded that there was little evidence the Applicant would be a target for Sri Lankan groups.

[8] Although the objective documentary evidence on conditions in Sri Lanka was unclear, the Officer determined that being Tamil or previously living in a LTTE controlled area was not enough, by itself, to expose an individual to risk. The PRRA application was therefore denied.

III. Issue

[9] Although the Applicant raises a number of issues, the Officer's treatment of the evidence is dispositive of this application and will be addressed as follows:

1. Is the letter from Applicant's brother new evidence?
2. Did the Officer reasonably consider the Applicant's profile in light of the record?

IV. Standard of Review

[10] Assessments of claims under ss. 96 and 97 of the *IRPA* are questions of mixed fact and law, and call for a standard of reasonableness (*A.B. v Canada (Citizenship and Immigration)*, 2008 FC 394). A reasonable decision is one based on "justification, transparency, and intelligibility" and one which falls into a range of reasonable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

1. *Is the letter from Applicant's brother new evidence?*

[11] The Applicant takes issue with the Officer's treatment of the evidence. The Applicant argues that the Officer failed to consider the totality of the evidence and its probative value and further erred by rejecting the new evidence in the form of a letter because it was from the Applicant's brother.

[12] While an Officer is obligated to take heed of the RPD decision and its credibility findings (*Obeng v Canada (Citizenship and Immigration)*, 2009 FC 61 at para 29), an exception exists if the Applicant offers new probative evidence to establish the alleged risks (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13). Importantly, the Applicant need not identify *new risks*, but only *new evidence* to establish previously identified risks (*Jiminez v Canada (Citizenship and Immigration)*, 2016 FC 938 at para 10 [*Jiminez*]).

[13] As such, the test for the acceptance of new evidence on a PRRA is whether there are “new developments, either in country conditions or in the applicant’s personal situation” (*Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240 at para 27) which may have affected the outcome of the board hearing (*Jiminez*, at para 11).

[14] In this case, the 2012 visit to the Applicant’s home and the brother’s 2016 letter speak to the same risk allegations; namely, that individuals sought out the Applicant at his family home. The RPD had found that the 2012 evidence lacked credibility because there was no record of it in writing.

[15] Here the Officer had *new* evidence in the form of the letter that provided additional support to the *same* risks alleged before the RPD. Had this evidence been before the RPD, it would have been considered in light of the other evidence and it may have affected the outcome, particularly as the RPD insisted on a written record of the 2012 visit to the Applicant’s home. The brother’s letter satisfies the RPD’s concerns. Therefore, the brother’s letter meets the test for

admission as it provides new, probative evidence of previously identified risks. It should therefore have been considered.

[16] Furthermore, the Applicant is correct that evidence should not be rejected simply because it is not arm's length (*Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24). The letter should have been assessed by the Officer and not outright dismissed because it originated from a family member.

[17] The Officer's refusal to consider the brother's letter is therefore unreasonable.

2. *Did the Officer reasonably consider the Applicant's profile in light of the record?*

[18] The Applicant's claimed profile is a Tamil returning to Sri Lanka after a failed asylum claim. The Applicant points to the documentary evidence respecting the treatment of Tamil returnees generally, not just those with a connection to the LTTE.

[19] The Officer was obligated to consider this evidence. Officers must consider all the risk factors put forward by the Applicant, cumulatively (*K.S. v Canada (Citizenship and Immigration)*, 2015 FC 999, at para 42). The Officer cannot view the evidence of such risks in isolation.

[20] Such an error was considered in the RPD context in *Suntharalingam v Canada (Citizenship and Immigration)*, 2014 FC 987 at paras 47-50. There, the Court rejected an RPD decision which reasoned that because an applicant was not targeted by the authorities for LTTE

involvement, there was no need to consider whether the applicant was at risk based on the evidence. The Court noted:

[47] In addition, the RPD appears to be saying that because it did not believe the applicant was targeted by the authorities for a perceived association to the LTTE, there is no need for it to consider whether he is at risk in relation to the objective documentary evidence.

[...]

[49] In my respectful view, the RPD's credibility concerns cannot determine the issue of whether there is a serious possibility of persecution of the claimant in his capacity as a failed refugee claimant returnee. The applicant's status in this regard is determined objectively by the fact that he is a failed refugee applicant by virtue of having his claim rejected by the RPD. It has nothing to do with credibility.

[50] On review of the record before the RPD there was evidence that failed refugee claimants returning to Sri Lanka have been both detained and tortured (*Freedom from Torture Report* at 7; UNHCR Guidelines at 8; *Risk of failed asylum seekers of Tamil ethnicity upon return to Sri Lanka*,). The RPD did not refer to this issue not to any specific documents in this regard. Nor does it address the specific concern of a returning failed refugee claimant. In my respectful view, the RPD had a duty to consider whether there is a serious possibility of persecution of the applicant as a failed refugee returnee.

[21] This case is analogous and presents the same error. The Officer found that the Report was probative. However, the Officer failed to consider the full Report, which documents the significant risks for Tamil returnees. The Officer, while acknowledging these risks, did not assess those risks against the Applicant's profile, and instead solely relied upon the RPD's credibility findings.

[22] The Officer cannot simply rely on these findings without a full consideration of the evidence. This error indicates a failure of the Officer to consider the cumulative profile of the Applicant, specifically regarding the Applicant's status as a Tamil returnee, separate and apart from any other risk profiles.

[23] Therefore the Officer's decision is unreasonable.

JUDGMENT in IMM-859-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the 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.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-859-17

STYLE OF CAUSE: PIRATHEEPAN KILAJANATHAN v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 7, 2017

JUDGMENT AND REASONS: MCDONALD J.

DATED: OCTOBER 30, 2017

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