Federal Court  Cour fédérale

Date: 20190215

Docket: IMM-2211-18

Citation: 2019 FC 194

Ottawa, Ontario, February 15, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SIDATH LUCKY PELZING BATUWITA LIYANAGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative Pre-Removal Risk Assessment ("PRRA") decision of a Senior Immigration Officer ("Officer"), dated March 26, 2018, which found that the Applicant is neither a Convention Refugee nor person in need of protection pursuant to s 96 and s 97, respectively, of the Immigration and Refugee Protection Act S.C. 2001, c. 27 ("IRPA").

[2] For the following reasons I have determined that this application must be dismissed.

Background

[3] The Applicant is a citizen of Sri Lanka. He claims that he and his family have faced persecutory treatment at the hands of the Sri Lankan police because of a suspicion that the family, which is Sinhalese, assisted or was associated with the Liberation Tigers of Tamil Eelam ("LTTE"). The Applicant arrived in Canada on November 30, 2011 and claimed refugee status on December 8, 2011.

[4] By a decision dated April 25, 2013, the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada rejected the Applicant's claim for protection. The RPD found that he generally lacked credibility and had failed to provide sufficient credible or trustworthy evidence to establish that, should he return to Sri Lanka, he would face a serious possibility of persecution or that it was more likely than not that he would be subjected personally to a risk of life or a risk of cruel and unusual treatment or punishment or to a danger of torture. He sought leave and judicial review of the negative RPD decision, which application was dismissed by this Court on February 16, 2015.

[5] Subsequently, the Applicant filed a PRRA application, which was refused on April 22, 2015. He then brought an application seeking leave and judicial review of the negative PRRA decision. Leave was granted by this Court and the matter was returned, on consent, for redetermination by a different officer.

[6] On redetermination, the PRRA decision was again negative. That decision is the subject of the present judicial review.

Decision Under Review

[7] The Officer described the role of the PRRA and noted that the Applicant continues to submit that the risk that caused him to flee Sri Lanka still exists and, additionally, that he now has a *sur place* claim as a potential failed refugee claimant and returnee from Canada, a country with a large concentration of Sri Lankan Tamils.

[8] The Officer considered the evidence submitted by the Applicant in support of his PRRA application to determine whether the evidence was "new" pursuant to s 113(a) of the IRPA and whether it was sufficient to overcome the findings of the RPD. The Officer set out his or her concerns with the new evidence and also found that the Applicant had failed to provide sufficient objective evidence to allow the Officer to come to a different conclusion than the RPD. The Officer also considered two affidavits of the Applicant, but had concerns with that evidence and a lack of corroborating objective documentary evidence. The Officer ultimately determined that all of the documents related to risk allegations previously considered by the RPD and that the evidence did not demonstrate that the Applicant would be exposed to a new, different or additional risk development.

[9] The Officer then considered the country conditions, reviewing the objective evidence submitted by the Applicant and additional evidence from the Officer's own research. The Officer

found that, although the conditions in Sri Lanka were not perfect, there have been improvements since the end of the civil war. Further, the Officer found that country conditions in Sri Lanka today are similar to the country conditions that existed prior to the RPD's decision. The content of those documents did not establish that there was a new risk, or a different or additional risk development that could not have been considered at the time of the RPD decision. Nor was there evidence of new risk personalized to the Applicant. As to the Applicant's *sur place* claim, the Officer stated that he or she had considered the evidence regarding failed refugee claimants, the particular circumstances of the Applicant, and the risk profiles outlined in the UNHCR Guideline. However, the Applicant had not provided sufficient objective new documentary evidence to demonstrate that he would be at risk as a failed refugee or returnee if he were returned to Sri Lanka or to suggest that, since the Applicant fled Sri Lanka, the authorities there have any reason to believe that he is a supporter of the LTTE.

Issue and Standard of Review

[10] The Applicant describes the issue in this matter as whether the Officer "conducted a meaningless assessment of the PRRA given that country conditions were assessed in a highly-selective manner and that support letters were dismissed unreasonably on the basis that their authors were not persons disinterested from the Applicant." However, I agree with the Respondent that the issue is properly framed as whether the Officer's assessment of the evidence, and therefore his or her decision, was reasonable. The parties submit, and I agree, that the applicable standard of review is reasonableness.

Analysis

[11] The Applicant submits that the Officer unreasonably assessed his new evidence, for example, by rejecting much of it because the authors were closely connected to the Applicant. He also submits that the Officer was unreasonable in requiring corroborative evidence to support the new evidence and the allegations made in the Applicant's affidavits.

[12] Further, he submits that the Officer erred in relation to the *sur place* claim. While the Applicant has not had involvement with Sri Lankan anti-government activities in Canada, this ignores the documentary evidence that speaks to the fact that simple state suspicion of links to the LTTE are sufficient to cause returnees to be subjected to persecution. In this regard, the Applicant alleges that the Officer was selective in the evidence that he or she considered from the objective country condition documentation. He argues that there was an abundance of objective sources in the record clearly stating that people with a similar profile to his, being a returning failed refugee claimants with suspected links to the LTTE, will frequently face torture while in police custody upon their return to Sri Lanka. In this regard, the Officer undertook no real or meaningful analysis of the current risk to the Applicant, in particular, as detailed in his two affidavits. The Applicant asserts that his personal profile has changed since 2013 and that it was an error of law for the Officer to "carve away" at his 2018 profile and to find that what remained to have been disclosed in 2013.

[13] The Applicant makes various other submissions, including that the Officer erred in importing credibility findings made by the RPD five years before the PRRA analysis. He argues

that if the Officer was going to rely on these same findings, the Officer was under an obligation to convene an oral hearing. Further, he submits that the Officer applied a wrong legal test in stating that the Applicant failed to demonstrate his risk on a balance of probabilities when the actual test is whether there is more than a mere possibility or a serious risk of persecutory treatment.

Credibility

[14] As a starting point, in my view, the Officer's reasons demonstrate that he or she properly understood the purpose of the PRRA and the effect of the RPD decision on the analysis required of the Officer. In that regard, the Officer stated that the decision of the RPD with respect to the issue of protection under s. 96 or s. 97 of the IRPA is final and is 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 considered at the time of the RPD decision. This is in keeping with jurisprudence of this Court, including Justice Shore's summation in *Chirivi v Canada (Citizenship and Immigration)*, 2015 FC 1114:

> [35] It is important to note that a PRRA application is not an appeal or a reassessment of the RPD decision to reject a refugee claim (*Nebie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 701 (CanLII), 2015 FC 701 (*Nebie*); *Raza*, above at para 12). The purpose of a PRRA is to assess new risks 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 face the risks set out in sections 96 and 97 (*Raza*, above at para 10; *Kulanayagam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 101(CanLII) at para 23). Thus, the RPD decision regarding sections 96 and 97 of the IRPA became *res judicata*, "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" (*Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 (CanLII) at para 5).

[15] Relatedly, and before considering the Officer's analysis of the evidence, it is also necessary to briefly address the Applicant's assertion that the Officer imported credibility concerns from the RPD's decision without granting him an oral hearing at which the Officer could have put those concerns to the Applicant and provided him an opportunity to respond. Upon review of the Officer's reasons and their structure, I am not persuaded that the Officer imported the RPD's credibility findings. The Officer described and quoted paragraphs of the RPD decision, including the negative credibility findings, and stated that the Applicant had the burden of displacing the RPD's findings with sufficient new evidence. The Officer then proceeded to analyze each "new" piece of evidence proffered by the Applicant. Nothing in that analysis suggests that the RPD's credibility concerns influenced the Officer's findings in relation to the newly filed evidence. Rather, the Officer gave the evidence little to no weight for the reasons he or she set out and it did not convince the Officer that the risk alleged by the Applicant had changed since the RPD hearing. In short, the Applicant's argument that the Office wrongly "imported" the RPD's negative credibility findings is without merit.

Assessment of the Evidence

[16] The Applicant also claims that the Officer unreasonably discounted the evidence of his family members simply because of its source. It is true that the Officer noted that, as family members, the Applicant's mother and spouse could be expected to have an interest in the outcome of the Applicant's claim for protection and, therefore, would not be without bias. And,

while decision-makers can take self-interest into account as a relevant factor when assessing such statements, this Court has often held that it is a reviewable error to dismiss entirely such evidence for the sole reason that it is self-interested (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at para 44). However, that is not the circumstance in this case as can be seen from the Officer's treatment of the two documents at issue.

[17] The first of these is the affidavit of the Applicant's spouse which states that the Applicant has unjustly been targeted by the Terrorist Investigation Division ("TID") and had received an order to attend at the TID office on August 11, 2014. She states that he has become a victim of the state owned anti-terrorism mechanism simply for having Tamil friends and that his life will be in danger if he returns. Fearing the authorities, she claims to have taken refuge with relatives.

[18] In his or her analysis, the Officer noted that the Applicant's spouse had an interest in the outcome of his application for protection. Further, he or she observed that the issue of being unjustly targeted had been considered by the RPD and was not a new matter, nor was an explanation provided as to why a similar document from the spouse had not been provided to the RPD. Further, the Officer noted that no corroborative evidence was presented to substantiate the claims made in this affidavit, such as a statement from the spouse's relatives with whom she had sought refuge. As a result, the Officer gave the affidavit no weight.

[19] I observe in passing that it was not unreasonable for the Officer to require corroboration given the Applicant's burden to overcome the findings of the RPD, which had considered these same risk allegations. In this context, it was open to for the Officer to find that the evidence

tendered by a witness with a personal interest in the matter did not, without any further corroboration, meet the evidentiary burden faced by the Applicant (*Perampalam v Canada (Citizenship and Immigration)*, 2018 FC 909 at paras 43-45, citing *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27).

[20] The second letter was from the Applicant's mother, it states that despite the war being over, the security officers never ceased their search for the Applicant, and that police officers used to come to her house asking for him. She states that she is at a loss to understand what these visits were about. In his or her analysis, the Officer again noted that the Applicant's mother had a vested interest and also found that the letter was relevant, but that it lacked sufficient details to corroborate past events or current dangers, and that it was vague in terms of time frames and information. The Officer concluded that the letter should be afforded no weight.

[21] Thus, rather than simply rejecting the letters because they came from people who were not disinterested, as the Applicant claims, the Officer dealt with each piece of evidence and also found that it either lacked corroboration, was vague, or addressed issues that were not "new" and was not sufficient to overcome the findings of the RPD. For all of these reasons, the Officer afforded that evidence no weight. In this regard, the situation differs from the cases cited by the Applicant such as *Abusaniniah v Canada (Citizenship and Immigration)*, 2015 FC 234, referencing *Ugalde v Canada (Citizenship and Immigration)*, 2011 FC 458 at para 28 (see also *Nagarasa v Canada (Citizenship and Immigration)*, 2018 FC 313 at para 24) and, in my view, the Officer's assessment of this evidence was reasonably open to him or her.

[22] As to the other evidence submitted by the Applicant, these documents were also reasonably assessed by the Officer.

[23] Regarding the letter of Dr. Wijesekara, the author identifies himself as having treated the Applicant's spouse, that she has symptoms of depression which may be aggravated by her fear of the Applicant being detained upon his return to Sri Lanka, and that she feels his life may be endangered by his return. The Officer found that the letter does not provide a basis or an opinion on whether or not the Applicant will face harm if returned to Sri Lanka. It simply states that the Applicant's spouse fears that he will face harm if returned. Accordingly, the Officer gave it no weight.

[24] Turning to the undated letter from A.A. Senevirathne, a lawyer retained by the Applicant's spouse, it states that the lawyer contacted the police and made inquiries about the Applicant. He was informed that the Applicant was arrested by the authorities under the Prevention of Terrorism Act and had been held and questioned on more than one occasion. Further, the Applicant was issued a summons to appear at the TID on August 11, 2014 and his failure to do so resulted in the issuance of a warrant for his arrest, which the police refused to provide to the lawyer. He goes on to explain that many individuals deported to Sri Lanka have been kidnapped and disappeared and the Applicant faces this same risk. The lawyer states that the Applicant's return in the face of an open warrant is not advisable and would "instill upon [him] imprisonment and torture in the highest degree."

[25] The Officer noted that the arrests and detention in question all took place before the Applicant fled Sri Lanka and were considered by the RPD. In the absence of an explanation as to why a similar document was not presented at the time of that hearing, the letter was not new evidence as permitted by s. 113(a) of the IRPA. Despite this finding, the Officer also found that the lawyer had speculated as to the fate of the Applicant upon his return. Further, that despite the lawyer's assertion, the Officer had not been provided with sufficient objective evidence to indicate that similarly situated persons, such as the Applicant's father, a failed refugee claimant previously deported from Canada, had been kidnapped or threatened with disappearance upon return nor that the Applicant's mother and spouse, who have resided continuously in Sri Lanka, have been kidnapped or threatened with disappearance as family members of a wanted sympathiser of the LTTE. Therefore, the Officer concluded that the letter was not sufficient to overcome the RPD's findings and that the Applicant had failed to provide sufficient objective evidence to establish that the authorities' perception of him had changed since the RPD hearing, such that harsher treatment was likely should he be returned to Sri Lanka. Thus, the Officer afforded the letter no weight.

[26] With respect to the TID summons, dated August 1, 2014, it states that the Applicant was suspected of associating with LTTE members and was ordered to attend at the TID to give a statement, failing which a warrant for his arrest would be issued. The Officer noted that the documentary evidence indicated that the issuing police officer had subsequently been arrested, further, that the Applicant had not explained how he came into possession of the summons, and that the document raised the same concerns the Officer had in relation to the lawyer's letter. The Officer therefore afforded it no weight.

[27] As to the two affidavits of the Applicant, the first of these, dated May 11, 2016, states that the Applicant continues to fear return to Sri Lanka because of that state's suspicions as to his support of, or links to, the LTTE. The Applicant states that his spouse told him that the TID went to his parent's home asking about him and told them that, if he returns, he must report to a local police station. He was also informed that his spouse lives in hiding with relatives. He states that she approached the Sri Lankan Human Rights Commission ("SLHRC") on several occasions since 2014, including after the TID visit, and the SLHRC said it would investigate and provide a letter to her within 30 days. Although such letter had not been received at the time the affidavit was affirmed, the Applicant said that he would try to obtain and forward it. The Applicant fears being stopped and screened at the Sri Lankan airport and that the authorities there would suspect that he was working with Tamils or the LTTE in Canada.

[28] The second affidavit, dated November 28, 2016 states that the Applicant's spouse left her cousins' home as the TID and/or police kept looking for her and inquiring about her, and that she now resides with her aunt. The Applicant stated that the TID returned to his parent's home in June 2016 and August 2016 inquiring about him and his spouse and gave his mother a letter instructing his spouse to appear for an interrogation, which she did not attend. Because of these visits by the TID, the Applicant's father fled to Singapore at the end of August 2016. The Applicant states that he had asked his spouse and mother for letters attesting to these events, which would be forwarded when received.

[29] The Officer considered these affidavits but noted, amongst other things, that he or she had not been provided with documentary evidence from relatives of the Applicant's spouse; that

the content of the affidavits was vague as to the TID visits to the Applicant's parent's home; that while the Applicant's spouse had not indicated when she visited the SLHRC, over two years had elapsed since the date of the Applicant's affidavit and nothing had been received from the SLHRC and there was no corroborating evidence concerning her visits; that the letter claimed to have been given to the Applicant's mother by the TID had not been provided, nor had the letters from the Applicant's spouse and mother which he deposed that he had requested; that there was insufficient objective evidence that the Applicant's parents had been arrested or detained because his spouse had not presented herself to the police or that the Applicant's parents had been mistreated by the authorities since his father was deported back to Sri Lanka or since the Applicant's departure from Sri Lanka, nor was it clear why his father had fled to Singapore.

[30] Ultimately, the Officer afforded the Applicant's affidavits little weight. More significantly, the Officer concluded that the evidence spoke to a continuation of the same risk that had previously been assessed by the RPD and which the Applicant and his family had faced since 2001, being that the TID and police had suspected them to be LTTE sympathisers, which was not new, different or additional risk. That is, while the described events, such as visits by the TID, were new developments, the nature of the alleged risk to the Applicant remained unchanged.

[31] While the Applicant does not agree with this assessment of the evidence or the weight afforded it by the Officer, it is not the role of the Court to reweigh the evidence and I cannot conclude that the assessment was unreasonable. And, in any event, the Officer's ultimate finding was that this evidence did not establish new risk.

Country Conditions and Sur Place Claim

[32] With respect to the country conditions and *sur place* claim, the Officer considered both the objective documentary evidence relating to country conditions and the two affidavits tendered by the Applicant.

[33] The Officer described the country reports that he or she considered, including the UK Home Office Country Policy and Information Note, Sri Lanka: Tamil separatism, Version 5.0, June 2017. This report states, amongst many other things, that "unlike in the past, returnees who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment." Further, the document notes that those former LTTE members most at risk are those who are or are perceived to be a threat because they had, or are perceived to have had, a significant role in relation to post-conflict Tamil separatism. A "significant role" refers to those in the LTTE's former leadership and/or former members who are suspected to have committed terrorist or serious criminal acts during the conflict, or to have provided weapons or explosives to the LTTE. The report also states that being a non-Tamil perceived as having support for or involvement with Tamil separatist groups does not put a person more or less at risk or give rise to a well-founded fear of persecution or serious harm in Sri Lanka.

[34] While it is true that the same report also references "stop" and "watch" lists for persons-of-interest, these pertain primarily to persons who left the country illegally, have outstanding arrest warrants, or are of interest due to separatist or criminal activities. Those on the watch list are not likely to be detained or arrested, although there are reports of returning Tamils being

detained for screening. Significantly, the Applicant is not of Tamil ethnicity and left the country legally on his own passport.

[35] The Applicant relies on this Court's decision in *Jesuthasan v Canada (Citizenship and Immigration*), 2018 FC 142 at paras 23-29, to argue that the Officer had an obligation to provide some sort of explanation as to why some sections of the report were selected as opposed to others. However, in *Jesuthasan* the officer was faulted for having ignored more recent objective country condition documents than those he had considered and which directly contradicted his conclusions. There is no similar allegation in the case at hand.

[36] The Applicant also submits that his profile has changed since the 2013 RPD decision in that he has been in Canada, which has a large Sri Lankan Tamil diaspora, for a longer period of time thus deepening his profile as a LTTE supporter. However, the Officer noted that he or she had "not been provided with an explanation as to why the aforementioned fears/risks could not reasonably have been expected in the circumstances to be presented to the RPD for assessment prior to the rejection of the refugee claim." That is to say, the same *sur place* concern would have been in play when the Applicant had been in Canada for two years and when his claim was assessed by the RPD. In the absence of evidence to support a change in country conditions indicating increased risk to returnees with his profile over that five year period, or that he had any involvement with LTTE supporters in Canada, in my view, there is nothing unreasonable in the Officer's assessment of this issue. And, as noted in the UK Home Office report, the latter point alone is not an indication that the Applicant will face harm.

Legal Test

[37] The Applicant submits that the Officer erred in applying a "balance of probabilities" test rather than the "more than a mere possibility" test as demonstrated in page 23 of his or her reasons. The Applicant offers no elaboration on this point.

[38] However, there is a distinction between the burden of proof required to establish the facts relied upon in an application (balance of probabilities) and the burden of proof to be applied in assessing whether the facts place a claimant at risk of persecution (more than a mere possibility) (*Alam v Canada (Citizenship and Immigration*), 2005 FC 4 at para 8; *Pararajasingham v Canada (Citizenship and Immigration)*, 2012 FC 1416 at para 49). In his or her reasons the Officer applied the "balance of probabilities" test when referring to his or her analysis of the evidence and the standard of proof to be applied, not the overall burden that the Applicant had to meet. Further, the impugned paragraph is found on pages 22 and 23 of the reasons, which read in context states:

> I have considered the evidence regarding failed refugee claimants, the particular circumstances of the applicant, and the risk profiles outlined in the UNHCR guidelines. In light of this information, I find that the applicant did not provide sufficient objective new documentary evidence to demonstrate that, on a balance of probabilities, he would be at risk as a failed refugee claimant/returnee if he returned to Sri Lanka. Nor, have I been provided with sufficient objective evidence to suggest that since he fled Sri Lanka, the Sri Lankan authorities have any reason to believe that the applicant is a supporter of the LTTE.
>
> In conclusion, having considered the evidence in its totality I find that the applicant has provided insufficient new evidence to satisfy me that there is more than a mere possibility that he will be persecuted in Sri Lanka. […]

[39] I am satisfied that the Officer properly understood and applied the applicable burden of proof to the issues before him or her.

[40] In conclusion, the Officer's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, accordingly, this Court will not intervene.

JUDGMENT IN IMM-2211-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2211-18
STYLE OF CAUSE:	SIDATH LUCKY PELZING BATUWITA LIYANAGE v MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 23, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	FEBRUARY 15, 2019

APPEARANCES:

Lal Handapangoda	FOR THE APPLICANT
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lal Handapangoda Brampton, Ontario	FOR THE APPLICANT
Department of Justice Toronto, Ontario	FOR THE RESPONDENT