Date: 20070814

Docket: IMM-612-07

Citation: 2007 FC 841

OTTAWA, Ontario, August 14, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

PRIYANA SWARN KIRINDAGE DE SILVA
ARAVINDA WEERATHUNGA
THILINI WEERATHUNGA
KEISHI WEERATHUNGA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an immigration officer (the "Officer"), dated December 28, 2006, wherein the Officer denied the applicants' Pre-Removal Risk Assessment (PRRA) application and determined that the applicants would not be at risk if returned to their country of nationality.

[2] The applicants are a family from Sri Lanka. Priyana Swarn Kirindage De Silva, the principal applicant, her husband and their two daughters came to Canada on visitor visas in December 2002.

[3] The applicants fear for their security and their lives because they believe their family has been targeted by members of the Special Police Unit for trying to determine who is responsible for the death of the principal applicant's sister. The principal applicant's sister, Thushari, was killed on July 14, 2000. She was reportedly killed in a police shoot out when the car she was in drove through a police check point. The applicants do not believe the reported version of Thushari's death. They believe that Ranjith Wanaraja, the head of the Police Special Unit squad, killed Thushari while she was in police custody. Their belief is based on the following factors:

- According to a newspaper article, a week before Thushari was killed she had written a letter to the president of Sri Lanka informing her she was receiving threats from Ranjith Wanaraja who wanted Thushari to give him a loan and also wanted her to have an affair with him.

- The principal applicant found a love letter addressed to Thusari and written by Ranjith Wanaraja in her sister's purse after her death.

- According to the medical report of Thushari's death, she had been shot on her right ear, in the middle of her chest and on her left wrist. The applicants believe that she could not have been shot in that manner if she was shot in her car as the police claim.

- Thushari's assistant was informed the day of Thushari's death that Thushari was being held in police custody.

A court in Sri Lanka determined that Wanaraja was not guilty. After the principal applicant found the love letter from Wanaraja addressed to her sister, her father informed the authorities about his letter. He was detained and Wanaraja demanded that he be given the letter. The primary applicant was in possession of the letter and she alleged that the police threatened to kill her if she did not give them the letter.

[4] The primary applicant went into hiding and then later fled to Bahrain where her husband was working. In 2001, the applicants returned to Sri Lanka allegedly because they read in the newspapers that the Police Special Unit had been dissolved. According to the applicants, former members of the Police Special Unit started to follow and threaten the primary applicant upon her return to Sri Lanka. The applicants apparently tried to lodge a complaint against the police and they also allegedly contacted a lawyer to instigate legal action against the Police Special Unit. The applicants claim that they continued to face harassment throughout 2002: they received anonymous death threats over the phone; the male applicant was assaulted by unknown attackers; the principal applicant's brother was stabbed and his attackers left a note threatening to do the same to the principal applicant; and the applicants were shoot at while in their car. After this final incident the applicants decided to leave Sri Lanka.

[5] The Refugee Board determined that the applicants have no nexus to a Convention ground and that they are not persons in need of protection since they did not produce credible or trustworthy evidence in support of their claims that there is a serious possibility they would face a danger of torture or a risk to their lives. The Refugee Board found the applicants were not credible based on a number of inconsistencies between their oral and written testimony.

[6] With respect to evidence to corroborate their claim, the Board stated the following:

> In the panel's opinion, the Court decision or the inquiry report would have shed some light to the circumstances surrounding the killing of the principal claimant's sister. It would have corroborated the testimony of the adult claimants that Wanaraja was personally involved in the killing and what prompted the Court to acquit the defendants. Given that there was no official documentation on the

> evidence presented in the Court proceedings, the tribunal relied on the second hand information of the adult claimants and the documentation filed.

THE DECISION UNDER REVIEW

[7] The Officer noted that the majority of the applicants' PRRA submissions related to allegations already dealt with by the Refugee Board. She held that the documents relating to the allegations about the murder of the female applicant's sister did not constitute new evidence because the Board had already found that these allegations do not relate to any Convention refugee ground and that there was not enough credible evidence to support these allegations. Consequently, the Officer considered only those documents submitted by the applicants that related to the principal applicant's psychological well-being and those documents dealing with the general country conditions in Sri Lanka.

[8] The Officer concluded that the applicants did not have a profile that would put them at risk and that, in any event, state protection was available and that they had an internal flight alternative.

ISSUE

[9] The issue before the Court is whether the Officer erred by not considering the documents as new evidence under subsection 133(a) of the *Immigration and Refugee Protection Act*, S.C. 2000, ch. 27.

[10] The applicants have made a number of other claims which are very vague and unsupported by argument and jurisprudence. At the hearing counsel informed the Court that I should not rule on the following issues at this time:

> First, the applicants submit that the PRRA officer who decided the applicants' case is not impartial or independent. They submit that "there is no real judicial independence for the PRRA officers" and that all of the decisions rendered by the PRRA officers show a systematic bias in favour of deportation and against the application of international human rights law.
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> Second, the applicants submit that article 2(3), the right to access a remedy, and article 14, the right to an independent and impartial tribunal, of the Covenant have been violated. They do not state what the Covenant they are referring to but I believe it is the *International Covenant on Civil and Political Rights*.
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> Third, they submit that the Officer was obligated to take into account all of the evidence under the Charter including evidence previously submitted and without any restriction in terms of the new evidence.
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> Finally, they submit that section 113 of the Act violates the Charter if evidence is not considered that would permit a violation of the rights guaranteed by the Charter without clearly stating what sections of the Charter are violated and why they are violated and any jurisprudence in relation to the said section.
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> The respondent has made very few submissions, if any.

ANALYSIS

[11] Section 113 of the Act deals with PRRA applications. Subsection (a) reads as follows:

Consideration of an application for protection shall be as follows:	Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles

rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

Standard of review

[12] The Court in *Elezi v. Minister of Citizenship and Immigration*, 2007 FC 240, considered the standard of review applicable to the issue of whether a PPRA officer properly applied subsection 113(a). The Court held:

> [22] When assessing the issue of new evidence under subsection 113(a), two separate questions must be addressed. The first one is whether the officer erred in interpreting the section itself. This is a question of law, which must be reviewed against a standard of correctness. If he made no mistake interpreting the provision, the Court must still determine whether he erred in his application of the section to the particular facts of this case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness.

[13] I adopt this analysis of the applicable standards of review.

New evidence

[14] The applicants claim that the Officer erred by not considering new evidence submitted by the applicants. The evidence includes the following:

1) the court record of the inquiry into Thushari's death;

2) a police complaint, dated January 10, 2006, made by the principal applicant's mother stating that unknown people were looking for the applicants and threatened to kill the principal applicant and her family;

3) a letter from the Asian Human Rights Commission to the National Human Rights Commission of Sri Lanka, dated May 2005, urging the Commission to investigate Thushari's death;

4) a newspaper article published in January 2001 that tells of a petition by her sister addressed to the present of Sri Lanka about threats from the police that she had sent a few days before being killed;

5) the love letter allegedly written by Wanaraja; and,

6) general documents as to country conditions in Sri Lanka with respect to human rights.

[15] The Officer refused to look at new evidence because it related to allegations already dealt with by the Refugee Board. She also held that the documents regarding the murder of the female applicant's sister were already before the Refugee Board and therefore do not constitute new evidence.

[16] The respondent submits that the only purpose of the PRRA program is to assess those risks that a person could face if they were to be removed to their native country, in light of new facts arising after the Refugee Board's decision on the refugee claim. The respondent cites a number of cases where the Court has held that the PRRA process is not intended to be an appeal of a decision of the Refugee Board and that the PRRA is designed to assess new risks (*Perez v. Minister v. Citizenship and Immigration*, 2006 FC 1380, *Kaybaki v. Soliciter General*, 2004 FC 32, *Quiroga v.*

Minister of Citizenship and Immigration, 2006 FC 1306, *Raza v. Minister of Citizenship and Immigration*, 2006 FC 1385).

[17] Although the PRRA process is meant to assess only evidence of new risks, this does not mean that new evidence relating to old risks need not be considered. Moreover, one must be careful not to mix up the issue of whether evidence is new evidence under subsection 133(a) with the issue of whether the evidence establishes risk. The PRRA officer should first consider whether a document falls within one of the three prongs of subsection 113(a). If it does, then the Officer should go on to consider whether the document evidences a new risk.

[18] This distinction was clear to the PRRA officer whose decision was reviewed in *Perez v. Minister of Citizenship and Immigration*, 2006 FC 1379 and the Court then reviewed both steps of the officer's analysis. The Court described the PRRA officer's process in the following way:

> [9] The PRRA Officer found that the Applicants submitted new evidence as per section 113(a) of the *IRPA*. However, the PRRA Officer found that the new evidence did not provide any new risk that had not existed and been considered by the RPD. The PRRA Officer, after reviewing current country condition documents, was satisfied that there has not been a deterioration of general country conditions since the RPD decision in June 2004.

The Court in *Perez* concluded that the Officer had properly considered the new evidence and had reasonably concluded that the new evidence was not sufficient to establish that the applicants would be at risk.

[19] In *Elezi*, the Court found a PRRA officer cannot exclude all evidence simply because it related to risks raised in front of the Refugee Board. The Court held:

> [38] All of this evidence is obviously extremely probative, and to a large extent, refutes all of the Board's conclusions against Mr. Elezi. Had he submitted this evidence at his Board hearing, the Board may well have written a very different decision. Yet, these documents do not raise any "new" risks, *per se*. The risks outlined were the same as those Mr. Elezi claimed during his hearing before the Board. Was it then reasonable for the PRRA officer to exclude all these documents on that basis? In my opinion, no.
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> [39] I believe the PRRA officer should have considered at least some of these documents pursuant to the first branch of subsection 113(a) of the IRPA. First, the letters appear to have been written after the Board's decision. They were notarized after the Board's decision, and the date on the envelopes in which they were sent also postdates the Board's decision. More importantly, however, I think the officer should have admitted the undated letters because they contain information that goes beyond a mere repetition of what was already in front of the Board. Unlike country condition reports and other documentary evidence of a general nature, the six letters that were excluded all directly relate to Mr. Elezi. The letters from his friends are first-hand witness accounts that corroborate his story. Of even more significance are the letters from state officials of the highest rank, which, lend credit to Mr. Elezi's fear of reprisals and to his claim that Albania cannot protect him.
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> [40] This approach, I hasten to say, appears to be consistent with this Court's findings in both *Mendez*, above, and *Raza*, above. In the latter decision, Justice Mosley went out of his way to distinguish the case before him from *Mendez*, opining that the new evidence in *Mendez* was "central to the applicant's claim as it went to the very heart of the Board's conclusion that he would not be at risk as a HIV-positive gay man in Mexico" (*Raza*, above, at paragraph 18). He added, at paragraph 22, that when assessing "new information", "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."
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> [41] In other words, the nature of the information, its significance for the case, and the credibility of its source, are all factors that can and should be taken into consideration in determining whether it can be considered "new evidence", when it appears to have been created after the Board's decision. In the context of the present case, I believe the information contained in the letters from the Mayor and from the Deputy, at the very least, qualify as "new evidence."

[20] Had the Officer properly applied section 113, she would have found that some of the documents relating to Thushari's death, specifically the love letter and the newspaper article, were not new evidence since they were before the Refugee Board. Other documents could be considered new evidence. The Court inquiry record could reasonably be considered new evidence since the applicants provided an affidavit from the male applicant's brother explaining the difficulties he had in obtaining the document, i.e. why the document was not reasonably available at the time of the applicant's Refugee Board hearing. The police complaint and the letter from the Asian Human Rights Commission are both dated after the Refugee Board hearing and, therefore, could be considered as new evidence according to the first prong of subsection 133(a), i.e. evidence that arose after the rejection.

[21] The Officer excluded these documents solely based on the fact that they related to the allegations raised in front of the Refugee Board. This is not the test for new evidence set out in subsection 113(a). Consequently, I find that the Officer erred in law by misinterpreting 113(a).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter is returned for a new hearing before a different immigration officer in accordance with these reasons.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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