Date: 20070821

Docket: IMM-4133-06

Citation: 2007 FC 846

Montréal, Quebec, August 21, 2007

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

THAVENDRARAJAH KRISHNAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Thavendrarajah Krishnan applies for judicial review of a decision of the Minister's Delegate, dated June 12, 2006, that the applicant constitutes a danger to the public of Canada, pursuant to paragraph 115(2)*(a)* of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

Background

[2] The applicant, Mr. Krishnan, is a citizen of Sri Lanka and an ethnic Tamil, who came to Canada as an unaccompanied minor in 1992, at the age of 13, and sought refugee protection. He was found to be a Convention refugee in 1993 and received permanent resident status in 1995, but never obtained Canadian citizenship.

[3] Between 1998 and 2001, the applicant accumulated 15 criminal convictions, but was not convicted of any criminal offences between 2001 and 2006. In 2001, the applicant was identified by the Toronto police and Immigration officials as being a member of a Tamil gang known as the A.K. Kannan gang.

[4] On January 17, 2002, a removal order was issued against the applicant. The applicant appealed the removal order before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, and his appeal was dismissed on April 20, 2004. He then sought judicial review of the decision, which was denied on April 18, 2005. See: *Krishnan v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 517.

[5] After he was ordered deported, the applicant received notice, dated August 31, 2004, that ministerial officials would seek an opinion from the Minister that the applicant was a danger to the public and should not be allowed to remain in Canada, on the ground of organized

criminality and the nature and severity of the acts committed, in order to give effect to the applicant's deportation to Sri Lanka.

[6] The applicant provided submissions in opposition to this notice on October 18, 2004, and again on June 29, 2005.

[7] The Minister's Delegate issued her decision on June 12, 2006, and determined that the applicant was a danger to Canada's security, that he would not face a substantial risk if returned to Sri Lanka and that, alternatively, even if there was a risk, then the risk he poses to Canada's security outweighed any risk to him.

Issues for consideration

[8] The following issues are raised in this judicial review application:

1) Did the Minister's Delegate err in her determination that the applicant was a danger to the public in Canada?
2) Did the Minister's Delegate properly assess the risk to the applicant upon his return to Sri Lanka?
3) Did the Minister's Delegate err by failing to balance the applicant's protection interests against the danger he poses to the public in Canada?

Pertinent legislation

Immigration and Refugee Protection Act, S.C. 2001, c. 27	**Loi sur l'immigration et la protection des réfugiés**, (S.C.2001, ch. 27)
115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Standard of review

[9] It is well established in the jurisprudence that decisions of Ministerial Delegates under section 115 of the *Act* are entitled to an important degree of deference and that as such, the determination that an individual constitutes a danger to the security of Canada is to be reviewed against the standard of patent unreasonableness. As stated by the Supreme Court of Canada in *Ahani v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 72:

> [16] For the reasons discussed in *Suresh*, the standard of review on the first decision is whether the decision is patently unreasonable in the sense that it was made arbitrarily or in bad faith, cannot be supported on the evidence, or did not take into account the appropriate factors. A reviewing court should not reweigh the factors or interfere merely because it would have come to a different conclusion. Applying the functional and pragmatic approach mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982 , we conclude that the Parliament intended to grant the Minister a broad discretion in issuing a s. 53(1)(b) opinion, reviewable only where the Minister makes a patently unreasonable decision.

Analysis

1) Did the Minister's Delegate err in her determination that the applicant was a danger to the public in Canada?

[10] Before reaching the conclusion that the applicant's presence in Canada poses an unnecessary risk of danger to the Canadian public, the Minister's Delegate engaged in a lengthy analysis, in which she considered the offences which led to the applicant's numerous convictions, as well as his link to a Tamil gang. She made extensive references to the Book of Evidence prepared by Citizenship and Immigration Canada in the context of the applicant's

hearing before the IAD, the Project 1050 Overview prepared by the Street Violence Task Force of the Toronto Police, the decision of the IAD, the transcripts of the IAD hearing, and the submissions from the applicant's counsel. She also took note of the fact that the applicant had not been charged with any criminal offences in recent years, but concluded that this gap in activity did not mean that the applicant would not re-offend, and that she was not convinced that he had in fact abandoned his former lifestyle.

[11] The Minister's Delegate also supported her conclusion on the possibility that the applicant might re-offend by relying on the decision of Justice J. François Lemieux in *La v. Canada (Minister of Citizenship and Immigration)*, [2003] FCT 476, in which he quoted the following passage from the decision of Justice Barry L. Strayer in *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646, at paragraph 29:

> … In the context the meaning of "public danger" is not a mystery: it must refer to the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender. It need not be proven - indeed it cannot be proven - that the person will reoffend. What I believe the subsection adequately focuses the Minister's mind on is consideration of whether, given what she knows about the individual and what that individual has had to say in his own behalf, she can form an opinion in good faith that he is a possible reoffender whose presence in Canada creates an unacceptable risk to the public…

[12] First, it is important to emphasize that, before this file arrived on the desk of the Minister's Delegate, the order to deport the applicant had already been upheld by both the Immigration Appeal Division and the Federal Court. In *Krishnan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 517, Justice Shore concluded as follows:

> [20] It was open to the Appeal Division to find reasonable grounds to believe that Mr. Krishnan had been a member of the A.K. Kannon gang and involved in criminal gang activity. It was open to the Appeal Division to find that he had not severed all ties to this gang, given the fact that he refused to even admit the possibility that some of his previous associates were gang members; and given that his evidence regarding many aspects of his criminal activity was untrustworthy and not credible. Based on the evidence provided, including Mr. Krishnan's criminal history, his refusal to take responsibility for his actions and his willingness to lie when convenient, the Appeal Division did not accept that his criminal ties no longer existed. This finding was open to the Appeal Division.
>
> [27] The Court finds that it was open to the Appeal Division to conclude that Mr. Krishnan posed a danger to the public and was likely to re-offend in light of the evidence that Mr. Krishnan had a history of failure to comply with probation and recognizance, was not adverse to lying to avoid detection for these failures and in light of the testimony of Officer Ragell that Mr. Krishnan continued to associate with people who were members of the gang with criminal records.

[13] The Court cannot find anything wrong with the Minister’s Delegate’s reliance on the findings of the IAD, which were upheld by the Federal Court, since the IAD member had the benefit of hearing the testimony of the applicant and of Officer Ragell. Furthermore, the Minister’s Delegate did not simply rely on this decision in her determination of the danger posed by the applicant, but she also consulted the transcripts, the documentary evidence and the submissions of the applicant. As such, the Court agrees with the respondent that the Minister’s Delegate conducted an independent assessment of the evidence before her and that it is not for this Court to re-weigh this evidence.

[14] The applicant also questions the fact that the Minister's Delegate relied on police reports, instead of affidavits or first hand statements, and newspaper articles in her analysis. The respondent, for his part, maintains that the Minister's Delegate is not bound by the evidentiary rules of a criminal court and was entitled to rely on any evidence which she found to be credible and reliable. As the applicant has not presented any evidence that would convince this Court that these documents were irrelevant to the determination or were derived from sources whose credibility was questioned, I cannot conclude that her consideration of this material amounts to a reviewable error.

[15] Finally, the applicant submits that the Minister's Delegate erred by not considering the evidence submitted showing that the applicant had changed his life, including his relationship with a Canadian citizen, his lack of criminal convictions since 2001, his successful completion of probation in 2003 and his continued employment. Moreover, the applicant questions the finding of the Minister's Delegate with regards to the applicant's continuing gang membership and her reliance on the conclusions of the IRB to that effect.

[16] Once again, the applicant is asking the Court to re-weigh the evidence that was properly considered by the Minister's Delegate in her danger assessment and in her H&C assessment, and this the Court will not do.

[17] Furthermore, while the applicant is particularly concerned with the Minister's Delegate's conclusion that the applicant remains a member of the A.K. Kannan gang, which he claims is

now considered defunct, the finding of the Minister's Delegate that the applicant's presence in Canada poses an unnecessary risk of danger to the Canadian public was not based on his membership in this gang, but on his past criminal convictions, which she examined at length.

[18] In light of the high degree of deference owed to the Minister's Delegate, the Court is not satisfied that the applicant has shown that the danger assessment was patently unreasonable such that the intervention of this Court would be warranted.

2) Did the Minister's Delegate properly assess the risk to the applicant upon his return to Sri Lanka?

[19] In performing the risk assessment, the Minister's Delegate considered the applicant's Personal Information Form (PIF) and acknowledged the fact that he had been found to be a Convention refugee, but concluded that the country conditions in Sri Lanka had changed so that, in spite of his refugee status, he could still be 'refouled' to Sri Lanka.

[20] While the Minister's Delegate admitted that the conditions in Sri Lanka were still far from ideal as there remained clashes between the LTTE and the Sri Lankan army, she did not believe that such a generalized risk met the requirement of section 97 of the *Act.* She based her determination with regards to the country conditions and to the risk for returnees on the United States Department of State Country Reports on Human Rights Practices (the US DOS Report) and on a report prepared by the IRB Research Directorate. The Minister's Delegate ultimately concluded:

> Having examined all of the information available to me, I am satisfied, on a balance of probabilities, that Mr. Krishnan would not face a risk of torture or a risk to his life, or to a risk of cruel and unusual treatment or punishment if returned to Sri Lanka. Finally, based on the material that I reviewed, I am satisfied that, on the balance of probabilities, that he will not face any of the risks identified under section 97 of IRPA as a result of the criminal convictions that he incurred while he was present in Canada.

[21] The applicant first submits that the Minister's Delegate erred in failing to consider the impact that the applicant's particular characteristics, such as his alignment with the LTTE and the publicity regarding his gang membership, would have on his risk of return. The respondent for his part maintains that while the applicant argues that the Minister's Delegate ignored evidence that would demonstrate his personal risk of return to Sri Lanka, he points to no specific evidence that she ignored.

[22] Furthermore, since the Minister's Delegate did acknowledge the applicant's claims with regards to affiliation with the LTTE, it cannot be said that she ignored this particular characteristic of the applicant. The fact that she did not assign it the weight the applicant felt that it deserved is another issue, which as the respondent correctly noted, is generally considered to be "outside of the realm of expertise of reviewing courts". See: *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, [2007] FC 229, paragraph 39.

[23] As for the issue of 'publicity', the respondent directed this Court to the decision of Justice Rouleau in *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 72, where he upheld a decision of a PRRA officer in which a senior gang member with a higher

profile than the applicant and whose name had appeared in connection with a Tamil gang in both Canadian and Sri Lankan newspapers, was found not to be at risk of harm if returned to Sri Lanka. Furthermore, while this issue is not discussed in the Minister's Delegate's decision, it must be acknowledged that the only 'publicity' in evidence is one paragraph in one Toronto Star article dated August 3, 2002, which mentions the applicant as being an "alleged A.K. Kannan member". So, the failure of the Minister's Delegate to mention such an insignificant element cannot be considered to be a reviewable error.

[24] The applicant also takes issue with the Minister's Delegate's assessment of the evidence on the country conditions in Sri Lanka, in particular her decision to rely on the US DOS Report, which he claims is not the most "credible" source of information. In light of the fact that these reports are routinely relied on by immigration officials assessing country conditions, I give no weight to this particular argument.

[25] The applicant also argues that country conditions had begun to change for the worst just before the decision was made, and that, a few weeks after the decision was rendered, the war between the LTTE and the army in Sri Lanka had resumed. While this may be true, it remains that it was the responsibility of the applicant to submit any material he felt was relevant before the decision was made, which he failed to do. The applicant is not arguing that the Minister's Delegate ignored evidence that was before her, but that she failed to seek out additional information that would support the applicant's case, and thus ignored evidence that was not in fact before her, which cannot be considered a reviewable error.

[26] The Minister's Delegate was not alert and alive to the possibility that the alleged change in Sri Lanka could give rise to an enhanced risk of torture or persecution upon the applicant's return to his country.

[27] There is no question that the Minister's Delegate's decision cannot be set aside due to subsequent developments in Sri Lanka that may increase the risk to the applicant. Post-decision changes to country conditions are not reviewable by this Court at this stage of the procedure.

3) Did the Minister's Delegate err by failing to balance the applicant's protection interests against the danger he poses to the public in Canada?

[28] As a final argument, the applicant submits that the Minister's Delegate failed to balance the risks he will face if he returns to Sri Lanka, against the danger that he represents to the public in Canada.

[29] As correctly noted by the respondent, not only are the risk inquiry and the subsequent balancing of danger and risk not expressly directed by subsection 115(2), *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, [2006] FCA 151, but if the Minister's Delegate concluded that the applicant did not in fact face a significant risk upon return to Sri Lanka, there would have been little point in balancing that finding against her conclusion that the applicant poses a threat to Canadians.

[30] And yet, the Minister's Delegate still turned her mind to this question, when she concluded in her reasons:

> After fully considering all facets of this case, including the humanitarian aspects, and an assessment of the risk that Mr. Krishnan might face if returned to Sri Lanka and the need to protect Canadian society, I find that the latter outweighs the former. In other words, upon consideration of all the factors noted above, I am of the opinion that the interests of Canadian society outweigh Mr. Krishnan's presence in Canada and any minimal risk that he might incur if returned to Sri Lanka.

[31] Clearly, the applicant's argument is without merit as the Minister's Delegate did balance the applicant's protection interests against the danger he poses to the public in Canada. The fact that the applicant would have preferred a different result to this balancing exercise does not justify a judicial intervention.

[32] For the above reasons, this judicial review application is denied.

Certification of a question

[33] Counsel for the applicant submits that his arguments potentially raise a question in respect of the submission on breach of the duty of fairness. In that while the Delegate in this case purported to decide the issue of risk on "current" evidence, according to the applicant it is not apparent in the reasons that the Delegate considered any evidence later than 2003 in making her decision in June, 2006. Counsel for the applicant therefore requests that the following question be certified:

> "Does the duty of fairness require that the Minister's delegate either make herself aware of the conditions in the applicant's country of origin, through publicly available human rights reports and other such material, at the time of making a decision under s.115(2) of the Immigration & Refugee Act or give notice to the applicant that a decision will shortly be made and invite the applicant to provide updated information on the conditions in the country of origin, where a significant period has passed since the applicant's case was perfected for consideration without a decision having been made."

[34] The respondent opposes certification of the proposed question as the threshold for certification is not met: no serious issue of general importance which would be determinative of an appeal arises in this case. In *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637, the Federal Court of Appeal stated:

> [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interest of the immediate parties to the litigation and contemplates issues of broad significance or general application … but it must also be one that is determinative of the appeal.

Same statement also in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89.

[35] The law is clear: the duty of fairness does not change the obligation of a person who is the subject of a danger opinion to put all material that he or she wishes to have considered before the Minister's Delegate who is the decision maker in this case. The burden of proof rests with the applicant. See *Kante v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 525. This principle has been followed constantly.

[36] The applicant was given the opportunity to make submissions to the Minister's Delegate. If the applicant wanted the Minister's Delegate to consider additional information material about the country conditions, he had the obligation to present that material to the Minister's Delegate. See *Owusu v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 94.

[37] The applicant was able to make submissions to the Minister's Delegate at any time before the decision. See *Sittampalam v. Canada (Minister of Citizenship and Immigration),* 2007 FC 687. As a matter of fact, the applicant provided submissions on October 18, 2004, and again on June 29, 2005 to the Minister's Delegate.

[38] Deciding a case relating to "refoulement" on the basis of current information about the country conditions is certainly an important issue emphasized by this Court in several decisions. See *Barabhuiyan v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No.1456. But nothing in the Delegate's decision suggests or permits this Court to conclude that the current available information about the country conditions was not considered at the time the Delegate made her decision. On the contrary it appears that the Delegate based her determination with regards to the country conditions and to the risk for returnees on the United States Department of State Country Reports on Human Rights Practices (the US DOS Report) and on a report prepared by the IRB Research Directorate.

[39] These reports were available to everyone. Therefore, if the applicant wanted to provide additional or updated information on the conditions in his country of origin, it was his burden and responsibility to do so.

[40] The question proposed for certification would in effect either transfer this burden to the Minister's Delegate or impose on the Delegate an additional obligation, with the result of delaying the decision. Since the Court is not prepared to do so, the proposed question will not be certified.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is dismissed. No question is being submitted for certification.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Barbara Jackman	FOR THE APPLICANT
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barbara Jackman Jackman & Associates Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT