Date: 20080702

Docket: IMM-5401-07

Citation: 2008 FC 827

Ottawa, Ontario, July 2, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

PRIYANTHA SWARN KIRINDAGE DE SILVA,
ARAVINDA WEERATHUNGA,
THILINI WEERATHUNGA, AND
KEISHI WEERATHUNGA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Who killed Thushari de Silva on the 14th day of July in the year 2000? Was she shot to death by Sri Lankan police for failing to stop at a road check or was she murdered by her erstwhile lover, Ranjith Wanaraja, the corrupt head of the equally corrupt Police Special Investigation Unit? The official version is the former. Thushari's sister's refugee claim, more properly a claim for international protection under section 97 of the *Immigration Refugee and Protection Act*, is based on the latter.

[2] The claim of Priyantha de Silva, her husband and their two children, was dismissed in May 2004. The Panel concluded that the claimants had failed to produce credible or trustworthy evidence of a serious possibility that they would be at risk from the police should they return to Sri Lanka. Their first pre-removal risk assessment (PRRA) was also rejected, but Mr. Justice Teitelbaum granted judicial review, 2007 FC 841, 63 Imm. L.R. (3d) 245. The second PRRA decision was also negative. This is a judicial review of that decision.

[3] Thushari de Silva died violently, of that there can be no doubt. Her sister Priyantha's claim for Canada's protection had a number of facets. It was alleged that there had been a court inquiry and that the police had been absolved of all blame. However Ms. de Silva subsequently found a love letter which put Inspector Wanaraja in the spotlight. The Sri Lankan court record, which was not produced, as it was said to have been misplaced, was, among other things, supposed to establish that Thushari's assistant had received information that she under arrest and had attended at a police station to investigate.

[4] In its decision, the Panel noted the "total lack of official documentation on the evidence presented in the Court proceedings." The Panel also did not believe that the alleged love letter was written by Inspector Wanaraja. An application for leave and judicial review was refused. However, subsequently Mr. Justice Teitelbaum granted judicial review of the first PRRA as the officer failed to consider "new evidence" that arose after the original rejection, or was not reasonably available, as required by section 113 of IRPA. More particularly, he held at paragraph 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 113(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.

[5] In this judicial review of the second PRRA, Ms. de Silva again asserts that the new officer erred in law in concluding that section 113(a) of IRPA requires new facts and not merely new evidence. It is also submitted that the officer's decision, particularly in concluding that there was no evidence demonstrating that Ms. de Silva's complaints had become known to the Sri Lankan authorities was unreasonable, and that since credibility was in issue a hearing should have been granted under Regulation 167.

DISCUSSION

[6] Section 113(a) provides:

113. Consideration of an application for protection shall be as follows:	**113.** 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 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; […]	*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 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; […]

[7] Section 113(a) requires a two-step analysis. The officer must first determine whether each piece of so-called new evidence is actually new. If so, that evidence is admissible. The next step is to assess and give weight to it.

[8] Ms. de Silva alleges, and I agree, that the officer combined these two steps, and therefore did not take into account the whole of the evidence, both old and new. For instance, the new evidence included a letter from a journalist which largely corroborated the allegations. The officer said that the fact that these allegations were now coming from a journalist did not make the allegations new. That is quite true, but given the finding of lack of credibility in the original decision, corroborating evidence from someone whose evidence was not reasonably available at the first hearing is both relevant and new.

[9] Copy of some Sri Lankan court proceedings were produced at the second PRRA hearing. The record may not be complete as it does not establish that Inspector Wanajara was acquitted. Rather, the record appears to be more in a nature of a preliminary inquiry. Mr. Justice Teitelbaum specifically took the first PRRA officer to task for not considering the court record. What is important about the record, even if only a preliminary inquiry, is that it states that Thushari's assistant did attend at a police station the day before, as was confirmed by the testimony of a police officer. This puts in question the Panel's original analysis:

> …allegedly, her father told her that an employee, Zeena, who worked at his employment agency with Thushari testified in court that the evening before the killing, two men visited her house to inform her that Thushari had been taken into custody. Allegedly, a police officer confirmed at the court that Zeena had gone to the

> police station inquiring about the principal claimant's sister.
> [Emphasis added.]

The allegation has been established, which may have some bearing on credibility.

[10] Another very important issue is whether the authorities in Sri Lanka would have been on notice that Ms. de Silva had been publicly complaining about this case not only while she was still in Sri Lanka, but also from Canada. In this regard, the record contains a letter from Ms. de Silva dated 10 May 2004 to the President of Sri Lanka with copies to the Prime Minister, the Attorney General, the Inspector General of Police and a Member of Parliament.

[11] The timing of the 10 May 2004 letter is relevant. The original hearing before the Refugee Protection Division of the IRB was on 19 January and 7 April 2004. The date of the decision was 21 May 2004. The Minister points out that this letter came into existence before the rejection. Section 161(2) of the Regulations requires an applicant to specifically identify new evidence and indicate how that evidence applies to him or her. This was not done, and consequently it is not surprising that the officer made no reference to it.

[12] Yet, a cornerstone of the negative holding was that the authorities would not be aware of Ms. de Silva's various activities. This letter appears to put the lie to that contention. It is clearly an important piece of evidence. The officer is presumed to have considered everything in the file, even if not mentioned. However, the more important the evidence is, the more important it is to identify it (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998]

F.C.J. No. 1425 (QL)). It is speculation on the Minister's part that the officer considered the letter and rejected it on the grounds that it was not new evidence.

[13] Considered as a whole, the original Panel's finding with respect to credibility permeates the officer's decision. Regulation 167 prescribes the officer's discretion to hold a hearing as follows:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[14] A hearing should have been granted.

[15] For these reasons, the application for judicial review will be granted. No doubt, Ms. de Silva will identify her letter to the President of Sri Lanka as new evidence. Whether it is, in the circumstances, remains to be seen.

ORDER

UPON APPLICATION for judicial review of the decision of a Pre-Removal Risk Assessment Officer, dated 16 November 2007, rendered in file ID numbers 5234-6006,5234-6005, 5240-3935, and 5240-3948, refusing the applicants' pre-removal risk assessment application;

FOR THE REASONS GIVEN ABOVE;

THIS COURT ORDERS that:

1. The application is granted.
2. The matter is referred back to another officer for redetermination in accordance with these reasons.
3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5401-07
STYLE OF CAUSE:	PRIYANTHA SWARN KIRINDAGE DE SILVA ET AL v. MCI
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DATE OF HEARING:	June 18, 2008
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