Date: 20080708

Docket: IMM-10-08

Citation: 2008 FC 843

Ottawa, Ontario, July 8, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ABIRAMIE RAMANATHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by Pre-Removal Risk Assessment (PRRA) officer N. Sohal dated November 8, 2007, concluding that the applicant would not be at risk of persecution if returned to Sri Lanka, her country of citizenship.

FACTS

Background

[2] The applicant is a 31-year-old Sri Lankan citizen of Tamil descent. She arrived in Canada on May 15, 2000, having been sponsored for permanent residence by her then fiancée. However,

sometime after arriving, the applicant's relationship broke down and her fiancée's family backed out of the arranged engagement.

[3] The applicant states that her failed engagement resulted in emotional devastation and caused her to suffer a "severe breakdown," wherein she experienced depression and auditory hallucinations. As a result, the applicant saw a doctor and was prescribed psychiatric medication, which she continues to take.

[4] In February 2003, a removal order was issued against the applicant because she failed to comply with the terms of her application for permanent residence – *i.e.*, she did not marry her sponsor. As a result of the removal order, the applicant was convoked to a hearing before the Immigration Appeal Division of the Immigration and Refugee Board (the Board), wherein she represented herself. In her Affidavit, sworn January 31, 2007, the applicant states that she was suffering from severe depression at the time, but did not alert the Board to this fact because she felt ashamed by her condition. On March 9, 2004, the Board dismissed her appeal. The applicant sought to have this decision judicially reviewed, but her application for leave was dismissed.

[5] Later in 2004, the applicant obtained counsel and filed a PRRA application citing a fear of returning to Sri Lanka because of increasing hostilities between the government and the Liberation Tigers of Tamil Eelam (LTTE). No submissions were made regarding the applicant's mental state because, as the applicant states, she did not disclose this issue to her lawyer. On October 25, 2004, the applicant's PRRA application was rejected.

The PRRA application

[6] On January 22, 2007, the applicant filed a second PRRA application, which was completed with the assistance of the same counsel currently representing the applicant before the Court. The basis of the application was the heightening conflict between the LTTE and the Sri Lankan government, as well as the applicant's mental health issues. While the applicant was scheduled for removal on February 12, 2007, an Enforcement Officer agreed to defer her removal until such time as her PRRA submissions could be considered.

[7] On November 8, 2007, the PRRA officer concluded that the applicant would not be at risk if returned to Sri Lanka. The PRRA officer's analysis began with recognition that the human rights situation in Sri Lanka was becoming increasingly strained as a result of worsening relations between the government and the LTTE. The PRRA officer's analysis relied heavily on a document entitled "Operational Guidance Note: Sri Lanka," which was issued by the U.K. Home Office on November 5, 2007, three days prior to the PRRA officer's decision. The Guidance Note, which itself relies on evidence collected by various human rights organizations, characterizes the situation in the following terms:

> Both Amnesty International (AI) and Human Rights Watch (HRW) have highlighted the increase in large scale military operations conducted by the Government and the LTTE and the worsening human rights situation in the country. AI has reported that the range of people being targeted appears to be expanding and that although most of those killed since the LTTE split had clear links to either the LTTE or the Karuna faction, there has been an increase in the number of civilians killed who have little or no evident connection to armed activity. This reportedly includes journalists, academics, teachers and farmers as well as former members of the Tamil armed groups who have not been involved in armed activities for a long time. …

[8] The PRRA officer next addressed the applicant's particular circumstances, stating at page 6 of the decision:

> With respect to the applicant's particular circumstances, I note that there is insufficient evidence before me to indicate that the LTTE have ever had any particular interest in her or her family members previously. There is little if any evidence to indicate that she would fit the profile of an individual that would be targeted by the LTTE as the documentary evidence shows those that … have been targeted have frequently been those who are opposed to them.

[9] With respect to whether the applicant would be at risk of being targeted by the Sri Lankan government upon her return to the country, the PRRA officer reviewed the evidence contained in the Guidance Note, which states that while most returning individuals are only briefly detained for questioning, those with noticeable scars are more prone to rigorous questioning and potential ill-treatment. Having reviewed the evidence, the PRRA officer concluded that since the applicant provided little detail of any scars she may possess, she did not "fit the profile of an individual who would be targeted by Sri Lankan authorities upon a return to Sri Lanka."

[10] The PRRA officer also considered whether the applicant would be at risk of extortion for being "perceived as wealthy owing to her stay in Canada." In this regard, the PRRA officer considered the evidence filed by the applicant, namely the United Nations High Commissioner for Refugees Position on the International Protection Needs of Asylum-Seekers from Sri Lanka, dated December 2006 (the UNHCR Position). After briefly reviewing the content of the UNHCR Position, the PRRA officer stated at page 8:

> I have taken into consideration the above evidence relating to returning asylum seekers being targeted for extortion and while I

> acknowledge that there exists a mere possibility, I am not satisfied there exists more than a mere possibility of extortion. Indeed, the UNHCR report referring to at least two incidences of extortion from immigration officials shows that while it is a concern, it is not occurring with great regularity.

[11] Finally, the PRRA officer considered whether the applicant would be at risk due to her gender and alleged mental health condition. The PRRA officer held that such risks would be significantly diminished by the fact that the applicant was returning to a country where she had an "extensive family network" to provide emotional support. With respect to the applicant's mental health condition, the PRRA officer again referenced her significant family support, but also noted that she had filed "little medical evidence to indicate how a return to Sri Lanka would affect her."

[12] Accordingly, the PRRA officer concluded that returning to Sri Lanka would not place the applicant at risk under either sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[13] By letter dated November 27, 2007, the applicant was notified that a decision had been made, and was asked to attend the PRRA office on December 18, 2007 to be given the decision. In response, by letter dated December 17, 2007, the applicant's counsel requested an opportunity to file updated evidence concerning conditions in Sri Lanka, since the original submissions were almost a year old. On this basis, he enclosed a number of updated news and human rights reports detailing "the continuing deterioration of the human rights situation for Tamil civilians in Sri Lanka."

The stay of removal

[14] The applicant was originally scheduled for removal from Canada on February 28, 2008. On February 25, 2008, Mr. Justice Mosely ordered a stay of that deportation until such time as this application has been finally determined.

ISSUES

[15] The applicant raises two issues for consideration:

1. Did the PRRA officer breach the rules of procedural fairness in rejecting the applicant's application; and
2. Was the PRRA officer's decision to deny the PRRA application unreasonable?

STANDARD OF REVIEW

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the Supreme Court of Canada reconsidered the number and definitions to be given to the various standards of review, as well as the analytical process employed to determine the appropriate standard in a given situation. As a result of the Court's decision, it is clear that the standard of patent unreasonableness has been eliminated, and that reviewing courts must focus on only two standards of review, those of reasonableness and correctness. In *Dunsmuir*, the Court also held that where the type of decision being reviewed has been thoroughly assessed in the preceding jurisprudence, subsequent decisions may rely on that standard.

[17] The first issue raised by the applicant concerns matters of natural justice and procedural fairness. Such issues are not governed by the standard of review analysis put forward by the Supreme Court in *Dunsmuir*. Rather, such matters are questions of law subject to review on the standard of correctness. In the event the PRRA officer breached the rules of natural justice and procedural fairness, no deference is due and the decision will be set aside: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

[18] The second issue concerns the reasonableness of the PRRA officer's decision and whether the officer had proper regard to all of the evidence when reaching a decision. It is clear as a result of *Dunsmuir*, above, that such factors are to be reviewed on a standard of reasonableness: see *Erdogu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, [2008] F.C.J. No. 546 (QL) and *Wa Kabongo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 348, [2008] F.C.J. No. 453 (QL).

ANALYSIS

Issue No. 1: <u>Did the PRRA officer breach the rules of procedural fairness in rejecting the applicant's application?</u>

[19] The applicant argues that her right to procedural fairness was breached when the PRRA officer relied on the U.K. Home Office Guidance Note without first providing her with an opportunity to address the Guidance Note and its application to her particular circumstances.

[20] As noted above, the Guidance Note was issued by the U.K. Home Office on November 5, 2007, three days before the PRRA officer rejected the applicant's PRRA application. Accordingly,

it is clear that this document was not available when the applicant filed her PRRA submissions in January 2007. Further, the record shows that the PRRA officer's consideration of the Guidance Note was not communicated to the applicant prior to the decision.

[21] In general, immigration officers may consider evidence that was not normally available at the time of the applicant's submissions. However, where that information evidences a change in the general country conditions that may affect the disposition of a case, fairness dictates that such information be made available to the applicant for comment. As the Federal Court of Appeal held in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.) at paragraphs 22 and 26:

> ¶ 22 … where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.
>
> […]
>
> ¶ 26 … The fact that a document becomes available after the filing of an applicant's submissions by no means signifies that it contains new information or that such information is relevant information that will affect the decision. It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant.
>
> [Emphasis added.]

[22] In *Sinnasamy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 67, [2008] F.C.J. No. 77 (QL), Mr. Justice de Montigny was faced with a similar situation to the case at bar; namely, the applicant alleged that his right to procedural fairness was breached when the PRRA officer considered the Home Office Guidance Note without first providing him with an opportunity to comment on it. In that case, the basis of the applicant's argument centred on the fact that the document was not contained in the Board's national documentation package on Sri Lanka and was not a recognized human rights report, but rather a policy document for U.K. asylum officers providing recommendations on how to process claims arising out of Sri Lanka.

[23] In his decision, Justice de Montigny considered the above-noted statements from the Federal Court of Appeal in *Mancia*, above, and concluded at paragraph 39 that the PRRA officer was entitled to rely on the Guidance Note since it was obtained from a reliable source and merely "confirms and collects" the evidence available from other sources:

> ¶ 39 In the case at bar, I believe the PRRA officer was entitled to rely on the UK Home Office Operational Guidance Note for Sri Lanka, since this is a publicly available document from a reliable and well-known website. The fact that the report is not contained in the IRB reference material does not mean that it is not publicly available. While I am not prepared to accept that every document available on the internet is "publicly available" for the purpose of determining what fairness requires in the context of a PRRA, since this would impose an insurmountable burden on the applicant as virtually everything is nowadays accessible on line, I am of the view that the specific document under challenge here could be consulted by the PRRA officer without advising the applicant. In many respects, it merely confirms and collects the evidence available from other sources. It does not reveal novel and significant changes in the general country conditions, even if it is not entirely parallel with the findings reported in the UNHCR document. …
>
> [Emphasis added.]

It must be noted, however, that while Justice de Montigny concluded that the PRRA officer's reliance on the Guidance Note did not breach the rules of procedural fairness, the officer nevertheless erred in failing to consider the contradictory findings of the UNHCR Position, which was relied on by the applicant.

[24] In the case at bar, the applicant does not dispute that the PRRA officer was entitled to rely on the Guidance Note in considering the merits of her claim. However, the applicant argues that the timing of the PRRA officer's decision mandated that she be provided with an opportunity to comment on the Guidance Note before a decision was rendered.

[25] In reviewing the record, the Court finds that the PRRA officer's decision was issued seven days after the applicant voluntarily agreed to discontinue an application for judicial review and stay motion regarding her removal from Canada, and three days after the U.K. Home Office issued the Guidance Note relied on by the PRRA officer. The Guidance Note rejected the UNHCR Position dated December 2006 and was a significant and prejudicial development affecting the applicant's case. I agree that the PRRA officer had a duty to give the applicant an opportunity to comment on the Guidance Note before rendering a decision.

Issue No. 2: <u>Was the PRRA officer's decision to deny the PRRA application unreasonable?</u>

[26] The applicant contends that even if no breach of procedural fairness occurred, the PRRA officer nevertheless erred in rejecting the applicant's application. The basis of the applicant's argument is that the PRRA officer misinterpreted and otherwise failed to have proper regard for the

evidence contained in the UNHCR Position which, according to the applicant, sufficiently justifies her claim for protection. The Court agrees.

[27] In the decision, the PRRA officer relied on an out-dated UNHCR position paper entitled "Returns of Tamil Asylum Seekers with scars," dated January 1, 2005, which was referenced in the Home Office Guidance Note and stated that Tamils with scars are at risk if deported. The officer's error is ignoring or failing to realize that this position paper was out of date, and had been superseded by the more recent UNHCR Position dated December 2006, which stated that no Tamils – regardless of whether they had scars – should be deported to Sri Lanka under the current conditions. This statement applies to the applicant. The PRRA officer should not have relied on the statement made in the January 2005 position paper since it was out of date, and the information contained therein had changed.

[28] As noted above, the current UNHCR Position was issued in December 2006 and, like the U.K. Home Office Guidance Note relied on by the PRRA officer, details the deteriorating relationship between the Sri Lankan government and the LTTE, and the effect that that deterioration has had on the international protection needs of individuals seeking asylum. In addition to providing a general update on the most recent developments, the UNHCR Position provides guidance on how to assess claims for international protection arising from Sri Lanka. In relation to claims by Tamil individuals from the North or East of Sri Lanka, the document states at pages 12-13:

> (i) All asylum claims from Tamils from the North or East should be favourably considered. In relation to those individuals who are found to be targeted by the State, LTTE or other non-state agents, they should be recognized as refugees under the criteria of the 1951

> Convention, unless the individual comes within the exclusion criteria of the 1951 Convention.
>
> [...]

[29] In the decision, the PRRA officer quoted this statement before considering the applicant's particular circumstances and whether she would be at risk if returned to Sri Lanka. The applicant submits that the PRRA officer erred by misinterpreting this statement to mean that asylum should only be granted where the claimant has suffered past persecution at the hands of the state, the LTTE, or other non-state agents. The PRRA officer's decision fails to realize that the same UNHCR Position also states that "[n]o Tamils from the North or East should be returned forcibly until there is significant improvement in the security situation in Sri Lanka." This would apply to the applicant regardless of whether she has been persecuted in the past. The PRRA officer unreasonably failed to consider the UNHCR recommendation.

[30] Accordingly, for these reasons, this application is allowed, and the matter remitted to another PRRA officer for redetermination. The parties and the Court agree that the applicant may file updated submissions to the new PRRA officer within three weeks of this Order.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed and the matter is remitted to a different PRRA officer for redetermination after the applicant has filed updated submissions in accordance with these Reasons.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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