Federal Court  Cour fédérale

Date: 20100223

Docket: IMM-2249-09

Citation: 2010 FC 204

Ottawa, Ontario, February 23, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PACKIAM NAGARATNAM

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the negative decision of the Applicant's Pre-Removal Risk Assessment (PRRA), dated March 25, 2009 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 70-year-old citizen of Sri Lanka. She came to Canada in September, 2005 and made a claim for refugee protection the following month.

[3] The Applicant's claim for refugee protection was rejected by the Refugee Protection Division (RPD) of the Immigration and Refugee Board on the basis of credibility. The RPD's reasons demonstrate that the Applicant's testimony negatively affected her credibility. Leave for judicial review of this decision was denied in April, 2007.

[4] The Applicant then filed a PRRA application which was rejected in March, 2009.

DECISION UNDER REVIEW

[5] The PRRA Officer (Officer) canvassed the RPD's finding with regard to credibility, noting the numerous discrepancies within the Applicant's evidence and testimony, including:

a) Whether or not she had been threatened at gunpoint;

b) Her unconvincing explanation for omitting to mention being held at gunpoint;

c) Whether or not the Applicant lived alone in Sri Lanka; and

d) Whether the Applicant had in fact been subjected to extortion.

[6] The Officer then considered the country conditions in Sri Lanka and found that the documentation did not rebut the "serious credibility findings of the RPD and do not present evidence regarding the personalized risk of the Applicant."

[7] Furthermore, the Officer determined that the Applicant's new evidence did not prove the existence of new and material elements to her claim. Rather, she felt that the Applicant's PRRA application did not provide any new risk development and simply enumerated the same risks that had already been considered by the RPD.

[8] Nonetheless, the Officer undertook a review of the current country conditions of Sri Lanka to determine if there had been a significant change that could put the Applicant at risk as defined in sections 96 or 97 of the Act. While the Officer acknowledged a change in circumstances in Sri Lanka, she also noted that "recent events indicate that the government has almost achieved total control of the country." Accordingly, she concluded that the changes in country conditions since the decision of the RPD would not put the Applicant at risk pursuant to sections 96 or 97.

[9] The Officer determined that the Applicant had not discharged her burden of providing evidence to substantiate the risk declared in her application. Indeed, the Officer held that "in the case before me, I find that the applicant has not provided sufficient objective evidence that she is at risk from the government, the army, the LTTE or other groups operating in Sri Lanka."

ISSUES

[10] The issues on this application can be summarized as follows:

1. Whether the Officer erred by making a finding of credibility without convoking an in-person hearing;
2. Whether the Officer erred in assessing the Applicant's "personalized risk" as per section 96;
3. Whether the Officer erred in making unreasonable factual findings;
4. Whether the Officer erred in applying the wrong legal test;
5. Whether the Officer erred in conflating the legal tests under sections 96 and 97.

STATUTORY PROVISIONS

[11] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themself of the protection of each of those countries; or

crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires

generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

…

…

113. Consideration of an application for protection shall be as follows:

(*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;

113. Il est disposé de la demande comme il suit :

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;

STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[13] Whether the Officer erred by making a finding of credibility without convoking an in-person hearing is an issue of procedural fairness. Accordingly, it will be reviewed on a standard of correctness. See *Dunsmuir* at paragraphs 126 and 129 and *Golesorkhi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, [2008] F.C.J. No. 637 at paragraph 8.

[14] The issue of whether the Officer erred in assessing the Applicant's "personalized risk" as per section 96 of the Act is concerned with whether the Officer applied the legal test to the facts at hand in an appropriate way. This is an issue of mixed fact and law and is to be reviewed on a standard of reasonableness. See *Dunsmuir* at paragraph 164.

[15] Similarly, whether the Officer erred in making unreasonable factual findings is an issue of fact that will attract a standard of reasonableness upon review. See *Dunsmuir* at paragraph 51.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[17] The final two issues are concerned with whether the Officer erred in applying the wrong legal test, and whether the Officer erred in conflating the legal tests under sections 96 and 97. Issues with regard to the legal test applied by the Officer are to be determined on a standard of correctness. See *Golesorkhi* at paragraph 8.

ARGUMENTS

The Applicant

Wrong Legal Test

[18] The Applicant submits that the Officer did not apply the correct legal test in determining that the Applicant needed to provide "sufficient" evidence in support of her application. The definition with regard to the legal meaning of the term "sufficient" as used by the Officer in this case is unclear. The Applicant submits that the change in terminology made by the Officer with respect to

the legal test affected the Applicant's ability to fully understand the threshold she had to meet to prove her case.

[19] While the Applicant is aware of the Court's decision in *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 903, [2008] F.C.J. No. 1120, the Applicant submits that it can be distinguished from the case at hand on a factual basis. In *Ferguson*, the legal test was not altered or elevated, as opposed to the case at hand where the Officer's wording elevated the legal test to be met by the Applicant.

Interview

[20] The Officer further erred in not interviewing the Applicant with regard to the Officer's credibility concerns. Instead, the Officer relied on the findings made by the RPD with regard to the Applicant's credibility. The Applicant submits that she should have been interviewed by the Officer in order to allow the Officer to make her own determination on the Applicant's credibility.

Erroneous Factual Findings

[21] The Applicant submits that the Officer erred in finding that no significant changes in country conditions occurred which would put the Applicant at risk, since most, if not all, of the documentary evidence referred to by the Officer states the exact opposite. Recent documentary evidence from Sri Lanka demonstrates that it is agents of the Sri Lankan government who have

denied the human rights of those who are similarly situated to the Applicant. The Applicant points specifically to page 5 of the Decision which contains a lengthy quotation from the 2008 U.S. Department of State Country Report on Human Rights Practices for Sri Lanka explaining the human rights situation in Sri Lanka. This report clearly does not support the Officer's finding that the government is not subjecting members of the Tamil community to human rights violations.

[22] The Officer then devotes merely one paragraph to analysis and critical findings. This analysis is made without any clear evidentiary basis. The Applicant contends that anyone reading this Decision would have difficulty understanding how, and upon what basis, the Officer reached her final conclusion. See, for example, *Ali v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 982, 31 Imm. L.R. (3d) 4.

[23] This same evidence discusses the arbitrary nature of the targeting of Tamils. The Applicant submits that this means that the Applicant could be targeted by both state agents as well as the LTTE because of her identity, profile, ethnicity and social group. As such, the risk in this instance is personalized to the Applicant.

State Protection

[24] Furthermore, the recent objective documentary evidence shows deterioration in the country conditions from June 2006, when the Applicant made her refugee claim, to the time of the PRRA.

[25] The Applicant submits that the United States Department of State Report Country Report on Human Rights Practices (DOS Report) from March 2007 demonstrates that the current situation in Sri Lanka "has deteriorated significantly." The cease-fire brokered in 2002 is virtually over and civilian killings are occurring.

[26] The DOS Report also shows that extortion is occurring in Sri Lanka. As an elderly woman with children known to be living abroad, the Applicant will continue to be a target for extortion, or abduction for ransom. The DOS Report notes that

> targeted assassinations have been particularly frequent in Jaffna and parts of the east, often victimizing civilians with no connection to the LTTE. Political killings, abductions and disappearances have also spread to Colombo, where abductions for ransom have targeted both Tamils and Muslims.

[27] Moreover, the United Nations High Commissioner for Refugees (UNHCR) Position on the International Protection Needs of Asylum Seekers from Sri Lanka states that

> In addition to the situation of widespread insecurity and the impact of the armed conflict in the North and East, Tamils in and from these regions are at risk of targeted violations of their human rights from all parties to the armed conflict. Harassment, intimidation, arrest, detention, torture, abduction and killing at the hands of government forces, the LTTE and paramilitary or armed groups are frequently reported to be inflicted on Tamils from the North and East.

[28] The same documentary evidence states that "Tamils in Colombo are especially vulnerable to abductions, disappearances and killings." Given her identity, profile, and ethnicity, it is clear that the Applicant would be at risk if returned to Sri Lanka.

Personalized Risk

[29] The Officer also erred by failing to examine the circumstances of individuals who are similarly situated to the Applicant. Based on the reasoning in *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250, [1990] F.C.J. No. 454, the Applicant submits that there is

> [N]o requirement under section 96 of [the Act] that the Applicant show that his fear of persecution is "personalized" if he can otherwise demonstrate that it is "felt by a group with which he is associated, or even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition of a Convention refugee."

Accordingly, the generalized oppression and harassment of members of the Applicant's Tamil community may lead to a finding of personalized risk to the Applicant herself.

Conflated Tests

[30] The Officer's analysis does not contain a separate section 97 assessment of the PRRA. As compared to the test under section 96, the section 97 test contains more assessment of objective risk, and the Applicant suggests it "does not include the ordinary assessment of subjective fear and credibility *per se*." See *Balakumar v. Canada Minister of Citizenship and Immigration)*, 2008 FC 20, [2008] F.C.J. No. 30.

[31] A negative credibility finding under section 96 of the Act is not necessarily determinative of the section 97 claim. See *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC

1211, [2003] F.C.J. No. 1540 and *Anthonimuthu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 141, [2005] F.C.J. No. 162. Further, according to the Court in *Bouaouni* paragraph 41, "although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate." As pointed out by Justice de Montigny in *Anthonimuthu* at paragraph 52, "the only circumstance in which the Refugee Division may dispense with a separate 97 analysis is when there is absolutely no evidence that could support a claim that a person is in need of protection."

[32] The Officer's conclusion that the Applicant would not face a serious risk to life in Sri Lanka is not adequate to discharge the onus of providing a clear and separate analysis under section 97.

The Respondent

Consideration of New Evidence

[33] The Officer was correct in using the RPD decision as the starting point for the PRRA analysis. The RPD decision is considered final with regard to refugee protection, subject only to the assessment of new evidence or new developments of risk which arise after the RPD decision.

[34] A PRRA is not intended to be a second refugee claim or an appeal of the previously rejected claim. Accordingly to Justice Snider in *Perez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379, [2006] F.C.J. No. 1733 at paragraph 5,

> The decision of the RPD is to be considered as final with respect to the issue of protection under s. 96 or s. 97, 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.

[35] The Officer was correct to begin her analysis with a review of the RPD decision and its findings with regard to the Applicant's credibility. The Officer then noted that the Applicant had not provided any new risk developments and, as such, "has not provided sufficient objective evidence that would persuade me to conclude differently from the decision of the RPD."

[36] The Respondent submits that the Officer's conclusion was entirely reasonable, given the negative determination of the RPD and the nature of the new evidence submitted.

Interview

[37] The role of the Officer was not to conduct a *de novo* credibility assessment by means of an oral hearing. Rather, the findings of the RPD are only subject to new evidence and risk developments demonstrated in the PRRA. The country conditions submitted by the Applicant did not cast doubt on the RPD's negative credibility finding. Nothing in this new evidence required the Officer to hold an interview with the Applicant. In such a case an Officer can properly make a finding of insufficiency of evidence. See, for example, *Ferguson* and *Parchment v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1140, [2008] F.C.J. No. 1423.

Documentary Evidence

[38] After having determined that there was no basis upon which to interfere with the RPD's negative credibility finding, the Officer analyzed the updated country condition documents. While the Officer noted the changing circumstances in Sri Lanka, she also noted that the government had almost achieved total control of the country. As a result, the Applicant was not at risk from the government, its army, the LTTE, or other groups in Sri Lanka.

[39] The Officer's conclusion was reasonable and based on objective evidence. The Officer acted reasonably in her role of weighing the evidence before her, and it is not the Court's task to reweigh this evidence. See, for example, *Augusto v. Canada (Solicitor General)*, 2005 FC 673, [2005] F.C.J. No. 850 at paragraph 9.

Personalized Risk

[40] The Officer was also correct in assessing the Applicant's "personalized risk." The Applicant did not have to show that she was more at risk than others, but simply that her circumstances could be connected to the risks described in the documentary evidence. See, for example, *Tharmaratnam v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1153, [2007] F.C.J. 1496 at paragraphs 12-15.

[41] The assessment and weighing of the evidence is within the expertise of the Officer. In this instance, the Officer concluded that there was insufficient evidence that the Applicant faced a risk if returned. This conclusion was reasonable on the facts.

No Error in Legal Test

[42] The Decision itself makes it clear that the Officer considered the Applicant's application under both sections 96 and 97. The Officer examined recent country condition documents to determine if the Applicant would be subject to persecution (under section 96) or subjected to torture, a risk to her life, or a risk of cruel and unusual punishment (under section 97). The Officer refers to both sections throughout the Decision.

[43] The outcome of the Applicant's application did not depend on a difference between section 96 and 97. The Officer's conclusions plainly apply to both sections of the Act. The Federal Court has determined that in such circumstances, there is no need for a separate analysis of section 96 and 97. See, for example, *Plancher v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1283, [2007] F.C.J. No. 1654; *Soleimanian v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1660, [2004] F.C.J. No. 2013; and *Kugaperumal v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 881, [2004] F.C.J. No. 1085.

ANALYSIS

[44] The Applicant has raised a number of points in her application (refined to three at the hearing) all of which I have examined. With regard to credibility and the need for an interview, I can find nothing in the Decision to suggest that the Officer imported the RPD's credibility findings into her analysis of the objective country conditions. On these facts, Rule 167 was not triggered and there was no need to convene an interview to deal with a Decision that, essentially, is concerned with country condition documentation.

[45] In my view, the only arguable issue raised by the Applicant is the adequacy of the Officer's objective country condition analysis and findings.

[46] The Officer acknowledges the Applicant's profile and the risks she fears:

> As an elderly woman with children known to be living abroad, the applicant fears that she will continue to be targeted for extortion, or abduction for ransom. She fears she will be subjected to torture as well as threats to her life or risks of cruel and unusual treatment or punishment because she is an elderly Jaffna woman with relatives abroad.

[47] Most of the Officer's Decision summarizes the RPD decision and then goes on to quote from the documentation. Her analysis and conclusions come down to a single paragraph:

> I acknowledge the changing circumstances in Sri Lanka; however, recent events indicate that the government has almost achieved total control of the country. I have no objective evidence before me that the government of Sri Lanka is subjecting Tamil citizens to a sustained and systemic denial of their core human rights. The burden of proof rests with the applicant; that is the onus is on the applicant to

> provide evidence to substantiate all of the grounds of her application. In the case before me, I find that the applicant has not provided sufficient objective evidence that she is at risk from the government, the army, the LTTE or other groups operating in Sri Lanka.

[48] Having recited passages from various documents that emphasize the abuses faced by Tamils in Sri Lanka, the Officer's conclusion that "I have no objective evidence before me that the government of Sri Lanka is subjecting Tamil citizens to a sustained and systemic denial of their core human rights" appears unfounded and inexplicable.

[49] It is difficult to know what the Officer means by this conclusion and how it relates to any analysis of the documentation with the Applicant's specific profile in mind. The Officer does not say that the Applicant has failed to provide objective proof of the extortion and torture risks faced by someone with her profile, and it is difficult to see how the Officer's general conclusions fit the evidence or relate to the case before her. There is evidence in the documentation concerning abductions and disappearances, and it is not possible to tell from the Decision what conclusions the Officer would have come to if she had assessed this evidence against the specific risks stated by the Applicant and the Applicant's profile.

[50] This is particularly problematic in this case where the IRB dismissed the refugee claim on the basis of subjective credibility and did not provide an objective analysis of the country conditions documentation.

[51] All in all, and bearing in mind the Applicant's age and vulnerability, I think this matter must be sent back for reconsideration. The Decision is unreasonable in that it is not possible to say there is an evidentiary basis that supports the Officer's conclusions and it is not possible to say that the Officer addressed herself to the specific risks faced by someone with the Applicant's profile. See *Cepeda-Guitterez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425 at paragraphs 15-17.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The matter is returned for reconsideration by a different officer.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2249-09
STYLE OF CAUSE:	PACKIAM NAGARATNAM
	- and -
	MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	FEBRUARY 4, 2010
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	FEBRUARY 23, 2010

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