Federal Court  Cour fédérale

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Dockets: IMM-5155-09
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Citation: 2010 FC 608

Ottawa, Ontario, June 7, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

IYENKARAN ARIYARATNAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These reasons for judgment and judgment relate to two applications by Mr. Ariyaratnam for judicial review heard consecutively on May 27, 2010.

[2] The first application concerns a decision, dated August 20, 2009, of Pre-Removal Risk Assessment (PRRA) Officer Susan Neufeld, wherein it was concluded that Mr. Ariyaratnam is not a

Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), respectively.

[3] The second application concerns a decision, also dated August 20, 2009, by the same Officer, wherein she declined to grant Mr. Ariyaratnam's request for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds.

[4] With respect to the PRRA decision, Mr. Ariyaratnam alleges that the Officer erred by (i) failing to deal with the main risk factors that he identified in his updated application; (ii) misconstruing the documentation on country conditions that she reviewed on her own initiative; and (iii) failing to consider a report dated July 2009 by the United Nations High Commissioner for Refugees, which was released a few weeks before the Officer's decision.

[5] With respect to the H&C decision, Mr. Ariyaratnam alleges that the Officer erred by (i) failing to assess whether he would experience unusual and undeserved, or disproportionate, hardship in Sri Lanka, given that he is a young Tamil male from the north of that country; and (ii) applying the wrong test in assessing his H&C application.

[6] For the reasons that follow, I have concluded that the Officer erred in both of her decisions by failing to sufficiently analyze the main risk factors identified by Mr. Ariyaratnam and to adequately explain why the evidence did not satisfy her that he would not (i) in the case of the PRRA decision, incur a risk contemplated by sections 96 or 97 of the IRPA; and (ii) in the case of the H&C decision, experience a hardship contemplated by section 25 of the IRPA.

I. Background

[7] Mr. Ariyaratnam is a 28 year old citizen from the north of Sri Lanka. He is of Tamil ethnicity.

[8] He left Sri Lanka in December 2000 and arrived in Canada in September 2003, after staying in India during the intervening period. Shortly after his arrival, he applied for refugee status. That application was refused in September 2004, largely on the basis of concerns regarding his identity, nationality and credibility. He subsequently obtained a passport and other documentation that satisfactorily identified him to be of Sri Lankan nationality.

[9] In his submissions made in May 2008 in support of his initial PRRA application, Mr. Ariyaratnam alleged that he would face risk in the form of harassment and extortion by the Liberation Tigers of Tamil Eelam (LTTE), and possible detention by the army and police, should he return to Sri Lanka. In an updated submission, dated July 22, 2009, he alleged that, despite the defeat of the LTTE by government forces in May 2009, he feared that he would be detained and mistreated by government authorities if he were to return to Sri Lanka.

[10] Before this Court, Mr. Ariyaratnam's counsel conceded that Mr. Ariyaratnam no longer has a significant fear of harassment or extortion by the LTTE.

II. The PRRA Decision

[11] The Officer rejected Mr. Ariyaratnam's PRRA application after finding that (i) the news articles and country conditions documentation that he submitted "do not specifically refer to the applicant and would appear to indicate a generalized risk"; (ii) the evidence that he submitted regarding the arrest and torture of his cousin and friend did not appear to support his claim regarding his own likely risk or harm; and (iii) the country documentation that she reviewed on her own initiative indicated that, while there continue to be problems, conditions in Sri Lanka have continued to steadily improve, including with respect to the security situation and the recovery process in general.

III. The H&C Decision

[12] The Officer rejected Mr. Ariyaratnam's H&C application after finding that (i) the evidence he submitted regarding the arrest and torture of his cousin and friend was not sufficient to establish that he would likely face hardship if he were required to return to Sri Lanka; (ii) while far from ideal, conditions have continued to steadily improve in Sri Lanka, as described above – this section of the Officer's decision was virtually identical to the corresponding section in her PRRA decision; (iii) the nature and closeness of his family and personal ties in Canada were insufficient to establish that he would likely face hardship if required to return to Sri Lanka; (iv) he had not provided sufficient evidence to demonstrate that he had become established in Canada to the extent that severing his ties here would amount to an unusual and undeserved, or disproportionate hardship; and (v) there was insufficient documentation to support a conclusion that he would have difficulties readjusting to Sri Lankan society and culture.

IV. Issues

[13] Did the Officer err in her PRAA decision by:

i. failing to deal with the main risk factors identified by Mr. Ariyaratnam;

ii. misconstruing the documentation on country conditions that she reviewed on her own initiative; or

iii. failing to consider the UNHCR's July 2009 report?

[14] Did the Officer err in her H&C decision by:

i. failing to assess whether Mr. Ariyaratnam would experience unusual and undeserved, or disproportionate, hardship in Sri Lanka as a young Tamil male from the north of that country; or

ii. applying the wrong test in assessing his H&C application?

V. Standard of Review

[15] The standard of review applicable to the first four issues raised by Mr. Ariyaratnam is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras. 46 and 47).

[16] The standard of review applicable to the fifth issue raised by Mr. Ariyaratnam is correctness (*Khosa*, above at para. 44).

VI. Analysis

A. *Did the Officer err in failing to deal with the main risk factors identified by Mr. Ariyaratnam?*

[17] I agree with Mr. Ariyaratnam's submission that the Officer failed to address his submission that he would face a risk of being detained and mistreated by government authorities, if he were to return to Sri Lanka.

[18] The Officer assessed conditions in Sri Lanka in two paragraphs of her decision. In the first of those paragraphs, she briefly addressed the evidence submitted by Mr. Ariyaratnam. It was here that she made her findings that (i) the news articles and country condition reports submitted by Mr. Ariyaratnam "do not specifically refer to Mr. Ariyaratnam and would appear to indicate a generalized risk"; and (ii) the evidence regarding the arrest and torture of his cousin and friend "does not appear to support his contention of risk or harm."

[19] In the following paragraph of her decision, the Officer briefly addressed the documentation on country conditions that she reviewed on her own initiative. It was at this point that she made her finding that, while there continue to be problems, conditions in Sri Lanka have continued to steadily improve, including with respect to the security situation and the recovery process in general.

[20] Immediately following these two paragraphs, the Officer concluded that "[o]n the facts of this case, the applicant does not face more than a mere possibility of persecution for any of the Convention grounds in Sri Lanka." She then added that she was not persuaded that Mr. Ariyaratnam's removal to Sri Lanka would subject him to a risk contemplated by section 97 of the IRPA.

[21] Nowhere in her decision did the PRAA Officer ever directly or indirectly address Mr. Ariyaratnam's specific claim that he would be subjected to a risk of mistreatment by authorities in Sri Lanka on the basis of his personal profile as a young Tamil male from the north of the country.

[22] This claim was central to Mr. Ariyaratnam's PRRA application. Accordingly, in my view, the Officer's failure to explain why the evidence was not sufficient to permit her to conclude that Mr. Ariyaratnam, as a young Tamil male from the north of the country, would face a risk contemplated by sections 96 or 97 of the IRPA if returned to Sri Lanka constitutes a reviewable error. Had she addressed that risk and reached the same conclusion, her decision may well have been reasonable. However, her failure to do so was fatal.

B. *Did the Officer err by misconstruing the country conditions documentation?*

[23] The principal document reviewed by the Officer on her own initiative was the U.K. Home Office's publication entitled *Country of Origin Information Report - Sri Lanka*, dated June 26, 2009. That report is a compilation of information from other respected sources.

[24] The U.K. Home Office's country of origin reports are generally accepted to be among the most objective credible reports regarding country conditions.

[25] The Officer observed that, according to the U.K. Country of Origin Report, "since the end of the war with LTTE rebels in May 2009, while far from ideal, conditions have continued to steadily improve in Sri Lanka." She then noted some of the ongoing difficulties in Sri Lanka that were identified in some of the reports from June 2009 that were cited in that Country of Origin Report.

[26] Mr. Ariyaratnam submits that the Officer misconstrued that report. More specifically, he submits that it was not reasonably open to the Officer to conclude that the report, when read in its entirety, supports the view that conditions have continued to steadily improve in Sri Lanka. He further submits that it was unreasonable for the Officer not to have cited specific page references in that report, to permit him to identify the specific passages that the Officer relied upon in making her observations about the report.

[27] When asked to identify specific passages in that report which do not support the Officer's characterization of the report, Mr. Ariyaratnam's counsel was only able to identify three passages. The first of those passages reported that a pro-LTTE website had reported on June 4, 2009 that the police had taken 25 Tamil youths into custody in Colombo and its suburbs and severely interrogated them. The second passage quoted from the U.S. Department of State Country Report on *Human Rights Practices, 2008, Sri Lanka*. That report was dated February 25, 2009, well before the end of the civil war in May of that year. The third passage quoted from the same report, and seemed to be addressing "LTTE suspects" and "civilians suspected of LTTE connections".

[28] The main body of that report provides information that was available prior to June 1, 2009, which was approximately when government forces defeated the LTTE. In my view, it was not unreasonable for the Officer to have placed little weight on the information in that part of the report.

[29] However, the "Latest News" section of the report contains information on events and reports accessed during the period June 2, 2009 to June 25, 2009. Based on my review of the information in that section of the report, I am unable to conclude that the Officer's characterization of the information in the report regarding conditions as at the end of June 2009 was unreasonable.

[30] Moreover, I am unable to conclude that the failure of the Officer to specifically quote particular sections of the report was unreasonable, particularly given that it was Mr. Ariyaratnam's burden to establish a well founded fear of persecution contemplated by section 96 of the IRPA, or a risk contemplated by section 97 of the IRPA. The Officer made it very clear that she was addressing the information post-dating the end of the civil war with the LTTE. That information was set forth in the "Latest News" section mentioned above, which was only four pages in length.

C. *Did the Officer err by failing to consider the UNHCR's July 2009 report?*

[31] Mr. Ariyaratnam submitted that the Officer had an obligation to consider the UNHCR's July 2009 report, which was released a few weeks before the Officer's decision. In this regard, he relied upon this Court's decisions in *Sinnasamy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 and *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 964. In my view, those cases are distinguishable.

[32] In *Sinnasamy*, a PRRA Officer relied on a report of the UNHCR dated December 2006 to support a conclusion that the Applicant in that case did not fall within the profile of Tamils in Colombo who are specifically targeted. However, that same document contained information which contradicted that conclusion. My colleague, Justice de Montigny, appropriately questioned why the Officer did not address this other material in the report and observed that the Officer had conducted a very selective reading of the document (*Sinnasamy*, above at paras. 32-33). He then observed that no explanation was given as to why the document was disregarded by the Officer in concluding that the Applicant had an internal flight alternative in Colombo.

[33] In *Christopher*, the PRRA Officer reached a conclusion that was directly contrary to the information contained in the new evidence that had been submitted by the Applicant, without addressing that evidence. My colleague, Justice Kelen, understandably held that this evidence should have been specifically mentioned and addressed. He then proceeded to address the Applicant's claim that the Officer erred by failing to consider a 2006 UNHCR report on the *International Protection Needs of Asylum-Seekers from Sri Lanka*. It is not clear from the decision whether that report had been included in the evidence submitted by the Applicant in that case. Justice Kelen then observed that "when important new evidence contradicts the PRRA decision, the Officer should specifically mention and analyze this evidence." I do not read this statement as suggesting that PRRA Officers have a positive obligation to review, on their own initiative, the most recent reports published by the UNHCR concerning the country they are reviewing.

[34] In my view, requiring PRRA Officers to read the most recent report of the UNHCR or any other particular document would be inconsistent with the clear direction that the Supreme Court of Canada has given that "Parliament intended administrative fact finding to command a high degree of deference" (*Khosa*, above at para. 46; see also *Dunsmuir*, above at paras. 48, 49 and 53).

[35] Accordingly, I am unable to conclude that the Officer erred in failing to consider the UNHCR's July 2009 report.

[36] A second reason why I do not believe that it was unreasonable for the Officer to have failed to consider that report is that it was issued only a few weeks before her decision. While PRRA Officers have some obligation to examine the most recent sources of information in conducting a risk assessment (*Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489 at para. 33), this Court has recognized that "it would be unrealistic to expect PRRA Officers to monitor continuously the conditions in all applicants' countries of origin and update their analyses on an ongoing basis" (*Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 6 at para. 7).

[37] It is important for applicants and their counsel to keep in mind that the applicant bears the burden of adducing sufficient evidence to establish a well founded fear of persecution contemplated by section 96 of the IRPA or that he would suffer a risk contemplated by section 97 of the IRPA, if required to return to his country of origin. To require a PRRA Officer to research and address information contained in any particular report would be inconsistent with this fundamental principle.

[38] Where a PRRA Officer is satisfied that the evidence adduced by an applicant includes reliable, objective and up-to-date information, a PRRA Officer is under no obligation to research and address in his or her reasons any additional documentation. Where a PRRA Officer wishes to supplement the documentary evidence adduced by an applicant with additional information, the PRRA Officer is free to do so. Where a PRRA Officer has reason to believe that the country documentation adduced by an applicant may not be reliable, objective or up-to-date, the Officer's obligation to examine additional documentation may be met by consulting one or more generally recognized sources of reliable, objective information. As to the specific source or sources consulted, the PRRA Officer is entitled to a high degree of deference (*Khosa*, above at para. 46).

D. Did the Officer err by failing to assess whether Mr. Ariyaratnam would experience unusual and undeserved or disproportionate hardship as a young Tamil male from the north of Sri Lanka?

[39] The part of the H&C decision that addressed whether Mr. Ariyaratnam would face unusual and undeserved, or disproportionate hardship if required to return to Sri Lanka is highly similar to the corresponding part of the PRRA decision. As with the PRRA decision, the Officer failed to address the specific risk identified by Mr. Ariyaratnam and to explain why she reached her conclusion, given that he is a young Tamil male from the north of the country.

[40] At the hearing before this Court, the Respondent's counsel conceded that if I found that the PRRA decision was deficient on this basis, it should follow that the H&C decision was similarly deficient.

[41] I have indeed concluded that the Officer erred in failing to address, in the H&C decision, the specific risk of hardship identified by Mr. Ariyaratnam and to explain why she concluded that he would not face unusual and undeserved, or disproportionate hardship if required to return to Sri Lanka, given that he is a young Tamil male from the north of the country.

E. *Did the Officer apply the wrong test in assessing the H&C application?*

[42] Mr. Ariyaratnam submits that the Officer failed to apply the appropriate hardship-oriented test in assessing his H&C application. In this regard, he relies on the fact that the essence of the analysis in the Officer's H&C decision was incorporated from her PRRA decision.

[43] I am unable to agree with this submission. There is nothing wrong with a PRRA Officer using material from a PRRA decision when writing an H&C decision, so long as that material is analyzed within a framework that focuses upon whether the Applicant is likely to face unusual and undeserved, or disproportionate, hardship.

[44] At the outset of the H&C decision, the Officer clearly and correctly set out the appropriate test. She did this under each of the first three headings of her decision. Indeed, under the second heading, she provided definitions of the terms "unusual and undeserved hardship" and "disproportionate hardship". She also assessed, under separate headings, matters that typically are assessed in H&C applications but are not addressed in PRRA applications. These matters included spousal, family or personal ties that might create hardship if severed; Mr. Ariyaratnam's degree of

establishment in Canada; the fact that he has no children whose best interests should be considered; and whether he would have difficulties readjusting to Sri Lankan society and culture.

[45] Accordingly, I am unable to conclude that the Officer applied the wrong test in assessing Mr. Ariyaratnam's H&C application.

VII. Conclusion

[46] Mr. Ariyaratnam's applications are granted. The decisions dismissing his PRRA and H&C applications are set aside. Those applications are remitted to another PRRA Officer for reconsideration in accordance with the law and these reasons.

[47] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT these applications for judicial review are granted. The decisions rejecting Mr. Ariyaratnam's PRRA and H&C applications, respectively, are set aside. Those applications are remitted to a different PRRA Officer to determine, according to law and in accordance with the foregoing reasons, whether Mr. Ariyaratnam (i) is a Convention refugee within the meaning of s. 96 of the IRPA and/or a person in need of protection within the meaning of s. 97 of the IRPA; or (ii) entitled to an exemption under section 25 of the IRPA.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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