Federal Court  Cour fédérale

Date: 20131223

Docket: IMM-7620-13

Citation: 2013 FC 1286

Ottawa, Ontario, December 23, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

YAZHKOVAN BALAZUNTHARAM

Applicant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] By a decision dated November 4, 2013, the respondent, through his delegate, concluded that the applicant could be removed to Sri Lanka in view of his extensive criminal activities in Canada despite the fact that he has been declared to be a refugee some 15 years ago.

[2] The applicant seems to have been granted refugee status on account of his involvement with the Liberation Tigers of Tamil Eelam [LTTE], which resulted in his detention and torture at the hands of the Sri Lankan army. We have to say that it "seems" to be the case because the positive

decision was not available on this record. It is not clear whether it could be made available. Refugee status was granted on December 2, 1998. However, the applicant never became a permanent resident; his application was denied on June 1, 2006 because he was found inadmissible by reason of serious criminality. For the limited purpose of this stay application, it will suffice to say that the criminal activities of the applicant fall within the parameters of section 36 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act").

[3] The legal framework is the following. It is section 115 of the Act that finds application. Subsections (1) and (2) are relevant:

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	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou

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.	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.

[4] The reasons for the determination made in this case pursuant to paragraphs 115(2)(*a*) and (*b*) were completed by the Minister's delegate on November 14, 2013. It is a document 27 pages long. It is from that decision, finding that the applicant can be sent back to Sri Lanka in spite of having been found to be a refugee some 15 years ago, that judicial review is sought in accordance with section 72 of the Act. The motion for a stay is incidental to the application for leave and for judicial review of the Minister's delegate decision. If the motion is granted, that will allow for the case to be heard on its merits.

[5] It is not disputed that the tri-partite test of *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) controls. Hence, the Court must be satisfied that there is a serious issue to be tried on the judicial review, that irreparable harm to the applicant will arise if deported, and the balance of convenience favours him. Failure on the part of the applicant on any prong of the test is fatal.

[6] The parties agree that as for the serious issue prong of the test, the burden on the applicant is to show that the issue raised is neither frivolous nor vexatious. That is a fairly low threshold.

[7] In essence, the applicant argues that he was arrested and tortured in Sri Lanka more than 15 years ago because of his association with the LTTE. He is also arguing that there was a connection with the LTTE in the commission of the crimes in Canada for which he is inadmissible and which constitute in the opinion of the Minister a danger to the public in Canada.

[8] This is a case that largely turns on its peculiar facts. If the applicant can show that he has been a person of interest for the Sri Lankan authorities in the mid-nineties, as opposed to being a bystander who was merely rounded up with others, an argument can be made that he might still be a person of interest many years later. It is all a function of the interest he presented then.

[9] Similarly, counsel for the applicant suggests (more than he actually proves) that the illegal activities of the applicant in this country since he has been allowed to remain may have contributed to the LTTE in some fashion. If that is accurate, that would tend to suggest that the applicant could be, even to this day, a person of interest for the Sri Lanka authorities.

[10] However, it is disputed that the facts of this case rise to the level of making this applicant that kind of a person of interest. My own review of the evidence and the arguments left me unconvinced that the allegations can be proven or substantiated at this stage. However, such is not the test. The test is rather whether the issue raised is frivolous or vexatious.

[11] The more it can be shown by the applicant that his activities then and now are done for the benefit of or in association with the LTTE, the more it can also be inferred that the applicant runs a

serious risk of beatings and torture if returned. That much seems to be conceded by the Minister's delegate when he writes:

> Overwhelmingly, the documentary evidence provides information that supports a finding that persons who are detained by the Sri Lankan army or the Terrorist Investigation Department (TID) are subject to abuses that range from denial of due process and other basic rights of detainees, to mistreatment amounting to torture. With respect to the latter, the evidence on file indicates that torture is systemic, and there is a pervasive sense of impunity regarding the abuse and torture of detainees. Freedom from Torture's report *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka 2009 - 2011* compiled evidence from 35 medico-legal reports of Sri Lankan asylum seekers, and found that "those at particular risk of torture include Tamils who have an actual or perceived association with the Liberation Tigers of Tamil Eelam (LTTE)."[38]

Furthermore, the delegate does not dispute that people with the applicant's profile, i.e. a failed asylum seeker, will be easily detected upon their return to Sri Lanka:

> According to the Canadian High Commission in Colombo, this questioning is completed by the Criminal Investigation Unit (CID) which also conducts criminal records checks, and the State Intelligence Service (SIS) which is interested in information about human trafficking and smuggling. A joint submission prepared by four parties (human rights organizations and one lawyer) states that failed asylum seekers are identifiable by their travel documents, are taken out of the immigration queue and subjected to special questioning by police and members of the Terrorist Investigation Department (TID). According to this joint submission, detention while the checks are completed by the police and the TID are completed could be a matter of hours or months, depending on the ability to reach family members and obtain police records. Mr. Balazuntharam may experience some difficulty in establishing his identity given the absence of his family members from Sri Lanka. However, the information on file leads me to conclude that detention upon arrival as a result of verification of identity or criminal history is routine, and there is insufficient evidence to lead me to conclude that detainees in these circumstances are more likely than not to be tortured.

[12] In spite of those findings, the Minister's delegate concludes against the applicant. At the end of the day, it seems to boil down to, that was then and this is now. The association with the LTTE may have been enough to be granted refugee status in 1998, but the criminal behaviour in Canada since then does not amount to crimes committed in association with the LTTE. Indeed, the civil war has been over for four years and it would take much more than the criminality exhibited by the applicant to make him a person of interest. If the profile of the applicant is not in tune with the argument made by counsel, which may very well be the case in my estimation, the risk run by the applicant would be less than substantial. Hence, the delegate wrote:

> Although Mr. Balazuntharam is suspected of having ties with the LTTE through the criminal organization of which he was a part while in Canada, there is insufficient evidence on file to lead me to conclude that these suspicions are public knowledge such that they have come to the attention of the Sri Lankan authorities.
> Mr. Balazuntharam denies any association with the LTTE, either prior to his departure from Sri Lanka or as part of the Sri Lanka diaspora.

[13] As I have tried to explain, the jurisdiction of the Court at this stage is to decide if the issue is either frivolous or vexatious. On this record, I am unable to conclude that the issue raised is without merit in that there is no arguable case. Furthermore, the stakes are high. As already acknowledged by the delegate, torture is a real issue. As such, if there is an issue to be tried, the balance of convenience and the irreparable harm prongs of the test would favour the applicant.

[14] It seems to me that a proper examination of this case deserves that it be judicially reviewed. I am not convinced that the delegate's decision is unreasonable but that is not for me to make that determination.

[15] The applicant has been detained for some time. We were advised by his counsel that he has not made an application to be released in more than one year. I should not be taken to suggest that the ruling on this stay motion changes in any way the state of affairs *ex ante*. The risk that this applicant may pose has not been altered, one way or the other by this ruling.

[16] I would grant the motion for a stay of execution of a removal order now scheduled for December 29, 2013 until the underlying judicial review application has been heard and decided by this Court.

ORDER

THE COURT ORDERS that the motion for a stay of execution of a removal order now scheduled for December 29, 2013 is allowed until the underlying judicial review application has been heard and decided by this Court.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7620-13

STYLE OF CAUSE: YAZHKOVAN BALAZUNTHARAM v. MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 19, 2013

REASONS FOR ORDER AND ORDER: ROY J.

DATED: DECEMBER 23, 2013

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