Federal Court  Cour fédérale

Date: 20141113

Docket: IMM-12545-12

Citation: 2014 FC 1074

Ottawa, Ontario, November 13, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SURESHKUMAR SAVUNTHARARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*" or the "Act") of a decision of the Canadian Border Services Agency (the "CBSA") dated December 5, 2012 refusing to defer the execution of the removal order against the applicant. Sureshkumar Savunthararasa (the "applicant") is a Sri Lankan Tamil. The applicant seeks a mandamus order compelling the Minister of Public Safety and Emergency Preparedness (the "Minister") to conduct an assessment of the risk he will face

upon return to Sri Lanka, or, in the alternative, that the CBSA's decision be overturned and that the matter be remitted for reconsideration. The application was heard December 3, 2013, with supplementary oral submissions from parties following two directions from the Court at a hearing on June 2, 2014 and submissions on certified questions provided August 30, 2014.

[2] This Court heard this appeal together with the judicial review application in *Peter v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073 [*Peter*]. Both applicants were represented by the same counsel. Accordingly, I direct that a copy of these reasons be placed in the *Peter* application file. In addition, Prothonotary Aalto granted leave to the Canadian Association of Refugee Lawyers ("CARL") to intervene and to file a factum. I allowed CARL to make submissions to the Court in both matters on the issues raised by the parties.

[3] Central to both matters are two common issues. The first is whether section 112(2)(b.1),(the "PRRA bar") which was added to the *IRPA* by the *Balanced Refugee Reform Act*, SC 2010, c 88, violates the principles of fundamental justice contrary to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter*"). Section 112(2)(b.1) prohibits a Pre-removal Risk Assessment Protection ("PRRA") being brought within 12 months after an applicant's refugee protection claim was last rejected

[4] The second issue is whether the removals process used to determine whether to defer the applicant's removal from Canada pursuant to section 48 of the Act violates section 7 of the

Charter. This latter issue encompasses questions around the removals test as developed by the Federal Courts and applied by the Inland Enforcement Officer (the "removals officer" or the "officer"), the officer's competency and authority to assess risk, and other related aspects of the removals process, including the role of the Federal Court in motions brought before it to stay an applicant's removal following rejection of a deferral request by the removals officer.

[5] The issues of the constitutionality of section 112(2)(b.1) of the Act and the removals process raised by Mr. Savunthararasa are identical to those considered and decided in *Peter*. In that matter, I reviewed the evidence and submissions of the parties and concluded that neither section 112(2)(b.1) of the Act nor the removals process violated section 7 of the *Charter*. My decision and reasons in *Peter* apply herein with the same result of my rejecting the applicant's claim that the legislation and the processes used to determine whether to defer the applicant's removal are unconstitutional.

[6] The remaining issue in this application concerns the reasonableness of the officer's decision rejecting the applicant's request to defer his removal. I conclude that the decision of the removals officer was reasonable. My reasons in support of these conclusions follow.

I. BACKGROUND FACTS

[7] The applicant is a Sri Lankan Tamil from Jaffna, in the north of the country. He left Sri Lanka on July 3, 2009, passed through Ecuador, Guatemala, Panama, Mexico, and finally the United States before arriving in Canada on July 5, 2011. He entered the country illegally. He

claimed refugee protection on July 7, 2011 at Citizenship and Immigration Canada ("CIC") in Etobicoke, Ontario.

[8] On February 13, 2012, the applicant's claim was rejected by the Refugee Protection Division (the "RPD" or the "Board") of the Immigration and Refugee Board (the "IRB"). The Board found that his account lacked credibility, that his fear was not well-founded, and that in any case, conditions in Sri Lanka had changed for the better. He submitted an application for leave and for judicial review of the RPD decision, which was denied by the Federal Court on August 16, 2012.

[9] On November 15, 2012, he was advised that his removal was scheduled for December 15, 2012. The Enforcement Division of CBSA received the applicant's request to defer removal on November 29, 2012 and this request was denied on December 10, 2012. He filed for leave and for judicial review of the CBSA decision to refuse to defer removal. He also filed a motion in this Court for a stay of removal on December 6, 2012.

[10] At the request of his counsel, the applicant's pending application was joined with three others in the stay order in *Balasingam v the Minister of Public Safety and Emergency Preparedness*, 2012 FC 1525, which was granted by Justice Hughes on December 20, 2012.

II. REMOVAL DECISION

[11] The applicant submitted a request to defer his removal from Canada pending the determination of his PRRA application. His request was based on allegations of mounting

evidence of worsening conditions in Sri Lanka for persons with the applicant's profile – a young Tamil male from the north of Sri Lanka, who has spent time abroad, and who is refused refugee protection in Canada. The request was supported by a large package of background information on the country conditions in Sri Lanka and a statutory declaration of Patricia Watts, a law clerk with the applicant's counsel. She deposed, among other things, that several of Mr. Peter's counsel's clients with similar risk profiles had been detained, abducted, and beaten after their arrival in Sri Lanka.

[12] The applicant's submissions were said to be divided into two parts: first, the legal reasons why the applicant's removal could not take place without a risk assessment and secondly, the risks to him upon removal.

[13] The legal protections against removal without a PRRA were described in various documents including the CIC's PRRA procedures manual (CIC, Protected Persons: Pre-Removal Risk Assessment), various international conventions, decisions of the Supreme Court of Canada, and decisions of the Federal Court related to deferral decisions. The personal risks with respect to the applicant's profile were based on new information of current country conditions which were alleged to demonstrate that a person with his profile would be at risk upon return to Sri Lanka. This evidence is reviewed in some detail later in my reasons.

[14] The officer noted that his discretion to defer removal is limited, describing it as being limited to situations where removal would expose the applicant to a risk of death, extreme sanction, or inhumane treatment.

[15] The officer further noted that the RPD had dismissed the applicant's claim because it did not find his story generally credible or his fear to be well-founded. With reference to the various articles and reports submitted to the RPD, he found that because the applicant was not on the security watch-list, he was not a wanted person and not suspected of being either a LTTE member or supporter. The officer found that there was no indication that he was engaged in demonstrations or activities in support of the LTTE. The RPD did not believe on a balance of probabilities that the applicant faces a risk of arrest or treatment as an LTTE suspect or supporter if returned to Sri Lanka.

[16] The officer acknowledged that some of the material submitted represented new evidence, but concluded that the articles did not support the personalized risk allegations as advanced by the applicant. Apart from being an ethnic Tamil from northern Sri Lanka, he concluded that there was no other evidence submitted to substantiate the assertions that he was at risk based on the other listed profile criteria. He observed that the applicant did not submit any materials providing evidence of personalized risk. The circumstances of victims mentioned in the articles submitted demonstrated that personal involvement with the LTTE was a factor in the violence against them which did not apply to the applicant. Further, no evidence was provided that the applicant had participated in overt protests or criticism of the Sri Lankan government.

[17] Further, in regard to the applicant's family members who remain in Sri Lanka, who share the same profile, insufficient evidence was provided that they were at risk.

[18] In regard to the submitted articles that reported deportees being at risk upon return to Sri Lanka, there was no evidence that the applicant was in similar circumstances of having any previous affiliation, real or perceived, with the LTTE, or being deported as a group from the United Kingdom on chartered flights.

[19] The officer noted that the evidence from the affiant Watts was largely anecdotal and not authenticated by any objective evidence.

[20] Finally the officer noted that the applicant had initially sought protection from persecution in the United States which he abandoned prior to coming to Canada. After the applicant came to Canada the RPD assessed his risk under sections 96 and 97 of the Act and its Convention refugee refusal was upheld by this Court when it denied leave for judicial review. The officer concluded that the applicant had been granted due process because his risk had been assessed and the officer was satisfied on the information before him that a deferral of removal was not warranted for the reasons described.

III. STANDARD OF REVIEW

[21] The standard of review of the decision of an enforcement officer to defer removal is reasonableness, unless it involves a question of law, in which case it is correctness (*Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, 343 DLR (4th) 128 at para 27 [*Shpati*]).

IV. ANALYSIS

[22] As in *Peter*, the applicant filed no materials outlining any specific issues or submissions challenging the reasonableness of the removals officer's decision. Oral submissions were equally of a limited and general nature, being mainly comprised of references to new documentation on country conditions in Sri Lanka since the RPD decision.

[23] The materials contained voluminous references to documents on country conditions produced after the RPD decision and were said to indicate that, despite the end of the armed conflict, Sri Lanka continues to be beset by serious and systematic human rights violations.

[24] Amongst the most relevant of these materials were references to reports in 2012 including from reports from Tamils against Genocide, Freedom from Torture, and Human Rights Watch that noted the detention and torture of Tamils returning from western countries, including rejected asylum-seekers.

[25] I am satisfied that the decision of the removals officer was reasonable in deciding that the applicant had not discharged his onus that his removal should be deferred because it would expose him to a risk of death, extreme sanction, or inhumane treatment.

[26] The officer's reasons speak for themselves. They demonstrate a careful and responsive analysis of the issues raised in the applicant's materials, reflecting as well on the officer's competence. The officer acknowledges that new evidence post-dating the RPD decision on

country conditions was provided, but concludes, among other things, that the circumstances detailed in the articles did not support the personalized risk allegations advanced by counsel.

[27] For the most part the applicant's submissions were rejected for insufficiency of evidence, whether it was in reference to his not meeting the various profile assertions alleged or the rejection of other evidence introduced, such as the abuse of Tamil returnees from the United Kingdom not describing the applicant's situation.

[28] The rejection of the affidavit evidence of the law clerk from counsel's office is also reasonable. The affiant deposed that "based on the experience of [the applicant's counsel's] office" H&C applications rarely receive favourable consideration when the applicants are not present in Canada. The information was largely anecdotal and not substantiated by documentary evidence. I repeat my comments made in *Peter* in that I am critical of law firms filing affidavits on substantive issues in proceedings before decision-makers.

[29] In summary, I find the removals officer's decision within a range of reasonable acceptable outcomes that is explained in reasons that are justified, transparent, and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 47 and 53).

V. CONCLUSION

[30] This application for judicial review shall be dismissed.

VI. CERTIFIED QUESTION

[31] I shall certify the same questions is this matter as were certified in *Peter* as follows:

1. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 12 months have passed since the claim for refugee protection was last rejected infringe section 7 of the *Charter*?

2. If not, does the present removals process, employed within 12 months of a refugee claim being last rejected, when determining whether to defer removal at the request of an unsuccessful refugee claimant for the purpose of permitting a Pre-Removal Risk Assessment application to be advanced, infringe section 7 of the *Charter*?

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed; and

2. The following serious questions of general importance are certified:

   a. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 12 months have passed since the claim for refugee protection was last rejected infringe section 7 of the *Charter*?

   b. If not, does the present removals process, employed within 12 months of a refugee claim being last rejected, when determining whether to defer removal at the request of an unsuccessful refugee claimant for the purpose of permitting a Pre-Removal Risk Assessment application to be advanced, infringe section 7 of the *Charter*?

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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