Federal Court  Cour fédérale

Date: 20150309

Docket: IMM-4307-13

Citation: 2015 FC 292

Ottawa, Ontario, March 9, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SAYELLA SAKTHIVEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Ms. Sakthivel [the Applicant] sought a permanent resident visa as a Convention refugee abroad, but her application was refused by an immigration officer [the Officer] at the High Commission of Canada in Singapore. She now applies for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], asking the

Court to set aside the negative decision and refer the matter to a new officer with such directions as the Court considers appropriate.

[2] The Applicant is a 36-year-old Tamil woman from Jaffna, in northern Sri Lanka, who alleges that she has a well-founded fear of persecution in Sri Lanka. She therefore went to Malaysia in April, 2008, where her status is precarious and the United Nations High Commissioner for Refugees [UNHCR] determined in July, 2010, that she was not a Convention refugee. Her parents and sister were originally with her in Malaysia, but they have since immigrated to Canada and are now permanent residents. The Applicant also tried to immigrate to Canada as a skilled worker, but her application was denied since her English-language ability was insufficient.

[3] However, the Applicant had friends and family in Canada who were willing to sponsor her and their bid to do so was approved on January 20, 2010. With that support, the Applicant applied for permanent residence in Canada on March 12, 2010. Although she checked off the box indicating that she was applying as a member of the family class, her application was accompanied by the forms used to apply as a refugee outside Canada or as a member of the country of asylum class and that is how her application was processed. The Applicant was eventually interviewed on February 27, 2013.

II. Decision under Review

[4] By letter dated May 29, 2013, the Officer refused Ms. Sakthivel's application. After noting that the claim was governed by sections 145 and 147 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [*Regulations*], the Officer wrote that "I am not satisfied, on balance, that you have established a well-founded fear of persecution or that you have been seriously and personally affected by a civil war, armed conflict, or a massive violation of human rights."

[5] More detailed reasons for the Officer's decision were recorded in the Global Case Management System [GCMS] on May 28, 2013, wherein the Officer noted that the Applicant originally left Sri Lanka because of problems related to the armed conflict between the government and the Liberation Tigers of Tamil Eelam. As that war was over, the Officer did not consider the Applicant's continued reluctance to return to be "reasonable grounds to believe that this is a well-founded fear of persecution." Nor was it ever, according to the Officer, since the Applicant's accounts of receiving threatening messages and witnessing shelling did not rise to that level, and her alleged fear that the government would persecute her was undermined by the fact that she had worked for the government for six months.

[6] Furthermore, the Officer believed that Colombo was a reasonable internal relocation alternative, as the Applicant had lived there from 1996 to 2008, mostly independently, and there was no reason to believe she could not do so again. Although her immediate family now lived in Canada, the Officer noted that she still has an aunt living in Sri Lanka who may be able to help her re-establish herself.

[7] The Officer was also unconvinced that the Applicant was a member of the country of asylum class prescribed by section 147 of the *Regulations*, which only applies when foreign

nationals "have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights." Again, the Officer noted that the civil war had ended, and while there are still human rights violations in Sri Lanka, the Officer did not think there was enough evidence to show either that they were massive or that they seriously affected the Applicant.

[8] Finally, the Officer considered whether to grant protection under subsection 108(4) of the *Act*, which applies when there are "compelling reasons" arising out of previous persecution, torture, treatment or punishment for a claimant refusing to avail themselves of the protection of the country which they left. Ultimately, the Officer decided that the incidents described by the Applicant did not meet that threshold.

III. The Parties Submissions

A. *The Applicant's Arguments*

[9] The Applicant notes that there are several oblique references to "country of origin information" and a UNHCR document in the GCMS notes that are not part of the certified tribunal record. According to the Applicant, the absence of any citation to the country condition documentation referred to by the Officer is a "glaring problem" and a fatal error. The Applicant says that the Officer's decision-making processing needs to be transparent.

[10] Moreover, the Applicant argues that not disclosing that information to the Applicant was unfair (relying on *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004]

3 FCR 195, and *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FCR 205, 66 NR 8 (CA)). The Applicant submits that she was entitled to know the case to meet, and although it is unclear what country documentation the Officer relied on, the Applicant says that the most recent information from UNHCR certainly demonstrates risk for the Applicant should she be returned to Sri Lanka.

[11] Furthermore, the Applicant contends that the Officer misstated the test for a well-founded fear of persecution by requiring that there be "reasonable grounds to believe that this is a well-founded fear of persecution". This represents a higher standard than what the Applicant should need to establish (citing *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraphs 114-117, [2005] 2 SCR 100 [*Mugesera*]). Rather, the Applicant contends that the "proper test is that of reasonable chance or good grounds that persecution will occur" (citing *Krishnapillai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 244 at paragraph 10 [*Krishnapillai*]).

[12] The Applicant urges the Court to adhere to previous standards and states that the Officer's use of "reasonable grounds" is not one of the accepted standards by which the Applicant's fear of persecution should be assessed. According to the Applicant, this aspect of the Officer's decision is reviewable upon a standard of correctness, in that it was incumbent upon the Officer to select and understand the correct test.

[13] The Applicant argues that the above errors also taint the Officer's findings about the country of asylum class under section 147 of the *Regulations*, and whether there were

compelling grounds to grant refugee status for past persecution under subsection 108(4) of the *Act*.

[14] The Applicant also complains that the Officer did not explain why receiving threatening messages was not persecutory or why working for the government for six months undermined her claim.

[15] With respect to an internal flight alternative [IFA], the Applicant points out that there is no evidence about where the Applicant's aunt lives in Sri Lanka and, in any event, the Officer's errors in assessing the Applicant's fear of persecution undermine the finding of an IFA. According to the Applicant, it is not reasonable to say there is an IFA in Colombo just because she has an aunt living somewhere in Sri Lanka.

B. *The Respondent's Arguments*

[16] The Respondent emphasizes that this is a visa officer's decision, not a decision by the Refugee Protection Division [RPD]. Accordingly, the level of procedural fairness required in reviewing such a decision is at a lower level. The Respondent says that even if the standard of fairness here may be somewhat elevated, given the effect of the decision upon the Applicant, the Officer here fairly assessed the Applicant's application. The Respondent argues that the Officer had no duty to disclose the UNHCR report, since the Applicant was told about the pertinent concerns and had sufficient opportunity to respond.

[17] The Respondent argues that the standard of review for the other issues in this case is reasonableness, which means that the reasons need only be transparent, justifiable, and intelligible (citing *Nabizadeh v Canada (Citizenship and Immigration)*, 2012 FC 365 at paragraph 28, 407 FTR 74 [*Nabizadeh*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 30, [2011] 3 SCR 654 [*Alberta Teachers*]).

[18] The Respondent argues that those criteria are even more relaxed when an officer's notes are being assessed. According to the Respondent, it is enough if the reasons disclose the officer's findings of fact, the principal evidence upon which those findings are based, the major issues, and the reasoning process that resolves those issues (citing *Dunsmuir* at paragraph 49; *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paragraph 11, 282 NR 394; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708; *VIA Rail Canada Inc v National Transportation Agency* (2000), [2001] 2 FCR 25 at paragraph 22, 193 DLR (4th) 357). The Respondent also adds that the Court should try to supplement reasons before criticizing them.

[19] In this case, the Respondent argues that all of the necessary elements are present in the decision. It is clear that the Officer accepted the Applicant's accounts of what happened to her, but simply decided that the threats were not serious. Given that, the Respondent says it is plain enough why they did not amount to persecution, which requires a "sustained or systemic violation of basic human rights" (citing *Canada (AG) v Ward*, [1993] 2 SCR 689 at 733, 103

DLR (4th) 1). Specifically, the Respondent argues that the Applicant's claim was weak since the only direct link to the Applicant's fear of persecution was in respect of the failed kidnapping of her sister and the subsequent threatening messages. In addition, the Respondent points out that there has been nothing directly affecting the Applicant for several years.

[20] As for the finding that the Applicant's employment with the government undermined her claim, the Respondent says that this is a minor point and, in any event, it was reasonable for the Officer to find that such employment detracted from her claim of persecution. According to the Respondent, this is a common sense conclusion by the Officer, since if the government had hired her, why would it then persecute her?

[21] The Respondent also defends the Officer's decision that Colombo is an IFA. The Respondent says that the Officer's reasons and decisions in this regard were reasonable. The Applicant had lived in Colombo for 12 years. According to the Respondent, the Officer's observation that the Applicant's aunt lived in Sri Lanka was unconnected to the finding that Colombo was an IFA, so it does not matter where she lived. Nor did it matter that the Applicant was threatened in Colombo since the Officer had found that those threats were not persecutory.

[22] The Respondent argues that the Officer did not misstate the test. By referring to "reasonable grounds" to believe that there is a well-founded fear of persecution, the Respondent claims that the Officer was referring not to the standard of proof but to the evidentiary burden. In its view, the standard of a serious possibility of persecution is embedded within the phrase "well-founded fear," and it is not an error for the Officer here to use the actual words of the statute to

express the standard of proof. The Respondent adds that what matters is how the test was applied, not how clearly it was articulated (citing *Janagill v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 587 (QL) at paragraphs 4-6 (TD)).

[23] Finally, the Respondent argues that the Applicant's assertions about the country of asylum class under section 147 of the *Regulations* and compelling reasons under subsection 108(4) are devoid of both facts and arguments. The Respondent states that this is not the sort of case where such compelling circumstances would arise. According to the Respondent, the Applicant just being scared of the army is not sufficient, although it may be something to consider with respect to her subjective fear of persecution. The Respondent says one needs to look at the facts as a whole to assess any compelling reasons, and before there can be such compelling reasons, there needs to be a finding of persecution. Since there was no finding of persecution here, there should be and could be no consideration of any compelling reasons.

IV. Issues and Analysis

A. *Issues*

[24] Four issues emerge from the parties' submissions: (1) what is the standard of review; (2) did the Officer apply the correct test in assessing whether the Applicant's fear of persecution was well-founded; (3) was it unfair for the Officer not to disclose to the Applicant the country of origin information and UNHCR document referred to in the GCMS notes; and (4) was the Officer's decision reasonable?

B. *Standard of Review*

[25] The Respondent argues that the Court should apply the reasonableness standard when assessing whether the Officer understood the standard of proof under section 96 of the *Act*, since the Officer was ostensibly interpreting a home statute (*Alberta Teachers* at paragraph 30). That position finds some general support in the case law (see e.g. *Dusabimana v Canada (Citizenship and Immigration)*, 2011 FC 1238 at paragraph 21 [*Dusabimana*]; *Nabizadeh* at paragraph 27); but other cases have reached opposite conclusions and applied a correctness standard (see e.g. *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at paragraph 49, [2013] 1 FCR 261; *Kumarasamy v Canada (Citizenship and Immigration)*, 2010 FC 203 at paragraphs 8, 12).

[26] Despite this divergence in the case law, the fact of the matter is that, at least when it comes to pre-removal risk assessments [PRRAs] and decisions of the RPD, this Court has insisted that such decision-makers apply the correct standard of proof under section 96 (see e.g. *Arias v Canada (Citizenship and Immigration)*, 2010 FC 1029 at paragraphs 10-11; *Awadh v Canada (Citizenship and Immigration)*, 2014 FC 521 at paras 13, 15; *Talipoglu v Canada (Citizenship and Immigration)*, 2014 FC 172 at paragraphs 22, 24, 23 Imm LR (4th) 147). It would make no sense for the Court to defer to a visa officer's interpretation of section 96 when it does not do so in respect of the RPD's interpretation.

[27] As for why the Court has departed from the general rule in *Alberta Teachers*, several reasons may be offered, including:

1. Section 96 of the *Act* directly implements Canada's international obligations under the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6, which should be interpreted as uniformly as possible (*Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at paragraph 24, [2014] 2 FCR 224, aff'd 2014 SCC 68, 376 DLR (4th) 387; *Canada (Citizenship and Immigration) v A011*, 2013 FC 580 at paragraph 49, 433 FTR 229; *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at paragraph 71, 359 DLR (4th) 730 [*B010*]);

2. The jurisprudence has already settled on clear legal tests which it would make no sense to randomly disturb (*Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 17-20, 440 FTR 106);

3. Since paragraph 74(d) of the *Act* expressly gives the courts a supervisory role by permitting appeals when they raise serious questions of general importance, such authority could serve no purpose unless Parliament expected the courts to give a definitive interpretation of important statutory provisions (see e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paragraph 43, 160 DLR (4th) 193; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paragraphs 32, 35-36, 372 DLR (4th) 539; but see *B010* at paragraphs 68-70); and

4. Section 96 of the *Act* is applied by many different decision-makers, including PRRA officers, officers assessing Convention refugee abroad applications, the RPD, and the Refugee Appeal Division. Parliament must have intended that these

> decision-makers apply the same tests, and review on the correctness standard is the only way to ensure that they do.

[28] The foregoing rationales are not so manifestly wrong that they justify derogation from the principle of judicial comity (see e.g. *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paragraphs 43-45; *Apotex Inc v Allergan Inc*, 2012 FCA 308 at paragraphs 43, 47-48, 440 NR 269). In my view, the standard of review has been satisfactorily decided and need not be revisited (*Dunsmuir* at paragraphs 57, 62) and, consequently, the correctness standard applies to whether the Officer understood the standard of proof under section 96. Thus, the Court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question": *Dunsmuir* at paragraph 50.

[29] Correctness is also the standard for reviewing whether it was unfair for the Officer not to disclose to the Applicant the country of origin information and UNHCR document referred to in the GCMS notes (*Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339 [*Khosa*]). Persons affected by a decision must receive every procedural protection to which they are entitled, but relief may be withheld if any error "is purely technical and occasions no substantial wrong or miscarriage of justice" (*Khosa* at paragraph 43; *Federal Courts Act*, RSC 1985, c F-7, s 18.1(5)).

[30] The standard of review applicable to whether a claimant is a member of the Convention refugee abroad class is a factual determination to be evaluated on the standard of reasonableness

(see: *Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229 at paragraph 22; *Dusabimana* at paragraph 20). It is well established that the standard of reasonableness is concerned not only with the existence of justification, transparency and intelligibility within the decision-making process, but also with whether the decision under review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is not up to this Court to reweigh the evidence that was before the Officer, and it is not the function of this Court upon judicial review to substitute its own view of a preferable outcome (*Dunsmuir* at paragraphs 47-48; and *Khosa* at paragraphs 59 and 61).

C. *Did the Officer apply the correct test in assessing whether the Applicant's fear of persecution was well-founded?*

[31] In the GCMS notes, the Officer states, in part, as follows:

> ASSESSMENT:
>
> ...I do not find sufficient evidence in the application, the applicant's responses or country of origin information which demonstrates reasonable grounds for a well-founded fear of persecution on the basis of any of the Convention grounds.
>
> Therefore, having considered all of the evidence before me, I am not satisfied that reasonable grounds exist to find the applicant a member of the Convention Refugee class or the Country of Asylum class. I am therefore refusing this application.
>
> [Emphasis added]

[32] The Respondent argues that the Officer did not misstate or misapply the test for assessing whether the Applicant's fear of persecution was well-founded, and that the standard of a serious possibility of persecution is embedded within the phrase "well-founded fear." I reject this

argument in view of *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FCR 680 at 683, 57 DLR (4th) 153 (CA) [*Adjei*], where the Federal Court of Appeal stated:

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

[33] This passage from *Adjei* has been expressly endorsed in *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraph 120, 128 DLR (4th) 213 [*Chan*] , where the Supreme Court of Canada stated its preference for the term "serious possibility":

> …In the specific context of refugee determination, it has been established by the Federal Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, that the claimant need not prove that persecution would be more likely than not in order to meet the objective portion of the test. The claimant must establish, however, that there is more than a "mere possibility" of persecution. The applicable test has been expressed as a "reasonable possibility" or, more appropriately in my view, as a "serious possibility". See: *R. v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All E.R. 193 (H.L.).

[34] The Respondent further argues that "reasonable grounds" is ultimately identical to the standard set out in *Adjei* and *Chan*. In a different context, the Supreme Court defined it in a similar way, saying that "the 'reasonable grounds to believe' standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" (*Mugesera* at paragraph 114). While that is an attractive argument, the fact is that there is no way to determine or ascertain whether that is actually what the Officer meant. The Court is not a mind reader and can only review and examine the words the Officer actually used.

[35] The standard of proof for section 96 has been established for two decades and already has several synonyms. I see no reason or need to endorse another one. An officer deciding a refugee claim should be familiar with the leading cases from the Federal Court of Appeal and the Supreme Court of Canada, especially on such a basic and well-established question of law as the standard of proof for purposes of section 96 of the *Act*.

[36] Ultimately, the Officer's use of a test or standard of "reasonable grounds" for the threshold of risk in relation to a claim for protection under section 96 of the *Act* is incorrect. The Officer's decision in this regard is therefore much like that reviewed by the Court in *Krishnapillai* at paragraph 12, where Mr. Justice Richard Mosley determined that "[o]n the face of the decision letter, the officer applied the incorrect standard and I am not satisfied that she had the correct standard in mind when she arrived at her decision."

[37] Here too, an incorrect standard was stated by the Officer and the Court is not satisfied that he or she had the correct standard in mind. This conclusion is sufficient to allow the application for judicial review and, consequently, it is not necessary to address the third and fourth issues stated above.

[38] Before leaving this issue, I recognize that the "reasonable grounds" formulation was not repeated in the generic decision letter itself, the second page of which instead stated that the Officer was "not satisfied that there is a reasonable chance or good grounds that you are a member of any of the classes prescribed." However, the GCMS notes imply that the Officer never actually wrote that letter, since the final sentence by the Officer in the GCMS notes was:

"VON please draft Re-17 refusal letter." The next entry in such notes stating that the refusal letter was sent by registered mail was entered by someone with the initials "VON," which were different from the Officer whose initials were "RSP."

V. Proposed Question for Certification

[39] At the hearing of this matter it was determined that the parties would submit post-hearing written submissions addressing the issue of "reasonable grounds" and propose any serious question of general importance for certification with respect to this issue. The Respondent declined to submit any such question. The Applicant did so but only in case the Respondent's arguments on this issue were persuasive and dispositive. Accordingly, since the Respondent did not propose a serious question of general importance, no such question will be certified.

VI. Conclusion

[40] In the result, therefore, the application for judicial review is hereby allowed and the matter is returned for re-determination by a different immigration officer, with leave to the Applicant to file such further information and documentation upon such re-determination as she considers appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter returned for re-determination by a different immigration officer, with leave to the Applicant to file such further information and documentation upon such re-determination as the Applicant considers appropriate. No serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT