

Federal Court



Cour fédérale

Date: 20150916

Docket: IMM-8491-14

Citation: 2015 FC 1067

Ottawa, Ontario, September 16, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

B489

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a Tamil male from Sri Lanka who arrived in Canada in 2010 aboard the ship *MV Sun Sea*. The *MV Sun Sea*, which carried approximately 494 Sri Lankan ethnic Tamils, was widely reported to be owned and operated by the Liberation Tigers of Tamil Eelam [the LTTE]. The governments of Sri Lanka and Canada both consider the LTTE to be a terrorist

organization. The arrival of the ship in Canada received significant domestic and international media attention.

[2] The Applicant seeks judicial review of a decision of a visa officer [the Officer] to refuse his application for permanent residence on humanitarian and compassionate [H&C] grounds. For the reasons that follow, I have concluded that the Officer reasonably found that the Applicant would not face unusual and undeserved or disproportionate hardship if he were to return to Sri Lanka. The application for judicial review is therefore dismissed.

II. Background

[3] The Applicant argued before the Refugee Protection Division of the Immigration and Refugee Board [the RPD], and also in support of his request for a Pre-Removal Risk Assessment [PRRA], that he is at risk in Sri Lanka because the authorities will suspect him of having links to the LTTE solely because he travelled to Canada aboard the *MV Sun Sea*. He was unsuccessful in both forums and his application for leave and for judicial review of the RPD's decision was refused by this Court (*B489 v Canada (Minister of Citizenship and Immigration)*, IMM-2686-13, June 26, 2013 *per* Justice Russell).

[4] The Applicant then submitted an H&C application based on his degree of establishment in Canada, the best interests of children with whom he has formed an attachment in Canada, and the risk that he allegedly faces in Sri Lanka.

III. The Officer's Decision

[5] The Officer acknowledged several positive factors regarding the Applicant's degree of establishment in Canada: (i) he is employed full-time at Color Steels in Thornhill, Ontario; (ii) he is self-supporting; (iii) he is learning English; (iv) he volunteers at the Canadian Traditional Karate Association as a martial arts instructor and at the Vethantha Gnana Shiva Temple of Scarborough, Ontario; and (v) he is active in his community. However, the Officer was not persuaded that the Applicant's degree of establishment in Canada would cause him unusual and undeserved or disproportionate hardship if he were to return to Sri Lanka. The Officer noted that the Applicant's wife and children reside in Sri Lanka, and that the Applicant has acquired skills and training in Canada which could assist him in finding work in Sri Lanka.

[6] The Officer also acknowledged that the Applicant has established a bond with the children of the couple with whom he resides in Canada. However, the Officer found that the Applicant had not demonstrated any interdependency between himself and the children. The Officer concluded that the best interests of these children would not be significantly affected, given that their parents and extended family live in Canada. Furthermore, the Officer determined that it was clearly in the best interests of the Applicant's children in Sri Lanka to be reunited with their father, and gave greater weight to the best interests of the Applicant's own children.

[7] Finally, the Officer considered documentary evidence of country conditions in Sri Lanka. The Officer accepted that former passengers on the *MV Sun Sea* who are known or perceived to be affiliated with the LTTE may be at risk of arbitrary detention and police abuse. However, the

Officer concluded that the Applicant's travel to Canada aboard the *MV Sun Sea* did not in itself put him at risk, given that he has no apparent connection to the LTTE. Furthermore, the Officer concluded that the Applicant had not demonstrated that the Sri Lankan authorities were aware that he had travelled aboard the *MV Sun Sea*.

[8] The Officer noted that recent country condition reports indicate that there is no systematic monitoring of Sri Lankans who are forcibly returned, and that the majority of those who are found to be actual LTTE members are released from detention. In support of his conclusions the Officer cited an IRB research document titled LKA104245 dated February, 2013; a UK Home Office Operational Guidance Note on Sri Lanka, and a recent report from Freedom House.

[9] The Officer also considered the Minister's Disclosure regarding two previous passengers on the *MV Sun Sea* who were subsequently deported to Sri Lanka. However, the Officer concluded that the Applicant's situation was distinguishable because the two individuals in question were already known to the Sri Lankan authorities: one had previous ties to the LTTE and the other had been convicted of weapons smuggling in Thailand and had been involved in organizing the voyage of the *MV Sun Sea*. Furthermore, the Officer noted that one of the individuals featured in the Minister's Disclosure had reported to a Canada Border Services Agency officer that he was safe in Sri Lanka and that he had not experienced any problems.

IV. Issues

[10] This application for judicial review raises the following issues:

- A. Was the Officer's assessment of country conditions in Sri Lanka reasonable?

- B. Was the Officer's assessment of the Applicant's degree of establishment in Canada reasonable?

V. Analysis

[11] The Officer's conclusions regarding country conditions in Sri Lanka and the Applicant's degree of establishment in Canada involve questions of fact and questions of mixed fact and law. They are therefore subject to review by this Court against the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 (CA) at paras 18 and 20; *Figueroa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 673 at para 24; *Husain v Canada (Minister of Citizenship and Immigration)*, 2011 FC 451 at paras 11-13).

- A. *Was the Officer's assessment of country conditions in Sri Lanka reasonable?*

[12] The Applicant says that the Officer's decision was unreasonable because he did not refer to or explain his refusal to accept evidence that contradicted his conclusions – specifically, a report titled “Amnesty International Concerns with respect to forced returns to Sri Lanka for passengers of the MV Ocean Lady and MV Sun Sea” dated June 12, 2012 [the AI Report]. The AI Report suggested that passengers aboard the *MV Ocean Lady* and *MV Sun Sea* are presumed by the Sri Lankan government to be affiliated with the LTTE and “would be exposed to a serious

risk of detention, torture and mistreatment on return should the Sri Lankan authorities in turn suspect they had been on board those vessels.”

[13] The Minister points out that the AI Report was published before the RPD’s decision to reject the Applicant’s claim. He argues that it was reasonable for the Officer to rely on more recent evidence which indicates that former passengers on the *MV Sun Sea* who are forcibly returned to Sri Lanka are not at risk, and that the Officer was not obliged to revisit the RPD’s findings of fact based on a document that preceded its decision.

[14] It is an error for a visa officer to engage in a selective analysis of the evidence and to ignore contradictory evidence without providing a reasonable explanation (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 at para 17). This Court has on a number of occasions found that a failure to consider or provide reasons for rejecting the AI Report constitutes a reviewable error: *S.Y. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 324; *B381 v Canada (Minister of Citizenship and Immigration)*, 2014 FC 608 [B381] at para 41; *Thanabalasingam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 397 [Thanabalasingam] at para 17; *Pathmanathan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 640 at para 10; *Sittambalam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 813 at para 8.

[15] However, in this case the previous jurisprudence of the Court regarding the AI Report may be distinguished. Here, the Applicant’s application for leave and for judicial review of the RPD’s decision that he would not be at risk in Sri Lanka solely because he travelled aboard the

MV Sun Sea was rejected by this Court, and accordingly the RPD's decision is final. Also, the officer who conducted the PRRA found that the Applicant was not at risk.

[16] The AI Report did not feature prominently in the Applicant's submissions to the Officer. The Officer understandably focused on the Minister's Disclosure, given that this was the only evidence regarding country conditions in Sri Lanka that the RPD did not consider. The Officer's conclusions were supported by the evidence, and fell within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). They were therefore reasonable.

B. *Was the Officer's assessment of the Applicant's degree of establishment in Canada reasonable?*

[17] The Applicant does not contest the Officer's conclusions regarding the best interests of the children affected by his decision to refuse the Applicant's application for a permanent resident visa. However, the Applicant says that the Officer was wrong to refuse the application merely because the Applicant's degree of establishment was no greater than what one would expect in the circumstances (*Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385). I disagree. The Officer specifically considered whether the Applicant's return to Sri Lanka would result in unusual and undeserved or disproportionate hardship. The Officer's conclusion that there was nothing unusual about the Applicant's degree of establishment in Canada was consistent with his conclusion that the Applicant's return to Sri Lanka would not cause him hardship of this severity.

[18] The Applicant also argues that the Officer was wrong to find that the skills he acquired in Canada would assist with his re-integration in Sri Lanka, relying on Justice Campbell's decision in *Sosi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1300 at paras 9 and 18. In addition, the Applicant says that the Officer should not have assumed that he would have the support of his wife and children in Sri Lanka, given that there was no evidence before the Officer regarding the nature of their relationship. The Applicant relies on Justice Russell's decision in *Prashad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1286 [*Prashad*] at para 68.

[19] In *Gomez Jaramillo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 744 at paras 55 and 68, Justice Brown held that an applicant's ability to re-establish himself in his country of origin is relevant to the question of whether he will face unusual and undeserved or disproportionate hardship if he is required to apply for permanent residence from abroad in the usual manner. For the reasons articulated by Justice Brown, I am satisfied that it was appropriate for the Officer to consider the skills that the Applicant had acquired in Canada and whether they might be transferrable to Sri Lanka.

[20] Furthermore, *Prashad* is distinguishable. In that case, the visa officer concluded without any evidentiary foundation that the applicants had "a network of relatives and friends". In this case, there is no dispute that the Applicant's wife and children reside in Sri Lanka and the Applicant did not adduce any evidence to suggest that he is estranged from them. On the contrary, he included his wife and children in his application for a permanent resident visa and they currently reside with the Applicant's parents in Sri Lanka. It was therefore reasonable for

the Officer to infer that the Applicant's wife and children could assist him in re-integrating himself in Sri Lanka.

VI. Conclusion

[21] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Maureen Silcoff FOR THE APPLICANT

David Engel FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maureen Silcoff FOR THE APPLICANT
Silcoff, Shacter
Barristers and Solicitors

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada
Toronto, Ontario