Federal Court  Cour fédérale

Date: 20170724

Docket: IMM-3969-16

Citation: 2017 FC 718

Ottawa, Ontario, July 24, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KABILAN RASALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Background

[1] This is an application for leave and for judicial review, pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the IRPA], of a refusal to defer removal [Decision] by an inland enforcement officer [Officer] dated September 24, 2016. Due to the unreasonable treatment of certain evidence, the judicial review should be allowed.

[2] The Applicant, a young male Tamil from Sri Lanka, arrived to Canada on July 7, 2010 and made a refugee claim. The refugee claim was heard on September 21, 2011 and refused on October 18, 2011. Leave to bring a judicial review was denied by this Court in March 9, 2012.

[3] The Applicant then submitted a Pre-removal Risk Assessment [PRRA] on December 8, 2012, which was refused on January 7, 2014. The Applicant also challenged this negative decision, and while the Court granted leave, it rejected the judicial review on April 13, 2015. As a result of this decision, the Applicant's statutory stay of removal was lifted.

[4] Removal, however, was only scheduled well over a year later. On September 20, 2016, the Applicant requested a deferral of his impending removal a week later. On September 24, 2016, the deferral was refused. The Applicant applied once again to the Federal Court, this time for a stay of removal, based on an underlying challenge to the Decision.

[5] Justice Strickland, in granting the stay, found the following to be a serious issue in the Officer' s Decision: "the Enforcement Officer appears to have failed to have considered whether country condition documents postdating the Applicant's January 2014 Pre Removal Risk Assessment support the Applicant's contention that persons who fit his profile of a young Tamil male from the North of Sri Lanka who is a failed asylum seeker, face an increased or changed risk of persecution" (*Rasalingham v Canada (Public Safety and Emergency Preparedness)* (September 27, 2016), Ottawa, FC IMM-3969-16 (interlocutory judgment)).

II. Decision

[6] The Officer, in refusing to defer removal, found that there was insufficient compelling evidence to corroborate the claim that new evidence which post-dated the prior risk analyses (RPD and PRRA), demonstrated that the Applicant would face the risk of death, extreme sanction, or inhumane treatment after his removal to Sri Lanka.

[7] The Officer also noted that the Applicant had been the subject of two Humanitarian and Compassionate [H&C] requests in 2014 and 2016 (the latter of which was still outstanding), but noted that due to removals policy, there was no basis to stay removal pending H&C processing. The Officer also considered both hardship and establishment, including the Applicant's mental health. The Officer concluded that there was neither a basis to defer the removal on those factors, nor on the basis of risk to the Applicant upon his return.

III. Issues

[8] The Applicant claims that the Officer failed to consider the evidence before him, failing to consider the current, changed circumstances in Sri Lanka, and rather relying on the RPD and PRRA decisions, both of which were based on 2011 evidence and therefore outdated (given that the PRRA Officer appeared to limit himself to the same country condition evidence as was before the RPD: Certified Tribunal Record at 147).

[9] The Applicant also claims that the Officer did not properly assess the new (i) personal evidence submitted by the Applicant, namely documentation from the Applicant's family

members and family lawyer in Sri Lanka, giving little weight to this evidence, and (ii) medical evidence, from the Applicant's psychiatrist.

IV. Analysis

[10] The parties agree that the standard of review applicable to the decision of an enforcement officer to refuse a deferral of removal is reasonableness. When conducting a reasonableness review of factual findings, the Court must not reweigh the evidence or the relative importance given by the decision-maker to any relevant factor. As long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at paras 12-13).

[11] The context of deferral decisions is particularly difficult given the time-related sensitivities and realities at play. Often, removal arrangements are made with little advance notice. Accordingly, those being deported and applying to defer as a last resort, have limited time to make their requests. Officers also often act under narrow time frames, given the nature of these requests within the removals context.

[12] Officers accordingly have an extremely narrow discretion in which they may defer removals, limited to the most extreme cases (death, extreme sanction, or inhumane treatment) (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51, quoting *Wang v Canada (MCI)*, [2001] 3 FC 682 (FC)). Their functions are limited, and deferrals

are intended to be temporary. Enforcement officers are not intended to make, or to re-make, PRRAs or H&C decisions (*Shpati v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 286 at para 45).

[13] The discretion of enforcement officers should accordingly only be displaced by the Court when an important factor has been overlooked or if an officer has seriously misapprehended an applicant's circumstances (*Urbina Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18 at para 53). Having said that, the right to challenge an enforcement officer's refusal to defer is not illusory (*Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at para 18 [*Atawnah*]). Enforcement officers must consider evidence submitted, within the narrow confines set out above.

[14] With respect to the Applicant's deferral request, the Officer simply wrote that there was "insufficient compelling evidence to corroborate the claim that new evidence that post dates or could not be previously assessed by the RPD exists to convince [him that the Applicant] will face risk of death, extreme sanction, or inhumane treatment if he is removed to Sri Lanka" (Decision at 4).

[15] As mentioned above, the evidence of risk post-dated the Applicant's PRRA decision. There are several troubling passages in the Decision, including the passage cited in the paragraph immediately above - which make it clear that the Officer did not properly consider recent country condition evidence presented with the deferral request, based on the Applicant's profile as a young Tamil male from the North, particularly returning as a failed asylum seeker.

For instance, the Officer also states “I note that the risk allegation raised in the deferral request, namely, that Mr. Rasalingam is profiled because of his Tamil ethnicity, parallels the risk allegation he raised before the RPD and in his PRRA application” (Decision at 3).

[16] Whether or not the other findings with respect to the personal documentation from the Applicant’s family members and lawyer were reasonable, the Officer nonetheless had a duty to consider the new (post RPD/PRRA) country condition evidence and consider whether it would lead to the risk of death, extreme sanction, or inhumane treatment of the Applicant. Examples of such country condition evidence, which were not available at the time of the earlier RPD and PRRA risk analyses, included those found at pages 262, 361-394 and 439 of the Application Record (amongst others).

[17] The Applicant strongly relied on a case with a similar set of facts, where an enforcement officer’s failure to engage with recent Sri Lankan country condition evidence in a deferral context, was found to be unreasonable: *Kanakasingam v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 457 at para 21 [*Kanakasingam*].

[18] As a first observation regarding *Kanakasingam*, I agree with Respondent’s counsel that past decisions of this Court are not to be taken as adjudicative facts and thus do not create evidence of country conditions; rather this Court’s immigration jurisprudence comprises findings made with respect to the reasonability or correctness of the particular decision under review (see *Bossé v Canada (Attorney General)*, 2017 FC 336 at paras 14-16; see also *Konya v Canada (Citizenship and Immigration)*, 2013 FC 975 at paras 45-47).

[19] While observations were made in *Kanakasingam* regarding the situation in Sri Lanka, I agree with the Applicant that the reviewable decision-making error here is similar to that made in *Kanakasingam* – namely, a failure to properly consider the country condition evidence since the prior risk analyses, regarding a changed risk in Sri Lanka for people with the applicant's profile. (*Kanakasingam* at paras 18-19).

[20] Related recent jurisprudence has also overturned findings made by PRRA Officers basing their risk conclusions on outdated country conditions: see *Ramasamy v Canada (Citizenship and Immigration)*, 2016 FC 473 at para 29; *Srignanavel v Canada (Citizenship and Immigration)*, 2015 FC 584 at para 25; and *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 244 at paras 12-16 – as well as various other cases released during the decade that preceded the Federal Court of Appeal ruling in *Atawnah* (see paras 19-22).

[21] In addition to failing to consider recent country condition evidence, the Officer also believed that the Applicant needed to establish a personalized risk of harm – or at least that the documentation had to show personalized risk, when the Officer wrote: "I have also reviewed the country documents provided by counsel that post-date his refugee hearing; however, I note that these articles are general in nature and they do not refer to Mr. Rasalingam specifically" (Decision at 4).

[22] This statement is without basis. The Applicant did not need to present 'objective' country condition evidence that he would face targeted risks if he is sent back to Sri Lanka (given that the Officer placed no weight on the family and lawyer's evidence from Sri Lanka that spoke to

personalized risk). Rather, personal risks can be inferred by circumstantial evidence by the fact the he is a member of a group that is being targeted (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 53; *Kanakasingam* at para 20).

[23] Given that the Decision was unreasonable with respect to something as central as overlooking country condition evidence relating directly to the key issue the Officer needed to assess - namely the risk of death, extreme sanction, or inhumane treatment - there is no need to decide the other issues raised with respect to the treatment of the 'personalized' evidence – in this case medical, as well as from the family and lawyer.

V. Conclusion

[24] In light of the above, the judicial review is granted. There are no questions for certification, nor do any arise.

JUDGMENT in IMM-3969-16

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;

2. There are no questions for certification, and none arose; and

3. No costs will be ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3969-16
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APPEARANCES:

Mr. Hadayt Nazami	FOR THE APPLICANT
Mr. Christopher Crighton	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jackman, Nazami & Associates Toronto, Ontario	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS