Federal Court  Cour fédérale

Date: 20180326

Docket: IMM-2642-17

Citation: 2018 FC 338

Toronto, Ontario, March 26, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

THEEPAN KATHIRKAMANATHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Theepan Kathirkamanathan left Sri Lanka for Canada in 2010 and claimed on arrival that he had been detained by the Sri Lankan Army on suspicion that he was a member of the Liberation Tigers of Tamil Eelam (LTTE). He also maintained that he feared persecution by the LTTE, as well as other groups, including the Eelam People's Democratic Party (EPDP) and the People's Liberation Organization of Tamil Eelam (PLOTE).

[2] In 2011, a panel of the Refugee Protection Division (RPD) dismissed Mr Kathirkamanathan's refugee claim, finding that it was not well-founded. Mr Kathirkamanathan sought leave to pursue judicial review in this Court, but leave was denied for his application.

[3] In 2011, Mr Kathirkamanathan requested a pre-removal risk assessment (PRRA). This Court quashed the PRRA officer's negative decision and ordered a reconsideration. On the second PRRA, in 2012, Mr Kathirkamanathan provided additional evidence, including a letter from his father, but his application was once again dismissed. On judicial review, the second PRRA decision was quashed on the basis that the officer had failed to address the fresh evidence in any meaningful way. On the third PRRA, in 2015, the officer found that Mr Kathirkamanathan was not at risk of persecution if he returned to Sri Lanka. On judicial review, the third PRRA decision was quashed because the officer had failed to apply the correct standard of proof.

[4] On the fourth PRRA, Mr Kathirkamanathan provided additional evidence in support of his application but, in 2017, the PRRA officer concluded that he was not at risk of persecution if he returned to Sri Lanka. On this fourth application for judicial review of negative PRRA decisions, Mr Kathirkamanathan submits that the officer treated him unfairly by failing to convene an oral hearing, that the officer's analysis of the evidence was unreasonable, and that the officer applied the wrong standard of proof. He asks me to quash the officer's decision and order a fifth PRRA.

[5] I can find no basis for overturning the officer's decision. The officer was not obliged to provide Mr Kathirkamanathan an oral hearing because his credibility was not a central issue in

the case. Further, the officer's conclusion that the evidence did not indicate that Mr Kathirkamanathan was at risk of persecution was not unreasonable. Finally, in the end, the officer applied the correct standard of proof. I must, therefore, dismiss this application for judicial review.

[6] In addition to the issues set out above, there is a preliminary issue relating to the admissibility of an affidavit tendered by the Minister on this application (the Graham affidavit). The issues are:

1. Should the Graham affidavit be admitted?
2. Did the officer treat Mr Kathirkamanathan unfairly by failing to convene an oral hearing?
3. Was the officer's treatment of the evidence unreasonable?
4. Did the officer apply the wrong standard of proof?

II. The Officer's Decision

[7] Mr Kathirkamanathan provided the officer with a second letter from his father. This letter stated that the father had been visited by members of the Sri Lankan Army in 2015 and 2016, and that he was asked about Mr Kathirkamanathan's past involvement with the LTTE and current activities in Canada. According to the father, the soldiers stated that they monitored Mr Kathirkamanathan's activities in Canada and threatened to punish him if he returned to Sri Lanka.

[8] The officer considered the evidence, including the two letters from Mr Kathirkamanathan's father, and concluded that there was insufficient evidence to show that Mr Kathirkamanathan would be at risk if he returned to Sri Lanka after seven years' absence. According to the officer, the evidence did not indicate any new source of risk that arose after the RPD's decision.

[9] The officer noted that Mr Kathirkamanathan had at one point been detained by the Sri Lankan Army, but he was then released, suggesting that he was not suspected of having LTTE ties. In addition, the officer found that Mr Kathirkamanathan had not participated in any anti-Sri Lankan activities in Canada and, given the Sri Lankan government's ability to monitor events on foreign soil, he would not be suspected of supporting the LTTE on his return. The officer gave Mr Kathirkamanathan's father's letters little weight because they contradicted objective documentary evidence, and did not emanate from an unbiased source.

[10] In respect of the risk Mr Kathirkamanathan might face as a failed asylum seeker, the officer concluded that only those persons suspected of having ties to the LTTE were at risk on return to Sri Lanka. In the officer's view, that risk did not apply to Mr Kathirkamanathan. The officer cited documentary evidence about the treatment of returnees, including a UK report summarizing findings from a UK immigration tribunal that were consistent with the officer's conclusion.

[11] The officer found that the circumstances did not merit holding an oral hearing according to the relevant factors, in essence, because Mr Kathirkamanathan's credibility was not a central issue in his application.

[12] The officer concluded that Mr Kathirkamanathan faced no more than a mere possibility of persecution, and that he was unlikely to face a risk to his life, or of cruel and unusual punishment, if he returned to Sri Lanka.

III. Issue One – Should the Graham affidavit be admitted?

[13] On this application for judicial review, the Minister filed an affidavit attaching as exhibits jurisprudential guides for the RPD and the Refugee Appeal Division. The Minister argues that the affidavit and exhibits are admissible to address Mr Kathirkamanathan's argument, set out below, that the officer erred by referring to jurisprudence from the UK.

[14] I disagree. These documents were not before the officer and should not be admitted as evidence on judicial review. However, given that the exhibits are publicly available documents whose accuracy is not disputed, the Minister may cite them to support its legal argument about reliance on foreign jurisprudence.

IV. Issue Two – Did the officer treat Mr Kathirkamanathan unfairly by failing to convene an oral hearing?

[15] Mr Kathirkamanathan submits that, since his testimony established grounds for a positive PRRA, in denying his application the officer must have made negative credibility findings against him. The officer should not have done so without an oral hearing.

[16] I disagree. The officer relied primarily on the reasons the RPD had given for dismissing Mr Kathirkamanathan's claim and on the objective documentary evidence. Mr Kathirkamanathan's personal credibility was not a central concern. Therefore, the officer had no obligation to convene an oral hearing.

V. Issue Three – Was the officer's treatment of the evidence unreasonable?

[17] Mr Kathirkamanathan maintains that the officer failed to provide a valid basis for discounting the evidentiary value of his father's letters. Further, he argues that the officer ignored the fact that he had left Sri Lanka on an irregular or illegal passport and would be detained, questioned, and possibly tortured on his return. In addition, Mr Kathirkamanathan submits that the officer unreasonably relied on jurisprudence from the UK where different legal standards apply.

[18] I cannot conclude that the officer's treatment of the evidence was unreasonable.

[19] The officer discounted the value of Mr Kathirkamanathan's father's letters because his father naturally had an interest in the outcome of his application. The source of evidence provided by an applicant is obviously a valid factor to consider in weighing the value of that evidence. While it would be wrong to disregard evidence simply because it came from a relative of the applicant, at the same time, an officer can take into account whether the evidence is likely to be impartial or objective. Here, however, the officer did not dismiss Mr Kathirkamanathan's father's evidence outright. The officer provided reasons for preferring objective evidence to the father's letters, noting that Sri Lankan authorities must have doubted that Mr Kathirkamanathan was connected to the LTTE when they released him from detention, and that they would probably be aware that Mr Kathirkamanathan took no steps to support the LTTE in Canada.

[20] With respect to Mr Kathirkamanathan's alleged use of an irregular or illegal passport, the evidence on this point was contradictory. At one point, Mr Kathirkamanathan told the RPD that his passport was genuine and legal; at another, he said it was irregular if not illegal. The officer considered the risk Mr Kathirkamanathan might face on return to Sri Lanka given his overall profile. I cannot find anything unreasonable about the officer's analysis of this issue.

[21] As Mr Kathirkamanathan points out, the officer referred to case law in the UK (*GJ and Others (post-civil war: returnees) Sri Lanka CG* [2013] UKUT 003 19 (IAC)). Generally, foreign jurisprudence cannot provide evidence of country conditions (*Pathmanathan v Canada (Minister of Citizenship and Immigration)* 2009 FC 885). However, here the officer relied primarily on the evidence referred to in a UK report rather than on the tribunal's decision itself. In particular, the officer cited at numerous points an Operational Guidance Note for Sri Lanka

from 2013 published by the UK Home Office, which described country conditions at that point in time. The Guidance Note apparently incorporated a summary of the UK Upper Tribunal's conclusions from a particular case. While the officer quoted some of those conclusions, I do not read the officer's decision as being influenced by them. Rather, the officer relied on the source document, the UK Guidance Note, as well as other relevant documentary evidence. In other words, the officer was not relying on a UK decision; the officer was relying on a UK country condition report.

[22] The Minister argues that the officer's reference to a seminal case in the UK is no different from citing the jurisprudence guides identified by the Immigration and Refugee Board, as mentioned above. The IRB's guides refer officers to decisions believed to be precedential. Given that my reading of the officer's decision leads me to conclude that the officer was not relying on a UK decision but, rather, UK evidence, I need not address the Minister's argument that the use of the IRB's jurisprudential guides is analogous to reliance on foreign jurisprudence.

[23] Accordingly, I see nothing improper or unreasonable about the officer's consideration of the UK evidence.

VI. Issue Four – Did the officer apply the wrong standard of proof?

[24] Mr Kathirkamanathan submits that the officer articulated various versions of the appropriate standard of proof he had to meet and, ultimately, applied an incorrect standard.

[25] I disagree.

[26] The standard for findings of fact is the balance of probabilities. The standard for a finding that a person is entitled to refugee protection under s 96 of IRPA is met if the person faces a reasonable chance, or more than a mere possibility, of persecution on a prohibited ground. Finally, in respect of the ancillary protection under s 97 of IRPA, the person is entitled to protection if he or she faces a risk to his or her life, or to cruel and unusual treatment or punishment, or if there are substantial grounds for believing the person will be subjected to torture.

[27] Here, the officer addressed the standard of proof in a number of ways, but ultimately applied the correct standard. The officer stated that the Sri Lankan authorities would not, on a balance of probabilities, have an interest in Mr Kathirkamanathan. This was a factual finding, appropriately determined on the civil standard of proof.

[28] In addition, the officer found that Mr Kathirkamanathan did not face more than a mere possibility of persecution on a prohibited ground. This was the proper standard to apply under s 96.

[29] Further, the officer found it unlikely that Mr Kathirkamanathan would be exposed to a risk to his life or to cruel and unusual punishment. This was the proper standard to apply under s 97(1)(*b*). The officer also found there were no substantial grounds to believe that Mr Kathirkamanathan was exposed to a danger of torture. This was the proper standard to apply under s 97(1)(*a*).

[30] Overall, therefore, I cannot conclude that the officer applied the wrong standards of proof.

VII. Conclusion and Disposition

[31] The officer did not err in deciding not to convene an oral hearing given that Mr Kathirkamanathan's personal credibility was not a central issue. The officer's analysis of the evidence was reasonable, and the officer's ultimate conclusions were based on the proper standards of proof. Therefore, I must dismiss this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT IN IMM-2642-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, and no question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Convention refugee	Définition de réfugié
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	Personne à protéger
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2642-17
STYLE OF CAUSE:	THEEPAN KATHIRKAMANATHAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 11, 2018
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	March 26, 2018

APPEARANCES:

Micheal Crane	For The Applicant
Sharon Stewart Guthrie	For The Respondent

SOLICITORS OF RECORD:

MICHEAL CRANE Barrister and Solicitor Toronto, Ontario	For The Applicant
Deputy Attorney General of Canada Toronto, Ontario	For The Respondent