Federal Court  Cour fédérale

Date: 20180817

Docket: IMM-900-18

Citation: 2018 FC 843

Vancouver, British Columbia, August 17, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

B147

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of the decision rendered by the Minister's Delegate on December 29, 2017, rejecting his application for a restricted pre-removal risk assessment [PRRA] under paragraphs 112(3)(a) and 113(d)(ii) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, this application for judicial review is allowed.

II. Background

[3] The Applicant is a citizen of Sri Lanka of Tamil ethnicity. He arrived in Canada on board the vessel *MV Sun Sea* on August 13, 2010 and made a claim for refugee protection.

[4] In October 2010, an officer from the Canada Border Services Agency [CBSA] prepared a report under subsection 44(1) of the IRPA based on the opinion that the Applicant was inadmissible to Canada pursuant to paragraph 37(1)(*b*) of the IRPA for having engaged in the transnational crime of people smuggling in connection with the voyage of the *MV Sun Sea*. The matter was referred to the Immigration Division of the Immigration and Refugee Board [ID] for a hearing.

[5] In August 2011, the ID determined that the Applicant was inadmissible to Canada pursuant to paragraph 37(1)(*b*) of the IRPA and issued a Deportation Order against him. Following the ID's determination, the Refugee Protection Division found the Applicant to be ineligible to make a refugee claim pursuant to paragraphs 104(1)(*b*) and 101(1)(*f*) of the IRPA.

[6] The Applicant applied for a PRRA in September 2011. Despite a positive risk opinion rendered by a Senior Immigration Officer in April 2012, the Applicant's PRRA application was rejected by the Minister's Delegate on September 4, 2013. The Applicant filed an application for leave and for judicial review of this decision. The application was later discontinued when the Respondent consented to the matter being re-determined by a different Minister's Delegate.

[7] Upon return of the application to a different Minister's Delegate in September 2016, the Applicant was invited to provide updated submissions and evidence. In addition to his own sworn statements, the new evidence adduced by the Applicant included: (1) a Sri Lankan warrant for the Applicant's arrest for failure to appear in Court on February 17, 2016; (2) an extract from the "Information Book of Terrorist Investigation Unit Police Station" dated October 25, 2010 indicating that the Applicant must present himself at the Department of Terrorist Investigations Office on November 10, 2010; (3) an affidavit from the Applicant's cousin in Sri Lanka sworn on November 14, 2016 alleging that he was interrogated, detained and threatened by the Sri Lankan authorities in September 2016 regarding the Applicant's whereabouts; and (4) several undated letters from the Applicant's lawyer in Sri Lanka. They indicate that the Applicant's lawyer was contacted by the Sri Lankan authorities in 2016 and 2017 for information about the Applicant and that if the Applicant returns to Sri Lanka, he will definitely be arrested at the airport and his life will be in danger.

[8] On December 29, 2017, the Minister's Delegate rejected the Applicant's PRRA application on the basis that the Applicant was not likely to face personalized risks as identified in section 97 of the IRPA if he returned to Sri Lanka. The Minister's Delegate accepted that the Applicant was a Tamil male from the Northern Provinces of Sri Lanka and that he was likely arrested, detained and questioned in 2009 by the Sri Lankan authorities regarding his ties to the Liberation Tigers of Tamil Eelam [LTTE]. However, the Minister's Delegate was not satisfied that the Applicant would be at risk because of suspected ties to the LTTE, being a failed refugee claimant from Canada, having been found inadmissible on grounds of organized criminality, having come aboard the *MV Sun Sea* to Canada, or for being a Tamil male.

[9] The Applicant submits that the Minister's Delegate's decision is based on veiled credibility findings that were made in violation of the principles of procedural fairness. He argues that the Minister's Delegate erred in failing to consider and address the Applicant's request for an oral hearing and in failing to hold such a hearing. The Applicant further contends that the Minister's Delegate employed the wrong standard of proof in assessing the Applicant's likelihood of risk.

[10] In contrast, the Respondent submits that the decision of the Minister's Delegate is based on the insufficiency of evidence, not veiled credibility findings. The Respondent is also of the view that the Minister's Delegate applied the appropriate standard of proof.

III. Analysis

[11] The determinative issue in this application is the Minister's Delegate's failure to grant the Applicant an oral hearing.

[12] The jurisprudence of this Court regarding the standard of review applicable to the issue of whether an oral hearing should be granted in the context of a PRRA application has been mixed. In some cases, the Court has applied a correctness standard because the matter is viewed as a matter of procedural fairness (see *Mudiyanselage v Canada (Citizenship and Immigration)*, 2018 FC 749 at para 11; *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at para 13; *Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 at para 13). In other cases, the reasonableness standard has been applied on the basis that the decision involves a question of mixed fact and law (*Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 at para 12;

Lionel v Canada (Public Safety and Emergency Preparedness), 2017 FC 1180 at para 11; *Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 737 at para 40 [*Chekroun*]).

[13] In the circumstances of this case, it is not necessary for me to determine the appropriate standard of review since in either case, the decision of the Minister's Delegate must be set aside.

[14] In the normal course of determining PRRA applications, oral hearings are not commonly held. However, pursuant to subsection 113(b) of the IRPA, an oral hearing may be held if the Minister is of the opinion, on the basis of prescribed factors, that such a hearing is required. The cumulative prescribed factors are set out in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227:

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify	c) la question de savoir si ces éléments de preuve, à

allowing the application for protection.	supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[15] The Applicant asserts that the decision to reject his PRRA application was based on veiled credibility findings, not on the insufficiency of the evidence or its lack of corroboration, as the Respondent contends. To support his argument, the Applicant relies on a number of passages in the PRRA decision where the Minister's Delegate refers to inconsistencies in the Applicant's statements, his admission that he has not been completely truthful since his arrival in Canada and his access to fraudulent documents.

[16] I agree with the Applicant that, on its face, the decision of Minister's Delegate appears to be based on veiled credibility findings. While the findings of the Minister's Delegate regarding the new evidence are couched in "sufficiency of evidence" language, when the decision is read as a whole, the following expressions certainly leave open the interpretation that the Minister's Delegate had credibility issues with the Applicant and his new evidence. Such expressions include "[the Applicant] has provided numerous changes in his story", "[the Applicant] has provided a variety of conflicting statements", "at his inadmissibility hearing, [the Applicant] stated since his arrival he had never been completely truthful", "the information contained therein differs from what was stated in earlier submissions" and "the information differs from that provided directly from [the Applicant] during his interview with CBSA". The most important one, in my view, is the Minister's Delegate's statement that he is "also cognizant that throughout his dealings with CBSA officials, there is reference to [the Applicant] having access to many documents, fraudulent or otherwise" and is "therefore, cautious of the documentary

evidence submitted by [the Applicant] from third parties, particularly those documents he was able to obtain after his arrival to Canada". This last statement leads me to believe that the Minister's Delegate had credibility issues with the Applicant's new evidence of risk.

[17] It is also my view that the Applicant's new evidence was central to the Applicant's PRRA application and could have justified allowing the application.

[18] In assessing the Applicant's risk, the Minister's Delegate examined the most recent country condition information and considered the factors that would cause the Applicant to be at risk were he to return to Sri Lanka. It appears from the information relied upon by the Minister's Delegate that while failed refugee claimants have been detained and questioned when returning from abroad and often fined for leaving the country illegally or on false documents, those who have previous connections with the LTTE are able to return to their communities without suffering ill-treatment. On the basis of that information, the Minister's Delegate acknowledged that the Applicant is likely to be questioned at the airport about his absence from Sri Lanka and his activities abroad. However, he was not persuaded that the Applicant would face detention given that he left Sri Lanka using a valid legally issued passport and it was not demonstrated that he was in violation of the Sri Lankan Immigration Act. The Minister's Delegate concluded that he was not satisfied that the Applicant would personally face the risks identified in section 97 of the IRPA if he returned to Sri Lanka.

[19] The problem, however, with the Minister's Delegate's analysis is that it fails to consider the country condition evidence that indicates that individuals on "watch lists" or "stop lists" are

equally at risk of being detained at the airport, handed over to the authorities and receiving ill-treatment. It appears from that evidence that airports maintain a list of persons of interest by law enforcement agencies that have violated Sri Lankan law. Individuals on "stop lists" include those persons "who have committed serious crimes, have a warrant outstanding, or perceived to be connected to terrorism."

[20] Here, the Applicant's new evidence included a warrant for his arrest for failure to appear in Court on February 17, 2016. It also included the affidavit from the Applicant's cousin stating that he had been subjected to interrogation torture and intimidation in September 2016 regarding the Applicant's whereabouts.

[21] The Minister's Delegate discounts the arrest warrant on the basis that it has a different case number from the one found in the Applicant's earlier evidence and because the warrant is not connected to any previous case of the Applicant in Sri Lanka. The Minister's Delegate also relies heavily on a letter dated June 10, 2009 that indicates that the Applicant was released from detention on May 14, 2009, after being held on suspicion of terrorist activities for three (3) months, because "terrorist related activities were not established".

[22] There is information however in the record that could explain the existence of the 2016 warrant. For instance, the record contains a document entitled "Message Form" dated January 23, 2010 that indicates that the Applicant is required to be present in Court on January 29, 2010 to give evidence in the same case as the one for which the Applicant was released. Additionally,

the extract taken from the "Information Book of Terrorist Investigation Unit Police Station" dated October 25, 2010 included in the Applicant's new evidence indicates as follows:

> [The Applicant] was taken into custody on February 14th 2009 at […] for inquiries and was later released on May 14th, 2009 due to insufficient evidence. To follow up on information gathered after his release, on October 19th 2010, we went to his residences […] and discovered that he was not present at either residence. Therefore, we hereby inform him to be present at the Department of Terrorist Investigations Office, […] on November 10th, 2010 at 9 am with his National Identity Card.
>
> If he fails to be present at this office on this date, we hereby inform him that we will file a case against him under the Prevention of Terrorism Act number 15 of 1979 of the Criminal Procedure Code of Paragraph 11 and section 115/1.

[23] The information contained in these documents suggests that after the Applicant's release in May 2009, additional information came to light and the Sri Lankan authorities wanted to speak with the Applicant failing which they would institute some sort of proceedings against him. It also appears from the affidavit of the Applicant's cousin and the letters from the Applicant's Sri Lankan lawyer that the Sri Lankan authorities were still interested in the Applicant's whereabouts in 2016. Thus, if the Applicant is in fact the subject of an outstanding warrant or if he is perceived to be connected to terrorist related activity, the country condition evidence indicates that he may likely be detained by the authorities at the airport notwithstanding the fact that he left the country legally using his own documents. The Applicant's new evidence was therefore central to his claim for protection and could have justified allowing the application. On that basis alone, the Minister's Delegate should have convened an oral hearing. Given that the Applicant was found to be ineligible to make a refugee claim and has never had the opportunity to be heard on his allegations regarding risk, it was even more important that he be given the opportunity to address the credibility concerns of the Minister's Delegate.

[24] The Applicant is also challenging the Minister's Delegate's failure to address his request that adverse credibility findings not be made without an oral hearing. In his submissions dated January 23, 2013, the Applicant's counsel explicitly refers to subsection 113(b) of the IRPA and indicates that no adverse credibility findings should be made against the Applicant without an oral hearing. Furthermore, in his updated submissions attaching the sworn statement of the Applicant's cousin, the Applicant's counsel indicates that the Applicant's cousin will be made available for cross-examination on the contents of his affidavit if there are any questions about credibility or reliability. The same invitation is equally extended to the Minister's Delegate regarding the Applicant's Sri Lankan lawyer.

[25] The Respondent submits that the Minister's Delegate was not required to address the Applicant's request for an oral hearing given that he did not make veiled credibility findings and because the request was made in the context of the Applicant's original submissions prior to the matter being re-determined.

[26] I disagree.

[27] There is nothing in the PRRA decision indicating that the Minister's Delegate considered the Applicant's request. In the absence of any reasons, it is not possible for me to determine whether the Minister's Delegate considered the request and to assess the reasons for not holding such a hearing.

[28] Given that the decision of the Minister's Delegate is open to interpretation, and in view of my finding that the Minister's Delegate made veiled credibility findings, it was incumbent on the Minister's Delegate to address the Applicant's request for an oral hearing and to provide reasons for refusing to grant the request (*Chekroun* at para 72; *Montesinos Hidalgo v Canada (Citizenship and Immigration)*, 2011 FC 1334 at para 20). Even if the request was not reiterated in the Applicant's updated submissions, the Minister's Delegate considered both the original and updated submissions of the Applicant for the purpose of determining the PRRA application.

[29] For all the above reasons, I am satisfied that, regardless of the applicable standard of review, the Minister's Delegate erred in failing to convene an oral hearing and to address the Applicant's request for such a hearing. As a result, the application for judicial review is allowed. No questions were proposed for certification and I agree that none arise.

[30] On consent of the parties, the style of cause shall be amended to identify the Applicant by the identification number that was assigned to him by the CBSA upon his arrival in Canada aboard the *MV Sun Sea*.

JUDGMENT in IMM-900-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of the Minister's Delegate dated December 29, 2017 is set aside and the matter is remitted back for re-determination by a different decision maker;
3. The style of cause is amended and the Applicant shall be identified as "B147";
4. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-900-18
STYLE OF CAUSE:	B147 v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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