Federal Court  Cour fédérale

Date: 20190528

Docket: IMM-2152-18

Citation: 2019 FC 746

Ottawa, Ontario, May 28, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

VIJAYARATNAM SEENIYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of Sri Lanka of Tamil ethnicity. He entered Canada in October 2013 on a visitor visa to visit his sister. In June 2014, he submitted a claim for refugee protection on the basis that he was at risk for having been politically active on behalf of Tamils in Sri Lanka. His refugee claim was suspended in January 2015 pending a determination of his admissibility to Canada. In November 2015, the Immigration Division [ID] of the Immigration and Refugee Board of Canada determined that the applicant was inadmissible on security

grounds under section 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. As a result of this determination, the applicant is ineligible for refugee protection (see *IRPA*, s 101(1)(f)) and his refugee claim was terminated (see *IRPA*, s 104(2)(a)). In August 2016, the applicant's application for judicial review of the ID's determination was dismissed (*Seeniyan v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 956).

[2] In March 2016, the applicant submitted an application for a pre-removal risk assessment [PRRA] under section 112 of the *IRPA*. Since he had been determined to be inadmissible on security grounds, the applicant was only entitled to what is referred to as a "restricted" PRRA (see *IRPA*, s 112(3)(a)). That is to say, the only issue before the decision-maker would be whether, on a balance of probabilities, the applicant was a person in need of protection under section 97 of the *IRPA*.

[3] The applicant contended that he personally would be at risk if he returned to Sri Lanka because of his past involvement with the political opposition in Sri Lanka, the perception that he was associated with the Liberation Tigers of Tamil Eelam [LTTE], the fact that he had made a claim for asylum in Canada, and his association with the Tamil diaspora in Canada (a group often accused of supporting the LTTE).

[4] In a decision dated February 16, 2018, a Senior Immigration Officer refused the PRRA application. The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*.

[5] For the reasons that follow, I am allowing the application.

[6] It is well-established that a PRRA officer's decision is to be reviewed on a standard of reasonableness (see, for example, *Thamotharampillai v Canada (Citizenship and Immigration)*, 2016 FC 352 at para 18, and *AB v Canada (Citizenship and Immigration)*, 2017 FC 629 at para 12). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a 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).

[7] In my view, two errors by the PRRA officer are determinative of this application.

[8] First, the applicant had contended in part that he was at risk because he had admitted before the ID that he had been a long-time member of the Illankai Tamil Arasu Kachchi [ITAK], a political party in Sri Lanka. The ID had found that this was sufficient to establish membership by proxy in the LTTE and, as a result, the applicant's inadmissibility on security grounds. The PRRA officer rejected the applicant's submission that this put him at risk if he returned to Sri Lanka because "the applicant has not explained how Sri Lankan authorities would be aware of the ID's finding," adding: "As the hearing [before the ID] was held *in camera*, there is no indication that Sri Lankan authorities would be aware of the statements made by the applicant or of the decision reached as a result of their disclosure."

[9] This conclusion is unreasonable. In fact, the applicant did explain how Sri Lankan authorities could be aware of what happened before the ID despite the *in camera* nature of that proceeding – namely, through the reported decision of the Federal Court, which set out the applicant's admissions before the ID as well as that body's findings (which were upheld by the Court). As the applicant pointed out in written submissions to the PRRA officer, this decision is a matter of public record (the applicant even provided the officer with the neutral citation for the judgment). This distinguishes the present case from *SK v Canada (Citizenship and Immigration)*, 2011 FC 788, relied on by the respondent, where information about the ID proceedings was not publicly available (see para 18).

[10] In support of the present application for judicial review, the applicant filed an affidavit to which was attached an exhibit demonstrating that there had been news stories about the Federal Court's decision in the applicant's case and that they (as well as the decision itself) could be found through a simple Google search. In my view, this exhibit and the associated paragraph of the applicant's affidavit are not admissible on this application for judicial review. The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]). This general rule admits of exceptions (as stated in *Access Copyright* at para 20 and *Bernard* at paras 19-28) but none apply here. I would also note that the news stories in particular pre-date the PRRA officer's decision by almost 18 months and no explanation has been offered for why neither they nor the Google search results were submitted

in support of the PRRA application. In any event, this evidence is immaterial. It is indisputable that reported decisions of the Federal Court are accessible on-line. It is unreasonable for the PRRA officer to have ignored this obvious fact.

[11] The respondent observed that information about the ID proceeding is publicly accessible through the Court's earlier judgment because the applicant did not obtain any sort of anonymization order in connection with the prior application for judicial review. Indeed, the applicant did not even request such an order (to be fair, neither did the respondent). I agree that this could be a salient consideration. A failure to attempt to protect information earlier could well weaken later arguments about the harmful consequences that flow from that information being publicly accessible. (It should be noted that present counsel for the applicant, Mr. Wichert, was not counsel on the prior application for judicial review.) However, the respondent did not press this point before me and in my view this is not the appropriate case in which to attempt to resolve the thorny problems associated with it.

[12] The second reviewable error committed by the PRRA officer is the following. After acknowledging that there are screening protocols for returnees in place in Sri Lanka and that returning citizens who are suspected of having ties to or of having supported the LTTE face a higher likelihood of scrutiny by Sri Lankan authorities upon arrival and a greater risk of mistreatment, the officer reasoned as follows:

> While it is reasonable to expect that the applicant may be questioned upon return to Sri Lanka regarding his activities in Canada, what specific information the applicant elects to disclose to Sri Lankan authorities upon his return is solely his prerogative and it would be purely speculative to suggest what the nature of that disclosure might be. Notwithstanding, the applicant has

> adduced insufficient objective evidence to establish that Sri Lankan authorities would perceive him to be an LTTE supporter. Consequently, I do not find his profile would bring him to the adverse interest of authorities upon his return to the country.

[13] In my view, the PRRA officer erred in the very same way as the decision-makers did in *Vilvarajah v Canada (Citizenship and Immigration)*, 2018 FC 349 at paras 15-16, and *Jeyaredsagathas v Canada (Citizenship and Immigration)*, 2018 FC 1238 at para 32. It is unreasonable for the officer to have proceeded on the basis that the applicant might not answer questions about his activities in Canada truthfully. The officer accepted that it was likely that the applicant would be questioned about his activities in Canada when he returned to Sri Lanka. Those "activities" included seeking asylum here and (as a matter of public record) being found to be inadmissible to Canada on security grounds because of his membership in the LTTE. The officer should have assessed the applicant's risk on the basis that the applicant would tell the truth to Sri Lankan authorities if questioned about what he had been doing in Canada since 2013. The officer's failure to do so renders the decision unreasonable.

[14] For these reasons, the decision of the PRRA officer dated February 16, 2018, must be set aside and the matter returned for redetermination by a different decision-maker.

[15] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-2152-18

THIS COURT'S JUDGMENT is that

1. The decision of the PRRA officer dated February 16, 2018 is set aside.

2. The matter is remitted for redetermination by a different decision-maker.

3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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