Federal Court Cour fédérale

Date: 20220224

Docket: IMM-5936-20

Citation: 2022 FC 262

Ottawa, Ontario, February 24, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THUSYANTHAN SUTHAKAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Thusyanthan Suthakar, is Tamil and a citizen of Sri Lanka. He asks that the decision on his Pre-Removal Risk Assessment [PRRA] be set aside because the officer who made it made negative credibility findings such that a hearing ought to have been held and because it is otherwise unreasonable on the evidence.

[2] For the reasons that follow, I do not accept the Applicant's submissions and will deny this application for judicial review.

Background

[3] The Applicant came to Canada in 2005 as a permanent resident, as a dependant of his mother, a refugee.

[4] He says that in 2010, while visiting Sri Lanka for a wedding, he was arrested by the police. He believes that someone in his village thought that he was his cousin, a member of the Liberation Tigers of Tamil Eelam [LTTE]. The Applicant claims he was photographed by the Criminal Investigation Department [CID] of the Sri Lankan police and was detained for two days, until his aunt paid a bribe.

[5] On the same trip to Sri Lanka, the Applicant lost his permanent resident card and driver's license. A police report from the Sri Lankan police regarding the lost documents was provided and a permanent resident determination was done in Colombo. The Applicant was ultimately able to return to Canada.

[6] The Applicant claims that while in Canada he took part in demonstrations against the Sri Lankan government. He says he was filmed by the RCMP and, since Sri Lankan authorities monitor Tamils abroad, the Sri Lankan authorities are likely aware of his anti-government activities.

[7] On or about September 22, 2014, the Applicant was convicted of assault, assault with a weapon, and sexual assault. As a result of these convictions, the Applicant was found inadmissible to Canada on the grounds of serious criminality and he lost his permanent resident status.

[8] The Applicant applied for a PRRA in March 2016.

The Decision

[9] The Applicant provided documents from his mother's 1999 refugee claim; however, the officer found there was not sufficient evidence to show that the evaluation of his mother's circumstances at that time would apply to the present personalized risks he claims to face.

[10] The officer acknowledged the Applicant's submissions that people like him, who return to Sri Lanka with an emergency travel document are always arrested, controlled, and interrogated by Sri Lankan authorities.

[11] The officer considered whether the Applicant was of interest to the Sri Lankan authorities. The police documents provided by the Applicant regarding the loss of his permanent resident card and driver's license in 2010 were considered. The officer indicated that the documents do not indicate that the police are interested in the Applicant. The officer also noted that these documents were addressed to the Canadian embassy and that the Applicant had not indicated how they came into his possession.

[12] The officer found that the Applicant had failed to provide "objective evidence" that he had been detained by the Sri Lankan police in 2010, been photographed by the CID, or participated in demonstrations against the Sri Lankan government.

[13] The officer then reviewed evidence submitted by the Applicant regarding country conditions in Sri Lanka as well as "recent objective sources on current country conditions in Sri Lanka" that had been published after the application had been received.

[14] The country conditions documents indicated that Tamils in Sri Lanka faced human rights abuses and discrimination from government and security forces. The officer cited a July 2016 report from the UK Home Office [the Home Office Report] indicating that persons with suspected links to the LTTE had been arrested and detained in 2010-2012. The officer set out the security screening procedures for people leaving Sri Lanka. According to the Home Office Report, 6 identifications were conducted on departure, some by the airline and some by the Airport Security Department.

[15] With respect to persons returning with temporary travel documents, the officer set out the following evidence from a November 2017 Immigration and Refugee Board Response to Information Request [the RIR]:

> [P]olice undertake an investigative process to confirm identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records.

[16] The officer concluded that the evidence did not support that the Applicant is of interest to officials in Sri Lanka and, therefore, he did not face a personalized risk.

[17] The officer noted that the Applicant was able to leave Sri Lanka in 2010 on his own passport without issue, and the Applicant did not indicate that during his trip in 2010 he was interrogated and detained on either departure or arrival. The officer found it "reasonable to expect that had the applicant been of interest to the Sri Lankan authorities due to his perceived LTTE activities or support, he would not have been released from detention or allowed leave the country without incident." The officer acknowledged that the Applicant may face questioning at the airport, but that there was no objective evidence to support that he faces a risk of persecution or harm as a result.

Issues

[18] The Applicant sets out the following issues:

1. Did the officer err by making a negative credibility finding, which would have required an oral hearing?
2. Was the officer's requirement that the Applicant provide "objective evidence" unreasonable?
3. Did the officer err in making a decision without regard to the evidence?
4. Did the officer err by failing to give the Applicant an opportunity to respond to documents that were created over 18 months after submissions were made?

Standard of Review

[19] The Respondent submits that the standard of review for PRRA decisions is reasonableness. I agree that the standard of review for the officer's assessment in the PRRA decision is reasonableness. However, questions regarding procedural fairness are assessed on a higher standard.

[20] The Supreme Court of Canada in *Mission Institution v Khela*, 2014 SCC 24 at para 79 observed that "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'."

[21] As noted by Justice Boswell at para 10 of *Zmari v Canada (Minister of Citizenship and Immigration)*, 2016 FC 132 [*Zmari*], "[t]he appropriate standard of review applicable to whether an oral hearing is required in a PRRA determination is open to some question…[because] [t]he Court's recent decisions in this regard diverge." Some judges consider it to be a question of mixed fact and law, while others consider it to be an issue of procedural fairness.

[22] In my view, the question of whether an oral hearing is required is in essence a question of procedural fairness. Therefore, the issues of whether the officer ought to have conducted an oral hearing in order to make a negative credibility finding and whether the officer ought to have given the Applicant an opportunity to respond to new country documents are both alleged breaches of procedural fairness, and they will be reviewed on the standard of correctness.

1. *Did the officer err by making a negative credibility finding, which would have required an oral hearing?*

[23] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, requires an oral hearing in cases where there is evidence that raises a serious issue of an applicant's credibility, that evidence is central to the decision, and the evidence, if accepted, would justify allowing the application. The Applicant submits that regardless of the enumerated factors, an oral hearing is required whenever credibility is in issue (see *Zmari* at para 17; *Tekie v Canada (Minister of Citizenship and Immigration)*, 2005 FC 27 at para 16).

[24] The Applicant notes that while "there is a difference between an adverse credibility finding and a finding of insufficient evidence, the Court has sometimes found an officer to have improperly framed true credibility findings as findings regarding sufficiency of evidence and therefore an oral hearing should have been granted" (*Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984 at para 34, citing *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103, *Liban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252, and *Haji v Canada (Minister of Citizenship and Immigration)*, 2009 FC 889).

[25] The Applicant alleged he had been previously detained by Sri Lankan authorities, had his photograph taken while detained, and had participated in demonstrations against the Sri Lankan government. However, the officer questioned whether these events had occurred, which according to the Applicant, means that his credibility was clearly being called into question. The Applicant also submits that the officer cast doubt "as to whether the applicant's assertion that he would be wanted as a suspected LTTE member was credible."

[26] The Applicant submits that the officer's disbelief of the Applicant, absent objective corroborating evidence, amounts to a veiled credibility finding.

[27] The Respondent submits, and I agree, that the decision does not turn on the Applicant's credibility; rather it turns on the insufficiency of the evidence provided.

[28] The officer's findings are expressly written in terms of sufficiency and the decision does not appear on its face to be based on a disguised credibility finding. The officer did not point to contradictions in the Applicant's statements nor suggest that he was not truthful.

[29] In *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, I wrote at para 27:

> Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered.

[30] In the present case, the Applicant has made statements in his own self-interest. Such statements typically require corroboration in order to have sufficient probative value. The officer's decision with respect to the Applicant's testimony and the lack of objective evidence is,

in my view, a consideration of sufficiency and a lack of corroboration, and not a credibility assessment.

[31] There is no inconsistency between accepting the Applicant's testimony that he would be suspected to be an LTTE member as true and finding that he is unlikely to be suspected to be an LTTE member by the Sri Lankan authorities. The Applicant's testimony is that of a subjective belief. He believes that he will be targeted. However, what the Applicant may sincerely believe does not make it objectively true. The officer is free to look to the surrounding circumstances and any additional evidence to determine whether this subjective belief is justified.

2. Was the officer's requirement that the Applicant provide "objective evidence" unreasonable?

[32] The Applicant submits that even if the finding was one of sufficiency, the officer requiring objective evidence of his detention was unreasonable. He submits that the circumstances of the present case are similar to that of *Sierra v Canada (Minister of Immigration, Refugees and Citizenship)*, 2020 FC 441 [*Sierra*].

[33] In *Sierra*, the applicant claimed a risk of violence at the hands of a criminal gang. The officer gave little weight to corroborating evidence of violence from the Applicant's cousin because the evidence was not from an impartial source disinterested in the outcome. Justice Favel found that it was unreasonable to do so and noted at para 32 that "[i]t is difficult to provide pieces of evidence that will satisfy an Officer, especially in cases where testifying parties have

reasons not to contact police and gain objective support for their claims through an objective police report or other document."

[34] The Applicant submits that it is unreasonable for an officer to require an applicant detained by the authorities without cause and released on a bribe to contact those same authorities to obtain confirmation of the detention.

[35] While I accept the Applicant's submission that approaching the Sri Lankan authorities for objective evidence is unreasonable, other evidence could have been put forward. A letter from the Applicant's aunt who paid the bribe and therefore had knowledge of the detention, could have been provided. It is possible that it would not have been considered "objective" by the officer, however, I believe that what the officer was seeking was corroborating evidence, in keeping with this Court's jurisprudence.

3. Did the officer err in making a decision without regard to the evidence?

[36] The Applicant submits that the officer's findings were made without regard to the evidence that he would be taken into custody upon return to Sri Lanka. The evidence was that those taken into custody are routinely tortured and therefore the primary issue was whether he would be taken into custody.

[37] The Applicant notes that the officer relied on the RIR, which itself relied on an Australian Department of Foreign Affairs report. These reports indicated that returnees with temporary travel documents would be "interviewed" but were not subject to mistreatment at the airport.

[38] The Applicant submits that the officer erred by failing to consider treatment after leaving the airport. Applicant submits that the officer ignored evidence from a report from the Swiss Refugee Council [the SRC Report] that confirms the arrest of suspected LTTE members after leaving the airport and documents instances of abduction, torture, and sexual assault of refused asylum seekers who return to Sri Lanka.

[39] The Applicant further submits that the officer ignored the evidence within the RIR itself, quoting the SRC Report, that those with temporary travel documents "will always be detained, interrogated and thoroughly checked by the Sri Lankan authorities," as a temporary travel document indicates to Sri Lankan authorities that the individual previously left the country illegally. The Applicant submits that he is at risk of more than simply being "interviewed" and instead would be "arrested and interrogated."

[40] There was no error in the consideration of the evidence. Given the finding that the Applicant would not be suspected of being an LTTE member, there was no need to consider risks associated with those suspected of being an LTTE member. The only circumstance that would draw the attention of authorities that was established by the Applicant was his return with a temporary travel document. Only the risks stemming from that needed to be assessed, and the officer acted reasonably in so doing.

[41] I note that the Applicant submits that a Human Rights Watch report indicates that those detained are "invariably" tortured. Having reviewed this report, I see nothing in the report that

indicates that everyone who is detained in Sri Lanka, much less at immigration processing at the airport, experiences torture.

4. Did the officer err by failing to give the Applicant an opportunity to respond to documents that were created over 18 months after submissions were made?

[42] The Applicant submits that given the different conditions set out in the RIR, the officer ought to have disclosed this report to the Applicant so that he could have an opportunity to respond. The PRRA submissions were made in March and April 2016 and reference the 2015 SRC Report. However, the decision was not rendered until August 2018, almost two and a half years later.

[43] The Applicant notes that the decision largely relies on the November 2017 RIR, which post-dates the Applicant's submissions by 18 months. According to the Applicant, that document appears to suggest that conditions in Sri Lanka "have significantly changed in that returnees were allegedly not subject to mistreatment during processing at the airport."

[44] The Applicant cites *Gunaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 122 [*Gunaratnam*], as an example of a case where significant changes in country conditions in Sri Lanka meant that procedural fairness required the officer to disclose to an applicant new country conditions reports. *Gunaratnam* itself cites another case involving changes in country conditions in Sri Lanka: *Mahendran v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1236 [*Mahendran*].

[45] The only change cited by the Applicant between the RIR and the SRC Report is that, according to the RIR, returnees were not subject to mistreatment during airport processing.

[46] The section of the SRC Report under the heading "Retour avec un *Emergency Travel Document / Laissez-Passser*" [Return with an *Emergency Travel Document/Laissez-Passser*] is accurately summarized by the Applicant. It indicates that those returning with temporary documents are always arrested, interrogated, and carefully controlled by Sri Lankan authorities, and that a temporary travel document is seen as a clear indicator that the person left Sri Lanka illegally. Persons returning with temporary documents are generally interviewed ("entendues") by the CID and are arrested if the authorities are satisfied that they left the country illegally.

[47] Most of the information in the other sections of the SRC Report relates to treatment of suspected LTTE members.

[48] There is no significant inconsistency between the RIR and the SRC Report. Both indicate that those returning on temporary travel documents are detained on arrival and questioned at length. While the RIR notes that some sources indicate treatment of returnees is improving, it is quick to note that those sources do not provide details about how the situation has improved. It goes on to detail the agencies that conduct interviews (which are consistent with those in the SRC Report), that the process is lengthy, and that returnees are processed *en masse* and "cannot exit the airport until all returnees have been processed."

[49] Given that the IRB Report is largely consistent with those relied on by the Applicant, there was no need for the officer to disclose it to the Applicant or to request submissions on it.

Conclusion

[50] For these reasons the application is dismissed. No question was posed for certification.

JUDGMENT IN IMM-5936-20

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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