**Date: 20080118**

**Docket: IMM-713-07**

**Citation: 2008 FC 67**

**Ottawa, Ontario, January 18, 2008**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**THAVAM SINNASAMY**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a Pre-Removal Risk Assessment (PRRA) wherein the officer concluded that the applicant was not a person at risk pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the *IRPA*). The PRRA officer concluded that the applicant had an Internal Flight Alternative (IFA) in Colombo and hence, his claim was rejected. For the reasons that follow, I would allow this application for judicial review.

## FACTS

[2] The applicant is a 46 year-old Tamil and a citizen of Sri Lanka. He comes from the city of Jaffna, in the northern part of the country. He claims that he was tortured on several occasions and

suffered human rights abuses at the hands of the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE).

[3] More precisely, he was arrested, detained and tortured by the SLA for two weeks in November 1997. He states that he was fearful of the LTTE and forced to comply with their demands which resulted in his second arrest by the SLA on December 21, 1999. The applicant says that he was then tortured and threatened with death. When he paid a bribe to the police, he was finally released on February 11, 2000.

[4] According to his first PRRA application signed December 2, 2006, the applicant left Sri Lanka and travelled to Germany in 1994 where he claimed refugee protection. His asylum request was refused. He then fled to the United States in February of 2000. On August 10, 2000, he arrived in Canada and asked for refugee protection at the port of entry.

[5] On January 22, 2002, the Convention Refugee Determination Division concluded that the applicant was not a Convention refugee or a person in need of protection. The applicant sought to have this decision judicially reviewed, but his application was dismissed. The applicant then applied for a PRRA which was rejected on July 24, 2006. After this Court granted his motion for a stay of removal, the applicant applied for a second PRRA on December 22, 2006.

[6] The applicant fears returning to Sri Lanka precisely as he is a male Tamil born in Jaffna. He fears persecution at the hands of the LTTE, the SLA, the police and pro-government Tamil militias

if he were to return to his country. Detention, torture, injury and murder are some of the applicant's alleged fears. He states that he would be particularly vulnerable due to his fragile physical condition.

[7] As his wife has been detained since her return to Sri Lanka for possession of a forged passport, he also believes that he would be arrested immediately once the authorities learn of his connection to her.

[8] Although he refused to join the LTTE, the applicant submits that he may be the victim of extortion, recruitment, forced labour and persecution in the city of Colombo where LTTE operates "legally". Further, he would not be able to return to his home in the North, as access to highways and living conditions are problematic.

[9] As a result of his absence from Sri Lanka since 1994, he says that the police will suspect him of being a LTTE supporter, which will also result in his persecution.

[10] The applicant also asserts that state protection is unavailable to him, since the state is an agent of persecution, is corrupt and does not protect Tamils. Furthermore, he submits there is no IFA within Sri Lanka. Finally, he fears returning to the United States as he would likely be detained and subsequently deported to Sri Lanka.

**THE IMPUGNED DECISION**

[11] The PRRA officer commenced her analysis by assessing the admissibility of the evidence. She noted that the numerous country documents were general in nature and did not demonstrate a personalized risk. She also considered the travel report prepared by the Department of Foreign Affairs and International Trade (the DFAIT report), which advises that non-essential travel to Sri Lanka should be limited, and found that it was inapplicable to foreign nationals.

[12] Regarding the letter written by the applicant's doctor, the PRRA officer stated that it was incomplete and not helpful as it did not state the actual treatments followed by the applicant, their expected length and the extent of his injuries.

[13] The PRRA officer also gave little probative value to the letter from the Sri Lankan attorney detailing with the arrest and detention of the applicant's wife. Indeed, she found it to be illegible, of poor quality and containing spelling errors. She noted that there is no indication of how the applicant had it in his possession. Moreover, the PRRA officer could not see why the applicant would be detained as a result of his wife's arrest for possession of a forged passport.

[14] The PRRA officer also gave little probative value to the letter from the Sri Lankan attorney detailing with the arrest and detention of the applicant's wife. Indeed, she found it to be illegible, of poor quality and containing spelling errors. She noted that there is no indication of how the applicant had it in his possession. Moreover, the PRRA officer could not see why the applicant would be detained as a result of his wife's arrest for possession of a forged passport.

[15] The PRRA officer then rejected the applicant's claim. In fact, she considered that the applicant did not meet the profile of those at risk from the LTTE, namely young Tamil professionals, Tamil businessmen, Tamil political figures and activists with a pro-Tamil stance.

[16] While she acknowledged the increase of violence against Tamils, the PRRA officer considered the Sri Lankan government capable of protecting the applicant in the southern and western areas of the country which it controls. While she admitted that security and movement restrictions, as well as difficult living conditions, were challenging in the LTTE controlled areas, the PRRA officer determined that the applicant had a viable IFA in Colombo.

[17] After a review of the documentary evidence, she concluded that the applicant may likely experience arrests and short term detention in Colombo as a result of periodic security measures undertaken by the government. The PRRA officer, however, found such actions would not amount to persecution as these measures would be put in place for the purpose of preventing disruptions and dealing with terrorism.

[18] She also found there was no corroborating evidence supporting the applicant's submission that he would be seen as an LTTE sympathizer due to having left the country for a long period of time. She also questioned the applicant's alleged fear of return to the United States since she could not find any reasons or evidence supporting the allegation that the applicant would be treated differently from other failed claimants.

[19] The PRRA officer concluded it would not be unreasonable to expect the applicant to settle in Colombo where his movements would not be restricted. While she reiterated the fact that there is an increase of violence in the northern and eastern parts of the country, she nevertheless determined that the applicant would have a valid IFA in Colombo, a city controlled by the government which is capable of protecting him. She noted that the documentary evidence shows that Sri Lanka is unstable but she mentioned that the applicant did not provide any evidence supporting a personalized risk.

**ISSUES**

[20] The applicant has raised a number of issues with respect to the PRRA decision, some of which are more substantial and of more consequences than others. I shall therefore address those of his arguments that I find most compelling, with a view to providing guidance to the panel member who will eventually reassess the applicant's file. These arguments have to do with the following aspects of the decision under review:

- Can short term security detentions amount to persecution?
- Did the PRRA officer apply the correct standard in her section 96 analysis?
- Did the PRRA officer err in her assessment of the evidence?
- Was the applicant's right to procedural fairness breached as a result of the PRRA officer relying on country evidence obtained through independent research?

**ANALYSIS**

[21] A PRRA officer's decision considered globally and as a whole should be assessed on a standard of reasonableness *simpliciter,* as determined in *Figurado v. Canada (Solicitor General),*

2005 FC 347. That being said, each particular finding must be reviewed according to its nature. Considering the specialized expertise in risk assessment of PRRA officers, their findings of fact should therefore be reviewed on a standard of patent unreasonableness, while questions of mixed law and fact will be reviewed on a standard of reasonableness and questions of law on a standard of correctness: *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437; *Raza v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385; *Choudry v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 239.

[22] The applicant alleges that there was a breach of procedural fairness when the PRRA officer relied on documentary evidence that she found through independent research. This question does not necessitate a pragmatic and functional analysis. The Court will only have to determine if the process of the PRRA officer satisfies the requirements of procedural fairness: see, for example, *Sketchley v. Canada (Attorney General)*, 2005 FCA 404; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

A) Short security detentions

[23] The PRRA officer acknowledged that the applicant was likely to be detained for short periods as a result of security measures implemented by the government, but concluded that would not amount to persecution. She wrote:

> Periodic security measures are familiar to residents; all residents including Sinhalese people are regularly stopped and checked. The targets of arrests and detentions are young Tamils, particularly those who are newly arrived in Colombo from the Northern and Eastern districts; most are released after identity checks. The applicant may experience arrests and short detentions in Colombo; however, the

> Federal Court of Canada has held that short detentions for the purpose of preventing disruptions or dealing with terrorism does not constitute persecution, risk to life, cruel and unusual treatment or punishment. It is practical on their part to implement such security measures. UHNCR informs, in the North and East of Sri Lanka all three ethnic groups, Sinhalese, Muslims and Tamils are affected by the situation of generalized violence and armed conflict.
>
> (T.R., p. 14)

[24] Although the Federal Court has stated that short security detentions do not always constitute persecution, it nevertheless held that the particular circumstances of each case have to be considered. Commenting on a finding by the Refugee Protection Board quite similar to that of the PRRA officer in the present case, Justice O'Reilly had this to say in *Murugamoorthy v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1114:

> [3] The Board analyzed this part of her claim with reference to case law from this Court. It purported to quote from that jurisprudence when it said: "The Federal Court Trial Division…outlined that 'short detentions for the purpose of preventing disruptions or dealing with terrorism do not constitute persecution'".
>
> […]
>
> [6] It appears to me that the Board has reduced its understanding of the case law to the brief formulation set out above. The same statement appears in numerous decisions of the Board (see, for example, *Q.W.T. (Re)*, [2002] C.R.D.D. No. 15, at para. 17). This formulation derives from *Brar* and *Mahaligam* but, since *Thirunavukkarasu*, those cases are of questionable authority. I believe the correct approach is set out in *Velluppillai v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 301, (QL) (T.D.), at para. 15. There, Justice Gibson agreed that, in general, short detentions for legitimate law enforcement purposes did not constitute persecution. However, the Board must go on to consider the particular circumstances of the applicant – including factors such as the person's age and prior experiences – in deciding whether he or she was persecuted. The Board failed to do so in Ms. Murugamoorthy's case.

> [7] Therefore, in my view, the Board erred when it stated that short-term arrests for security reasons cannot be considered persecution, even when they are carried out, as here, in a discriminatory way. The Board specifically acknowledged that the Sri Lankan authorities discriminate against the Tamil population and found that, indeed, the police had discriminated against Ms. Murugamoorthy.

[25] "Particular circumstances" are not just limited to the age and prior experience of an applicant. The court has also decided that the location, the treatment during detention and the manner of release are all equally relevant. As demands for bribes by the police are a form of extortion, they may also, in relevant circumstances, amount to "persecution" for the purposes of the Convention: see *Kularatnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1122, at paras. 10-13.

[26] I have not been persuaded that the PRRA officer correctly assessed the applicant's particular circumstances. She disagreed that he would be particularly vulnerable as a result of the car injuries he has sustained. She also found that he would be able to prove his identity which would facilitate his travel to Sri Lanka and his residency in Colombo. She then stated: "It is reasonable to expect the applicant to seek the support of the more than 250,000 Tamils who live in the capital city" (T.R., p. 15).

[27] Police forces are never entitled to arrest people in a discriminatory way even during a state of emergency. This is all the more true when an arrest may involve torture: see *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 at para. 22. In the present case, the PRRA officer did not consider the two alleged arbitrary detentions of the applicant by the

SLA, nor did she take into account his treatment during those detentions. She did not comment on the various reports according to which the use of torture to extract admissions and confessions is endemic. She said nothing about the requirement for Tamils living in Colombo to register with Sri Lanka police. She failed to consider the applicant's allegation of extortion by the police. In light of these oversights, I am of the view that her conclusions with respect to short detentions are patently unreasonable.

B) The standard applied in the context of section 96 analysis

[28] The applicant asserts that the PRRA officer did not apply the correct standard in her section 96 analysis. It is true, as stated by the respondent, that the officer knew what the proper standard is. Indeed, she concludes her assessment with the following paragraph:

> Based on the totality of evidence before me, I find that there is less than a serious possibility that the applicant would be subjected to persecution as described in Section 96 of the IRPA. The applicant can safely return to Sri Lanka to reside in Colombo. Similarly, there are no substantial grounds to believe that the applicant would face a risk of torture; nor are there reasonable grounds to believe he would face a risk to life, or a risk of cruel and unusual treatment or punishment as described in paragraphs 97(1)(a) and (b) of IRPA, if returned to Sri Lanka.
>
> (T.R., p. 22)

[29] This is no doubt the right standard to apply when assessing the risk under sections 96 and 97 of the *IRPA*. Yet, the officer did use, on a number of occasions, an elevated standard when analyzing the applicant's submissions. Commenting on the letter from a lawyer from Sri Lanka to the effect that the applicant's wife is under detention on the allegation that she had a forged passport in her possession, the officer wrote: "The evidence before me does not support that the applicant has

a forged passport or that he will be detained for this. (…) Further, the applicant has not submitted documentary evidence to establish that he would in fact be arrested at the airport upon arrival" (T.R., p. 11).

[30] Later on, when discussing the possibility of an IFA in Colombo, the officer stated: "If the applicant was to relocate to another area of Sri Lanka, such as Colombo, the evidence does not support that he would be targeted by the Sri Lankan authorities or the LTTE" (T.R., p. 21).

[31] Of course, the mere use of the words "will" or "would" is not, in and of itself, sufficient to conclude that the officer applied the wrong legal test, especially if this is an isolated occurrence. Regard must be had to the decision as a whole, as this Court has made clear on a number of occasions: see, for example, *Nabi v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 325 (QL); *Sivagurunathan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 432. On the other hand, the mere recital at the very end of an assessment of a standard formula with respect to the correct threshold will not cure the deficiencies found elsewhere in the reasons. The present case seems to me to be borderline. If the officer had made no other reviewable error, I do not think this would be sufficient to quash her decision. But it adds to the other problems found with her decision and, cumulatively, they most certainly warrant a new PRRA.

C) The assessment of the evidence

[32] The officer relies on the United Nations High Commissioner for Refugees (UNHCR) Position on the International Protection Needs of Asylum-Seekers from Sri Lanka, dated December

2006, to support her conclusion that the applicant does not fall within the profile of Tamils in Colombo who are specifically targeted. But this same document states that "[a]ll asylum claims of Tamils from the North or East should be favourably considered"; "[w]here individual acts of harassment do not in and of themselves constitute persecution, taken together they may cumulatively amount to a serious violation of human rights and therefore be persecutory"; "[…] there is no realistic internal flight alternative given the reach of the LTTE and the inability of the authorities to provide assured protection"; "[i]t may be noted that Tamils originating from the North and East [who are able to reach Colombo], in particular from LTTE-controlled areas, are perceived by the authorities as potential LTTE members or supporters, and are more likely to be subject to arrests, detention, abduction or even killings"; and "[n]o Tamils from the North or East should be returned forcibly until there is significant improvement in the security situation in Sri Lanka".

[33] It is difficult to understand why the officer did not address these findings. The least that can be said is that she conducted a very selective reading of this document. No explanation was given as to why the officer disregarded this document in concluding that the applicant has an IFA in Colombo. After all, this is a most credible source, and the leading refugee agency in the world. As so often repeated by this Court, the officer's burden of explanation increases with the relevance of the evidence to the disputed facts: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at para. 17.

[34] I am also of the view that the officer erred in giving little probative value to the letter from a Sri Lankan lawyer submitted by the applicant for the simple reason that it contains spelling errors

and is a poor quality faxed photocopy. After all, it is to be expected that a letter written by somebody who may not use English on a regular basis will contain spelling mistakes. This is no reason to conclude that the letter is not genuine and does not originate from a Sri Lankan lawyer. The same goes for the fact that a portion of the letter was not legible due to the poor quality of the faxed photocopy.

[35] Finally, the applicant submits that the PRRA officer misinterpreted a DFAIT report which advises Canadian against all non essential travel. While I find it disingenuous to argue that it is only meant to advise Canadians and does not apply to citizens of Sri Lanka, as if the country were not as dangerous for them as it is for Canadians and permanent residents of Canada, I agree with the respondent that this advisory could be interpreted as discouraging travel to the north and east only.

D) The reliance of the PRRA officer on the UK Home Office Operational Guidance Note

[36] The applicant argues that his right to procedural fairness was breached when the PRRA officer considered a document emanating from the UK Home Office without telling him and without providing him with an opportunity to comment on it. This document, it is to be noted, is not found in the national documentation package of the Immigration and Refugee Board (the IRB). Moreover, it is not a recognized human rights report but a policy document for UK asylum officers which provides clear recommendations on most categories of Sri Lankan claims considered by the UK system.

[37] The Federal Court of Appeal dealt with this issue at length in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 565 (QL) [*Mancia*]. Called upon to determine whether a Post Determination Refugee Claimants in Canada officer violates the principle of fairness when he or she fails to disclose, in advance of determining the matter, documents relied upon from public sources in relation to general country conditions, Justice Décary first summarized the case law with the following two propositions:

> [22] […] First, an applicant is deemed to know from his past experience with the refugee process what type of evidence of general country conditions the immigration officer will be relying on and where to find that evidence; consequently, fairness does not dictate that he be informed of what is available to him in documentation centres. Secondly, where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case.

[38] He then looked at the documents at issue in such proceedings and stated:

> [26] The documents are in the public domain. They are general by their very nature and are neutral in the sense that they do not refer expressly to an applicant and that they are not prepared or sought by the Department for the purposes of the proceeding at issue. They are not part of a "case" against an applicant. They are available and accessible, absent evidence to the contrary, through the files, indexes and records found in Documentation Centres. They are generally prepared by reliable sources. They can be repetitive, in the sense that they will often merely repeat or confirm or express in different words general country conditions evidenced in previously available documents. The fact that a document becomes available after the filing of an applicant's submissions by no means signifies that it contains new information nor that such information is relevant information that will affect the decision. It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions

> that may affect the decision, that the document must be communicated to that applicant.

[39] In the case at bar, I believe the PRRA officer was entitled to rely on the UK Home Office Operational Guidance Note for Sri Lanka, since this is a publicly available document from a reliable and well-known website. The fact that the report is not contained in the IRB reference material does not mean that it is not publicly available. While I am not prepared to accept that every document available on the internet is "publicly available" for the purpose of determining what fairness requires in the context of a PRRA, since this would impose an insurmountable burden on the applicant as virtually everything is nowadays accessible on line, I am of the view that the specific document under challenge here could be consulted by the PRRA officer without advising the applicant. In many respects, it merely confirms and collects the evidence available from other sources. It does not reveal novel and significant changes in the general country conditions, even if it is not entirely parallel with the findings reported in the UNHCR document. Indeed, it seems to me the PRRA officer erred not so much in considering the Home Office document, but in not discussing the contradictory findings of the UNHCR.

[40] I am comforted in this conclusion by the decision reached by my colleague Justice Dawson in *Al Mansuri v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22. The documents consulted by the PRRA officer in that case were bulletins providing guidance to caseworkers dealing with Libyan asylum claims and were therefore very similar to the document relied in the present case. After quoting from the decision of Justice Décary in *Mancia*, she characterized these documents as being in the public domain, available online, disseminated by a

widely recognized and reliable source of information concerning country conditions, and general and neutral in their content (see para. 47). She then came to the following conclusion:

> [52] […] in light of the ongoing nature of the applicants' submissions with respect to risk, the public availability of the two documents at issue, the notoriety of the United Kingdom Home Office as a reliable source for country condition information, the general nature of the content of the two documents at issue, and the fact that Amnesty International documents on the same point were being submitted to the PRRA officer by the applicants the duty of fairness did not require disclosure of the two documents at issue. With due diligence the documents would have been available to the applicants. In view of that, and the content of the Amnesty International documents which the applicants did submit, the applicants were not deprived of a meaningful opportunity to fully and fairly present their case as to risk.

[41] The same can be said in this instance. In his submissions to the PRRA officer, counsel for the applicant referred to a number of media reports, to documents of Human Rights Watch and Amnesty International, as well as to the Country of Origin Information Report on Sri Lanka from the UK Home Office. It is difficult to argue, in this context, that the applicant has not been treated fairly considering the circumstances of the case. He did make representations with respect to the evidence which affected the disposition of the case. Indeed, the UK Home Office Operational Guidance Note refers extensively on other public sources, first and foremost on country reports prepared by the Home Office. It cannot be said that this document was not available, could not be foreseen to be a source on which the officer would rely, and that it was so novel and significant that it evidenced changes in the country conditions which might have affected the decision. As a result of the foregoing, I would dismiss this argument.

[42] Given the many reviewable errors made by the PRRA officer in the assessment of the applicant's case, I shall therefore grant the application for judicial review. No question of general importance was raised by counsel, and none will be certified.

## ORDER

**THIS COURT ORDERS that** this application for judicial review is granted. The decision rendered by the PRRA officer is set aside and the matter is referred back for re-determination by a different PRRA officer. No question of general importance is certified.

"Yves de Montigny"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-713-07 |
| **STYLE OF CAUSE:** | Thavam Sinnasamy<br>v.<br>MCI |
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| **DATED:** | January 18th 2008 |

**APPEARANCES:**

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| Bridget A. O'Leary | FOR THE RESPONDENT |

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