

Date: 20080306

Docket: IMM-248-08

Citation: 2008 FC 310

Toronto, Ontario, March 6, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

JOTHIRAVI SITTAMPALAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR ORDER AND ORDER

[1] By a decision of Justice Snider, dated June 28, 2007, the Applicant in the present motion for a stay of removal was partially successful in challenging the decision of a Minister's Delegate pursuant to s. 115(2)(a) in which he was found to be a danger to the public in Canada and that he would not be at risk if he were to be returned to Sri Lanka. Justice Snider upheld the danger aspect of the Minister's Delegate's decision but ordered that "[t]he opinion of the Minister's Delegate is set aside and the matter is remitted to the same Minister's Delegate for the sole purpose of re-assessing the risk to the Applicant if he were returned to Sri Lanka." Pursuant to the order, a Minister's

Delegate did re-assess the risk to the Applicant with this re-assessment being the subject of the present judicial review Application.

[2] On the present motion for a stay of removal, Counsel for the Applicant argues that serious questions arise from the following passages of the re-assessment:

Given the prevailing situation of widespread hostilities, insecurity and human rights violations in the North and East of Sri Lanka, it is UNHCR's view that the situation there can be characterized as one of generalized violence and events serious disrupting public order. All three ethnic groups, Sinhalese, Muslims and Tamils are affected by the situation of generalized violence and armed conflict.

[...]

Analysis under Section 97

In reviewing the material to determine if Mr. Sittampalam may face risk upon return to Sri Lanka, I am required to turn my mind to the issues outlined in s.97 of *IRPA*. *IRPA* is very clear that one of the keys in making a finding such as this is that the risk must be faced by the person in every part of the country and is not faced generally by other individuals in or from that country. While I consider the news and other reports quite credible, I must balance them appropriately not only in terms of personalised risk to Mr. Sittampalam but also considering if he would face persecution based on any of the grounds enumerated in the Convention.

Mr. Sittampalam left the country as a young man about 17 years ago. There is no warrant for his arrest in Sri Lanka, and the evidence I have reviewed does not indicate that refugees are generally detained. I am not satisfied on a balance of probabilities that he would either be targeted or sought out for any of the reasons that counsel alleges. Although there is the possibility of some generalized risk to Mr. Sittampalam on return to Sri Lanka due to the country conditions, I am not satisfied based on a balance of probabilities that his removal would expose him to a risk of persecution, torture, cruel or unusual punishment or treatment.

The basis of the risk assessment is forward looking. I am not satisfied on balance that there is a future prospect of risk or persecution from his legal troubles or profile.

Although I noted Counsel's submission on the Travel Reports that recommend against non-essential travel, this is not the equivalent of a moratorium on removals. Travel to Sri Lanka is possible and is happening as is evidenced by the reports on the amount of tourist activity. Therefore, I have given minimal weight to the impact of the travel report.

Based on the totality of information before me and on a balance of probabilities, Mr. Sittampalam would be in no different situation than other residents of Sri Lanka. There is no question that there is some risk in a country with ongoing civil strife and unrest. However, this generalized risk throughout the country does not meet the test of section 97.1 do not find that there is more than a possibility that Mr. Sittampalam could be subjected to persecution as described in Section 97 of *IRPA*.

(Minister's Delegate's Decision, pp. 8 and 20-21).

[3] In this respect, referring to the Minister's Delegate, Counsel for the Applicant makes the following argument:

a. She concluded all in Sri Lanka were at the same risk, which is not borne out in the evidence. The reports which she cited were reports about the specific risks faced by Tamils and while they did note that others in country were impacted by the armed conflict, they did not conclude that the risks were equal. The delegate's conclusion that all faced the same risk is perverse given the tenor of the Hotham report, the Human Rights Watch reports and the UNHCR report.

b. To the extent that she recognized a greater risk for Tamils, she erred in characterizing this as 'generalized', when it was an identifiable group to which the Applicant belonged which was at risk.

(Applicant's Application Record, p. 601)

[4] I agree with Counsel for the Applicant's argument.

[5] With respect to the issues of irreparable harm and balance of convenience in the present stay motion, since I have found that serious questions for determination on judicial review arise from the Minister's Delegate's re-assessment, in my opinion, to remove the Applicant prior to the judicial review Application being determined will render his judicial review remedy nugatory; this circumstance itself constitutes irreparable harm and tips the balance of convenience in the Applicant's favour (see eg. *Resulaj v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1168; *Figurado v. Canada (Minister of Citizenship and Immigration)* 2005 FC 247 at paras. 43-45; *Streanga v. Canada (Minister of Citizenship and Immigration)* 2007 FC 792 at para. 40).

ORDER

Accordingly, I order a stay of removal to be in effect until the present judicial review Application is finally determined.

"Douglas R. Campbell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-248-08

STYLE OF CAUSE: JOTHIRAVI SITTAMPALAM v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION and THE
MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 5, 2008

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: March 6, 2008

APPEARANCES:

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