

Date: 20081006

Docket: IMM-939-08

Citation: 2008 FC 1125

Ottawa, Ontario, October 6, 2008

PRESENT: The Honourable Mr. Justice Louis S. Tannenbaum

BETWEEN:

Niranjan SELVARASA

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] I have before me an application for judicial review of the decision of Martine Beaulac (hereinafter the PRRA officer) refusing the applicant's permanent resident application based on humanitarian and compassionate considerations (hereinafter the HC application).

[2] The applicant is a citizen of Sri Lanka. He came to Canada in April 2002 and filed an application for refugee protection several days later. This application was refused by the Immigration and Refugee Board (IRB) on January 9, 2003, based on the applicant's lack of credibility. An application for judicial review of the IRB decision was dismissed by the Federal

Court in a decision dated March 22, 2004 (*Selvarasa v. Minister of Citizenship and Immigration*, 2004 FC 424).

[3] On September 29, 2006, the applicant filed his HC application, based on the risks that he alleges he faced because he was a young Tamil from the North. On June 21, 2007, the applicant filed additional submissions, alleging for the first time that he was homosexual and that, on this basis, he could not return to Sri Lanka. According to the applicant:

4. Sex between males is a criminal offence in Sri Lanka punishable by up to 12 years in prison. Although the law is not always enforced it is used by the police to harass gays and to extort money from them.

5. Moreover, homosexuality is a societal taboo in Sri Lanka. It creates a stigma and that is why I never mentioned my sexual orientation to anyone while in Sri Lanka.

6. I realized that I was gay when I was 15 when I fell in love with a boy who was my school mate. We met on occasion but always in hiding.

[4] The applicant described meeting a man, Robert Dorion, after he arrived in Canada. He began a relationship with him in October 2004. One month later, one of the applicant's family members learned of this relationship and relayed this information to the applicant's parents in Sri Lanka. On this point, the applicant states:

12. I have never spoken with my father since that incident as my father told me never to speak to him again. My mother just cries when I call her. I have contact only with a brother who is in Qatar.

13. I believe that if I return to Sri Lanka I will be banished from my family and will find no place to go because I am a gay Tamil and civil war has started again. There is no freedom of movement. Tamils who do move from one place to another are suspected by the authorities of supporting the LTTE.

14. Since I came to Canada I have become comfortable with my sexual orientation and am living without fear. I do not want to return to a situation of shame and fear. I do not want to live in hiding and to be at the mercy of society and the police who harass young Tamil males and especially homosexuals.

[5] The applicant also filed a pre-removal risk assessment (PRRA). Both applications were refused by the same officer on January 7, 2008. The decision on the PRRA application is also the subject of an application for judicial review, in docket IMM-801-08 (for the decision regarding the PRRA decision, see page 205 of the Tribunal Record).

[6] On March 5, 2008, Madam Justice Gauthier granted the motion to stay the enforcement of the applicant's deportation.

[7] The PRRA officer noted that in the HC application the applicant relied on his integration in Canada, his ties with this country and the risks of removal. She began her analysis by observing that as a general rule for HC application to be allowed an applicant must establish that he would suffer unusual, undeserved or disproportionate hardship if forced to make his application from outside of Canada and that an HC application is an exceptional case.

[8] In regard to the applicant's integration, the PRRA officer noted that the applicant had been working in Canada for four years, but that this situation was not particular to the applicant and does not amount to an exception.

[9] In regard to the applicant's ties with Canada, the PRRA officer learned that Mr. Dorion is still married and lives with his wife, who is aware of her husband's sexual preferences. She wrote:

[TRANSLATION]

I consider that the relationship of the claimant and this man is less important than the one that his friend has with his wife and children. In fact, his friend himself decided by assigning more importance to his relationship with his wife and children. Accordingly, I assign weight to this relationship, where one party is bound by contract to another.

[10] The PRRA officer decided to assign more weight to the applicant's ties with his family in Sri Lanka than to his ties to Mr. Dorion.

[11] With regard to the risks alleged by the applicant, the PRRA officer noted that the applicant [TRANSLATION] "stated that he had to live in hiding in his country because the police harassed Tamil men and homosexuals." The PRRA officer considered the applicant's allegations regarding his homosexuality and decided to give the benefit of the doubt to the claimant and to examine the risks to his safety and to his life resulting from his sexual orientation. However, the PRRA officer took into account the IRB decision undermining the applicant's credibility, as well as the fact that the applicant had been released after being detained when he returned to Sri Lanka after a trip to the Netherlands in 1999.

[12] The PRRA officer added:

[TRANSLATION]

In regard to the situation of homosexuals in Sri Lanka, I note that it is criminalized in that country and liable to imprisonment for 10 to 12 years, yet this law is not enforced or applied. There is a gay Sri Lankan defense

league in Colombo: *Companions on a Journey*, a club for gays and lesbians of the country, founded by Sherman de Rose. ...

Even though it is illegal under a colonial law which dates back more than 100 years, there have not been any prosecutions for homosexuality in over 50 years. The organization *Companions of a Journey* [sic] work with the Sri Lankan Department of Health, distributing condoms in gay meeting places, giving counselling, make-up courses, health education and advice as well as a refuge for gays and lesbians. ...

I note that the applicant was able to study and work in his country until his departure and he did not refer to any incidents which occurred in his country related to his homosexuality. His way of life indicates that he was not in danger for his safety or his life because of his sexual orientation.

The fact that he was banished by his family does not mean that his safety and his life were in danger. The law does not intervene in private relationships unless there is abuse.

[13] Further, in regard to the situation in Sri Lanka for young Tamils, the PRRA officer determined that Tamils returning to Sri Lanka are not detained when they have proof of their identity and establish that they do not have a criminal record. According to the PRRA officer, [TRANSLATION] “The applicant had the opportunity to live in regions controlled by the army in order to ensure his safety despite the incidents of violence against the authorities or the Sinhalese army. He did not establish that his safety or his life would be in danger in his country.”

[14] The applicant argues that the PRRA officer’s findings were unreasonable in regard to the risks to the applicant due to his homosexuality and his identity as a young Tamil from the North, as well as his ties with Canada and the fact that he had been previously deported. In his arguments, the applicant also raises the issue of the test applicable to the risks referred to in an HC application. In my opinion, the issues can be described as follows:

- a. Did the PRRA officer err in the determinations regarding conditions in Sri Lanka for homosexuals?
- b. Did the PRRA officer err in her findings regarding the conditions in Sri Lanka for young Tamils from the North?
- c. Did the PRRA officer err in her findings regarding the ties between the applicant and Canada?

[15] The parties agree on the issue of the appropriate standard of review for the PRRA officer's decision on the facts, which is that of reasonableness (see for example *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL)). This standard of review has not changed since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL) (*Gazlat v. Minister of Citizenship and Immigration*, 2008 FC 532, [2008] F.C.J. No. 677). However, in regard to the issue of the appropriate test for assessing an HC application, which is a question of law, the appropriate standard of review is that of correctness (*Thalang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 340, [2008] F.C.J. No. 433 (F.C.T.D.) (QL) [*Thalang*]).

- (1) Did the PRRA officer err in the determinations regarding conditions in Sri Lanka for homosexuals?

[16] HC applications are governed by section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Subsection 25(1) provides:

. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative,

(1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et

<p>examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.</p>	<p>peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s’il estime que des circonstances d’ordre humanitaire relatives à l’étranger — compte tenu de l’intérêt supérieur de l’enfant directement touché — ou l’intérêt public le justifie.</p>
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[17] An HC application is a measure that is an exception to the general rule to the effect that people who wish to live permanently in Canada must, “prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa” (*Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at paragraph 20, [2006] F.C.J. No. 425 (F.C.T.D.) (QL)). However, a PRRA application is a measure through which persons can have risks to their life or safety assessed before they are removed to their native country. CH applications differ from PRRA applications insofar as the requirements for assessing the application in question, as Mr. Justice Teitelbaum stated:

Risk assessment in an H&C must be assessed according to the standard of whether the risk factors amount to unusual, undeserved or disproportionate hardship and not according to the higher standard in a Pre-Removal Risk Assessment . . .

(*Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 554 at paragraph 12, [2007] F.C.J. No. 749 (F.C.T.D.) (QL) [*Gallardo*]. See also *Thalang*, *supra*)

[18] In her decision, the PRRA officer referred on several occasions to the requirement of danger to the safety or life in considering the applicant's allegations regarding his homosexuality. However, in his application, the applicant alleged not only that his safety or his life would be in danger, but also that he would face additional problems with his family, society and the Sri Lankan authorities, in light of the documentary evidence which establishes that, despite the fact that the law against homosexuality is generally not applied, "its existence has allowed for official discrimination and societal stigma towards homosexuals" (Home Office Border & Immigration Agency, "Sri Lanka" (May 11, 2007) at page 115. See also LKA35952.EF, *Sri Lanka: Treatment of homosexual men by the authorities, the Muslim community, and the broader community; laws proscribing homosexual acts and whether they are applied in practice* (1997 - November 2000) at page 35 of the Tribunal Record; United States Department of State, "Country Reports on Human Rights Practices – 2006 – Sri Lanka" (March 6, 2007) at page 119 of the Tribunal Record). Having given the applicant the benefit of the doubt regarding his homosexuality, the PRRA officer did not at all analyze these alleged problems in regard to the "unusual, undeserved or disproportionate hardship" requirement. This is an error of law.

[19] The PRRA officer also, in my opinion, erred in her findings of fact regarding the applicant's homosexuality. The PRRA officer determined that the fact that the applicant's life-course did not refer to any incidents occurring in his country related to his homosexuality

[TRANSLATION] "indicates that his safety or his life were not in danger because of his sexual orientation." The PRRA officer also determined that the ties between the applicant and his family in Sri Lanka were more significant than the ties between the applicant and Mr. Dorion. It seems to me

that the PRRA officer made these findings without taking into account certain evidence that was before her.

[20] More specifically, regarding the applicant's situation while she was living in Sri Lanka, the PRRA officer did not consider the applicant's claim to the effect that he had concealed his homosexuality at least until his arrival in Canada. This clearly appears in the submissions of the applicant who says that he "never mentioned my sexual orientation to anyone in Sri Lanka." If there was not anyone in Sri Lanka who was aware of the applicant's sexual orientation while he was living in that country, the fact that he never encountered any problem does not indicate that he would not be threatened now that his homosexuality is more generally known.

[21] Further, when the PRRA officer gave [TRANSLATION] "more weight to his ties with his family in Sri Lanka than to his ties to a friend in Canada, who he saw sporadically", she did not take into account the applicant's allegation that he is no longer speaking to his family with the exception of a brother who lives in Qatar.

[22] In my opinion the PRRA officer's decision is erroneous and the intervention of this Court is justified.

[23] No question of general importance was formulated for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is allowed and the matter referred back to a different PRRA officer for redetermination.

“Louis S. Tannenbaum”

Deputy Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

Authorities considered by the Court

1. *Nelli Tikhonova v. MCI*, 2008 FC 847
2. *Fouad Rebai v. MCI*, 2008 FC 24
3. *Dipesh Kumar Thalang v. MCI*, 2008 FC 340
4. *MCI v. Ferenc Varga et al*, 2006 CAF 394
5. *Thayaseelan Sellan v. MCI*, 2008 FC 44
6. *Thavan Sinnasamy v. MCI*, 2008 FC 67
7. *Monica Streanga v. MCI*, 2007 FC 792
8. *Rogelio Ponce Melchior v. MCI*, 2004 FC 1327
9. *Serda v. MCI*, 2006 FC 356
10. *Uddin v. MCI*, 2002 FCT 937
11. *Baheerathan v. MCI*, 2007 FC 802
12. *Nazaire v. MCI*, 2006 FC 416
13. *Kathirgamu v. MCI*, 2007 FC 1222
14. *Krishnapillai v. MCI*, 2007 FC 563

FEDERAL COURT
SOLICITORS OF RECORD

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