Date: 20081222

Docket: IMM-2733-08

Citation: 2008 FC 1405

Ottawa, Ontario, December 22, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SORUBARANI SINNAIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Sorubarani Sinnaia applied for judicial review of the decision of the Pre-Removal Risk Assessment (PRRA) Officer (the Officer) on April 23, 2008, finding that she would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment pursuant to section 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c.27 (the Act) if returned to Sri Lanka, her country of nationality.

BACKGROUND

[2] The applicant is a 62 year old Tamil widow originally from the Jaffna district in northern Sri Lanka. The area is under the control of the Liberation Tigers of Tamil Eelam (LTTE). She entered Canada accompanied by her daughter through the United States in 2000 and made a refugee claim. Their refugee claim was denied by the refugee panel in May 2001. The applicant then made an application under the Post-Determination Refugee Claimant in Canada Class which was rejected in October 2001.

[3] In January 2003 the applicant applied for the PRRA that is the subject of this proceeding; she was given an opportunity to make updated submissions in September 2007. Her PRRA was rejected in April 2008. The applicant's removal was scheduled for July 3, 2008. She was granted a stay of removal on June 27, 2008.

DECISION UNDER REVIEW

[4] On April 23, 2008, the applicant's PRRA was rejected because it was determined that she would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka.

[5] The Officer noted that the determinative issues in the 2001 refugee hearing were credibility, agents of persecution and an internal flight alternative (IFA). The Officer noted that the refugee panel found that the claimants, the applicant and her daughter, had family in Colombo and held that the claimants did not fit the profile of Tamils at risk of a serious possibility of persecution. The

refugee panel had stated that unlike northern Tamils without established relatives, Colombo was a viable internal flight alternative (IFA) and that the claimants should take advantage of a viable IFA in their own country.

[6] The Officer noted the civil war between the Sri Lankan government and the secessionist LTTE and the escalation of the conflict in 2006 and 2007 that resulted in the termination of a ceasefire agreement in January 2008. The LTTE are in control in the northern and eastern provinces. The Sri Lankan Army (SLA) has committed serious human rights violations against the Tamil population in those provinces. Both the SLA and the LTTE conduct military operations including shelling and aerial bombardment with total disregard for the civilian population.

[7] The government is in control of the rest of Sri Lanka. The LTTE carries out terrorist attacks or military strikes against military, political, and strategic targets in the rest of Sri Lanka. The government has imposed emergency regulations and security controls with which the populations must comply. Security measures include curfews, checkpoints, roadblocks and search operations throughout the road network and in Colombo. The Officer noted extensively that emergency regulations and security measures had been implemented that were applicable to all residents, including security checks which may involve short detentions.

[8] The Officer noted that country documentation reports that human rights abuses in Sri Lanka are focussed on high profile politicians, human rights advocates, prominent military personnel, members of clergy, and young Tamil men - not on elderly widowed Tamil women.

[9] The Officer concluded that the applicant could have a well founded fear of persecution if she were required to return to either of the northern or eastern provinces. However, the Officer noted the applicant had family in Colombo, quoting from the PRRA application – Updated Additional Submissions prepared by counsel: *". . . the Applicant's family has, for safety reasons, moved to Colombo in April 2007 and has since been living there, although stay in Colombo entails risks to Tamils.*" The Officer stated that the applicant did not provide sufficient evidence her family experienced any particular incidents different from the general Tamil population in Sri Lanka. The Officer decided the applicant's personal circumstances were not sufficient to bring her within the meaning of either a convention refugee or a person in need of protection.

[10] The Officer found "that outside of the Northern and Eastern provinces in Sri Lanka, there is less than a mere possibility that the applicant would be subjected to persecution as described in section 96 of IRPA." Similarly, there were no substantial grounds to believe that she would face a risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment as described in paragraphs 97(a) and (b) of IRPA.

[11] Before the earlier stay application and now on the record in this judicial review, is an affidavit by the lawyer who prepared the Updated Additional Submissions, taking responsibility for erroneously stating the applicant had family in Colombo due to a mix-up with another immigration file.

ISSUES

The issues in this case are as follows:

a. Was the PRRA officer required to identify a specific IFA and to perform a two-pronged IFA analysis?

b. Does the incorrect statement that the applicant's family was in Colombo render the Officer's decision unreasonable or violate the Applicant's right to procedural fairness?

STANDARD OF REVIEW

[12] The decisions by a PRRA officer are reviewed on the standard of reasonableness: *Sounitsky v. Canada (M.C.I.),* 2008 FC 345, at para.18. Similarly, findings of fact by a PRRA officer are reviewable on the deferential standard of reasonableness: *Yousef v. Canada (M.C.I.),* 2006 FC 864.

[13] A decision is reasonable if justified, made in a transparent manner, and falls within a range of acceptable outcomes which are defensible in regard to the facts and the law. Factual findings are accorded the highest level of deference. *Dunsmuir v. New Brunswick*, 2008 SCC 9, at pars 47 – 49. Decisions ought not to be set aside unless based on "an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it." *Federal Courts Act* section 18.1(4) (d); *Nava v. Canada (M.C.I.),* 2008 FC 706, at paras. 12, 22.

[14] A breach of procedural fairness does not require application of a standard of review. The Court need only determine if the process satisfies the requirements of procedural fairness: *Sketchley v. Canada (Attorney General),* 2005 FCA 404. If the tribunal breached procedural fairness, the impugned decision will be set aside: *Hamzai v. Canada (M.C.I.),* 2006 FC 1108, at para. 15.

Analysis

Was the PRRA officer required to identify a specific IFA and to perform a two-pronged IFA analysis?

[15] The applicant submits that the Officer failed to apply the two pronged test to determine whether there was an IFA. Furthermore, the applicant submits that if the Officer found the applicant had an IFA, the Officer failed to specify the location of an IFA.

[16] The respondent submits that the Officer was not required to identify a specific IFA in this case. The Officer found that the applicant was not required to return to any particular area in Sri Lanka, but could return to another part of the country other than the north or the east.

[17] The respondent submits that in a similar case the PRRA officer found that the applicants would not be at risk in Sri Lanka. In *Navaratnam v. Canada (Solicitor General),* 2005 FC 3, at paras. 3-7, the court stated:

> "In my view, looking at the officer's reasons as a whole and the general nature of the applicant's allegations, she was not obliged to arrive at definitive conclusions about the locations where the applicants might be safe or the reasonableness of their re-settling there. She was simply observing that some areas might be safer than others. I can find no error on her part."

[18] The respondent submits that the Officer concluded that despite the country condition evidence of a generalized risk, the applicant did not establish a personalized risk. The Officer found that the applicant failed to link the documentary evidence regarding country conditions in Sri Lanka to her personalized, forward-looking risk.

[19] The respondent submits that the Officer undertook a thorough review of the most recent documentary evidence and did not find a personalized risk. The applicant failed to rebut the presumption that the Officer considered all the evidence in the record. The respondent submits that the Officer is not required to refer to or address particular passages in the evidence when rendering a decision.

[20] The Officer concluded that the evidence did not support that elderly widowed Tamil women are at particular risk. He reviewed the country document on the conflict between the Government of Sri Lanka and the LTTE. He noted the two decade old conflict has resulted in the deaths of more than 60,000 people and has escalated in 2006 and 2007 with most of the fighting taking place in the northern and eastern districts of Sri Lanka. The Officer stated:

> The aforementioned documentary sources suggest that the conditions in the Northern and Eastern provinces of Sri Lanka are dire; this evidence leads me to conclude that the applicant could have a well-founded fear of persecution pursuant to section 96 of the IRPA *if* she were required to return to one of these two provinces.

I take from the Officer's conclusion he accepts that the applicant cannot return to her home community of Jaffna in northern Sri Lanka because of risk of persecution.

[21] The Officer must apply the two pronged test to find a viable and safe IFA exists for the applicant: *Rasaratnam v. Canada (M.E.I.)*, [1991] F.C.J. No. 1256, (CA). The Officer must be satisfied on the balance of probabilities that there is no serious possibility of the applicant being persecuted in the proposed IFA and conditions in the proposed IFA must be such that it would not

be unreasonable for the applicant to seek refuge there upon consideration of all circumstances, including the applicant's personal circumstances: *Kumar v. Canada (M.C.I.)*, 2004 FC 601.

[22] The Officer, after considering country conditions in the rest of Sri Lanka, states:

> Based on the totality of the evidence before me, in light of the evidence submitted, the documentary sources consulted, and the specific circumstances of the applicant's case, I find that outside of the Northern and Eastern provinces in Sri Lanka, there is less than a mere possibility that the applicant would be subjected to persecution as described in section 96 of the IRPA.

[23] Without expressly saying so, the Officer appears to have decided on the basis of an IFA since he has found the applicant cannot return to Jaffna in northern Sri Lanka.

[24] While the Officer has not specified a specific location as an IFA, I find that the Officer considered Colombo as a specific IFA. I do so because of the Officer took specific note of the refugee panel's finding the applicant had family in Colombo and quoted from the PRRA submission that the applicant's family had moved to Colombo in 2007 for safety reasons.

Does the erroneous statement that the applicant's family was in Colombo render the Officer's decision unreasonable or violate the Applicant's right to procedural fairness?

[25] In *Kumar* at para. 17, Justice Mosley held that the specific location identified must be real and attainable: also *Whenu v. Canada (M.C.I.)*, 2003 FC 1041, at paras. 9-12

[26] The Officer is required to assess the applicant's particular circumstances; age, prior experience, location and physical condition are factors that may be taken into account: *Sinnasamy v.*

Canada (M.C.I.), 2008 FC 67, paras. 24-26. In *Rudi v. Canada (M.C.I.)*, 2003 FC 957, Justice Layden-Stevenson held:

> Regarding the IFA finding, identification of an IFA generally is insufficient. A specified geographic location must be identified where conditions are such as to make it a realistic and attainable safe haven.

[27] The Officer noted that the applicant had six siblings in Sri Lanka based on the applicant's PRRA application. That document gives their location as Sri Lanka and does not locate them outside the northern or eastern provinces.

[28] The Officer considered Colombo to be a viable IFA for the applicant. Implicit in the Officer's reference to the applicant's family having moved to Colombo for safety reasons in 2007 is that it is a realistic and safe haven for the applicant. Since the applicant is an elderly widow, the attainability of the proposed place of safety is a necessary consideration.

[29] The difficulty with Colombo as an IFA for the applicant is that the applicant's previous counsel provided an affidavit admitting to making an error about the presence of family in Colombo. The Officer relied upon the erroneous statement, singling it out by specifically quoting it in the negative assessment of the risk to the applicant on return to Sri Lanka.

[30] I pause to note this is not a situation where the applicant is alleging she had incompetent counsel. Here, it is counsel who has acknowledged error due to a mix up of immigration files and who is taking responsibility for the error.

[31] The respondent submits, according to *Yang v. Canada (M.C.I.)*, 2008 FC 269, at paras. 17, 24; and *R. v. GDB*, 2000 SCC 22, at paras. 26-29, that for there to be a violation of procedural fairness on this issue the applicant must establish three elements:

a. counsel's alleged acts or omissions constituted incompetence;

b. the Applicant was prejudiced by the alleged conduct; and

c. there was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different.

[32] The respondent says the applicant has not satisfied this test, as the alleged error does not amount to incompetence; it was a mistake.

[33] It is worth reviewing counsel's submissions about the applicant's family contained in the Updated Additional Submissions (underlining added):

> 1.3 The Applicant fears that she cannot return to and remain safely in Sri Lanka today because of the current violent conditions in Sri Lanka and the serious threats and risks which Tamils face in Sri Lanka, as explained below. The fact <u>that she is a widow and has no family or friends in Sri Lanka</u> renders her position more vulnerable.
>
> 4.7 As mentioned above, <u>the Applicant's family has, for safety reasons, moved to Colombo in April 2007 and has been living there</u>, although stay in Colombo entails risks to Tamils.
>
> 5. In the light of current violent conditions in Sri Lanka and serious human rights abuses and atrocities perpetuated by the military and paramilitary groups against Tamil civilians in Sri Lanka, I submit that if the Applicant is obliged to return to Sri Lanka, as a Tamil female she will suffer irreparable harm at the hands of the different agents of violence identified above. Her personal <u>circumstances as a widow without any family or friends in Sri Lanka</u> renders her more vulnerable in the current critical situation.

[34] These contradictory assertions in the Updated Additional Submissions support the lawyer's affidavit that the statement the applicant had family in Colombo was indeed in error.

[35] In *Yang*, at para. 18, Deputy Judge Frenette went on to say that incompetence is determined by analysing whether the conduct "fell within the wide range of reasonable professional assistance." The misstatement of crucial information because of a mix up of immigration files may be an honest mistake but it is not reasonable professional assistance.

[36] The Officer quoted the erroneous information emphasizing its significance. The implication is that since the applicant has family in Colombo, she will be able to obtain family assistance in settling there. Since her submission is that she has no family to provide assistance, the use made of the erroneous information was prejudicial to her position and resulted in a PRRA assessment based on an erroneous statement.

[37] The Officer began with the refugee panel's finding of family in Colombo. The panel stated: "Unlike Northern Tamils <u>without established relatives</u>, Colombo is a viable option." (underlining added) Had the Officer not relied upon the erroneous statement by the applicant's previous counsel, the Officer may well have come to a different conclusion about whether an elderly widow without family in Colombo had a viable IFA in Sri Lanka.

CONCLUSION

[38] I conclude that the Officer was required to apply the two pronged test which included identifying a specific IFA and assessing whether the proposed IFA was unreasonable having regard to the applicant's circumstances. The Officer did, by implication, identify Colombo as an IFA but his assessment was based on an erroneous statement. The Officer relied on this error in deciding the risk assessment.

[39] A PRRA decision that is based on erroneous statement of fact is unreasonable. The application for judicial review is granted.

[40] Neither the applicant nor the respondent submitted a general question of importance for certification

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the matter is to be referred to another Officer for re-determination.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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