Date: 20090129

Docket: IMM-3116-08

Citation: 2009 FC 90

Ottawa, Ontario, this 29th day of January 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Nilakaran KANAGASINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an opinion by the Minister of Citizenship and Immigration's Delegate, pursuant to paragraph 115(2)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), signed on June 10, 2008, according to which the applicant is a danger to the public in Canada and may therefore be removed to Sri Lanka.

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[2] Nilakaran Kanagasingam (the “applicant”) is a citizen of Sri Lanka who has lived in Canada since December 7, 1998, when he arrived as an unaccompanied minor and made a claim for refugee status. The day of his arrival in Canada, the applicant became the subject of an inadmissibility report on the basis of paragraph 19(2)(*d*) and subsection 9(1) of the former *Immigration Act*, and subsection 14(1) of the former *Immigration Regulations* for not complying with the conditions that he apply for and obtain an immigration visa and be in possession of a valid passport, identity or travel document upon arrival in Canada.

[3] The applicant had fled Sri Lanka because of fear of the Liberation Tigers of Tamil Eelam (the “LTTE”), the Sri Lankan army and the police. As the eldest male child in his family, he was targeted by the LTTE for recruitment. He and other students had to attend general meetings of the LTTE at his school, and the LTTE eventually took him to work for them for about 15 days. In July 1998, the LTTE approached his family about his recruitment; they were afraid to refuse, despite their opposition. With the help of his mother and an agent, the applicant was able to leave the country, but not before he was interrogated and detained overnight by the police regarding his involvement with the LTTE.

[4] On July 7, 1999, the Immigration and Refugee Board (“IRB”) determined that the applicant was a Convention refugee.

[5] Between February 28 and June 11, 2003, the applicant was convicted of a number of offences: (1) personation with intent, for which he was sentenced to one day in prison; (2) robbery, for which he was sentenced to eight months in prison and two years probation; (3) failure to comply

with conditions of recognizance, for which he was sentenced to one day in prison; (4) uttering threats, for which he received a suspended sentence and probation for three years; and (5) the use of an imitation firearm in the commission of an offence, for which he was sentenced to 12 months in prison.

[6] On April 16, 2003, he became the subject of an inadmissibility report pursuant to subsection 44(1) of the Act, on the ground of serious criminality (paragraph 36(1)(*a*)), and organized criminality (paragraph 37(1)(*a*)). On February 24, 2004, the applicant was issued a deportation order on the basis of criminality and serious criminality. He filed a Notice of Appeal of the Removal Order on the same day. On March 24, 2005, the Immigration Appeal Division ("IAD") dismissed his appeal.

[7] On November 22, 2005, immigration officials at the Canada Border Services Agency in Montréal informed the applicant of their intention to seek an opinion of the Minister of Citizenship and Immigration on whether he is a danger to the public and may be removed (or *refouled*) to Sri Lanka. He was invited to make submissions. On December 9, 2005, the applicant provided documents regarding his employment history. On September 19, 2007, immigration officials disclosed additional information to the applicant relating to the danger he allegedly poses to the public, the risk he would face if returned to Sri Lanka, and relevant humanitarian and compassionate considerations. In response to an invitation to make further submissions, the applicant provided a letter from his employer dated September 21, 2007 and a copy of his personal deposit account history at the Royal Bank of Canada.

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[8] At page 10 of the impugned opinion, the Minister's Delegate writes:

> I note that Mr. Kanagasingam's criminal record is supported by numerous documents from the courts, the police and the Immigration and Refugee Board that describe the offences in considerable detail and provides insight in respect of the circumstances, his character and possible harm to the victims. In addition, information on record provides credible evidence regarding Mr. Kanagasingam's propensity to use weapons to threaten his victims and his willingness to wield dangerous and threatening weapons to threaten such as a machete, in the commission of his crimes. The evidence also provides numerous credible examples detailing Mr. Kanagasingam's disrespect for the law, such as when he provided a false identity to police and the occasion when he violated his probation orders. Thus in reaching my decision, I have done so by relying on information and evidence that I consider to be credible and reliable, having particular regard to the various police reports relating to Mr. Kanagasingam's serious criminal convictions and reasons of the IAD relating to his appeal from his deportation order.

[9] He then adds: "I have also carefully considered Mr. Kanagasingam's submissions […]. While I appreciate that he is employed and has a bank account, these submissions do not directly address his criminal history". Moreover, the Minister's Delegate notes that the applicant had shown "no remorse for his criminal conduct and little insight into his offence history", and indeed had not taken responsibility for his conduct, which demonstrated that he had not been rehabilitated.

[10] The Minister's Delegate observes that the applicant's submissions of December 9, 2005 did not address the question of risk. He therefore reviews the basis for the applicant's grant of refugee status. In addition, the Minister's Delegate consults the most recent U.S. Department of State Country Report on Human Rights Practices in Sri Lanka (2007). At page 13 and 14 of the opinion, he writes:

> Mr. Kanagasingam indicates that when he was a student, a young 15-year-old Tamil boy from the North, the LTTE wanted to recruit him. Based on the evidence on record which shows that Mr. Kanagasingam is no longer a young boy, but a 25-year-old adult, I am satisfied, on balance, that he no longer faces a risk of being recruited by the LTTE as a child soldier. […]
>
> As a Tamil male returning to Sri Lanka, I find there is insufficient information to satisfy me, on balance of probabilities, that Mr. Kanagasingam will be personally targeted by the LTTE for recruitment. […]

[11] He concludes, at page 16:

> Based on the evidence, I am satisfied, on a balance of probabilities, that Mr. Kanagasingam has not had any affiliation with the LTTE or other political groups that would lead directly to his being personally targeted by the government of Sri Lanka security forces as a person of interest for detention, mistreatment or torture should he be returned to Sri Lanka. In addition, I am also satisfied, on balance, that Mr. Kanagasingam would not be of any interest to the LTTE such that he would be facing any of the risks enumerated under section 97 of *IRPA* should he be removed to Sri Lanka. I find, therefore that, on balance of probabilities, that [*sic*] Mr. Kanagasingam would not be targeted by the LTTE or the Sri Lankan authorities upon his return to Sri Lanka, such that he would not be at any greater risk than the general population of facing any risk to his life, or a risk of torture or cruel and unusual treatment and being a Tamil male returning to Sri Lanka.

* * * * * * * *

[12] This matter raises the following issues:

1. Did the Minister's Delegate err in his determination that the applicant is a "danger to the public", pursuant to paragraph 115(2)(*a*) of the Act?

2. Did the Minister's Delegate err in his determination that the applicant would not face a significant risk upon his return to Sri Lanka?

* * * * * * * *

[13] The following provisions of the Act are relevant:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

…

[…]

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

…

[…]

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[…]

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[…]

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; ….

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; …

[14] The following Article of the *United Nations Convention Relating to the Status of Refugees* is also pertinent:

Article 33. – Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 33. – Défense d'expulsion et de refoulement

1. Aucun des États contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

* * * * * * * *

[15] Before turning to consider the merits of the application, it is helpful to recall the statutory context. Subsection 115(1) of the Act sets out the general rule against *refoulement*, and embodies the first paragraph of Article 33 of the *United Nations Convention Relating to the Status of*

Refugees. Paragraph (*a*) is therefore one of the exceptions to this general rule, and accords with paragraph 2 of Article 33. As the Federal Court of Appeal writes in *Nagalingam v. Minister of Citizenship and Immigration*, 2008 FCA 153:

> [69] In addressing my final point of analysis on the second certified question, I accept the appellant's argument that the "fundamental character of the prohibition of *refoulement* and the humanitarian essence of the … Convention more generally, must be taken as establishing a high threshold for the operation of exceptions.
> …
>
> [My emphasis.]

[16] The Court in *Nagalingam* also quotes Sir Elihu Lauterpacht and Daniel Bethlehem's contention that:

> 186. The text of Article 33(2) makes it clear that it is only convictions of crimes of a particularly serious nature that will come within the purview of the exception. This double qualification – *particularly* and *serious* – is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated pursuant to this provision only in the most exceptional of circumstances. Commentators have suggested that the kinds of crimes that will come within the purview of the exception will include crimes such as murder, rape, armed robbery, arson, etc.
>
> E. Lauterpacht & D. Bethlehem, "The Scope and Content of the Principle of *non-refoulement*: Opinion" in E. Feller, V. Türk & F. Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York: Cambridge University Press, 2003) 87, at 139.

[17] In *Ragupathy v. Minister of Citizenship and Immigration*, 2006 FCA 151, the Federal Court of Appeal set outs the proper methodology for a Danger Opinion at paragraphs 16 through 19. Notably, at paragraph 17, the Federal Court of Appeal is clear that whether a protected person is a danger to the public is a determination that

> … is to made on the basis of the criminal history of the person concerned, and means a "present and future danger to the public": *Thompson v. Canada (Minister of Citizenship and Immigration)* (1996), 119 F.T.R. 269 at para. 20.

[18] As for the applicable standard of review, prior to *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard applied to a Danger Opinion by this Court on review was that of patent unreasonableness. Following *Dunsmuir*, wherein the Supreme Court collapsed patent unreasonableness and reasonableness *simpliciter* into a single norm, the standard of review now applicable to the review of a Danger Opinion is reasonableness. In paragraph 47 of *Dunsmuir*, the Supreme Court of Canada states:

> . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[19] The Court must therefore determine whether the opinion's conclusions fall among the range of "acceptable outcomes which are defensible in respect of the facts and law".

[20] With all that in mind, I now turn to the substantive issues of this case.

Danger Assessment

[21] The applicant argues that the Minister's Delegate erred in focusing almost exclusively on the convictions accumulated by the applicant in 2003, and in giving virtually no weight to his

conduct during the period between 2004 and 2008, during which he maintained steady full-time employment and obtained no convictions.

[22] The respondent claims that the applicant merely objects to the weighing of the factors considered by the Minister's Delegate, which does not present an appropriate basis for this Court's intervention. In his reply, the applicant answers that his position is not properly characterized as relating to the weighing of factors; rather, he is challenging the Minister's Delegate failure to, in effect, apply the appropriate criteria under the law.

[23] As elements of the evidence before him, the Minister's Delegate was entitled to rely on the IAD's determinations and on statements by the sentencing judge. I share the concern expressed in the opinion about the applicant's apparent lack of remorse at that time, as manifested in these statements. Nonetheless, the mere fact that a claimant committed a serious offence just brings him into the purview of the provision; it is not determinative of whether the claimant is a *danger to the public*. Paragraph 115(2)(*a*) incorporates a temporal dimension, as the applicant points out, in so far as it is concerned with attempting to identify the likelihood of a *present and future* danger to the public, as interpreted by the jurisprudence (see, for instance, *Ragupathy*, *supra*). The Minister's Delegate, however, makes no mention of the fact that the applicant has had *no convictions or arrests* in the intervening years since 2004. The IAD in its ruling writes at paragraph 18 that it "has no reason to believe that the appellant will or can change his ways". The evidence before the Minister's Delegate is precisely of the kind that might have provided just such a reason, and warranted greater attention. In my view, the Minister's Delegate did not reasonably apply paragraph 115(2)(*a*).

Risk Assessment

[24] I further agree with the applicant that the Minister's Delegate erred in his determination that the applicant would not face a significant risk upon his return to Sri Lanka.

[25] As the applicant notes, the Minister's Delegate quotes at some length from the Department of State's Country Report on Human Rights in Sri Lanka from 2007 ("DOS Report") to show that the situation in Sri Lanka has changed so that children are no longer targeted by the LTTE for recruitment. However, the very same passage cited makes reference to the LTTE's shift in focus towards young Tamil men – precisely the demographic of the applicant. This would suggest that the applicant would be a ripe target for the LTTE, contrary to the Minister's Delegate's finding. Given such a glaring contradiction with his statements regarding the applicant's risk, the Minister's Delegate had a duty to further explain his position. Moreover, I cannot agree with his argument that the applicant would not face more than the generalized risk faced by others; on the contrary, he would face the risk disproportionately borne by his social group, namely young Tamil men.

[26] With respect to the applicant's risk vis-à-vis the government of Sri Lanka, the DOS Report's opening paragraphs include the following assertion:

> The government's respect for human rights continued to decline due in part to the escalation of the armed conflict. While ethnic Tamils composed approximately 16 percent of the population, the overwhelming majority of victims of human rights violations, such as killings and disappearances, were young Tamil males. Credible reports cited unlawful killings by government agents, assassinations by unknown perpetrators, politically motivated killings and child soldier recruitment by paramilitary forces associated with the government, disappearances, arbitrary arrests and detention, poor prison conditions, denial of fair public trial, government corruption and lack of transparency, infringement of religious freedom,

> infringement of freedom of movement, and discrimination against minorities. …

[27] Moreover, the document later reports, in a portion not cited in the opinion:

> In the conflict affected north and east, military intelligence and other security personnel, sometimes working with armed paramilitaries, carried out documented and undocumented detentions of civilians suspected of LTTE connections. The detentions were followed by severe interrogations, frequently including torture. When the interrogations failed to produce evidence, detainees were often released with a warning not to reveal information about their arrests and threatened with re-arrest or with death if they divulged information about their detention. Some were killed by masked gunmen on motorcycles immediately after leaving these military facilities on foot.

[28] This passage is at odds with the Minister's Delegate's conclusion that the applicant is unlikely to be "personally targeted by the government of Sri Lanka security forces as a person of interest for detention, mistreatment or torture should he be returned to Sri Lanka".

[29] The failure to adequately consider the contrary evidence relating to risk constitutes, in my view, an error warranting the intervention of this Court.

* * * * * * * *

[30] For all the above reasons, the application for judicial review is allowed and the matter is remitted to a different Minister's Delegate for re-determination in accordance with these Reasons.

JUDGMENT

The application for judicial review is allowed. The matter is remitted to a different Minister of Citizenship and Immigration's Delegate for re-determination in accordance with the Reasons for Judgment rendered this day.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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