

Federal Court



Cour fédérale

Date: 20100223

Docket: IMM-2401-09

Citation: 2010 FC 203

Ottawa, Ontario, February 23, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SABALINGAM KUMARASAMY

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of a Visa Officer (Officer) dated March 24, 2009 (Decision), which refused the Applicant's application for a permanent resident visa as a member of the Convention Refugee Abroad class or as a member of the Humanitarian-Protected Persons Abroad class.

BACKGROUND

[2] The Applicant is a Tamil Hindu citizen of Sri Lanka. His parents and four of his siblings are Canadian citizens. One of his siblings is a citizen of the United States.

[3] The Applicant fled Sri Lanka for fear of persecution. He was approached by the LTTE to work for them. He was arrested by the LTTE and was released six days later after agreeing to collaborate with them.

[4] On his way to Canada the Applicant was abandoned in Ghana by his smuggler. He made an application for a permanent resident visa under the Convention Refugee Abroad Class and as a member of the Humanitarian-Protected Persons Class.

DECISION UNDER REVIEW

[5] The Officer determined that the Applicant did not meet the requirements for immigration to Canada because the Applicant was not a member of any of the prescribed classes. The Officer also determined that the Applicant was not credible.

[6] Although the Officer's letter provides no basis for her finding of credibility, the CAIPS notes state that the Officer was "[n]ot satisfied by rationale behind the reasons why he could not go

back, as do not find credible that suddenly after 12 years in the same position without collaborating with the LTTE he was in danger to get kill if [sic] would refused [sic] to collaborate as claimed.”

[7] Furthermore, the Officer was not satisfied that the difficulties claimed by the Applicant demonstrated that he had been seriously and personally affected by armed conflict and civil war in Sri Lanka, or that he had a well-founded fear of persecution. Accordingly, she concluded that he could repatriate to Sri Lanka without fear of consequence.

ISSUES

[8] The issues on the application can be summarized as follows:

1. Whether the Officer applied the wrong test for Convention refugee status;
2. Whether the Officer failed to give adequate reasons for rejecting the application;
3. Whether the Officer erred in her understanding and consideration of the risks facing the Applicant and the documentary evidence supporting those risks;

STATUTORY PROVISIONS

[9] The following provisions of the Act are applicable in these proceedings:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être

religion, nationality, membership in a particular social group or political opinion,

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

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) 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.

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.

[10] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also applicable in these proceedings:

139. (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

139. (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :

...

...

(e) the foreign national is a member of one of the classes prescribed by this Division;

e) il fait partie d'une catégorie établie dans la présente section;

...

...

147. A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

(a) they are outside all of their countries of nationality and habitual residence; and

(b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

147. Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des circonstances suivantes :

a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[12] The issue of whether or not the Officer applied the correct legal test should be reviewed on a standard of correctness. See *Golesorkhi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, [2008] F.C.J. No. 637 at paragraph 8.

[13] The determination of whether the Officer failed to give adequate reasons for rejecting the application is an issue of procedural fairness. Accordingly, it will be reviewed on a standard of correctness. See *Weekes (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 293, 71 Imm. L.R. (3d) 4 at paragraph 17.

[14] The consideration of whether the Officer erred in her understanding and consideration of the risks facing the Applicant and the documentary evidence supporting these risks is an issue of fact. As such, it will attract a standard of reasonableness upon review. See *Dunsmuir* at paragraph 51.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

Wrong Legal Test

[16] The Applicant submits that the Officer erred in applying the wrong legal test for Convention refugee status. The proper legal test is that of reasonable chance, or good grounds, that persecution will occur, and not that the Applicant must establish the probability of persecution to the satisfaction of the Officer. See *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, [1989] F.C.J. No. 67; *Krishnapillai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 244, [2005] F.C.J. No. 302 at paragraphs 9-10.

[17] The onus placed on the Applicant to establish his claim in this instance was heavier than is legally required. The Applicant contends that the Officer imposed on him an onus to prove a well-founded fear of persecution, as opposed to a reasonable chance, or good grounds to believe that he may suffer persecution. See, for example, *Sutharasan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 226, 60 Imm. L.R. (3d) 249.

Adequacy of Reasons

[18] The Officer's adverse finding of credibility was determinative in the rejection of his claim. The Officer erred by failing to provide any reason as to why she found the Applicant was not credible. A finding of credibility must be made in "clear and unmistakable terms." See *Hilo v.*

Canada (Minister of Employment and Immigration)(1991), 130 N.R. 236, 15 Imm. L.R. (2d) 199.

In the case at hand, as in *Krishnapillai*, the Officer failed to set out what she found not to be credible; nor was there any analysis of how the credibility concerns related to the merits of the claim.

[19] Without the provision of adequate reasons it is impossible to determine how the Officer reached her Decision. See, for example, *Javed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1458, 41 Imm. L.R. (3d) 118. In this case, the Officer did not provide adequate reasons or analysis to show how she arrived at an adverse finding of credibility.

[20] The Applicant contends that the Officer failed to provide him with proper reasons or adequate notes for her Decision. This resulted in a breach of procedural fairness.

Inadequate Consideration of Evidence

[21] The Applicant identified his fear of extortion by the LTTE to the Officer in the context of his family unit. His parents and siblings have all left Sri Lanka. The Officer failed to properly analyse this risk of extortion which was supported by documentary evidence.

[22] In the Decision, the Officer neglected to mention that the LTTE and other militant groups extort from Tamils in Sri Lanka. She further failed to consider the documentary evidence before her which demonstrates the presence of extortion in Sri Lanka. The Federal Court has held that the

failure of an Officer to recognize the possibility of extortion among returnees to Sri Lanka is a reviewable error. See *Narany v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 155, [2008] F.C.J. No. 194. Similarly in this case, the Officer erred in failing to address the possibility of the Applicant facing extortion upon his return to Sri Lanka.

[23] Furthermore, the Officer erred in failing to address the 2006 United Nations High Commissioner for Refugees (UNHCR) Position on the International Protection Needs of Asylum-Seekers from Sri Lanka which was submitted by the Applicant in support of his application. This document was not even listed in the index of documents identified by the Officer. The Applicant cites *Sinnasamy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 67, 68 Imm. L.R. (3d) 246 which described this same UNHCR document as “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.”

[24] In a recent case of the Federal Court, Justice Kelen noted that “the UNHCR Report states that ‘all asylum claims of Tamils from the North or East should be favourably considered’ and that ‘those individuals who are found to be targeted by the State, LTTE or other non-state agents’ should be recognized as refugees.” See *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 964, [2008] F.C.J. No. 1199.

[25] Indeed, the Officer erred in concluding that the Applicant would not face risk upon returning to Sri Lanka without considering the relevant evidence and testimony before her that suggested the opposite conclusions.

The Respondent

The Framework of the Act

[26] The Applicant's application is distinguishable from an application for Convention refugee status made in Canada. The Act lists three classes of people that are eligible to become permanent residents: the family class; the economic class; and the Convention refugee class. The Regulations then create three subclasses of the Convention refugee class: Convention refugees abroad; country of asylum class; and source country class. In order to be accepted under the country of asylum class, pursuant to section 147 of the Regulations, an applicant must demonstrate that he "has been and continues to be seriously and personally affected by a civil war, armed conflict or massive violation of human rights in his country" (no emphasis in original).

[27] Subsection 61(1) of the Act places an onus on applicants to answer all questions put to them truthfully. Where an applicant does not comply, the officer must refuse the application pursuant to subsection 11(1) of the Act. The statutory framework of the Act places the burden of proof on the applicant.

Legal Test Correctly Applied

[28] The language “seriously and personally” is a requirement under the country of asylum class in the Regulations. Contrary to the argument of the Applicant, the word “establish,” found in the Officer’s letter of decision, does not indicate that the wrong legal test was applied. Moreover, the *Sutharsan* decision is distinguishable since, in that case, no personal interview occurred and no credibility finding was made. A more reasonable comparison to the case at hand is the recent case of *Besadh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 680, [2009] F.C.J. No. 847 in which an officer found that “I am not satisfied that you are a member of any of the classes prescribed because you have not satisfied me that you have a well-founded fear of persecution.” No error was found by the Court on those facts.

[29] Furthermore, in the case of *Saverimuttu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1021, [2002] F.C.J. No. 1329, the IRB rejected a claim for credibility reasons and determined that the claimant “has not established that he would encounter the problems he alleges upon his return to Sri Lanka.” In this instance, Justice Blais found no reviewable error since the determinative issue at hand was whether the test was properly applied.

Reasons Were Adequate

[30] The Applicant has cited much case law which stems from proceedings before the IRB. However, this is of little assistance where an Officer is making an administrative decision. See

Qarizada v. Canada (Minister of Citizenship and Immigration), 2008 FC 1310, [2008] F.C.J. No. 1662 at paragraph 27.

[31] The Federal Court of Appeal has held that a risk assessment officer and an administrative tribunal conducting an adjudicative hearing should not be held to the same standard in providing reasons. Rather, it is unreasonable to require an administrative tribunal “to give as detailed reasons for their decisions as may be expected of an administrative tribunal that renders its decisions after an adjudicative hearing.” See *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, 282 N.R. 394 at paragraph 11.

[32] In the case at hand, the Officer’s reasons were sufficient. The Officer noted that the Applicant read his story from a piece of paper, was evasive with regard to how he was financing his stay in Ghana, and would not provide the name of his smuggler. Furthermore, she determined that it was unreasonable that the Applicant was able to work for twelve years as a Justice of the Peace prior to encountering trouble. Each of these findings was written in the CAIPS notes.

[33] The Officer’s adverse finding of credibility was reasonable on the facts before her. The inferences drawn by the Officer were not so unreasonable as to require judicial intervention. See, for example, *Aguebor v. Canada (Minister of Employment and Immigration)*, 160 N.R. 315, [1993] F.C.J. No. 732 at paragraph 4.

Claim Properly Considered

[34] The Officer reasonably determined that the Applicant's failure to provide credible evidence was fatal to his claim. Objective evidence of country conditions alone is not enough for a positive determination of a claim without a link between the Applicant's personal situation and the current country conditions in Sri Lanka. The onus was on the Applicant to demonstrate this link, which he was unable to do.

[35] Once the Officer made her determination of a lack of credibility, she did not have a duty to seek a link between the documentary evidence and the Applicant's situation. See, for example, *Fernando v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1349, 58 Admin. L.R. (4th) 272. The Federal Court of Appeal has determined that where an applicant is found to lack credibility, "that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim." See *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, 384 N.R. 163.

[36] In granting the application for leave, Justice Simpson noted that "the agent of persecution was defeated and obliterated by the Sri Lanka army in May/June 2009." See *Kumarasamy v. Canada (Minister of Citizenship and Immigration)*(9 November 2009), Ottawa IMM-2401-09.

[37] Furthermore, the possibility of extortion was mentioned in the CAIPS notes. The Officer acknowledges the Applicant's allegation of extortion, but notes that he has not been working and has been living in West Africa. Accordingly, this allegation was not determinative of the Application.

[38] The Officer's findings and conclusions were reasonably open to her to make. The Court owes these conclusions deference and should not interfere.

ANALYSIS

[39] The Respondent says that at the centre of this Decision lies a general credibility finding which impacts the other issues raised.

[40] In the letter part of the decision, the Officer says very little about why she does not find the Applicant credible:

After carefully assessing all factors relative to your application, I am not satisfied that you are a member of any of the classes prescribed because based on the evidence before me, I find on balance that you are not credible. The details you provided me and the difficulties you say you encountered do not demonstrate that you continue to be seriously and personally affected by armed conflict and civil war in your country, neither do they establish that you have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. I am of the opinion that you could repatriate to Sri Lanka without fear of consequence. Therefore, you do not meet the requirements of this paragraph.

[41] In this paragraph, the Officer says she finds the Applicant not to be credible, but she does not say why. It is not clear if she does not believe the details he provided, or whether she believes the details but does not think they demonstrate the Applicant would be personally affected.

[42] If we turn to the CAIPS notes for clarification on the credibility finding, the Officer provides the following rationale:

Not satisfied by rationale behind the reasons why he would not go back, as do not find credible that suddenly after 12 years in the very same position without collaborating with the LTTE he was in danger to get kill (*sic*) if would refused (*sic*) to collaborate as claimed.

[43] The Officer seems to be saying that she finds something inherently non-credible or implausible about the Applicant's story that he was approached by the LTTE after a 12-year period as a Justice of the Peace.

[44] There is nothing inherently implausible about this at all. Furthermore, the Officer does not ask the Applicant why it took the LTTE 12 years to approach him and put him in custody until he promised to collaborate.

[45] In other words, if there is a general negative credibility finding here, as alleged by the Respondent, then it is not based upon any facts. Rather, it is based upon the Officer's own speculation about what is plausible in a situation of which she has no knowledge except for the details provided by the Applicant. The Officer does not explain why she does not believe that the Applicant was taken into custody by the LTTE and told to collaborate. All she says is that the

passing of 12 years makes it non-credible. We are not told why a particular period of time should be the deciding factor in this case.

[46] A similar problem arises with regard to the risk of extortion on return raised by the Applicant. The Officer acknowledges that he has raised this risk but simply says that she is “not satisfied by rationale behind the reasons why he could not go back.” Once again, this lack of satisfaction is related to his past experiences and her reliance upon the 12-year period of time which has passed.

[47] I agree with the Applicant that the Officer does not provide him with sufficient reasons as to why she doubts his credibility or why his fear of extortion can be discounted. This is an administrative decision and something less in the way of reasons can be expected than would be required of the Refugee Protection Officer (see *Ozdemir* at paragraphs 9-11), but I really do not think there is any real explanation at all for doubting what the Applicant says about his past treatment at the hands of the LTTE. Even in an administrative context, reasons have to be adequate for all of the reasons articulated by the Federal Court of Appeal. See *VIA Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001] 2 F.C. 25, [2000] F.C.J. No. 1685 at paragraphs 16-22.

[48] I also agree with the Applicant regarding the issue of the Officer’s misapplication of the correct test for the burden of proof, but there is no need to address this matter in detail as the Decision must be returned for reasons given.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is quashed and returned for reconsideration by a different Officer.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-2401-09

STYLE OF CAUSE: SABALINGAM KUMARASAMY

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: FEBRUARY 2, 2010

REASONS FOR : HON. MR. JUSTICE RUSSELL

DATED: FEBRUARY 23, 2010

APPEARANCES:

Kumar S. Sriskanda

APPLICANT

Kareena R. Wilding

RESPONDENT

SOLICITORS OF RECORD:

Kumar S. Sriskanda
Barrister & Solicitor
Scarborough, Ontario

APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada

RESPONDENT