

Federal Court



Cour fédérale

Date: 20101019

Docket: IMM-4705-09

Citation: 2010 FC 1015

Ottawa, Ontario, October 19, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MUTHUKAMARA THIYAGARAJAH

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 for judicial review of the decision rejecting that applicant's Pre-Removal Risk Assessment (PRRA) application. This application was heard with another, Court File IMM-4707-09, wherein the applicant challenged the decision made by the same officer refusing his application for permanent resident status based on humanitarian and compassionate grounds (H&C application).

[2] I agree with the submission of the applicant that if his judicial review application on the PRRA decision is allowed on the basis that the officer failed to address the risks alleged by the applicant, then his application in IMM-4707-09 which raised the same risks must also be allowed. This proposition was not strenuously opposed by the respondent.

[3] I have determined that this application must be granted on that basis and accordingly, it will be ordered that a copy of these reasons be placed in Court File IMM-4707-09, which is also allowed.

Background

[4] The applicant is a citizen of Sri Lanka. He has family living in Sri Lanka, including his wife, two teenaged sons, his mother and two of his siblings. He has a brother and a sister residing in Canada.

[5] Mr. Thiyagarajah first entered Canada in 1996, following an arrest by the police in Sri Lanka. He made a refugee claim which was refused in March 1997. He was then removed to the U.S.A. but returned to Canada 90 days later and re-submitted a claim for refugee status. The applicant's claim was refused in January 2000 and leave to review that decision was denied by this Court.

[6] Mr. Thiyagarajah then submitted a PRRA application in June 2009 and a humanitarian and compassionate application in July 2009. Both of these applications were denied by the same officer in September 2009.

[7] The officer determined that the documents relating to the current country conditions in Sri Lanka appear to indicate a generalized risk. She further conducted her own research with regard to country conditions, “using the most recent, reliable and publicly accessible information available.” In considering the UK Home Office Country of Origin Information Report from June, 2009 (UK COI Report), the officer determined that “since the end of the war with LTTE rebels in May 2009, while far from ideal, conditions have continued to steadily improve in Sri Lanka.” The officer went on to consider that some Tamil citizens who were displaced because of the conflict have been “held in large camps where they were barred from leaving until such time as Sri Lankan authorities were able to interview them and screen them to identify Tamil combatants.” The detention of these people, as well as the conditions of these camps, has been criticized by both foreign governments and human rights groups as being illegal.

[8] Nevertheless, the officer noted, based on 2009 BBC News reports, that there has been an improvement in the security situation and “the recovery process in general.” Amnesty International has called on the Sri Lankan government to address the human rights issues with regard to the displaced Tamils. The officer stated that “it is hoped that the increased scrutiny of the Sri Lankan authorities by the United Nations, human rights groups and foreign governments will result in a

sustained improvement to the human rights situation in Sri Lanka following the previous years of conflict.”

[9] The officer then concluded that “on the facts of this case, the applicant does not face more than a mere possibility of persecution for any of the Convention grounds in Sri Lanka.” As a result, the claim did not meet the requirements of s. 96 of the Act. The officer was also unconvinced that the applicant’s removal from Canada would subject him personally to a danger of torture, a risk to his life or a risk of cruel and unusual treatment or punishment. As a result, his claim did not meet the requirement of s. 97 of the Act.

Issues

[10] The issues raised in the written memorandum on this application are the following:

1. Did the officer fail to address the risk factors presented by the applicant;
2. Did the officer breach the applicant’s right to procedural fairness by providing inadequate reasons for her decision;
3. Did the officer err by failing to consider specific documentary evidence, and/or misunderstanding or selectively relying on the evidence before her; and
4. Did the officer err in considering irrelevant factors in making the decision?

[11] At the hearing, counsel focused on the applicant’s principle submissions, namely, that the officer’s reasons did not accurately reflect what had been submitted because the officer had

inadequately analysed the file and failed to seek out the more recent UNHCR report on Sri Lanka. I concur with counsel that these are the two main areas of concern in the decision under review.

Analysis

[12] The basis of the PRRA application was stated in the letter accompanying it as follows:

It is submitted that in the current country conditions set out in the documentation above, Mr. Thiyagarajah's PRRA application should be accepted. If anything, conditions and the government's respect for human rights have deteriorated recently. Nothing has been done to curtail the activities of armed groups who continue to target Tamils for various reasons, including extortion. It is submitted that his Tamil ethnicity, his originating from the north and his extended stay in Canada with the resulting risk of abduction and extortion together with the heightened suspicion and increased security measures imposed by the government all give rise to both a well founded fear of persecution on s. 96 of the *Act* based on the experiences of those similarly situated, and a risk to life, torture and cruel and unusual punishment under s. 97.

[13] There is no question that the majority of the PRRA submissions dealt with the situation, at the time the PRRA application was written, of male Tamils from the north of Sri Lanka and the risk to the applicant as a member of that class if he were to return. All parties as well as the officer acknowledged that the country conditions changed for that group as a result of the end of the civil war. However, the issue the applicant raises is that the officer fails to deal with all of the allegations set out above, specifically, the allegation that the applicant faces risk as a result of "his extended stay in Canada with the resulting risk of abduction and extortion."

[14] It is not disputed that the officer did not address this concern at all. However, the respondent submits that there was no need for the officer to address this as the applicant had failed to provide evidence of personalized risk of this nature.

[15] I cannot accept the respondent's submission. It may well be that the officer could conclude, based on the material filed, that the applicant had failed to demonstrate any personalized risk of the sort alleged. However, that determination is one the officer must make; it is not for counsel or this Court to determine that fact. What the officer failed to do in this case was to turn her mind to some of the risks raised by the applicant, whether supported or not in the evidence filed in the submissions. It is noteworthy that the officer fails to state anywhere in her decision the basis on which the applicant made his PRRA submission. Perhaps if she had done so she would have addressed all of the risks identified.

[16] On this basis the application must be allowed. It is unnecessary to address the other issues raised by the applicant.

[17] Given the substantial changes in Sri Lanka, before the applicant's application is redetermined he should be given an opportunity to submit new material regarding the risks he alleges he will face if returned to Sri Lanka.

[18] Neither party proposed a question for certification and no question is certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed, the decision of the officer dated September 2, 2009, is set aside and the applicant's Pre-Removal Risk Assessment application is remitted to another officer for determination after the applicant has been given an opportunity to make new submissions on his Pre-Removal Risk Assessment application;
2. No question is certified; and
3. A copy of these Reasons for Judgment and Judgment shall be placed on Court File IMM-4707-09.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4705-09

STYLE OF CAUSE: MUTHUKAMARA THIYAGARAJAH v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 14, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** ZINN J.

DATED: OCTOBER 19, 2010

APPEARANCES:

Micheal Crane FOR THE APPLICANT

Bradley Bechard FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Micheal Crane FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario