Federal Court  Cour fédérale

Date: 20110519

Docket: IMM-6099-10

Citation: 2011 FC 590

Toronto, Ontario, May 19, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MATHINI SIVAKUMARAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), of a decision of a visa officer (the officer) at the High Commission of Canada in New Delhi, India, dated August 16, 2010, whereby the officer denied the applicant's application for permanent residence as a Convention refugee and humanitarian-protected person abroad.

I. BACKGROUND

[2] The applicant is a citizen of Sri Lanka, Tamil ethnicity and has a ten year old son, Gokulan. She has seven siblings, six residing in Canada and one in Sri Lanka.

[3] The applicant's husband was killed on May 25, 2006. The applicant claims that he was on his way to buy groceries in their home town of Jaffna, Sri Lanka, when a "claymore" landmine detonated. Although he was not killed in the initial blast, he was shot and killed shortly after by the Sri Lankan military. She claims that the Sri Lankan military suspected that he, acting on behalf of the Liberation Tigers of Tamil Eelam (LTTE), had planted the mine and was responsible for the blast.

[4] Following her husband's death, the applicant says she became, "obsessed with the fear of being killed by (landmines) and the army and the LTTE." She feared that the Sri Lankan military, in particular, would come after her because of their suspicions regarding her deceased husband. Three months after her husband's death, the applicant says the Sri Lankan military came to her house as part of a broader search of her neighbourhood. They asked her questions about her husband's death and about whether or not she had ties with the LTTE.

[5] Out of fear for her personal safety, and the safety of her son, the applicant left Jaffna with her son and went to Colombo, Sri Lanka in January of 2007. In June of 2007, the applicant and her son left Colombo and arrived in India where she currently resides.

[6] In April of 2008, the applicant filed an application for permanent residence as a refugee and humanitarian-protected person abroad with the High Commission of Canada in New Delhi. Her application was sponsored by five family members: three bothers (two who are Canadian permanent residents and one who is a Canadian citizen), her sister (who is a Canadian citizen), and her father (who is a Canadian permanent resident).

[7] Following an interview with the applicant on August 16, 2010, the visa officer, whose decision is currently under review, rejected the applicant's application.

II. THE DECISION UNDER REVIEW

[8] By letter dated August 16, 2010, the officer indicated that he was not satisfied that the applicant was a member of the Convention refugee abroad class or the humanitarian-protected persons abroad class. The officer made three key findings.

[9] First, the officer found that the applicant had provided inconsistent information regarding her husband's death. All of the documentation that she had submitted, including her own written narrative, indicated that her husband had died as a result of the "claymore" landmine explosion. During the interview, however, the applicant indicated that her husband had died as a result of being shot by the Sri Lankan military, after the blast. When asked how she knew that her husband had been shot, the applicant initially explained that she had seen his body the day after. Later, however, she indicated that the body was actually bandaged when she saw it, and that it was because of an eye-witness account that she knew that he had been shot. The officer noted that the applicant failed

to provide an adequate explanation for these “major inconsistencies” and, as such, he concluded that the credibility of the applicant’s “entire application” was suspect.

[10] Second, the officer indicated that the applicant was unable to explain what her fear was based on. He noted that neither the applicant nor any member of her family was ever specifically targeted or persecuted on any basis.

[11] As a result of these two findings, the officer concluded that he was not satisfied that the applicant had a well-founded fear of persecution, nor was he satisfied that she had been seriously or personally affected by civil war or armed conflict.

[12] However, the officer went further than that. He also indicated that under paragraph 139(1)(*g*) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*Regulations)*, a permanent resident visa is only to be issued to a foreign national in need of refugee protection if that foreign national is able to become successfully established in Canada. The officer was not satisfied that the applicant would be able to become successfully established because she had not demonstrated resourcefulness in integrating herself into Indian society, despite living there for three years, and because of her limited education and lack of transferable work experience and skills. He also noted that the applicant had not made any effort to learn additional languages in India, even though English was one of the official languages there.

[13] Ultimately, the officer concluded that the applicant had not met the requirements of the *IRPA* and the *Regulations* and, as such, he refused her application.

[14] The officer's Computer Assisted Immigration Processing System (CAIPS) notes were also provided to the applicant. They reveal that, in addition to the three findings outlined above, the officer found that the lack of detail provided by the applicant regarding the Sri Lankan military's visit to her home had also detracted from her credibility.

III. LEGISLATIVE BACKGROUND

[15] Subsection 139(1) of the *Regulations* indicates that a permanent resident visa is to be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that a certain set of criteria are met. Of specific interest is the criterion set out in paragraph 139(1)(*e*): that the foreign national must be, "a member of one of the classes prescribed by this Division". The classes under consideration in the current application are the Convention refugees abroad class, described in sections 144-145 of the *Regulations*, and the humanitarian-protected persons abroad classes, described in sections 146-148 of the *Regulations*.

[16] Section 145 of the *Regulations* indicates that a foreign national is a member of the Convention refugees abroad class if an officer has determined that the foreign national is a Convention refugee outside of Canada:

Member of Convention refugees abroad class	**Qualité**
145. A foreign national is a Convention refugee abroad and a member of the convention refugees abroad	**145.** Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette

class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.	convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.

This determination is made according to the definition of Convention refugee which is set out in section 96 of the *IRPA*.

[17] Subsection 146(1) of the *Regulations* establishes that a person is a humanitarian-protected person abroad if they fall into either the country of asylum class or the source country class.

Humanitarian-protected persons abroad	**Personnes protégées à titre humanitaire outre-frontières**
146. (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of one of the following humanitarian-protected persons abroad classes:	**146.** (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à l'une des catégories de personnes protégées à titre humanitaire outre-frontières suivantes :
(*a*) the country of asylum class; or	*a*) la catégorie de personnes de pays d'accueil;
(*b*) the source country class.	*b*) la catégorie de personnes de pays source.

[18] The country of asylum class is at issue in the current application. Section 147 of the *Regulations* indicates that a foreign national is a member of the country of asylum class if an officer has determined that they are in need of resettlement because they are outside all of their countries of nationality and habitual residence and, "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."

Member of country of asylum class	**Catégorie de personnes de pays d'accueil**
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	**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*) they are outside all of their countries of nationality and habitual residence; and	*a*) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
(*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.	*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.

Another criterion that must be established before a permanent resident visa will issue under subsection 139(1) is that, "the foreign national and their family members included in the application for protection will be able to become successfully established in Canada". This is found at paragraph 139(1)(*g*).

IV. ISSUES

a) Did the officer err in finding that the applicant was not credible?

b) Did the officer err by failing to consider whether the applicant was a member of the country of asylum class under section 147 of the *Regulations*?

c) Did the officer err in his analysis of establishment under paragraph 139(1)(*g*) of the *Regulations*?

V. STANDARD OF REVIEW

[19] The decision as to whether or not an applicant is a member of the Convention refugees abroad class or the country of asylum class involves questions of fact or mixed fact and law, and is consequently to be reviewed using the reasonableness standard (*Mushimiyimana v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1124, [2010] FCJ No 1402, at para 21; *Saifee v Canada (Minister of Citizenship and Immigration)*, 2010 FC 589, [2010] FCJ No 693, at para 25; *Nassima v Canada (Minister of Citizenship and Immigration)*, 2008 FC 688, [2008] FCJ No 881, at para 8. As such, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9, at para 47).

VI. ANALYSIS

a) Did the officer err in finding that the applicant was not credible?

[20] The applicant submits that it was wrong for the officer to base an adverse credibility finding on the applicant's testimony as to the circumstances of her husband's death. The documents submitted indicate that the husband died as a result of a "claymore" landmine. While the applicant's inference was discrepant with the official documents, her believe that her husband was shot, does not alter the fact that her evidence of what she observed was consistent with the document that she presented. Since the post mortem report showed that the body had multiple "perforations", counsel submits that it would have been plausible for the applicant to conclude that her husband had been shot. While her ultimate conclusion may have been wrong, counsel submits it should not have affected her credibility. I disagree.

[21] Upon reviewing the materials that were before the officer, and upon reviewing the officer's notes, I am unable to conclude that an unreasonable determination as to credibility was made in this regard. The record does not support counsel's contention that the applicant arrived at an honestly-held, if potentially erroneous, belief as to the cause of her husband's death. Instead, the record shows that the applicant was inconsistent as to what she believed had happened to her husband and was ultimately unable to explain these inconsistencies.

[22] At the beginning of the applicant's interview she explained that her husband had been "killed by [a] claymore attack". Later, however, she indicated that, "There was [a] claymore attack

and the army suspected him so they shot him." She explained the difference by saying that she "was emotional in the beginning but [was now] telling the truth." However, being emotional at the beginning of the interview did not explain why the applicant had indicated in her written narrative, submitted over two years prior, that her husband "was killed when he went to buy groceries by a claymore bomb planted on the roadside". When confronted with this discrepancy, the applicant simply said, "All I know is that he was shot by the army after the claymore attack."

[23] The difference is significant. If the applicant's husband had been shot by the Sri Lankan military because of suspicion that he was involved with the LTTE, then that would provide a basis for finding that the applicant, herself, might also be suspected and targeted. It would provide the applicant with a particularized fear upon which to base her application. Indeed, the applicant indicated in her interview with the officer, "The army might come and suspect me because they shot my husband on suspicion. So I thought I might get the same troubles." However, such a fear would not be sustainable if the applicant's husband had been a random victim of a road side bomb blast, as is suggested by the evidence, and as was indicated by the applicant herself in the narrative she submitted in 2008 and at the beginning of her interview with the officer in 2010.

[24] The applicant also challenges the credibility finding recorded in the officer's notes – but not stated in his refusal letter - regarding the details surrounding the Sri Lankan military's visit to her house. The applicant claims that she answered all the questions put to her truthfully and, as such, no negative credibility determination should have been made. Again, I find that on reviewing the record the officer's credibility determination was not unreasonable. The applicant was initially asked if she was ever "troubled" by the Sri Lankan military. She responded, "Sometimes they came

to my house, sometimes they came to the neighbourhood." Upon further questioning, however, she admitted that the military had only come to her house once.

[25] The applicant has not demonstrated that the officer erred in such a way as to render his credibility finding unreasonable. The record reveals significant inconsistencies in the applicant's evidence.

b) Did the officer err by failing to consider whether the applicant was a member of the country of asylum class under section 147 of the *Regulations?*

[26] The applicant submits that the officer erred by focusing his analysis on the existence of a well-founded fear of persecution. Although this is relevant to the question of whether or not the applicant is a Convention refugee, it is not relevant – nor is it required - for the purposes of determining whether the applicant is a member of the country of asylum class under section 147 of the *Regulations*. The applicant submits that the officer failed to consider whether the applicant, even without a fear of persecution, might nonetheless be eligible for a permanent resident visa under section 147.

[27] On the contrary, the officer's refusal letter and notes both demonstrate that he did, in fact, consider section 147 of the *Regulations*.

[28] As stated above, section 147 requires that in order for a foreign national to be considered a member of the country of asylum class, the foreign national must "have been, and continue to be,

seriously and personally affected by civil war, armed conflict or massive violation of human rights" in their home country. Citizenship and Immigration Canada's "OP 5 - Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes" (2009-08-13) operations manual instructs at section 6.9 that the words "seriously and personally affected" require there to have been a "sustained, effective denial of basic human rights." The burden of proof in this regard rests with the applicant (*Qurbani v Canada (Minister of Citizenship and Immigration)*, 2009 FC 127, [2009] FCJ No 152, at para 17).

[29] After having concluded that the credibility of the applicant's entire application was questionable, and after having found that the applicant was unable to explain what her fears were founded upon (given that neither the applicant nor any family member had ever been targeted on any basis), the officer concluded in his refusal letter that the applicant did not meet the definition of Convention refugee and also that she had not demonstrated having been "seriously or personally affected by civil war or armed conflict". This latter conclusion is clearly a finding as to the applicability of section 147. The officer also refers to the country of asylum class at multiple points in his CAIPS notes.

[30] Thus I am satisfied that the officer did address section 147 and, given the lack of reliable evidence demonstrating that the applicant had been "seriously or personally affected by civil war or armed conflict", within the meaning of the provision, he reasonably concluded that the applicant was not a member of the country of asylum class.

a) Did the officer err in his analysis of establishment under paragraph 139(1)(*g*) of the *Regulations*?

[31] It is unnecessary to consider whether the officer's determination in this regard was reasonable. It has already been established that the officer had reasonably concluded, based on credibility concerns and the absence of an articulated basis for fear, that the applicant was neither a member of the Convention refugee abroad class, nor the country of asylum class. That finding is determinative. The requirement that the applicant be a "a member of one of the classes prescribed by this Division", as set out in paragraph 139(1)(*e*) of the *Regulations*, has not been met and so, regardless of whether the requirement under paragraph 139(1)(*g*) is satisfied or not, the officer's ultimate decision to reject the applicant's request for a permanent resident visa is not reviewable.

[32] For the foregoing reasons, this application for judicial review is dismissed.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review be dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6099-10
STYLE OF CAUSE:	MATHINI SIVAKUMARAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	16 MAY 2011
REASONS FOR JUDGMENT AND JUDGMENT:	TREMBLAY-LAMER J.
DATED:	19 MAY 2011

APPEARANCES:

Michael Crane	FOR THE APPLICANT
Khatidja Moloo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT