

Federal Court



Cour fédérale

Date: 20110531

Docket: IMM-3000-10

Citation: 2011 FC 633

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LESLIE ROSHAN DIVAKARAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Docket: IMM-3003-10

AND BETWEEN:

LESLIE ROSHAN DIVAKARAN

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*, SC 2001, c 27 (the Act), for judicial review of two decisions by a pre-removal risk assessment officer (the officer), dated April 14, 2010, wherein the officer refused the applicant's application under subsection 25(1) of the Act to have his application for permanent residence processed from within Canada on humanitarian and compassionate (H&C) grounds and also wherein the officer determined that the applicant would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment, if he returned to Sri Lanka.

[2] The applicant requests an order setting aside the decisions of the officer and remitting the matter back for redetermination by a different officer.

Background

[3] Leslie Roshan Divakaran (the applicant) is a citizen of Sri Lanka who arrived in Canada on December 12, 2004 and claimed refugee protection.

[4] The applicant is a Tamil male from northern Sri Lanka. Before the Immigration and Refugee Board, Refugee Protection Division (the Board), the applicant alleged that he was forced to work for the Liberation Tigers of Tamil Eelam (LTTE) in the 1990s and was questioned by the army for his role in working with the LTTE. He also alleged being arrested, detained and beaten by the army in 2000 and that he was sought by the LTTE in March 2004.

[5] The Board denied the applicant's refugee claim in August 2006. The Board found that he had failed to establish the well foundedness of his fear or that he was ever detained.

[6] The applicant then filed H&C and pre-removal risk assessment (PRRA) applications. He received negative decisions for these applications on April 14, 2010.

Officer's Decisions

Pre-Removal Risk Assessment (PRRA)

[7] The officer first reviewed the Board's decision and noted that the Board found credibility to be a determinative issue.

[8] The officer acknowledged the applicant's alleged risks as a Tamil, including needing permission to reside in Colombo and facing daily difficulties living in Jaffna.

[9] The officer's principal concern was the lack of sufficient evidence. The officer found that there was insufficient evidence:

- (a) that the applicant had previously been targeted by the state, the LTTE or other non-state agents in Sri Lanka;
- (b) that the applicant would likely be targeted if he returned to Sri Lanka;
- (c) that the authorities have an interest in the applicant or that his whereabouts is being sought;

(d) that the LTTE have the resources or desire to target the applicant after their defeat by the Sri Lankan government forces; and

(e) that due to being out of the country for several years, the applicant will be detained and questioned or of interest to either the authorities or paramilitaries, or that he would be suspected of having LTTE links by the government for the same reason.

[10] The officer found that the applicant may face risk of being extorted upon return to Sri Lanka, but concluded that the evidence does not indicate that this is a regular occurrence or that these requests for money are linked to a persecutory crime. The officer did not find this to amount to persecution.

[11] The officer ultimately concluded that there is not more than a mere possibility that the applicant would face persecution or risk to life or cruel and unusual punishment.

H&C Application

[12] The same officer considered the applicant's H&C application. The officer's assessment of risk was similar to that done under the PRRA application.

[13] The officer found that any discrimination and harassment that the applicant would face as an ethnic Tamil would not rise to a level to constitute unusual or disproportionate hardship. The officer noted that the applicant may have to register if living in Colombo, but found that the applicant could live in Jaffna with his parents-in-law and found that there was insufficient evidence that his parents-

in-law would be targeted by the authorities or paramilitaries if he did so. The officer accepted that the applicant might have to go through security checkpoints and register with the police, if he returned to Jaffna, but found that this did not amount to unusual or disproportionate hardship.

[14] The officer found that although the applicant might be subjected to extortion demands, he was not satisfied that the applicant would be identified as a wealthy businessman and did not find that this factor alone warranted exceptional in-Canada processing.

[15] The officer considered the applicant's employment and marriage but concluded that these factors did not amount to establishment in Canada such that he would suffer unusual, undeserved or disproportionate hardship if he had to apply for permanent residence from outside of Canada.

Issues

[16] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the officer fail to consider cumulative persecution in the PRRA application?
3. Did the officer err in finding that the applicant would not face persecution if subjected to extortion?

Applicant's Written Submissions

[17] The applicant submits that the officer also failed to consider the effect of cumulative persecution. The United Nations High Commissioner for Refugees (UNHCR) has noted that Tamil males from northern Sri Lanka may be subject to persecution on cumulative grounds. The applicant relies on *Ozen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 521 in which Madam Justice Eleanor Dawson allowed a judicial review where the Board had examined five individual acts of discrimination but failed to assess their cumulative effect on the applicant. The applicant in the case at bar submits that in the H&C decision, the officer accepted that the applicant would be subjected to extortion demands and would face security constraints, police checks and be forced to register with the police in Colombo. However, the officer did not acknowledge all of these risks in the PRRA decision and therefore, did not assess the possibility of cumulative discrimination in the PRRA decision.

[18] The applicant further submits that the officer erred in finding that being subject to the opportunistic crime of extortion is not persecution or undue hardship.

Respondent's Written Submissions

[19] The respondent submits that the officer did consider cumulative persecution. The officer explicitly stated in the H&C decision that he considered the claim both "individually and cumulatively". While the officer did not make such an explicit statement in the PRRA application, this was unnecessary as there was only evidence of one action which could be found discriminatory.

As such, a cumulative persecution analysis was not required. The case law relied on by the applicant, on cumulative persecution, is not persuasive as it relates to instances where the evidence established a series of discriminatory actions, which is not the case here.

[20] Although the officer accepted that the applicant could be approached for bribes at the airport, the officer found that that this did not amount to persecution or undue hardship because it is only a possibility, it occurs to all Sri Lankans and it is not linked to a persecutory act. In the H&C decision, the officer was not persuaded that the applicant would be identified as a wealthy individual. This conclusion was reasonable based on the evidence.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

As I held in *Hnatusko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 18 at paragraphs 25 and 26, findings of an officer deciding an H&C or PRRA application involve determinations of mixed fact and law and are generally afforded deference by this Court.

[22] Any issues of procedural fairness involving a PRRA officer, however, will be determined on the correctness standard (see *Parshottam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 355, [2009] 3 FCR 527; *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at paragraph 43).

[23] **Issue 2**

Did the officer fail to consider cumulative persecution in the PRRA application?

The Federal Court of Appeal and this Court have both held that a series of discriminatory events which individually do not give rise to persecution, may amount to persecution when considered cumulatively (see *Retnem v Canada (Minister of Employment and Immigration)* (1991), 132 NR 53 (FCA); *Ampong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 35 at paragraph 42).

[24] The respondent submits that in the PRRA application, the officer only found sufficient evidence to support the risk that the applicant may be subject to extortion at the airport and that this one incident cannot create cumulative persecution.

[25] I find that the officer failed to consider cumulative persecution. For example, in the H&C decision, the officer accepted that the applicant may have to register with police and may be questioned by state security agencies if he wishes to reside in Colombo, or, if he resides in Jaffna, the applicant might be required to proceed through security checkpoints and register with the police.

[26] These findings of fact were absent from the PRRA decision. As both decisions were made on the same day by the same officer, these findings should have formed part of the PRRA decision and the officer should have assessed whether the applicant would face more than a mere possibility of persecution on the basis of these discriminatory actions.

[27] I cannot know whether the officer would have found cumulative persecution in the PRRA analysis had he considered these other discriminatory events.

[28] As such, based on the errors of law above, I must allow the judicial review for both the PRRA and H&C applications. If the PRRA is faulty, then the same would follow for the H&C.

[29] Because of my finding, I need not deal with the remaining issue.

[30] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[31] **IT IS ORDERED that** the application for judicial review is allowed, the decisions of the officer are set aside and the matter referred to a different officer for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001 c 27*

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

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,

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) 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.

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

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

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

(i) the person is unable or, because of that risk, unwilling to avail themselves 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.

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3000-10

STYLE OF CAUSE: LESLIE ROSHAN DIVAKARAN
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 12, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 31, 2011

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