Federal Court Cour fédérale

Date: 20110804

Docket: IMM-2348-10

Citation: 2011 FC 975

Ottawa, Ontario, August 4, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GNANAMALAR SIVABALASUNTHARAMPILLAI

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 a decision of a pre-removal risk assessment officer (the officer), dated August 21, 2009, wherein the officer determined that the applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment if returned to Sri Lanka.

[2] The applicant requests that the decision of the Board be set aside and the claim remitted for redetermination by a different member of the Board.

Background

[3] Gnanamalar Sivabalasuntharampillai (the applicant) is a 67 year old Tamil female national of Sri Lanka. The applicant has three children all residing in Canada.

[4] The applicant left Sri Lanka in December 1999 and stayed in the United Kingdom for one month before transiting through the United States to claim refugee protection in Canada in January 2000.

[5] The applicant's refugee claim was refused in May 2001.

[6] The applicant filed a pre-removal risk assessment (PRAA) application in June 2008.

Officer's Decision

[7] The officer found that there was not a serious possibility that the applicant would face a personalized and objectively identifiable risk of harm if she were returned to Sri Lanka.

[8] The officer found that the applicant had presented insufficient evidence to substantiate her claim. While the officer noted that the applicant's PRRA materials were substantial, there was

insufficient evidence of how the harms indicated in the materials were connected to the applicant. The applicant presented evidence of risk of harassment of war widows and risk of "night violence" in rural areas, without any evidence that the applicant would reside in rural areas or was a war widow.

[9] The applicant also presented evidence of general abuses by the Liberation Tigers of Tamil Eelam (LTTE), police arrests and human rights concerns in the armed conflict between the government forces and the LTTE. The officer found that these documents were largely discussing conditions prior to the government forces capturing the LTTE territories in May 2009. The officer found that the applicant's evidence did not support a finding of a serious possibility of risk of harm or persecution if she were returned to Sri Lanka today.

[10] The officer also found that the applicant's concerns regarding extortion and kidnapping were speculative in nature.

[11] Finally, the officer found that the applicant's failure to claim refugee asylum in the United Kingdom or the United States did not support a finding that the applicant has a subjective fear or persecution or risk of harm on returning to Sri Lanka.

Issues

[12] The applicant submitted the following issues for consideration:

1. The PRRA officer failed to disclose an adequate set of written reasons and failed to support all critical findings with a clear evidentiary basis.

2. The PRRA officer erred at law by questioning the applicant's credibility and subjective fear of return to Sri Lanka but failed to convoke an in-person interview.

Applicant's Written Submissions

[13] The applicant submits that the officer did not provide an evidentiary basis in support of the PRRA findings. The applicant is concerned that the officer did not indicate what, if any, sources were consulted in the decision making. The applicant submits that the officer did not note the specific passages considered in the applicant's materials.

[14] The officer stated that the document RIR LKA102249 was not provided by the applicant. The applicant submits that this demonstrates that the officer did not consider this document in the decision, although it originated from the Immigration and Refugee Board.

Respondent's Written Submissions

[15] The respondent submits that it was clear that the officer had considered all of the evidence presented by the applicant and that the officer was not required to consult external sources.

[16] The respondent submits that the officer did not need to consider the document RIR LKA102249 as it was dated December 2006 and concerned the LTTE's treatment of persons which

was no longer relevant to the officer following the May 2009 defeat of the LTTE by the government forces. In addition, the burden of proof lay with the applicant to provide the document to the officer if she wanted it to be considered in more detail.

[17] The respondent submits that the officer considered whether there was evidence of any harassment or abuse that was sufficient to substantiate the applicant's claim, but found that there was not. The applicant's allegations of harm were speculative in nature and the officer therefore concluded that there was no serious possibility that she would face a personal identifiable risk of harm.

Analysis and Decision

Standard of Review

[18] Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[19] This Court has confirmed that the standard of review which applies to the findings of an officer deciding a PRRA application is that of reasonableness (see *Hnatusko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 18 at paragraphs 25 and 26). However, any issues of procedural fairness, including the right to be heard and a lack of adequate reasons, will be reviewed

on the correctness standard (see *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43).

[20] **Issue**

The PRRA officer failed to disclose an adequate set of written reasons and failed to support all critical findings with a clear evidentiary basis.

The officer concluded that the applicant's fears were generalized in nature. The officer concluded that since the war between the LTTE and the government ended in May 2009, the applicant's fears no longer existed in August 2009, the date of the decision. Conditions were different for the applicant than outlined in her documentation which was from 2006 and 2007.

[21] I have difficulty with this conclusion as the officer did not, in the decision, refer to any evidence to support the conclusion. The only evidence in the record shows that the applicant's fears were most likely objectively grounded based on the evidence from 2006 and 2007.

[22] The officer's conclusion about conditions in August 2009 may have a basis but this I cannot determine as the officer's reasons do not tell me on what evidence the officer's conclusion was based.

[23] As a result, I am of the view that the officer's reasons, in this respect, are inadequate in that the evidentiary basis for the conclusion is not stated.

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

[25] The application for judicial review is therefore allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

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

JUDGMENT

[27] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the officer is set aside and the matter is 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.
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 themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
. . .	. . .
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Immigration and Refugee Protection Regulations, SOR/2002-227

161.(1) A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.	161.(1) Le demandeur peut présenter des observations écrites pour étayer sa demande de protection et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil.
(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(a) of the Act and indicate how that evidence relates to them.	(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113a) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.
167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2348-10
STYLE OF CAUSE:	GNANAMALAR SIVABALASUNTHARAMPILLAI - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 10, 2011
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	August 4, 2011

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