Federal Court  Cour fédérale

Date: 20111110

Docket: IMM-1350-11

Citation: 2011 FC 1277

Toronto, Ontario, November 10, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

GNANATHAS RAJAGOPAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a young Tamil adult male, a citizen of Sri Lanka. He left that country and entered the United States of America where he made certain applications not relevant here. Subsequently, he entered Canada and made a refugee claim, but he was found to be ineligible. Thereafter, he sought a pre-removal risk assessment (PRRA) in which he received an unfavourable

decision. It is that decision, provided in a letter dated January 21, 2011, which is the subject of this application for judicial review. For the reasons that follow, I am allowing this application.

[2] The Applicant has raised essentially three issues:

1. Should the PRRA Officer have convoked a hearing?
2. Did the PRRA Officer apply the wrong standard in determining risk?
3. Did the PRRA Officer make an erroneous determination in respect of the written evidence?

[3] A pre-removal risk assessment arises out of the provisions of section 97 of the *Immigration and Refugee Protection Act* (IRPA), SC 2001, c 27, as amended, and requires an assessment as to the risk to which a person may be exposed if that person were to be returned to his or her country of origin. It is common ground that the applicant bears the burden of adducing evidence in that respect and that the appropriate standard to be applied by the Officer assessing that risk is whether or not that person would face more than a mere possibility of persecution if he or she were to be returned to their home country today.

[4] Section 113(b) of IRPA provides that an Officer assessing such risk may hold a hearing if, based on factors that may be found in Section 167 of the *Immigration and Refugee Protection Regulations* (IRPR), SOR/2002-227, as amended, are met. Section 167 reads:

167. *For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors*	***167.*** *Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une*

are the following:	*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.*

[5] That provision was considered by Justice Phelan of this Court in *Tekie v Canada (MCI)*, 2005 FC 27, particularly at paragraphs 15 and 16 where he determined that that provision becomes operative where credibility is an issue which could result in a negative PRRA decision.

[6] Recently, Justice Snider of this Court considered these provisions in *Mosavat v Canada (MCI)*, 2011 FC 647, particularly at paragraphs 7 to 14. I summarize her conclusions, which I adopt as my own:

a. In considering whether the Officer should have convoked a hearing, the applicable standard of review is reasonableness;

b. On this standard, the Court can only intervene if the Officer's decision does not fall within the range of possible, acceptable outcomes;

c. An oral hearing is only required if all the factors set out in section 167 of IRPR are met;

d. The Applicant bears the burden of proof in PRRA applications; and

e. Each case must be assessed on its own particular facts.

Issues

1. Should the PRRA Officer have convoked a hearing?

[7] A review of the Officer's decision clearly indicates that the Officer was concerned about the credibility of the Applicant's evidence in respect of several issues, at least one of which the Officer determined was central to the Applicant's case. These include:

- The Applicant had been inconsistent about his employment: he claimed he was a taxi driver; but when he arrived in the USA, he told airport officials he worked in the pharmaceutical business. The Applicant explained at the Pre-Screening Interview that he said that because his father is a pharmacist. The PRRA Officer also noted that the Applicant had not corroborated his claim of being a taxi driver other than through family members' statements. The Officer described this as a "central" issue.

- The Applicant did not adequately explain how he managed to elude checkpoints when he fled to Colombo.

- The Applicant's father's notarized letter did not explain how he immediately knew the Applicant had been arrested, nor does it explain how the father managed to bribe officials to release the Applicant.

- The Applicant's brother did not have any first-hand knowledge of the facts related to the application, and therefore his affidavit was accorded little weight.

[8] The Officer then proceeded to refer to a document that the Officer had made of record, a *World Organization Against Torture* report dated June 2010, to conclude that, since there was no centralized list of detainees, it was unlikely that the Applicant would be identified as having LTTE links. As Respondents' Counsel conceded, this reference was clearly wrong. That report said that since there was no such list, there was *"increased"* vulnerability of detainees.

[9] In the particular circumstances of this case, the Officer, acting reasonably, should have convoked a hearing.

2. Did the PRRA Officer apply the wrong standard in determining risk?

[10] As previously stated, the correct standard is whether or not the person would face more than a mere possibility of persecution if he or she were to be returned to their home country. The Officer states this standard in the Conclusion of the decision at issue.

[11] However, in the Officer's analysis under the heading *Risk to Failed Asylum Seekers*, and again in the subsequent heading *General Country Conditions: Risk to Young Tamil Males* just preceding the Officer's Conclusion, the Officer finds that the applicant "would not be at particular risk". This is not the standard.

[12] Therefore, from the reasons, it is not clear whether inconsistent or wrong standards were applied. The matter should be redetermined applying the correct standard.

Conclusion

[13] The matter is returned for redetermination by a different Officer applying the correct standard and with a hearing. Both Counsel agreed, as do I, that there is no question for certification.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is allowed.

2. The matter is referred back for redetermination by a different Officer, who shall hold a hearing.

3. There is no question for certification.

4. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1350-11
STYLE OF CAUSE:	GNANATHAS RAJAGOPAL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 7, 2011
AMENDED REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	November 10, 2011

APPEARANCES:

Michael Crane	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Michael Crane Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS