Federal Court Cour fédérale

Date: 20121207

Docket: IMM-2167-12

IMM-2169-12

Citation: 2012 FC 1443

Ottawa, Ontario, December 7, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**DEVEKA RAJANAYAGAM,
SANGEETHA RAJANAYAGAM,
GURUPARAN RAJANAYAGAM, and
KARTHTHEEPAN RAJANAYAGAM
(BY HIS LITIGATION GUARDIAN
DEVEKA RAJANAYAGAM)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek to set aside the negative decision on their application for a Pre-Removal Risk Assessment [PRRA] (IMM-2167-12) and the negative decision on their application for permanent residency on humanitarian and compassionate grounds [H&C] (IMM-2169-12).

[2] The applicants are citizens of Sri Lanka. Ms. Deveka Rajanayagam is the mother of daughter Sangeetha, and sons Guruparan and Karththeepan, aged 24, 20, and 12, respectively. They arrived in Canada in November 2005 and sought protection as refugees. The Rajanayagams say they are Tamils from the north of Sri Lanka with imputed links to the Liberation Tigers of Tamil Eelam and that they will face persecution if returned to Sri Lanka. The Refugee Protection Division of the Immigration and Refugee Board [RPD] rejected their claims in January 2007, on the basis of Ms. Rajanayagam's credibility.

[3] The applicants then made H&C and PRRA applications, both of which were rejected in December 2009. The applicants were scheduled to be removed from Canada on November 30, 2010. They retained new counsel and submitted fresh PRRA and H&C applications. They were successful in obtaining a stay of their removal pending the final determination of these applications.

[4] Counsel for the applicants submits that the officer made a considerable number of errors in reaching each decision: four in the PRRA decision and eight in the H&C. I find that there is one very strong and determinative reason for granting the judicial review of the H&C decision and need not therefore address the other seven alleged errors. I find that none of the alleged errors in the PRRA decision are justified and I will dismiss that application.

H&C Decision (IMM-2169-12)

[5] Subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, provides that the Minister may grant an applicant permanent resident status if "it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

[6] In order to provide guidance to officers tasked with such decisions and to ensure some measure of consistency in decision-making, the Minister has published *IP 5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* [IP5 Manual]. Therein the criterion of "unusual, undeserved or disproportionate hardship" is found. It has been adopted by this Court as appropriate and thus has more than mere administrative authority, as was observed by Justice Shore in *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, at para 38:

> Moreover, the criterion of "unusual, undeserved or disproportionate hardship" or "difficultés inhabituelles et injustifiées ou excessive" has now been adopted by this Court in its decisions on subsection 25(1), which means that these terms are more than mere guidelines (*Liniewska v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 591, 152 A.C.W.S. (3d) 500, at paragraph 16; *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 465, 147 A.C.W.S. (3d) 1050, at paragraph 35; *Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162, 146 A.C.W.S. (3d) 338, at paragraph 16; *Pashulya v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275, 257 F.T.R. 143, at paragraph 43; *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358, 2002 FCA 125, at paragraphs 23 and 28; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 17).

[7] At the outset of the H&C decision, the officer stated: "I consider that an unusual and undeserved hardship is a disproportionate hardship." The officer thereby conflated the criterion

and did so unreasonably. Even the officer's own employer distinguishes these terms in the IP5 Manual: "Sufficient humanitarian and compassionate grounds may also exist in cases that do not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances."

[8] I am unable to accept the submission of the respondent that "it is clear from a review of the H&C decision that, although the Officer may have used different wording, the Officer considered whether the hardship alleged by the Applicants was unusual and undeserved or disproportionate as defined by the Guidelines." That is not at all clear from reading the decision. On the contrary, the officer continually conflates these criteria and regularly uses the phrase "disproportionate" to describe the alleged hardship, as in the following examples:

- "the evidence does not show that the applicants have established themselves to such an extent that to return to [Sri Lanka] would represent disproportional hardship."
- "the situation [was not] sever [*sic*] to the point as being [*sic*] a disproportionate hardship."
- although it would be a hardship, the applicants had "not shown that [returning to Sri Lanka] would be a disproportionate [hardship] for [Karththeepan]."
- "the discrimination and violence that they may face in [Sri Lanka as Tamils is not] to be a disproportionate hardship for [the Rajanayagams]."
- being accused of having links to the LTTE "may be a hardship for the applicants but it is not described as a disproportionate one."

- "[n]either the evidence submitted y the applicants nor the recent country reports on discrimination or mistreatment of women in [Sri Lanka] show that the discrimination is probable and of a frequency or intensity that the discrimination would amount to disproportionate hardship for them in [Sri Lanka]."

[9] On this basis alone, the decision is unreasonable and must be set aside.

PRRA Decision (IMM-1267-12)

[10] The "new" evidence before the officer in the PRRA application consisted of affidavits of the three adult applicants, one letter from Sri Lanka, two reports from a Psychologist, Dr. Thirwell, and updated country condition information. In broad strokes, the officer found that the scant new evidence provided by the applicants did not show that there was more than a mere possibility that they would be persecuted in Sri Lanka, or that there were substantial grounds to believe that they would be exposed to the risks described in subsection 97(1) of the Act.

[11] The applicants submit that four issues are raised by the officer's PRRA decision:

1. Whether the officer breached the duty of fairness owed to the applicants by failing to interview them or to provide them with notice of his concerns with respect to the credibility of their evidence;

2. Whether the officer breached the duty of fairness by failing to give notice that he would consider the availability of an internal flight alternative;

3. Whether the officer erred in his analysis of state protection; and

4. Whether the officer erred in his assessment of the medical evidence.

1. Failure To Convoke An Oral Hearing

[12] The applicants say that because the officer did not believe that they were in Sri Lanka prior to coming to Canada and that they suffered the ordeal they claim, he erred by failing to convoke an oral hearing pursuant to paragraph 113(b) of the Act and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[13] In my view, the applicants have failed to demonstrate that an oral hearing was required. Paragraph 167(c) of the Regulations provides that the applicants, if they are to succeed, must demonstrate that the new evidence discredited by the officer would, "if accepted, have justified allowing the application for protection."

[14] The affidavit evidence of Sangeetha and Guruparan was discredited, but it is unexplained how, if at all, accepting their evidence would have justified allowing the application for protection. Their affidavit evidence, to the extent it is even "new," recounts incidents which the RPD, through their mother's evidence, found not credible, it pre-dates 2006, and in light of the substantially changed circumstances in Sri Lanka since then, could have little if any bearing on the forward-looking risk facing the applicants. Their evidence, even if believed, would not have been determinative and accordingly, the officer was not obliged to convoke an oral hearing.

2. Notice of Internal Flight Alternative

[15] The officer found that these applicants, even if at risk, had an IFA in Colombo. They say that the officer erred in failing to specifically bring to their attention that this IFA was being considered.

[16] I agree with the submission made by the respondent that an applicant cannot successfully allege unfairness in failing to bring to his or her attention a specific IFA when it was the applicant and not the officer who first raised it. That is the situation here. The applicants, in their written PRRA submission, wrote as follows:

> The UNHCR, when addressing the option of Internal Flight Alternative in their guideline, states, "In the case of a prospective IFA/IRA in Colombo, it should be borne in mind that young Tamil men originating from the north and east of the country could encounter closer scrutiny during the police registration process and may, in some cases, be denied a permanent residence permit." No Internal Flight alternative therefore exists for this family and they would, upon return to Sri Lanka, return to the northern Tamil region to live.

[17] The applicants were not only aware of the issue of Colombo being an IFA, they raised it. There is no error.

3. State Protection Analysis

[18] The applicants submit that the officer erred by (a) confusing the protection that could be afforded by Guruparan, then 19, with state protection, and (b) focusing on the measures being taken by the Sri Lankan government and not the effectiveness of those measures and in selectively relying on evidence in the record.

[19] The officer did not base his state protection finding on Guruparan's protection. Rather, the officer considered, based on the record, that Guruparan's presence was a relevant consideration as to whether the female members of the applicant family would face persecution or mistreatment. He said:

> Although there are reports of some discrimination and abuse of women in [Sri Lanka], often the abuse or discrimination, such as sexual assault, is described to more frequently occur in former conflict zones and to women who do not have a male protector or an adult male who accompanies them. The applicants include Guruparan, a male who is now 19 years old. […]

[20] There was nothing unreasonable, or even incorrect in the officer considering, in light of the information before him, that the actual situation of this family included an adult male and the impact this would have on the allegation that the women would be at risk.

[21] As to the other error, I agree with the applicants that the officer fails to specifically address the passage in the US DOS Report of 2009, quoted by the applicants in their submission, which states: "The law prohibits rape and domestic violence but it was not effectively enforced. Sexual assault, rape, and spousal abuse were pervasive societal problems."

[22] The officer notes that the evidence indicates that sexual assault and rape of women were more common in the conflict areas and among women who had no male in the family. Critically, the officer also found that "Neither the evidence submitted by the applicants nor the recent country reports on serious mistreatment of women in SL show that treatment is probable and of a frequency or intensity that would amount to a serious mistreatment described in A97." The use of the phrase "pervasive societal problems" may hint at a frequency or intensity

sufficient to meet the requirement of section 97 of the Act, but I cannot say that the officer's assessment, within the context of the evidence as a whole, was unreasonable.

4. Medical Evidence

[23] The applicants submit that the officer was "obligated to consider the overall medical history of Ms. Rajanayagam" are erred by failing to do so. They reference the two letters from a psychologist, Dr. Thirwell.

[24] The officer considered these reports, which said that Ms. Rajanayagam suffered from a post-traumatic stress disorder; however, the officer concluded that the RPD's credibility findings had more probative value as to the allegations of past mistreatment. That assessment was certainly open to the officer and it was not unreasonable.

[25] As to the forward-looking issues implicated by the letters, the officer found that the applicants had not provided evidence to show that due to the depression and stress identified in the letters, the applicants would face persecution or mistreatment as defined in the Act. That assessment, as well, is unassailable. The applicants have not pointed to any evidence in the record to the contrary.

Conclusion and Certified Question

[26] For the reasons given, the application for judicial review in IMM-2169-12 is allowed and that in IMM-2167-12 is dismissed

[27] The applicants proposed the following three questions for certification, all of which the respondent opposes:

1. Does an immigration officer commit a reviewable error in excluding from her consideration on a humanitarian and compassionate application, information and evidence which was, or could have been, previously considered by the Refugee Division determining the merits of a refugee claim and/or by an officer determining the merits of an application under the pre-removal risk assessment program?

2. Where a person presents evidence of establishment, acquired after her refugee claim and/or PRRA application was refused, is an officer entitled to discount entirely, or give diminished weight, to this evidence in making a decision on a humanitarian and compassionate application because it was acquired at a time when, in the officer's opinion, the person ought to have left Canada?

3. Is an officer required on a PRRA application to consider evidence from an adult applicant about past events relating to her fear of returning to her country, who at the time of his or her refugee hearing was a child and did not testify to these past events, the veracity of which was rejected by the Refugee Division on the basis of rejecting the testimony of the applicant's parent?

[28] The first two proposed questions relate principally, if not entirely, to the H&C decision. The basis on which it has been decided is not reflected in the questions and accordingly, they are not appropriate for certification.

[29] The third question is also not one that meets the test for certification. As noted above, the issue of the evidence of these children and its relevance turns ultimately on whether it would have affected the outcome. I have found that it would not and accordingly, an answer to the question is not dispositive of any appeal from this decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in Court File IMM-2167-12 is dismissed and no question is certified; and

2. The application for judicial review in Court File IMM-2169-12 is allowed, the decision is set aside, the applicants' application for permanent residence on humanitarian and compassionate grounds is remitted to a different officer for determination, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-2167-12**
STYLE OF CAUSE:	DEVEKA RAJANAYAGAM ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
	- and -
DOCKET:	**IMM-2169-12**
STYLE OF CAUSE:	DEVEKA RAJANAYAGAM ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 31, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	December 7, 2012

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