

Federal Court



Cour fédérale

Date: 20141022

Docket: IMM-4311-13

Citation: 2014 FC 1006

Toronto, Ontario, October 22, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**SIVANESAM SIVANANTHAN
SUTHARSHINY SIVANANTHAN
SIVATHANUSHAN SIVANANTHAN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

[1] The present Application is a challenge to a negative Pre-Removal Risk Assessment (PRRA) decision dated April 24, 2013. The history respecting the Applicants' claim for protection is stated by Counsel for the Applicants as follows:

The Applicants are a 55-year old female (Sivanesam), her 19-year old son (Sivathanushan) and her 20-year old daughter (Sutharshiny). All of the Applicants are Tamil and from Sri Lanka.

The Applicants had their refugee hearing before the Immigration and Refugee Board on August 16, 2011. On September 9, 2011, their refugee claims were refused. The Member who decided their refugee claim accepted their allegations of risk as true. The Member made no adverse credibility findings against the Applicants. The Applicants' claim for protection in Canada was based on their targeting by a pro-government paramilitary group, the attempted recruitment of the 19-year old Applicant by the paramilitary group, and the threats by a paramilitary leader to marry the 20-year old Applicant. The two younger Applicants were detained and abused by members of the paramilitary group.

The Member refused their refugee claim because he said that the risk the Applicants faced was from criminal activity and they were therefore not eligible for protection. The Member also said that the PLOTE was not active in Colombo and that the Applicants would therefore be safe if they moved to the Sri Lankan capitol [sic]. (Memorandum of Fact and Law, paras. 5 – 7)

[2] The primary argument made by Counsel for the Applicants before the PRRA Officer (Officer) was that, on cogent evidence that post-dates the negative RPD decision, the Applicants would suffer s. 96 and s. 97 risk if they were required to return to Sri Lanka as “Tamil failed asylum seekers”. The evidence was placed on the record directly, and also in the form of a proffered positive PRRA decision in which the evidence was applied.

[3] Counsel for the Applicants argues that the actual positive PRRA decision has precedential value and, therefore, it should be applied in the present case. Without deciding that issue, I am satisfied that the present Application turns on whether the Applicants' evidence, and not the proffered decision itself, was fully and properly considered in reaching the decision under review.

[4] The most direct evidence of risk to the Applicants upon return is found in a Report prepared by the Medical Foundation for the Care of Victims of Torture entitled *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka: 2009 – 2011* (Tribunal Record, pp. 77 – 103) which is quoted in Counsel for the Applicants’ argument (Tribunal Record, p. 52) and more fully quoted in the positive PRRA decision advanced for consideration (Tribunal Record, pp. 160 – 161) as follows:

Return to Sri Lanka from abroad: 14 of the 35 cases report periods of residence or travel abroad preceding detention and torture: five traveled for educational purposes, three for family reasons and four for the purpose of seeking refuge outside of Sri Lanka. In the remaining two cases, the purpose of travel was not stated. Of the four who sought refuge abroad, three were forcibly returned to Sri Lanka. In one case the individual had unsuccessfully claimed asylum in the UK a number of years earlier but was returned to Sri Lanka from another European state. Another was returned from a European state after two years of residence, having been refused asylum there. Of the 10 cases involving individuals who traveled abroad for non-asylum purposes, nine returned voluntarily to Sri Lanka (all from the UK). Several report returning for temporary visits for a variety of family reasons and two due to the disappearance of their fathers. One individual was en route to a non-European state for family reasons, but was returned en route due to the use of false documents.

All of the 14 individuals who had returned to Sri Lanka after a period abroad, whether they left Sri Lanka through a legal route or otherwise, were subsequently detained and tortured. In five of these cases, the episode of detention and torture documented in the MLR occurred over a year and up to seven years after return. However, in nine cases the individual was detained within days, weeks or a month of their return. Of these nine cases, six were detained in Colombo, either from their home, at checkpoints or from a lodging house. Others were detained at Checkpoints elsewhere in the country or directly from the airport upon arrival.

[5] With respect to the risk that the Applicants would face if they are returned to Sri Lanka, the Officer made the following findings of fact:

In the PRRA application and submissions, counsel states "the situation in Sri Lanka is extremely unstable for failed refugee claimants who are deported back to Sri Lanka. I have reviewed and considered the country condition reports and articles submitted in support of this application that post-date the RPD hearing and decision. These articles and reports state that a number of Tamils who were returned from the United Kingdom (and other countries) were arbitrarily arrested and tortured upon their return to Sri Lanka; those at significant risk are Tamils with an actual or perceived association with the LTTE. These reports and articles also indicate that political activists (including those who have been politically active abroad), human rights defenders, civil activists, and journalists are at risk of forced disappearance, torture and arrest. I do not find that the applicants have sufficiently tied these articles to a personal risk. Furthermore, insufficient evidence has been submitted to indicate the applicants fit the profile of those who have been identified as being at risk e.g. political activists, journalists, human rights defenders, former members of the LTTE or individuals with perceived ties to the LTTE. I find that the content of these articles and reports is not sufficient evidence to establish that the applicants' profiles would be of interest to the Sri Lankan authorities. I also find these reports and articles are insufficient on their own to overcome the findings of the RPD panel or to establish the existence of a new risk development. As such, I grant them low weight.

[Emphasis added] (Decision, pp. 11 – 12)

[6] It appears from the statement first emphasised above that the Officer accepted the evidence that Tamil returnees are at risk, but also found that Tamils with an actual or perceived association with the LTTE, and those that fit a special profile, are more at risk. The Officer then proceeded to find that, because the Applicants do not fit a special profile, they are not at risk. Not only is this finding contrary to the evidence that Tamil returnees suffer arbitrary detention and torture, it is unintelligible.

[7] At the minimum level, what the Officer was required to do is determine whether, because of their Tamil ethnicity, the Applicants would suffer more than a mere possibility of persecution should they return to the Sri Lanka. In my opinion, having regard to the cogent evidence on the record, the Officer completely failed to meet this requirement.

ORDER

THIS COURT ORDERS that the decision under review is set aside and the matter is referred back for redetermination by a different PRRA officer.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4311-13

STYLE OF CAUSE: SIVANESAM SIVANANTHAN, SUTHARSHINY
SIVANANTHAN, SIVATHANUSHAN SIVANANTHAN
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 21, 2014

ORDER AND REASONS BY: CAMPBELL J.

DATED: OCTOBER 22, 2014

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