Federal Court  Cour fédérale

Date: 20180320

Docket: IMM-3324-17

Citation: 2018 FC 313

Ottawa, Ontario, March 20, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SURESH NAGARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of an immigration officer to issue a negative Pre-Removal Risk Assessment ("PRRA") to the Applicant, a 27 year old Sri Lankan man of the Tamil ethnic group. On his PRRA application, he submitted three letters as evidence of his previous persecution as a perceived member or supporter of the Liberation Tigers of Tamil Eelam. These letters also spoke to the future danger and risk of persecution the Applicant faces

based on his status as a person of interest to the Sri Lankan authorities. All three letters were afforded little weight by the immigration officer. For the reasons that follow, the decision is set aside and returned for reconsideration by a different PRRA officer.

II. Facts

A. *Applicant's Mistreatment in Sri Lanka*

[2] For the entirety of his childhood and youth, Suresh Nagarasa's country has been plagued by a civil war between the independentist Liberation Tigers of Tamil Eelam ("LTTE") and the Sri Lankan Army ("SLA"). The conflict is overlaid with an ethnic dimension that involves longstanding tensions between the Sinhalese majority and the Tamil minority. As is so often the case in armed conflict, civilians have suffered immensely from the decades-long civil war. The Applicant in these proceedings is no exception.

[3] On two occasions, the Applicant claims to have been mistreated at the hands of the Sri Lankan authorities because they perceived him to be a supporter of the LTTE. The first instance was in May 2009, toward the end of the Sri Lankan civil war. The Applicant was separated from his family, arrested, detained, and tortured in a SLA camp over the course of three months. He was scarcely an adult at the time of his detention, and his own description of the mistreatment he suffered merits reproduction in full:

> During my detention, I was accused of being a Tiger and I was tortured. I was hung upside down and beaten. Members of the Army inserted needles underneath my nails. They would get drunk and hit me mercilessly. They did not give me enough food and water. I was fed only once a day. I was given bad, sometimes

> inedible, food. I was forced to swallow my own urine. I was regularly beaten with sticks, batons and rifle butts.

[4] The Applicant was transferred from the SLA camp to the Nellukalam internally displaced persons ("IDP") camp in August 2009, and then to Kadirkamar IDP camp in February 2010, where he was reunited with his family. They were released the following month.

[5] The Applicant began studying journalism at Jaffna University but, before long, he was again apprehended by the Sri Lankan authorities. This time, they accused him of organizing a "Hero's Day" event on November 27, 2012, which is a banned LTTE celebration. For this, the Applicant was detained at Jaffna Army Camp for one month, where he claims to have been separated from his fellow students, asked for the names of the organizers of the Hero's Day event, accused of being a Tamil Tiger or LTTE supporter, and physically mistreated three times. He was released on the condition that he report weekly to the SLA.

[6] Due to his fears for his safety and security, the Applicant's father sold some of his land and paid a smuggler to take the Applicant to Canada, where some of their relatives reside. Since his departure, the Applicant has been informed by his family that men from the SLA and Criminal Investigation Division ("CID") visited his village to inquire as to his whereabouts. Moreover, his mother has received phone calls and visits from the SLA, threatening the Applicant's life should he return to Sri Lanka.

B. *Immigration Proceedings in Canada*

[7] The Applicant entered Canada and made a claim for refugee protection, which was denied by the Refugee Protection Division ("RPD") on October 30, 2013. The RPD member considered the Applicant to be lacking in credibility, and found that he neither established that he had ever been suspected of LTTE membership or affiliation, nor that he had been detained or tortured by the authorities.

[8] The Applicant was ordered to be deported. Fearing for his safety, he did not appear for his deportation and went "underground" instead. In April 2017, desperate and fearful that he would be returned to Sri Lanka, he tried to commit suicide by ingesting a chemical spray. Mercifully, he was unsuccessful and, having passed out near a doctor's office, he was detained by York Regional Police, first at Maplehurst Correctional Centre and then at Central East Correctional Centre in Ontario. The Canada Border Services Agency was notified, and the Applicant was given a notice to apply for a PRRA.

[9] The Applicant's PRRA application contained three letters that were not before the RPD: 1) a letter from a Sri Lankan Member of Parliament ("MP") Sivagnanam Shritharan, dated June 2, 2017; 2) a letter from a Sri Lankan Justice of the Peace ("JP") Nishanthini Niranjan, dated April 7, 2017, and 3) a letter from the Applicant's mother, Nagarasa Manimekalai, dated May 19, 2017. The Applicant also provided documentary evidence to illustrate that members and perceived supporters of the LTTE continue to face surveillance in Sri Lanka, as well as a statutory declaration attesting to the history of mistreatment he had suffered in Sri Lanka.

[10] Senior Immigration Officer B. Au (the "Officer") rejected the PRRA application (the "PRRA Decision"). The form letter accompanying the PRRA Decision indicates that he was rejected because "[i]t has been determined that you would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to your country of nationality or habitual residence." The Officer found that MP Sivagnanam Shritharan's letter did not explain how he learned of the Applicant's arrest in 2009, and provided insufficient evidence that the MP had "…personally witnessed or has firsthand knowledge of these incidents" (PRRA Decision, p. 6). Similarly, with respect to the Applicant's November 2012 arrest and detention, the Officer found that the letter lacked details, thereby deeming it to be of low probative value (PRRA Decision, pp. 6-7). Finally, the letter was found to contain hearsay statements about whether the Applicant remained a person of concern to the Sri Lankan authorities because it did not explain how the author knew that the Applicant's name is on a Sri Lankan "watch" list (PRRA Decision, p. 7).

[11] The Officer also took issue with JP Niranjan's letter. The Officer noted the absence of details, namely "…on which date the 'Heroes Day' occurred, where the applicant was detained, how he was treated in detention, when he was released, and what the conditions of his release were" (PRRA Decision, p. 8). Similarly, the Officer found that the JP had not specified how the Applicant was being monitored by the authorities, or how she became aware that the authorities were monitoring the Applicant (PRRA Decision, p. 8). With respect to the ongoing threats by the SLA and CID, the Officer observed that the JP's letter did not constitute sufficient evidence that she had firsthand knowledge of the incidents, and found that it was likely that she learned of these events from the Applicant's family (PRRA Decision, p. 8). Due to the perceived subjective

nature of the assumed source of her information, the Officer found the JP's letter to be of low probative value and assigned it little weight (PRRA Decision, p. 8).

[12] With respect to the letter from the Applicant's mother, the Officer found it to be subjective because "she has a vested interest in the outcome of the application," and thus assigned it little weight (PRRA Decision, p. 9).

[13] Finally, with regard to the Applicant's documentary evidence, the Officer acknowledged that the Sri Lankan authorities continue to monitor Tamils with perceived links to the LTTE. However, the Officer found that the Applicant provided insufficient evidence to suggest that he would be of interest to the authorities (PRRA Decision, p. 9). The Officer further found that the Sri Lankan government has been demonstrating its efforts and ability to address the discrimination facing the Tamil population, citing a 2016 US Department of State Human Rights Report for Sri Lanka, and a report of the IRB Research Directorate (PRRA Decision, p. 9). Accordingly, the Officer concluded that there is insufficient evidence to conclude that the discrimination faced by Sri Lankan Tamils amounts to persecution (PRRA Decision, p. 9).

[14] The Applicant filed an application for leave and judicial review of the PRRA Decision on July 31, 2017. Meanwhile, he received a "Notification for Removal Arrangements" dated August 10, 2017, and scheduling his deportation for August 28, 2017. Accordingly, the Applicant brought a motion to stay his removal. While waiting for a decision on the stay, the Applicant became stressed and hopeless, and attests that his mental health deteriorated as a result of his

ongoing incarceration. He attempted to take his life again on or around August 24, 2017, and accordingly was put in a medical centre where he received help.

III. Issues

[15] In my view, one central issue arises on this application for judicial review, namely: was the Officer's assessment of the Applicant's evidence reasonable?

IV. Analysis

A. *Standard of Review*

[16] The parties agree that the standard of review applicable to this issue is reasonableness. As the Supreme Court of Canada explained in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 62 [*Dunsmuir*], where the appropriate standard of review is established in jurisprudence, a full analysis of the standard is unnecessary. This Court has found that the decision of a PRRA officer is reviewable on a standard of reasonableness: *Korkmaz v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1124 at para. 9. I shall adopt this standard in the case at bar.

B. *Was the Officer's assessment of the Applicant's evidence reasonable?*

[17] The Applicant argues that the Officer erred by attributing little probative value to the three letters included in the Applicant's PRRA submissions. The Applicant submits that these letters corroborate key aspects of the Applicant's experiences in Sri Lanka and, contrary to the Officer's determination, contain elements within the personal knowledge of their authors. By

way of example, the Applicant points to the MP's letter, which states that he was personally involved in securing the Applicant's release after the November 2012 incident, and that he had personally made inquiries that led him to discover that the Applicant was on a government watch list. The Applicant argues that his mother's letter recounts the threatening phone calls and visits that she personally received since 2013. By discounting the corroborative evidence while simultaneously recognizing the threats faced by Tamils who are perceived to be affiliated with the LTTE on the basis of objective documentary evidence, the Applicant argues that the Officer rendered an unreasonable decision.

[18] In a related argument, the Applicant submits that the Officer unreasonably took a segmented and selective approach when analyzing the evidence. According to the Applicant, the letters, statutory declaration, and country condition documents ought to have been considered holistically; instead, the Applicant submits that the letters were parsed and discounted without analysis of how they fit together.

[19] On the other hand, the Respondent submits that the Officer's decision was reasonable. The Respondent argues that, in view of the clear RPD findings, the Applicant was obliged to provide detailed and persuasive new evidence to establish the PRRA claim, and that the letters provided by the Applicant were largely not "new". The Respondent argues that the materials provided by the Applicant were vague and insufficient. Citing *Hernandez v Canada (Citizenship and Immigration)*, 2015 FC 578 at para. 27, the Respondent asserts that evidence provided by third parties, who cannot independently verify the facts to which they testify, may be assigned little weight without a credibility assessment.

[20] The Respondent proceeds to review the treatment of each of the letters, urging that the Officer's approach is reasonable. With respect to the MP's letter, the Respondent notes that the same individual submitted a letter on behalf of the Applicant for the RPD hearing, and adds that the document is replete with indicia of hearsay. The Respondent recognizes that hearsay is admissible under the *Immigration and Refugee Protection Act,* SC 2001, c 27, but affirms that it is open to a decision-maker to assign hearsay statements limited weight. With respect to the JP's letter, the Respondent submits that it provides no information about the source of the writer's knowledge. The Respondent similarly dismisses the Applicant's mother's letter on the basis that it does not provide dates, descriptions or meaningful details of the events it recounts.

(1) The Letters as Evidence of Persecution

[21] In arriving at a decision on this matter, it is useful to first establish clarity of the decision-maker's factual finding: Officer Au states that "insufficient evidence has been provided to demonstrate that the applicant was arrested and detained by the Sri Lankan Army, abandoned his reporting conditions, is listed by the Sri Lankan authorities as a person with security concern, and is a wanted person in Sri Lanka" [emphasis added]. In other words, the Officer says that, as a fact-finder, he or she did not have enough evidence to conclude that the Applicant was mistreated in Sri Lanka.

[22] Indeed, the PRRA Decision is replete with findings of "insufficient evidence". I will reproduce a few more of them, by way of illustration:

> I find that insufficient evidence has been provided to demonstrate that S. Shritharan has personally witnessed or has firsthand knowledge of these incidents [2009 detention].

> [PRRA Decision, p. 6.]
>
> Additionally, I find that insufficient evidence has been provided to demonstrate that [S. Shritharan] personally witnessed the applicant's name on the described lists…
>
> [PRRA Decision, p. 7]
>
> I find that insufficient evidence has been provided to demonstrate that [N. Niranjan] has personally witnessed or has firsthand knowledge of these incidents.
>
> [PRRA Decision, p. 8]
>
> I find that insufficient evidence to demonstrate that he has previous involvement with the LTTE or that he was/would be perceived by the Sri Lankan government to have links to the LTTE.
>
> [PRRA Decision, p. 9]
>
> I find that insufficient evidence has been provided to demonstrate that the applicant would be a (*sic*) targeted as a suspect by government authorities upon his return to his home country.
>
> [PRRA Decision, p. 9]
>
> [Emphasis added]

[23] In light of the evidence before the Officer, I find the Officer's conclusion to be unreasonable. One must ask a serious question: what evidence was before the Officer? The answer: a signed letter by a Member of Parliament on official letterhead, a signed letter by a Justice of the Peace bearing an official stamp, and a signed letter from the Applicant's mother. Between these letters, there appears to be no inconsistencies on the core claims – that is, that the Applicant was mistreated at the end of the Sri Lankan civil war, again in November 2012, and that he continues to be a person of interest to the Sri Lankan authorities. These letters are not only consistent with one another, but also with the Applicant's own statutory declaration. In my view, to characterize this body of evidence as "insufficient" is incomprehensible; three people

attest that the Applicant's account is true, and yet the Officer remains unconvinced, but does not explain why he or she is unconvinced. Momentarily setting aside the fact that two of the three letters are authored by a Sri Lankan lawmaker and a member of the judiciary whose authenticity the Officer had no reason to question, the Officer's overzealous approach to scrutinizing the letters for hearsay, dates, and other allegedly missing details comes dangerously close to imposing an impossible standard that would effectively require letters from persons who were physically present during the alleged mistreatment. Instead, it was incumbent upon the Officer to evaluate the letters on the basis of what they do contain: namely, three accounts that effectively corroborate the Applicant's alleged history of persecution and status as a wanted individual. Had this approach been taken, it is likely that the Officer would have arrived at a different conclusion about the veracity of the Applicant's claim of past persecution and risk of future persecution.

(2) The Applicant's Mother's Letter

[24] As stated above, the Officer also dismissed the letter authored by the Applicant's mother, dispensing with it in two sentences:

> While the applicant provided letter (*sic*) from his mother to support his statement, as previously stated, I find that the evidence is subjective as she has a vested interest in the outcome of the application. As the evidence comes from a source close to the applicant, I find that it has a low probative value and I have, therefore, assigned little weight to it.
>
> [Emphasis added]
>
> [PRRA Decision, p. 9]

This approach is simply wrong. This Court has repeatedly held that any letter written in support of an applicant could be characterized as self-serving, and evidence is not to be attributed little

weight on this basis alone: *Mata Diaz v. Canada (Citizenship and Immigration)*, 2010 FC 319 at para. 37; *Singh v Canada* (Citizenship and Immigration), 2015 FC 1210 at para 12; *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para. 37.

[25] Relatedly, the Officer fails to explain exactly why the mother's letter is self-serving and how this impacted the Officer's analysis. What exactly is the Applicant's mother's "vested interest" in the outcome of the decision? Is it possible that the "vested interest" is that her son's life is at risk should he return to Sri Lanka, and it is for this precise reason that she hopes he may remain in Canada? That is what is stated on the face of the mother's letter, but is dismissed for unknown reasons by the Officer. I think that in the normal course of things, a mother typically would wish that her child could return home to be closer to her, reinforcing the bond between parent and child. After all, this young Applicant was only just beginning the prime years of his life at the time of his departure from Sri Lanka. Instead of attending university as he ought to have been doing, he was trying to find a way to leave his family and country such that he might avoid the detention and mistreatment that had previously been visited upon him. As the Applicant stated, his father even sold part of his land to help his son escape to safety. Thus, to my mind, the fact that the Applicant's mother has written a letter urging that Canada "allow him to stay there" suggests that she is fearful about what might happen to her son should he return. In any event, the Officer's dismissal of the Applicant's mother's letter exclusively on the basis of an alleged "vested interest" is a reviewable error that must be corrected on redetermination.

(3) Risk of Suicide and Mental Health

[26] Finally, I am deeply troubled by the Officer's statement at the conclusion of the PRRA Decision, wherein it is stated:

> Counsel stated that the applicant is dealing with depression and recently attempted suicide in April 2017. I accept that the applicant suffers from depression and has attempted suicide in Canada; however, I find the risk that he may commit Suicide (*sic*) in Sri Lanka is not described in A96 or A97 of IRPA as there is no agent of persecution or risk. Moreover, I find that the risk of self-harm or suicide is speculative and controllable by the applicant's own actions and I have, therefore, assigned little weight to it.
>
> [Emphasis added]
>
> [PRRA Decision, p. 10]

[27] The Officer's finding is contradictory because it accepts that "the applicant suffers from depression and has attempted suicide in Canada" while simultaneously finding that "the risk of self-harm or suicide is speculative and controllable by the applicant's own actions."

[28] Far more serious than this contradiction, however, is the utter unfamiliarity or insensitivity that the Officer demonstrates toward issues of depression and mental health. Self-harm and suicide is not "controllable" by a person who contemplates taking his or her own life. By definition, the fact that the Applicant was willing to take his own life means that the pain with which he is suffering is so unbearable to him that, in his view, the only answer is to end his own life. Like other serious medical conditions, depression and other mental health issues often require intervention by specialists who can diagnose the problem and provide treatment in the form of counseling, medication, etc. As the Officer was well aware, the Applicant's situation was

so severe that he eventually came to the most extreme consequence of his condition: he attempted to take his life. Only the most perverse characterization would call attempted suicide in these circumstances a choice, or, in the Officer's words, "controllable by the applicant's own actions." Particularly as a Senior Immigration Officer, B. Au either knew or ought to have known better.

V. Certification

[29] Counsel for both parties were asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-3324-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter returned back for redetermination by a different officer on the following directions:
    a. Full and careful consideration is to be given to the Member of Parliament's letter and the Justice of the Peace's letter, in full recognition of the fact that these letters are written by a lawmaker and member of the judiciary respectively and speak to their personal knowledge of the Applicant and his circumstances.
    b. Full and careful consideration is to be given to the Applicant's mother's letter, including the extent to which it corroborates the Applicant's history of persecution in Sri Lanka and risk of future persecution.
2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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