Date: 20080512

Docket: IMM-3574-07

Citation: 2008 FC 597

Ottawa, Ontario, May 12, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

RAVINDRA KUMARASAMY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA") for judicial review of a decision made by a Pre-Removal Risk Assessment Officer (the "Officer"), dated July 23, 2007. The Officer determined that the Applicant, Ravindra Kumarasamy, would not be subject to risk of persecution, danger of torture, risk to life or cruel and unusual treatment or punishment if returned to Sri Lanka, his country of citizenship.

[2] In a decision dated March 23, 2005, the Refugee Protection Division of the Immigration and Refugee Board accepted that the Applicant is a Tamil from northern Sri Lanka, but rejected his claim for refugee status because of credibility issues.

[3] The Applicant applied for a pre-removal risk assessment on September 6, 2006. The Officer issued his negative assessment on July 23, 2007. In doing so, the Officer considered and extensively analyzed, without the Applicant's knowledge, two documents released after the Applicant's September 22, 2006 submissions. The documents considered by the Officer were:

- United Nations High Commissioner for Refugees Position on the International Protection Needs of Asylum-seekers from Sri Lanka (December 2006) ("UNHCR Paper").

- British Home Office Operational Guide Note on Sri Lanka (version 5, March 9, 2007) ("Home Office Guidance Note").

[4] The UNHCR Paper provided an update on the conflict in Sri Lanka and set out guidance for assessment of various categories of asylum claims by individuals from that country. It reported that since January 2006, the security situation in the north and east deteriorated with a marked increase in hostilities. The report covers events through the year including events as late as December 2006. The UNHCR Paper recommended that "[a]ll asylum claims of Tamils from the North or East be favourably considered" and that there were no internal flight alternatives for those who flee targeted violence or human rights abuses by either the LTTE or the authorities or paramilitary groups (Tribunal Record at 75).

[5] By contrast, the Home Office Guidance Note evaluates the general human rights situation in Sri Lanka and provides guidance to British asylum caseworkers on the handling of claims by nationals or residents from Sri Lanka. The Home Office Guidance Note, issued two months after the UNHCR Paper, covered events up to February 2007. The Home Office Guidance Note makes specific reference the UNHCR Paper and differs in its conclusions. For example:

> 3.6.22 In its' [sic] position paper dated 22 December 2006 on the International Protection Needs of asylum-seekers from Sri Lanka, UNHCR have said that following the reintroduction of the post ceasefire security arrangements, many checkpoints have been re-instated on the main roads and in the towns in the North and East or in Colombo, making it particularly difficult for Tamils to travel in or to government-controlled areas. In addition, they state that it is difficult for individuals born in LTTE-controlled areas (this is indicated on the National Identity Card), to cross the checkpoints and that the LTTE has also restricted movements of civilians out of the areas under its control, thus preventing them from moving into government-controlled areas. Furthermore, they state that there is no internal flight option open to Tamil groups and that even if an individual reached a government-controlled area, she/he would not necessarily be able to secure the protection of the authorities, particularly if they were being targeted by the LTTE, given the LTTE's capacity to track down and target its opponents throughout the country.
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> …..
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> 3.6.24 **Conclusion.** We do not accept UNHCR's position that there is no internal flight alternative for individuals fleeing targeted violence and human rights abuses by the LTTE due to difficulties in travel because of the reinstatement of checkpoints and because of the inability of the authorities to provide "assured protection" given the reach of the LTTE. UNHCR's reliance on the concept of "assured protection" is not a fundamental requirement of the Refugee Convention. In referring to "assured protection", UNHCR are using a higher standard than the sufficiency of protection standard required by the Refugee Convention (see caselaw section 3.6.23). Moreover, asylum an human rights claims are not decided on the basis of a general approach, they are based on the circumstances of the particular individual and the specific risk to that individual. It is important that caseworkers give individual consideration to whether the applicant has a well-founded fear of persecution for a convention reason or are otherwise vulnerable that they may engage our obligations under the ECHR. Claimants who fear persecution at the hands of the LTTE in LTTE dominated areas are able to relocate to Colombo, or other Government controlled areas and it would not normally be found to be unduly harsh for claimants to relocate in this way. Similarly, the government is willing to offer to protection to

> those who have relocated from LTTE controlled areas and who still fear reprisals from the LTTE.

[6] The Applicant submits that by being denied an opportunity to comment on the UNHCR Paper and the Home Office Guidance Note, he was deprived of procedural fairness. The Respondent submits that the two documents are widely available and do not reveal anything novel and significant which evidence changes in general country conditions in Sri Lanka that may have affected the PRRA decision.

ISSUE

[7] The issue in this judicial review is whether the Officer erred by failing to disclose that he was going to consider the UNHCR Paper the Home Office Guidance Note, both of which were released after the Applicant's PRRA submissions.

STANDARD OF REVIEW

[8] This precise issue was discussed in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 at para. 22 (F.C.A.). In upholding the decision of the application judge, the Federal Court of Appeal stated that "fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case".

[9] As the Court of Appeal indicates, this is a question of procedural fairness. As such, this Court's task is to determine if the process undertaken by the Officer satisfies the requirements of

procedural fairness. If not, the Officer's decision will be sent back for re-determination (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404).

ANALYSIS

[10] In *Mancia*, above, at para. 22, the Federal Court of Appeal set out the parameters of the duty of fairness owed by a PRRA officer when considering publicly available general country condition documents which have not been disclosed to a claimant. Justice Décary stated:

> These decisions are based, it seems to me, on the two following propositions. First, an applicant is deemed to know from his past experience with the refugee process what type of evidence of general country conditions the immigration officer will be relying on and where to find that evidence; consequently, fairness does not dictate that he be informed of what is available to him in documentation centres. Secondly, where the immigration officer intends to rely on evidence which is not normally found, or was not available at the time the applicant filed his submissions, in documentation centres, fairness dictates that the applicant be informed of any novel and significant information which evidences a change in the general country conditions that may affect the disposition of the case (emphasis added).

Later in the same decision, at paragraph 26, Justice Décary held:

> The documents are in the public domain. They are general by their very nature and are neutral in the sense that they do not refer expressly to an applicant and that they are not prepared or sought by the Department for the purposes of the proceeding at issue. They are not part of a "case" against an applicant. They are available and accessible, absent evidence to the contrary, through the files, indexes and records found in Documentation Centres. They are generally prepared by reliable sources. They can be repetitive, in the sense that they will often merely repeat or confirm or express in different words general country conditions evidenced in previously available documents. The fact that a document becomes available after the filing of an applicant's submissions by no means signifies that it contains new information or that such information is relevant information that will affect the decision. It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant (emphasis added).

[11] The use of the documents at issue, the UNHCR Paper and the Home Office Guidance Note, were recently the subject of judicial review in *Sinnasamy v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 67. While granting judicial review in that case, Justice de Montigny found that a PRRA officer could independently consult the UNHCR Paper and the Home Office Guidance Note without disclosure to the claimant. In that case, the claimant applied on December 22, 2006 for Pre-Removal Risk Assessment, the same month the UNHCR Paper was released. The Home Office Guidance Note was issued two months later. In *Sinnasamy*, above, at paras. 39-40, Justice de Montigny had the following to say about the Home Office Guidance Note:

> In the case at bar, I believe the PRRA officer was entitled to rely on the UK Home Office Operational Guidance Note for Sri Lanka, since this is a publicly available document from a reliable and well-known website. The fact that the report is not contained in the IRB reference material does not mean that it is not publicly available. While I am not prepared to accept that every document available on the internet is "publicly available" for the purpose of determining what fairness requires in the context of a PRRA, since this would impose an insurmountable burden on the applicant as virtually everything is nowadays accessible on line, I am of the view that the specific document under challenge here could be consulted by the PRRA officer without advising the applicant. In many respects, it merely confirms and collects the evidence available from other sources. It does not reveal novel and significant changes in the general country conditions, even if it is not entirely parallel with the findings reported in the UNHCR document. Indeed, it seems to me the PRRA officer erred not so much in considering the Home Office document, but in not discussing the contradictory findings of the UNHCR (emphasis added).

[12] Since the Officer relied upon the same documents which were under consideration by Justice de Montigny in *Sinnasamy*, above, the issue of judicial comity is raised. Specifically, I have to consider whether the Officer erred in not disclosing the UNHCR Paper and the Home Office Guidance Note, while keeping in mind that Justice de Montigny held, with respect to the same documents, that there was no requirement for disclosure on the part of the PRRA officer.

[13] Justice Mosley provided the following guidance with respect to judicial comity in *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107 at paras. 33-35; aff'd 2007 FCA 199; leave to appeal refused [2007] S.C.C.A. No. 391:

> Judicial comity is not the application of the rule of *stare decisis*, but recognition that decisions of the Court should be consistent to the extent possible so as to provide litigants with some predictability. I am aware, as was stated in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) [at page 592]:
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> > …I have no power to overrule a brother Judge, I can only differ form him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.
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> With judicial comity in mind, I have concluded that I should differ from the prior decisions of my colleagues only if I am satisfied that the evidence before me requires it or that I am convinced that the decisions were wrongly decided in that they did not consider some binding authority or relevant statue. In that regard, I would note that while the record before me includes the evidence that was before the Court in Thamotharem, it also includes new evidence that was not part of the record in that case.

[14] While the case at bar and *Sinnasamy*, above, share similarities, I am of the view that there is a major factual difference which takes this case outside the sphere of judicial comity. In this case, the Applicant made his PRRA submissions two months prior to the release of the UNHCR Paper. The motivation behind the 2006 release of the UNHCR Paper, which was an update of the April 2004 version, was the rapidly changing situation in Sri Lanka. The situation in Sri Lanka had changed to the extent that the authors of the paper stated in the introduction to the 2006 version that "[s]ince the issuance of the [UNHCR Paper] in April 2004, there have been several major

developments in the country which fundamentally affect the international protection needs of individuals from the country who seek, or have sought asylum abroad" (Tribunal Record at 65).

[15] In *Sinnasamy*, above, the claimant made his PRRA submissions in December 2006, close in time to the release of the UNHCR Paper. It is to be expected that the claimant in that case would have been aware of the situation in Sri Lanka as covered by the updated UNHCR Paper and his submissions would have reflected that worsening situation. In the case at bar, the Applicant made his PRRA submission at least two months prior to the release of the updated UNHCR Paper and therefore would have been unable to comment with the same currency to the worsening situation in Sri Lanka.

[16] The UNHCR Paper, a post-submission document relied upon by the Officer, in my view, satisfies the requirement that the information be "novel and significant" which evidences a change in the general country conditions, as set out in *Mancia*, above. The fact that the UNHCR Paper considered the worsening conditions sufficient that it decided to change its recommendations would be a new and significant development.

[17] As a result of the factual differences in *Sinnasamy*, above, and the case at bar, specifically that it was not possible for the Applicant's submissions in this case to correlate with the currency of the UNHCR Report, this is not an instance where judicial comity should apply.

[18] The importance of the UNHCR Paper was noted by Justice de Montigny in *Sinnasamy*, above. He stated at paragraph 40 that "the PRRA officer erred not so much in considering the [Home Office Guidance Note], but in not discussing the contradictory findings of the [UNHCR Paper]". I would add that the PRRA Officer is entitled, indeed obligated, to have regard for the UNHCR Paper, as a recent report on changing country conditions, and also may refer to the responding Home Office Guidance Note, which addresses the same circumstances. However, given the subsequent timing of these documents, he should have given the Applicant notice of the documents so he would have benefit of the Applicant's submissions.

[19] The Applicant's right to procedural fairness was breached insofar as the Officer failed to disclose the UNHCR Paper.

CONCLUSION

[20] I conclude that the judicial review should be granted and the matter sent back for re-determination.

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JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted. The decision is set aside and the matter sent back for re-determination.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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