Date: 20090414

Docket: IMM-3309-08

Citation: 2009 FC 371

Ottawa, Ontario, April 14, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JAYANTHAN PALAGURU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act) of the decision of a Pre-Removal Risk Assessment (PRRA) Officer (Officer) dated June 6, 2008 (Decision), refusing the Applicant's PRRA.

BACKGROUND

[2] The Applicant is a 27-year-old Sri Lankan national who came to Canada as a permanent resident in 1996 after being sponsored by his father, a refugee who was targeted by the Liberation

Tigers of Tamil Eelam (LTTE) because he was against the LTTE and the creation of an independent Tamil state.

[3] The Applicant was ordered removed from Canada on November 25, 2004, due to criminality within Canada. He appealed this decision to the Immigration and Refugee Board's Immigration Appeal Division (IAD) but his appeal was dismissed on January 26, 2006. The Federal Court rejected his application for leave to review that decision on August 2, 2006. The Applicant then applied for a PRRA on April 5, 2006, and a negative decision was issued June 6, 2008. It is this last decision that is the subject of the current judicial review.

DECISION UNDER REVIEW

[4] The Applicant claims a number of fears if he is returned to Sri Lanka, including the fear of forcible conscription by the LTTE, various forms of persecution from Tamil militants, including torture, kidnapping or death, as well as extortion by the LTTE, police, armed forces, criminal gangs and paramilitary organizations. His fear is based on his family association and his identity as a young Tamil male from the East of the country.

[5] The Officer reviewed the IAD decision, examined documentary material submitted by the Applicant and conducted an independent review of the country conditions at the time the Decision was made.

[6] The Officer concluded that there was no more than a mere possibility of a risk of persecution or that, on a balance of probabilities, the Applicant would be in danger of torture, a risk of cruel and unusual treatment or a risk to his life. The Officer also found that the Applicant would be able to avail himself of state protection and had an internal flight alternative (IFA) in the capital, Colombo.

STATUTORY PROVISIONS

[7] The following provisions of the Act are applicable in these proceedings:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants :
(*a*) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;	*a*) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la *Loi sur l'extradition*;
(*b*) they have made a claim to refugee protection that has been determined under paragraph 101(1)(*e*) to be ineligible;	*b*) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)*e*);

(*c*) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

c) si elle n’a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n’a pas expiré;

(*d*) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d’asile ou de protection, soit à un prononcé d’irrecevabilité, de désistement ou de retrait de sa demande d’asile.

(3) Refugee protection may not result from an application for protection if the person

(3) L’asile ne peut être conféré au demandeur dans les cas suivants :

(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d’au moins deux ans ou pour toute déclaration de culpabilité à l’extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans;

(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	*c*) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
(*d*) is named in a certificate referred to in subsection 77(1).	*d*) il est nommé au certificat visé au paragraphe 77(1).

ISSUES

[8] The Applicant raises the following issues:

1. Did the Officer err by ignoring evidence or considering irrelevant evidence?
2. Did the Officer err by relying on extrinsic evidence without providing the Applicant with an opportunity to comment?
3. Did the Officer err by failing to allow the Applicant an opportunity to address the issue of an IFA?
4. Did the Officer err by applying the standard of certainty in assessing the risk faced by the Applicant?

ANALYSIS

[9] The Applicant's fundamental complaint in this application is that he was given no opportunity to address the IFA findings of the Board that are the basis of the Decision.

[10] In the context of a refugee claim, there is an onus upon the Minister and the Board to warn a claimant that an IFA is going to be raised. The rationale for this was explained by Justice Linden in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (F.C.A.) at paragraphs 9-12:

> **9** On the one hand, in order to prove a claim to Convention refugee status, as I have indicated above, claimants must prove on a balance of probabilities that there is a serious possibility that they will be subject to persecution in their country. If the possibility of an IFA is raised, the claimant must demonstrate on a balance of probabilities that there is a serious possibility of persecution in the area alleged to constitute an IFA. I recognize that, in some cases the claimant may not have any personal knowledge of other areas of the country, but, in all likelihood, there is documentary evidence available and, in addition, the Minister will normally offer some evidence supporting the IFA if the issue is raised at the hearing.
>
> **10** On the other hand, there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised. A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met (see, for example, *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, at page 1114). The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing. As was explained by Mr. Justice Mahoney in *Rasaratnam*, *supra*, at pages 710-711:
>
>> [A] claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.

These two very different obligations, therefore, should be carefully distinguished.

11 Finally, what threshold must an IFA meet before claimants will be required to avail themselves of it rather than seeking international refugee protection? The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status suggests that a person will not be prohibited from claiming Convention refugee status "if under all the circumstances it would not be reasonable to expect" that person to seek internal refuge (at page 22). However, the reasonableness standard suggested by the Handbook is very brief and it does not seem to me to express clearly enough the basis of the IFA. Professor Hathaway, in The Law of Refugee Status, at page 134 has suggested the following:

> The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized

Professor Hathaway's explanation is helpful but it does not quite achieve the appropriate balance between the purposes of international protection for refugees and the availability of an internal flight alternative.

12 Mahoney J.A. expressed the position more accurately in *Rasaratnam*, *supra*, at page 711:

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances

> particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.

> Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.

[11] In other words, the Applicant in the present case says his right to be heard includes notice of the case to be met and, because he was not alerted to the IFA issue, he had no idea of the case he had to meet.

[12] The Respondent says that a PRRA application is different from an RPD hearing. An RPD hearing is adversarial and notice of an IFA is required in a situation where cross-examination on *viva voce* evidence occurs. The PRRA process, on the other hand, takes place almost entirely in writing and the onus is upon an applicant to provide all of the materials necessary to make his or her case.

[13] The Respondent also takes the position that the Applicant in this case actually had notice that an IFA was an issue he needed to deal with in his PRRA application. To begin with, the CIC Operations Manual on Pre-Removal Risk Assessments (PP3) explicitly deals with the issue under section 10 of Procedures and Guidelines which says that "… when assessing an application, all

applicable grounds must be considered and applied." Section 10.8 goes on to say that "when considering an application for protection, the decision maker must be alert to the possibility that the applicant, although at risk in one part of the country of return, might reasonably be expected to obtain protection at some other locality within that country. In such a situation, the applicant can be denied protection because they could avail themselves of an 'Internal Flight Alternative.'"

[14] The Respondent says that the Applicant was represented by counsel at all material times, so he must be taken to have known that an IFA was an issue he needed to address in his PRRA application.

[15] In addition, the Respondent points out that the Applicant in the present case, even though he did not have a refugee hearing where notice of an IFA would have alerted him to the issue, did go through a IAD appeal at which an IFA was raised and addressed. The Officer even refers to this fact in the Decision: "The IAD also found that 'there would be no valid reason why he could not live in Colombo.'" The IAD was dealing with hardship rather than risk, but the IAD did bring up and address the Colombo issue, so that the Applicant was aware that an IFA in Colombo was something he needed to address in his PRRA application.

[16] As the Applicant points out, notice of an IFA is important in the Refugee context because an applicant cannot possibly anticipate every place in a country which the RPD might consider as a suitable IFA. In the present case, because the Applicant did not go through a refugee claim process, he says he is in the same position and so cannot be expected to know what a PRRA officer might

consider as a suitable IFA. The only difference is that, on the present facts, the IAD raised Colombo as an IFA; but the Applicant questions whether this gave him sufficient notice that he would need to deal with Colombo in his PRRA claim. He says the connection is not strong enough to satisfy the requirement of natural justice that an applicant must know the case he has to meet.

[17] The parties say there is no case law on the fundamental point of whether notice of an IFA is required in the context of a PRRA application.

[18] In *Demirovic v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1560, Justice Dawson reviewed a PRRA decision in a context where the applicant's claim to refugee status had been summarily dismissed because he had been found to be inadmissible under subsection 35(1)(*a*) of the Act. Justice Dawson had the following to say at paragraphs 31 and 32:

> **31** Mr. Demirovic notes that, in her decision, the officer held that even if he was afraid of the Serbian extremists or paramilitary groups in Banja Luka, he could safely take up residence elsewhere within Bosnia. Mr. Demirovic submits that this is a finding that he had an IFA outside of Banja Luka. He further submits that, in order for a decision-maker to render a decision on the basis of an IFA, notice that this may be in issue must first be provided to an applicant, prior to the rendering of the decision thus affording an opportunity to adduce evidence to contradict the existence of an IFA. No evidence exists on the record in this case to suggest that such notice was provided to Mr. Demirovic. Therefore, the failure to provide such notice is said to be a breach of natural justice warranting intervention by this Court. Reliance is placed upon the decision of the Federal Court of Appeal in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706.
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> **32** In the present case, it is sufficient for me to conclude that prior to mentioning that Mr. Demirovic might be safe elsewhere in Bosnia, the officer had already determined that, while Mr. Demirovic might face difficulties in the form of harassment or

> discrimination in Banja Luka, these difficulties would not constitute cruel and unusual treatment or punishment, a risk to life, or a danger of torture. Therefore, I find that the officer's finding regarding the possibility of Mr. Demirovic living safely elsewhere was an extraneous observation that does not affect the validity of the decision that Mr. Demirovic faced no section 97 risk in Bosnia and Herzegovina.

[19] In the present situation, the IFA finding is central to the Decision and cannot be called extraneous. What is more, the Officer found that it would be reasonable for the Applicant to relocate to Colombo because of the large population of Tamils there and because the Applicant was born, and had resided, in Sri Lanka for 14 years.

[20] The Applicant says that, had he known that IFA would be an issue, he could have addressed material facts pertinent to the Officer's conclusion concerning a viable IFA in Colombo.

[21] I think the decision before me on this issue is a factual one. In the context of a refugee claim, we know from *Thirunavukkarasu* at paragraph 10 that a warning that an IFA is going to be raised is important because "a refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met."

[22] Under a PRRA application, an applicant also enjoys the benefit of the principles of natural justice and the right to be heard. But a PRRA application is different from a refugee claim and is usually preceded by other proceedings that may, depending upon the nature of those proceedings

and the full facts of the case, alert an applicant to the importance of an IFA in the assessment of risk. In the present case the Applicant must be taken to have known the following:

a. That in a PRRA application the onus is upon him to bring forward all information and evidence necessary to prove the risks he faces (normally this will only be new evidence because of a prior refugee claim, but not always);

b. That under the CIC Operations Manual (PP3) he might be denied protection if he has an IFA available to him although, in my view, this does not mean that he will know, or can know, where that IFA might be, unless he has been alerted to it in previous proceedings;

c. That in considering hardship, though not risk, the IAD had already raised IFA with him at his appeal hearing and found that "there would be no valid reason why he could not live in Colombo."

[23] The Applicant was represented by legal counsel at all material times. On the facts of this case, then, I do not see how the Applicant could not have been aware that he would have to deal with the Colombo IFA issue when it came to presenting his case for risk under his PRRA application. He had to know that the IAD decision was part of the record before the PRRA Officer and that it had already been concluded that there was no valid reason why he should not go to Colombo. The Applicant must also be taken to have known that the PRRA process, except where credibility is an issue, takes place in writing and that it was up to him to present his full case for risk in writing. In other words, on these facts, I think the Applicant did have reasonable notice that he

would need to explain why he could not go to Colombo to avoid the risks he placed before the PRRA Officer.

[24] The Applicant has raised several other issues in this application which I have examined. I do not think that, when read in the full context of the Decision, the Officer applied too high an evidentiary standard by the use of the words “has not persuaded me,” “would come to the attention of the LTTE,” and the like. These words are qualified and underwritten by the Officer’s obvious knowledge of the correct standards to be applied as expressed elsewhere in the Decision.

[25] Nor do I believe that the Officer’s failure to specifically address the UNHCR’s statement concerning the “LTTE’s capacity to track down and target its opponents throughout the country” is a reviewable error, given the vast amount of evidence that the Officer did consider and that this is a single phrase which is qualified in the UNHCR report by the words “it does not necessarily mean …” And I do not think that the Officer can be taken to have ignored other relevant evidence that was before him.

[26] More significant, in my view, is the complaint that the Officer relied upon extrinsic evidence and, in particular, the South Asia Terrorism Portal articles referred to in the Sources Consulted section of the Decision.

[27] The Decision relied upon recent materials in accordance with the Officer’s duty to consult the most recent sources of information: *Lima v. Canada (Minister of Citizenship and Immigration)*

2008 FC 222 at paragraph 13. It is well established that an officer is not limited to materials furnished by an applicant and is not obliged to disclose, prior to making a decision, all the information consulted where the information consists of commonly consulted public information as opposed to novel and significant information which may affect the disposition of the matter: *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.) (*Mancia*) at paragraph 22.

[28] Because the Applicant has the onus of providing evidence to support his position, there was nothing to prevent him from providing more up-to-date materials to the Officer before the Decision was made on June 5, 2008.

[29] It is clear from *Mancia* that the Officer had no obligation to disclose documents relied upon from public sources in relation to general country conditions.

[30] I have no evidence before me that any of the sources consulted by the Officer in the present case were not available from public sources. Some of them look very familiar and even the South Asia Terrorism Portal has not been shown to be unavailable from public sources. And even though it is clear that the information in these documents was used by the Officer to deal with his IFA findings, I am not convinced that they reveal anything that was novel, significant and/or evidenced changes in the general country condition that affected the Decision.

[31] The Applicant conceded in argument that the important issue was notice of the IFA in this case and that, absent that issue, his other complaints would not be sufficient to render the Decision unreasonable. I agree with that position. However, for reasons already discussed, I cannot accept the Applicant's position on an IFA notice on these facts. Hence, I do not think that the Decision was either unreasonable within the meaning of *Dunsmuir* or that it was incorrect because the Applicant was not afforded procedural fairness.

[32] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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