

Federal Court



Cour fédérale

Date: 20100826

Docket: IMM-6290-09

Citation: 2010 FC 849

Ottawa, Ontario, August 26, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

VIPUL NISANTHA KUMARA HETTIGE

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated November 27, 2009 concluding that the applicant is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 because the applicant does not have a well-founded fear, the alleged risk of persecution is generalized and there is an internal flight alternative (IFA) in Colombo.

FACTS

Background

[2] The applicant is a thirty-four (34) year old Sinhalese citizen of Sri Lanka (The Sinhalese are the majority ethnic group in Sri Lanka while the Tamils are the minority ethnic group). The applicant is married and has a wife, a son and a daughter in Sri Lanka. The applicant arrived in Canada on September 15, 2008 from Sri Lanka and claimed refugee protection.

[3] The applicant is originally from Chilaw, a western coastal town located north of the capital Colombo. In 1994 the applicant moved to Trincomalee in the northwest of the country to work as a civilian motor mechanic for the National State Administration at a naval base. The applicant was injured on August 1, 2007 by a bomb dropped by the “Liberation Tigers of Tamil Eelam” (LTTE) on the naval base. He said that he became fearful of living in Sri Lanka.

[4] On June 19, 2008 the applicant attended a party hosted by a Tamil friend. Alcohol and heroin were consumed during the night and a violent brawl ensued. The applicant assisted in stopping the fight and confronted two Tamil youths named “Arun” and “Bala”. The two youths later met the applicant on the road following the party and threatened to kill him. The applicant contacted the police and filed a police report on June 19, 2008. On June 20, 2008 the same two youths attacked the applicant with a wooden stick while he was walking to town. While the youths were beating the applicant, a police jeep appeared on the road which caused the youths to flee. The applicant was taken to hospital for treatment and later filed a second police report on June 20, 2008. The police captured Arun a few days later at his house and discovered large quantities of heroin.

The police informed the applicant that Arun and Bala were connected to an underground Tamil drug gang which supplied the LTTE with money to purchase weapons. The police told the applicant that they will pursue the Bala but not the rest of the Tamil drug gang or the LTTE liaison because such operation was beyond their capacity. The applicant feared that the LTTE or the Tamil gang would target him. After he began to receive threatening telephone calls on his cell phone. The applicant and his family went into hiding at his brother's house in Ambalagoda, located southwest of Colombo. He resigned his position at the naval base, and fled Sri Lanka with the aid of an agent on September 15, 2008.

Decision under review

[5] The applicant's refugee claim was dismissed by the RPD on November 29, 2009 based on the lack of foundation for the claim, the generalized nature of alleged risk, and the existence of an IFA in Colombo. The "well-foundedness" of the refugee claim was identified as the determinative issue.

[6] The RPD determined that the applicant was not credible for the following reasons:

1. the police reports do not mention Arun or Bala's connection to the LTTE or that the youths are members of an underground drug gang;
2. the letter from the Administrative Officer of the Trincomalee naval base links Arun to the LTTE, but it was dated on August 20, 2009, just before the refugee hearing;
3. a letter from the applicant's brother dated October 10, 2009, and just before the RPD hearing dated of November 12, 2009;

4. it is unlikely Bala would be able to trace the applicant since he is likely dead or in a detention camp in the north of the country following the last major assault by the army against the LTTE; and
5. Arun would not bother the applicant since he is in detention.

The RPD determined that the references to the drug gang or the LTTE were added in order to enhance or embellish the refugee claim. The RPD concluded that Arun and Bala may never have existed.

[7] The RPD also held that Colombo is a viable IFA. The RPD determined that there is no indication that persons with a similar profile to the applicant, who is a Sinhalese and former government employee, are subjected to persecution in Colombo. The RPD held that it was inferable that the applicant would enjoy the support and protection of the authorities since police have already captured Arun and the applicant's family have been able to live in peace in the Sinhalese controlled city of Ambalagoda. The RPD further determined that the risk alleged by the applicant is a generalized risk for the following reasons:

1. the LTTE has disappeared as a fighting force since the applicant fled;
2. it was unlikely that the remaining or emerging drug organizations currently have ties to the LTTE; and
3. even if Arun and Bala were part of a drug gang, there was no evidence that the applicant was targeted based on direct or imputed political opinion.

[8] Since the risk of persecution by criminal drug gangs is a generalized risk, the RPD determined that section 97 of the IRPA cannot ground the claim and that there is no nexus between the refugee claim and the five grounds for refugee status under the Convention. The applicant's refugee claim was therefore dismissed.

LEGISLATION

[9] Section 96 of IRPA grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[10] Section 97 of IRPA grants protection to certain categories of persons:

97. (1) A person in need of protection is a person in

97. (1) A qualité de personne à protéger la personne qui se

Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[11] The applicant raises the following issue:

1. Did the Refugee Division err in fact, err in law, breach fairness or exceed jurisdiction in determining that the applicant was not credible?

The Court notes that the applicant raises a number of other issues in its submissions. I will substitute the following as the list of issues which will encompass all of the individual issues listed by the applicant:

1. Was it reasonably open to the RPD to determine that the applicant was not credible?;
and
2. Was it reasonably open to the RPD to find that a viable IFA was available to the applicant in Colombo?

STANDARD OF REVIEW

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question”: see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[13] Questions of credibility, state protection and IFA concern determinations of fact and mixed fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* that such issues are to be reviewed on a standard of reasonableness. Recent case law has reaffirmed that the standard of review for

determining whether the applicant has a valid IFA is reasonableness: *Mejia v. Canada (MCI)*, 2009 FC 354, per Justice Russell at para. 29; *Syvryyn v. Canada (MCI)*, 2009 FC 1027, 84 Imm. L.R. (3d) 316, per Justice Snider at para. 3; and my decision in *Perea v. Canada (MCI)*, 2009 FC 1173 at para. 23.

[14] In reviewing the RPD's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir, supra*, at paragraph 47; *Khosa, supra*, at para. 59.

ANALYSIS

Issue No. 1: Was it reasonably open to the RPD to determine that the applicant was not credible?

[15] The applicant submits that the RPD erred in finding that the applicant was not credible. The applicant submits that the RPD's credibility finding is erroneously based on the following findings:

1. misconstruction of the police report evidence by requiring that the applicant's complaints contain a reference to the LTTE or drug gangs when the police only found out about those links after Arun was arrested and his house was searched; and
2. speculation by the RPD as to Bala's possible death or detention following the government's decisive victory against the LTTE.

The applicant submits that the RPD's errors with respect to credibility are material and prejudice the alternative findings on IFA and generalized risk.

[16] Sworn testimony is presumed true unless there is a reason to doubt its truthfulness: *Maldonado v. Canada (MEI)*, [1980] 2 F.C. 302 (F.C.A.), per Justice Heald at para. 5. The RPD is entitled to draw adverse findings of credibility from the applicant's testimony by assessing vagueness, hesitation, inconsistencies, contradictions and demeanor, for which deference is entitled when judicially reviewed: *Zheng v. Canada (MCI)*, 2007 FC 673, 158 A.C.W.S. (3d) 799, per Justice Shore at para. 17. The Court is not in as good a position as the RPD to assess the credibility of the evidence: *Aguebor v. Canada (MEI)* (1993), 160 N.R. 315 (F.C.A.). When a credibility finding is based on a number of points, the reviewing Court's analysis does not involve determining whether each point in the RPD's reasoning meets the reasonableness test: *Jarada v. Canada (MCI)*, 2005 FC 409, per Justice de Montigny at para. 22.

[17] The RPD combined its credibility assessment with the inquiry into the "well-foundedness" of the applicant's fear. The two issues are related but not identical. Credibility is one factor that determines whether a fear is well-founded. The RPD determined that one of the reasons why the applicant did not have a well founded fear of persecution is his lack of credibility. For the reasons that follow, the Court finds that it was not reasonably open to the RPD to find the applicant was not credible, but it was nevertheless reasonably open to the RPD to find that the applicant did not have a well-founded fear of persecution.

[18] The credibility finding in this case was based on the documentary evidence produced by the applicant which consisted of the following:

- a. two police reports, dated June 19, 2008 and June 20, 2008;
- b. a letter from the Administrative Officer of Trincomalee naval base;
- c. a letter from the applicant's brother dated October 10, 2008; and
- d. a letter of resignation by the applicant dated June 21, 2008.

[19] The RPD noted that the police reports did not mention Arun and Bala's links to the LTTE or their role in the underground drug gang. This omission led the RPD to find that the allegations of Arun and Bala's ties to the LTTE and drug gangs was an embellishment which was added to the above correspondence in order to bolster the applicant's refugee claim. The adverse credibility finding is therefore based on the failure of the police reports to corroborate certain elements of the refugee claim.

[20] Both police reports are date stamped prior to the arrest of Arun and the discovery of the heroin in his house. These reports are a record of the applicant's complaints to the police, not an official summary of the investigation. It was not reasonably open to the RPD to base its assessment of the credibility because the police reports did not contain information that has yet to be discovered. The mischaracterization of the police reports is a material error which infects the entirety of the credibility assessment.

[21] However, the RPD determined at paragraph 14 on a separate basis that the applicant did not have a well founded fear of persecution because of the change of circumstances in Sri Lanka since the applicant left in 2008:

¶14 The claimant had also cited the injury he suffered from the LTTE bombing of the Trincomalee naval base in August 2007, but that occurred two years prior to the route of the LTTE by government forces in May 2009. Since the LTTE was no longer an effective fighting force or a viable organization, with its leaders killed or gone and its structure decimated and in disarray, the chance that they would still be looking for him for crossing paths with Arun and Bala, even if there had been such a connection between the gang of drug dealers and the LTTE, the panel finds hard to believe, particularly if he stayed away from Trincomalee in the North-East.

[22] In *Hassan v. Canada (MEI)* (1992), 147 N.R. 317 (F.C.A.), Justice Heald held that a change in the circumstances of the home country since the applicant departed will affect the determination of whether a fear is well-founded:

¶9 In finding as it did that the situation in Uganda had changed, however, it is clear the Board was simply concluding that the appellant's fear of persecution, no matter how sincerely it was held, did not have the objective element necessary to make it well-founded.

[23] There is no doubt that the situation in Sri Lanka changed drastically after May 2009. It was reasonably open to the RPD to find that if the applicant was targeted by an LTTE supported drug gang in August 2008; his alleged fear following the defeat of the LTTE in May 2009 was no longer well-founded. The Court acknowledges that the RPD engaged in speculation over the possible fate of Arun and Bala following the May 2009 offensive but in the Court's view this is not a material

error since it does not detract from the reasonableness of the RPD's assessment. It is clear that Arun is in detention, and Bala is a youth who was a Tamil.

Issue No. 2: Was it reasonably open to the RPD to find that a viable IFA was available to the applicant in Colombo?

[24] The applicant submits that the RPD erred in formulating the test for an IFA when it determined at paragraph 18 of the decision that the applicant's "profile and background does not fit that of a person who would be subject to the persecution in Colombo, the capital city."

[25] In *Farias v. Canada (MCI)*, 2008 FC 1035, I set out at paragraph 34 a checklist summarizing the legal criteria for determining whether an IFA exists. The checklist is as follows:

1. If IFA will be an issue, the Refugee Board must give notice to the refugee claimant prior to the hearing (*Rasaratnam*, [1991] F.C.J. No. 1256, supra, per Mr. Justice Mahoney at paragraph 9, *Thirunavukkarasu*, [1993] F.C.J. No. 1172) and identify a specific IFA location(s) within the refugee claimant's country of origin (*Rabbani v. Canada (MCI)*, [1997] 125 F.T.R. 141 (F.C.), supra at para. 16, *Camargo v. Canada (Minister of Citizenship and Immigration)* 2006 FC 472, 147 A.C.W.S. (3d) 1047 at paras. 9-10);
2. There is a disjunctive two-step test for determining that there is not an IFA. See, e.g., *Rasaratnam*, supra; *Thirunavukkarasu*, supra; *Urgel*, [2004] F.C.J. No. 2171, supra at para. 17.
 - i. Either the Board must be persuaded by the refugee claimant on a balance of probabilities that there is a serious possibility that the refugee claimant will be persecuted in the location(s) proposed as an IFA by the Refugee Board; or

- ii. The circumstances of the refugee claimant make the proposed IFA location unreasonable for the claimant to seek refuge there;
3. The applicant bears the burden of proof in demonstrating that an IFA either does not exist or is unreasonable in the circumstances. See *Mwaura v. Canada (Minister of Citizenship and Immigration)* 2008 FC 748 per Madame Justice Tremblay-Lamer at para 13; *Kumar v. Canada (Minister of Citizenship and Immigration)* 130 A.C.W.S. (3d) 1010, 2004 FC 601 per Mr. Justice Mosley at para. 17;
4. The threshold is high for what makes an IFA unreasonable in the circumstances of the refugee claimant: see *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, per Mr. Justice Russell at paragraph 41. In *Mwaura*, supra, at para.16, and *Thirunavukkarasu*, supra, at para. 12, whether an IFA is unreasonable is a flexible test taking into account the particular situation of the claimant. It is an objective test;
5. The IFA must be realistically accessible to the claimant, i.e. the claimant is not expected to risk physical danger or undue hardship in traveling or staying in that IFA. Claimants are not compelled to hide out in an isolated region like a cave or a desert or a jungle. See: *Thirunavukkarasu*, supra at para. 14; and
6. The fact that the refugee claimant has no friends or relatives in the proposed IFA does not make the proposed IFA unreasonable. The refugee claimant probably does not have any friends or relatives in Canada. The fact that the refugee claimant may not be able to find suitable employment in his or her field of expertise may or may not make the IFA unreasonable. The same may be true in Canada.

[26] The jurisprudence establishes a high threshold which the applicant must satisfy on the balance of probabilities to prove that an IFA is not reasonably available. The claimant is required to

demonstrate the existence of conditions which would jeopardize his life and safety in locating the proposed IFA.

[27] The applicant in this case is a member of the Sinhalese majority group, has been previously offered police protection, and is a former government employee. The applicant could cite no reason why he could not resettle in Colombo or for that matter in Ambalagoda except that he is afraid of Arun, Bala, the LTTE, and the underground drug gang. The applicant proffered no evidence showing that his alleged persecutors are still interested him and could trace him in Colombo. It was reasonably open to the RPD to determine that the life and safety of the claimant would not be jeopardized if he were to relocate to Colombo. While the RPD misstated the IFA legal test, this error clearly would not have affected the result. Accordingly, this ground of review must therefore fail.

CERTIFIED QUESTION

[28] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6290-09

STYLE OF CAUSE: *Vipul Nisantha Kumara Hettige v. The Minister of
Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 10, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** KELEN J.

DATED: August 26, 2010

APPEARANCES:

Micheal Crane FOR THE APPLICANT

Khatidja Mooloo FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Micheal Crane FOR THE APPLICANT
Barrister & Solicitor

Myles J. Kirvan, FOR THE RESPONDENT
Deputy Attorney General of Canada