

Federal Court



Cour fédérale

Date: 20111026

Docket: IMM-5028-10

Citation: 2011 FC 1227

Ottawa, Ontario, October 26, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PATHMARUPAN THAMBIPILLAI

Applicant

and

**THE MINISTER OF CITIZENSHIP &
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of a pre-removal risk assessment officer (the officer), dated July 2, 2010, wherein the officer refused the applicant's application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The applicant requests that the decision be set aside and the claim remitted for redetermination by a different officer.

Background

[3] Pathmarupan Thambipillai (the applicant) is an ethnic Tamil citizen of Sri Lanka born on April 28, 1978.

[4] The applicant left Sri Lanka in May 2003 and claimed refugee protection in Canada. The Immigration and Refugee Board deemed his refugee claim to be abandoned when the applicant did not submit his Personal Information Form (PIF) within the required 28 day period. His application to re-open his claim and the subsequent judicial review were both dismissed.

[5] The applicant's brother and sister's refugee claims were allowed in 2002 and 2005 respectively.

[6] In March 2004, the applicant submitted an application for permanent residence on H&C grounds pursuant to section 25 of the Act to Citizenship and Immigration Canada (CIC). The applicant provided supplementary submissions to CIC in December 2004, January 2005, March 2008, May 2008 and May 2010.

[7] The applicant purchased a taxi cab and the business derived from it in March 2010 to begin his own taxi company.

[8] On July 2, 2010, CIC refused the applicant's application for permanent residence.

Officer's Decision

[9] The officer refused the H&C application for the following reasons.

[10] To begin, the officer outlined the test for an H&C exemption under section 25 of the Act: that the applicant would face unusual, undeserved or disproportionate hardship if required to apply for permanent residence from outside Canada.

[11] In assessing hardship, the officer found that the majority of the documents provided by the applicant pre-date the May 2009 defeat of the Liberation Tigers of Tamil Eelam (LTTE) by the Sri Lankan government forces. The officer acknowledged a duty to consider the most recent publicly available information and the officer found that this information shows that the country conditions in Sri Lanka have changed considerably since May 2009.

[12] The officer acknowledged the evidence that the applicant and his family originate from the Jaffna area of Sri Lanka and were displaced in 1991 and 1995. The applicant and his siblings were forcibly recruited by the LTTE and the applicant was detained by the Sri Lankan army.

[13] The officer noted that the country conditions in Sri Lanka are not ideal. However, the officer found that the applicant's profile, even as a young Tamil male, would not currently place him at risk. He is not at risk of being detained by the authorities as there is no arrest warrant for him and he

has no connection to the LTTE. The officer found that the applicant's concern of being extorted as a wealthy individual from the west was largely speculative.

[14] The officer also considered the applicant's establishment in Canada. The officer acknowledged that the applicant had worked in several jobs in Canada and had recently purchased a taxi cab company and license. The officer further acknowledged the applicant's support from friends and family in the community. The officer noted that the applicant is not married and resides alone but has a close relationship with his brother. The officer found that the applicant's sister had not provided information.

[15] The officer determined that the hardship to the applicant of losing his taxi business or the difficulty in leaving his friends and family did not meet the threshold of unusual, undeserved or disproportionate hardship.

[16] The officer concluded that the applicant's circumstances were not such that he would experience the hardships required under section 25 of the Act for an exemption to the requirement to apply for permanent residence outside of Canada.

Issues

[17] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the officer breach the applicant's right to procedural fairness?

3. Did the officer err in assessing the risks of hardship to the applicant?
4. Did the officer err in assessing the applicant's establishment in Canada?

Applicant's Written Submissions

[18] The applicant submits that the length of time that CIC took to process his application – seven years – was unreasonable.

[19] The applicant submits that the officer erred in assessing the documentary evidence. The officer was obligated to explain why he/she preferred contradictory evidence to that which supported the applicant's allegation of risk. The applicant submits that the information that pre-dates May 2009 is still relevant and credible. Further, the applicant submits that the post-May 2009 documentary evidence is mixed and too little time has passed to categorically find that the situation has changed or stabilized. The evidence relied on by the officer does not support a finding that there has been a durable change for the better in Sri Lanka for Tamil citizens. Those of highest risk today are young male Jaffna Tamils - the profile that the applicant fits.

[20] The applicant further submits that the officer was required to raise the issue of a change in country conditions in Sri Lanka with the applicant and provide the applicant with the opportunity to respond. Nothing in the applicant's submissions indicate that he was aware of the change in circumstances and a failure to inform him of such was a breach of procedural fairness.

[21] Concerning establishment, the applicant submits that the officer unreasonably faulted him for purchasing a taxi cab company despite having unsecured immigration status. The applicant submits that he did not know that his immigration status in Canada was tenuous.

[22] Finally, the applicant submits that the officer erred in fact by stating that his sister did not provide any information when there was a letter from the applicant's sister dated May 10, 2010. This misstatement of the evidence demonstrates that the officer failed to consider the applicant's family in Canada in assessing the H&C application.

Respondent's Written Submissions

[23] The respondent submits that the officer did not breach the applicant's right to procedural fairness. The officer applied the appropriate test for assessing the H&C application. The officer was under no duty to inform the applicant of a change in country conditions. In fact, the officer was obligated to consult the most recent publicly available country condition documents and the officer did not rely on any documents that were not publicly available. Further, the applicant bears the onus to establish sufficient H&C grounds to justify an exemption. This onus does not shift to the officer and there was no duty to conduct an interview with the applicant concerning a change in country conditions.

[24] Further, the respondent submits that the officer reasonably assessed the risks of hardship. The officer objectively analyzed the recent country condition evidence. The applicant's evidence of

past persecution was not sufficient to demonstrate risks of hardship today. It is not open to the Court to reweigh the evidence.

[25] Finally, the respondent submits that the officer appropriately assessed the applicant's establishment in Canada. The officer considered the applicant's business acquisition but reasonably found that while it is unfortunate that the applicant would be leaving his business behind, this hardship does not amount to anything greater than the predictable costs associated with leaving Canada. Likewise, the applicant should not be rewarded for amassing time in Canada as a means of assisting his H&C application.

[26] The respondent submits that the officer reasonably concluded that the applicant had not met the threshold for establishing that he would face an unusual, underserved or disproportionate risk if required to apply for permanent residence in Canada from Sri Lanka.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[28] Findings of an officer deciding an H&C application involve determinations of mixed fact and law and are generally afforded deference by this Court (see *Hnatusko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 18 at paragraphs 25 to 26). Any issues of procedural fairness involving a PRRA officer, however, will be determined on the correctness standard (see *Parshottam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 355).

[29] I wish to deal first with Issue 3.

[30] **Issue 3**

Did the officer err in assessing the risks of hardship to the applicant?

Changes to a country's conditions is a factual not legal question and this Court is only permitted to intervene where the officer's decision on changed circumstances is unreasonable and not supported by the evidence (see *Yusuf v Canada (Minister of Employment and Immigration)* (1995), 179 NR 11 (FCA) at paragraph 2).

[31] An officer considering an H&C application need not refer to all of the documentary evidence before him or her, provided the decision takes into account any evidence that contradicts the conclusion (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (FCTD)(QL) at paragraphs 14 to 17; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)(QL)).

[32] I have reviewed the country documentation connected with this application and in particular, I have reviewed documents referred to by the officer in the decision under review.

[33] The documents referred to by the officer also contain the following statements referenced below. In the tribunal record at page 1156, it is stated:

The military has been maintaining extra-legal detention centres for an estimated 11,000-13,000 people suspected of LTTE ties. These detained have had no access to lawyers, their families, ICRC or any other protection agency, and it is unclear what is happening inside the centres.

[34] At pages 1173 to 1174 of the tribunal record, the following excerpt from the documentary evidence is found:

8.19 Comprehensive information on the cordon and search operations between June and August 2009 is available from the Report of the FCO information gathering visit to Colombo, Sri Lanka 23-29 August 2009, published on 22 October 2009 (FCO October 2009 report). The report observed:

Most sources said that the frequency of cordon and search operations had not reduced significantly in recent months, though there were fewer large-scale operations than in previous years. No information was available on numbers of arrests. In general, young male Tamils originating from the north and east of the country were most at risk of being detained following cordon and search operations, with the above factors again increasing that risk. Those without employment or 'legitimate' purpose for being in Colombo were also likely to be seen as suspicious.

And at page 1122 of the tribunal record, the following is noted:

EVENTS IN SRI LANKA FROM 28 JANUARY TO 18 FEBRUARY 2010

16 February The European Union has decided to suspend Sri Lanka's preferential trade benefits because of concerns over the country's human rights record. The Government is facing increasing international calls for an independent investigation into allegations of war crimes committed in the final stages of the war between the security forces and Tamil Tiger rebels last year.

[35] At page 1361 of the tribunal record, the documentary evidence reads:

In theory, anyone was entitled to register to stay in Colombo, but some sources suggested that young Tamil men originally from the north or east of the country could encounter difficulties and face closer scrutiny. The presence of any of the 'risk factors' noted above would also generate greater attention from the police. In general, registration would be easier if people indicated that their stay in Colombo was temporary.

And at page 1383 of the tribunal record, the documentary evidence states:

3.17 The representative of the Swiss Embassy in Colombo said there were cases where there seemed to be a strong political motive; where media, human rights or political activities were involved. But there often seemed to be a mixture of both elements. Sometimes denouncement and personal revenge could also play a role. As for Colombo, the Embassy knew only about a few cases that were reported. The Swiss Asylum Section had the impression that detentions resulting from regular checks and cordon operations were not always due to investigations against terrorism, but also driven by the security forces' desire to get money. Some inmates had told the Asylum Section that, for whatever reason, the number of suspects in the cells remained the same.

And finally at page 1180 of the tribunal record, the following is noted:

8.36 The EU report of October 2009 further noted that:

International reports indicate continual and well-documented allegations of widespread torture and ill-treatment committed by State forces (police and military) particularly in situations of detention. The UN Special Rapporteur on Torture has expressed shock at the severity of the torture employed by the army, which includes burning with soldering irons and suspension of detainees by their thumbs. The UN Special Rapporteur on Extra-Judicial Killings has noted that the majority of deaths as a result of torture at the hands of the police are not caused by 'rogue' police officers but by ordinary officers taking part in an established routine. ...

[36] The officer made the following comments in the decision. At page 4 of the reasons, the officer quotes from the documentary evidence (application record page 11):

There is also a consensus that there have been no cordon and search operations since the end of the conflict in May 2009.

And at page 8 of the decision (application record page 15), the officer states:

The information before does not indicate that the applicant, although clearly of Tamil ethnicity, is the subject of an outstanding arrest or other warrant, or that he would be singled out as having a connection with the LTTE. The information before me also does not support that, given the current state of the LTTE since the war, that the applicant would be targeted for recruitment by the LTTE or the Sri Lanka Army. The applicant has indicated that he is in possession of a National Identity Card for Sri Lanka. The fears expressed by the applicant with regard to his being viewed as a wealthy person returning from the west, and thereby subjecting him to threats of extortion, appear to be largely speculative. The applicant's stated concerns with regard to his return to Sri Lanka are unsupported.

[37] As pointed out earlier, the officer need not refer to every piece of documentary evidence but the officer must refer to evidence that runs contrary to the evidence used in the decision and address why the other evidence is preferred. A comparison of the decision and the documentary evidence does not lead me to believe that this was done in this case. This is a reviewable error.

[38] As a result, the application for judicial review must be allowed and the matter referred to a different officer for redetermination.

[39] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

[40] Because of my finding on Issue 3, I need not deal with the other issues.

JUDGMENT

IT IS ORDERED that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

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.

97.(1) A person in need of protection is a person in Canada whose removal to their

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

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.

97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(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.

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) 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) 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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5028-10

STYLE OF CAUSE: PATHMARUPAN THAMBIPILLAI
- and -
THE MINISTER OF CITIZENSHIP
& IMMIGRATION

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AND JUDGMENT OF:** O'KEEFE J.

DATED: October 26, 2011

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