Federal Court  Cour fédérale

Date: 20121017

Docket: IMM-862-12

Citation: 2012 FC 1194

Ottawa, Ontario, this 17th day of October 2012

Before: The Honourable Mr. Justice Pinard

BETWEEN:

PATHMANATHAN NAGAMUTHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On January 27, 2012, Pathmanathan Nagamuthu (the "applicant"), a citizen of Sri Lanka, filed the present application for judicial review of the decision of L. Ly, an immigration officer with Citizenship and Immigration Canada (the "officer"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The officer denied the applicant's permanent residency application on humanitarian and compassionate grounds in docket

IMM-862-12 and also denied his pre-removal risk assessment ("PRRA") in docket IMM-863-12 on the same day.

[2] The applicant was born in Sri Lanka in 1952. He is a Tamil from the northern region of the country. The applicant arrived in Canada on March 12, 1995. A removal order was issued against the applicant on March 20, 1995.

[3] The applicant claimed refugee status, but his claim was denied on September 23, 1996 and leave for judicial review was denied on February 19, 1997.

[4] The applicant's application for permanent residence from within Canada based on humanitarian and compassionate grounds was received by Citizenship and Immigration Canada on September 29, 2005.

[5] The applicant claims to be established in Canada, having a job, going to temple and speaking English, while he sends money to his family back in Sri Lanka. The applicant contends that it is in the best interest of his children that he remain in Canada, for he sends his two children money back in Sri Lanka in order for them to pursue their studies. His children are in their twenties. His wife also remains in Sri Lanka.

[6] Due to the unfavorable conditions in Sri Lanka, if forced to return, the applicant claims that he would be at risk, being believed to be a supporter of the Liberation Tigers of Tamil Eelam ("LTTE"). Since the end of the war, his family has had problems with the Karuna, a paramilitary

group. He also claims to be at risk in Sri Lanka for having filed a failed refugee claim here in Canada. He also fears the Sri Lankan authorities and the paramilitary, being elderly and thereby vulnerable to persecution.

[7] In November 2010, the applicant filed his PRRA, which was refused by the officer on December 2, 2011, as was his application for permanent residency based on humanitarian and compassionate grounds. While the decisions are dated December 2, 2011, they were only served on the applicant on January 17, 2012.

[8] On December 14, 2011, applicant's counsel submitted additional documentary evidence on the country conditions in Sri Lanka. By correspondence dated the same day, the applicant was sent a call-in-notice informing him that a decision had been made and he had to attend an interview on January 17, 2012. At the January 2012 interview, the applicant was told that both of his applications were denied.

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[9] The issues raised by the present applications for judicial review can be summarized as follows:

i. *Did the officer err in law in her PRRA assessment, failing to apply the correct legal standard?*

ii. *Did the officer err in law in her PRRA assessment, failing to consider the cumulative persecution faced by the applicant?*

iii. Did the PRRA officer err by failing to conduct an analysis under paragraph 97(1)(a) of the Act?

iv. Did the officer fail to provide sufficient reasons in her decision to reject the applicant's application for permanent residency?

v. Did the officer err, making factual determinations in a perverse or capricious manner, without regard to the evidence before her?

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I. Did the officer err in law in her PRRA assessment, failing to apply the correct legal standard?

Applicant's arguments

[10] The applicant contends that the officer failed to apply the correct legal standard in her PRRA assessment. The applicant argues that he did not have the burden of proving based on a balance of probabilities that he would face persecution, contrary to the officer's assertion. The applicant submits that the officer had to determine whether the applicant would face more than a mere possibility of persecution pursuant to *Adjei v. Canada (Minister of Employment and Immigration*), [1989] 2 F.C. 680 [*Adjei*]; *Chan v. Canada (Minister of Employment and Immigration*), [1995] 3 S.C.R. 593 [*Chan*], and *Ponniah v. Canada (Minister of Employment and Immigration*) (1991), 132 N.R. 32 (F.C.A.). Rather, the officer used shifting burdens of proof in different parts of her decision.

Respondent's arguments

[11] The respondent asserts that the burden of proof is that of a balance of probabilities, the applicant having to prove the existence of a subjective fear which is objectively well-founded based

on a balance of probabilities, as set out in *Chan*, above. Then, the decision-maker must consider whether the applicant met his burden of proof, specifically, whether there is a serious possibility of risk or persecution. The respondent argues that a reading of the officer's PRRA decision indicates that she applied the proper test. The respondent submits that when the officer states that "on a balance of probabilities" the applicant did not prove he was an LTTE supporter, she is simply making findings of fact and not setting out the applicable legal test. Thereby, the respondent asserts that the officer cannot be faulted for addressing each of the allegations made by the applicant in his PRRA.

Analysis

[12] In my opinion, the officer did not apply an incorrect legal standard. The respondent correctly summarized the situation: the officer did not fail to apply the proper legal test in evaluating the applicant's PRRA application. Rather, the burden of proof rested on the applicant to establish that he faced a serious possibility of persecution (*Adjei*, above at para 5; *Chan*, above at para 120; *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 239 (F.C.A.) at para 29 [*Li*]). The officer clearly applied the correct legal test, concluding that:

> Ainsi, à la lumière de l'ensemble du dossier, je considère que le demandeur ne s'est pas déchargé du fardeau de sa preuve qu'il court un des risques prévus aux articles 96 et 97 de la Loi advenant un retour au Sri Lanka. Le demandeur n'a pas démontré qu'il y aurait plus qu'une simple possibilité qu'il soit persécuté au Sri Lanka ni qu'il a des motifs sérieux de croire qu'il serait personnellement exposé au risque d'être soumis à la torture, à une menace à sa vie ou au risque de traitements ou de peine cruels et inusités.
>
> [Emphasis added.]

[13] The references made by the officer to a balance of probabilities relate to her assessment of the evidence adduced by the applicant and not her identification of the legal test the applicant had to meet. The officer did not err in law.

II. Did the officer err in law in her PRRA assessment, failing to consider the cumulative persecution faced by the applicant?

Applicant's argument

[14] The applicant goes on to argue that the officer erred in her PRRA assessment, failing to consider that the individual incidents of discrimination considered cumulatively amount to persecution. In her decision based on humanitarian and compassionate grounds, the officer made numerous findings as to risks the applicant may face upon his return, such as having to register with the police, face questioning or proceed through security checkpoints. These findings are not mentioned in the officer's PRRA assessment. However, the applicant asserts that these findings should have been included and that the officer should have determined whether they cumulatively amounted to persecution, as the documentary evidence indicated discriminatory treatment of Tamils from the north.

[15] The applicant submits that since the officer erred in her PRRA assessment, she also did so in her decision based on humanitarian and compassionate grounds. Thereby, the applicant argues that both applications for judicial review should be allowed.

Respondent's arguments

[16] The respondent argues that while the applicant claims the officer failed to assess the incidents of discrimination cumulatively, the officer clearly stated in her decision based on humanitarian and compassionate grounds that she considered all of the factors individually and cumulatively, addressing each risk and fear raised by the applicant. The respondent submits that the officer then concluded that cumulatively, these factors and the evidence did not indicate that he would face disproportionate hardship or anything other than the generalized risks faced by the rest of the Sri Lankan population.

[17] The respondent asserts that the officer explained why cumulatively there was no persecution: the applicant was considered not to be credible by the Immigration and Refugee Board in his refugee claim based on the same allegations of persecution.

[18] Furthermore, the respondent argues that the present case can be distinguished from *Divakaran v. Minister of Citizenship and Immigration*, 2011 FC 633 [*Divakaran*], which is relied on by the applicant: here, the officer made no positive findings as to the alleged risks, finding there was little reason to believe the applicant would be detained or harassed.

Analysis

[19] The cases relied on by the applicant as to the notion of cumulative persecution can be distinguished from the case at hand. While it has been recognized that multiple incidents of discrimination can constitute persecution pursuant to section 96 of the Act (see *Ampong v. Minister of Citizenship and Immigration*, 2010 FC 35 at para 42), there are no such recognized incidents of

discrimination in the present case. Unlike in *Retnem and Rajkumaar v. Minister of Employment and Immigration* (1991), 132 N.R. 53 (F.C.A.) [*Retnem*], the applicant did not suffer any previous or subsequent harassment and there is no evidence that he would likely endure such treatment. Therefore, while a failure to address the cumulative nature of persecution has been considered an error of law (see *Retnem*, above), in the case at hand there were no multiple incidents of harassment that the officer had to consider: cumulative persecution was therefore not an issue.

[20] In *Divakaran*, above Justice John O'Keefe did recognize that an officer's failure to consider cumulative persecution in a PRRA application amounted to an error in law. However, in *Divakaran*, the officer had concluded in the applicant's application based on humanitarian and compassionate grounds that the applicant "may have to register with police and may be questioned by state security agencies if he wishes to reside in Colombo, or, if he resides in Jaffna, the applicant might be required to proceed through security checkpoints and register with the police" (at para 25). These findings were not mentioned in the officer's PRRA decision rendered the same day and thereby, this Court held that the officer had failed to consider whether these discriminatory acts cumulatively amounted to more than a mere possibility of persecution (*Divakaran*, above at para 26).

[21] However, in the present case, the officer made no such findings of fact as to possible discriminatory treatment the applicant may face upon returning to Sri Lanka. The officer concluded that there was insufficient evidence that the applicant would face any of the alleged mistreatment, the documentary evidence not being indicative of treatment faced by individuals similarly situated. Thus, considering there was no evidence that the applicant would be subject to discriminatory

treatment, the officer had no obligation to consider whether multiple incidents of discrimination would amount to persecution.

III. Did the PRRA officer err by failing to conduct an analysis under paragraph 97(1)(*a*) of the Act?

[22] The applicant argues that the PRRA officer erred by failing to conduct an analysis under paragraph 97(1)(*a*). The applicant submits that he faces the risk of torture by the state or agents of the state upon return to Sri Lanka, including the Karuna group and the Eelam People's Democratic Party, because those groups would believe he was a supporter of the LTTE.

[23] In the decision, the officer analyzed the risk that paramilitary groups pose to the applicant. The officer found that the applicant had not demonstrated on a balance of probabilities that he would be suspected upon return to Sri Lanka of being a sympathizer of the LTTE.

[24] The officer also analyzed whether paramilitary groups or the state authorities pose a risk to the applicant for other reasons. The officer found that the applicant had not demonstrated he is a person whose profile would be of interest to the paramilitary groups or the state authorities.

[25] The officer concluded the analysis with a boiler-plate statement regarding how the applicant has failed to prove he is subject to any of the risks provided for in sections 96 and 97 of the Act. The officer did not analyze whether the applicant met the criteria for paragraph 97(1)(*a*) specifically.

[26] Paragraph 97(1)(*a*) requires an applicant to prove it is more likely than not he or she will personally be subjected to a danger of torture upon return to their country of nationality (*Li*, above at para 29).

[27] The applicant alleges he is facing the risk of torture in Sri Lanka due to being perceived as an LTTE sympathizer, but the officer found the applicant would not be suspected of being associated with the LTTE. I do not believe that in this context it was incumbent on the officer to undertake a paragraph 97(1)(*a*) analysis. Therefore, I disagree with the applicant that the PRRA officer erred by failing to conduct an analysis under paragraph 97(1)(*a*).

IV. Did the officer fail to provide sufficient reasons in her decision to reject the applicant's application for permanent residency?

[28] The applicant argues that the officer's reasons are inadequate. The applicant contends that while the officer concludes that individually, the factors raised by the applicant's application do not amount to unusual, undeserved or disproportionate hardship, she does not explain why collectively these factors do not meet the required threshold of hardship, merely stating that collectively they are insufficient. I do not agree.

[29] The reasons provided by the officer are sufficient and this Court's intervention is not warranted on this basis. In both decisions, the officer explained why she rejected the applicant's applications: she addressed each of the factors raised by the applicant. The officer considered each factor, but concluded that there was a lack of evidence to establish that the applicant would suffer

unusual, underserved or disproportionate hardship. Therefore, the reasons given by the officer are sufficient: they enable the applicant to understand why his application was rejected.

[30] In this case, it is clear that the officer did not merely summarize the factors, but weighed each of them based on the evidence before her. While the applicant may disagree with the officer's weighing of the evidence, her reasons are clear and this Court cannot intervene on this basis.

V. Did the officer err, making factual determinations in a perverse or capricious manner, without regard to the evidence before her?

[31] The officer's assessment of the evidence was reasonable and the applicant has failed to establish that the officer ignored the evidence before her. While the officer did not specifically address the evidence of the economic conditions in Sri Lanka, this alone does not render the decision unreasonable. Rather, the officer considered there was insufficient evidence as to the specific economic consequences the applicant's return to Sri Lanka would have on him and his family; there was no evidence to support the applicant's allegations. Moreover, as explained by the respondent, the applicant did not explain why he would be unable to find work or start up a new business, based on his experience.

[32] Furthermore, the officer did not ignore the evidence outlining the difficulties encountered by Tamils, failed refugee claimants or individuals without National Identification Cards. The officer noted these facts outlined in the documentary evidence, but concluded that the applicant would face a generalized risk. The documentary evidence indicates that those likely subject to scrutiny by the Sri Lankan authorities are returning citizens with outstanding warrants, criminal records or known

associations to the LTTE, or without identification. These individuals will however not necessarily be arrested and no Sri Lankan without a National Identification Card has been arrested since 2009 according to the evidence relied on by the applicant. Moreover, there is no evidence that failed refugee claimants have had any problems upon their return once they have successfully entered the country.

[33] Therefore, the officer clearly did not ignore the evidence identified by the applicant. Rather, having evaluated the documentary evidence, she concluded that there was no evidence that the applicant would specifically be at risk or face unusual and undeserved or disproportionate hardship. Considerable deference is owed to the officer's factual determinations, including her weighing of the evidence (*Yousef v. Minister of Citizenship and Immigration*, 2006 FC 864, 296 F.T.R. 182 at para 19; *Augusto v. Solicitor General*, 2005 FC 673 at para 9; *Raza v. Minister of Citizenship and Immigration*, 2006 FC 1385, 304 F.T.R. 46 at para 10). The officer's assessment of the evidence was reasonable, falling within the range of possible, acceptable outcomes which are justifiable in fact and in law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para 47).

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[34] Therefore, for the above-mentioned reasons, the application for judicial review in each case, namely IMM-862-12 and IMM-863-12, is dismissed.

[35] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of the decision of L. Ly, an immigration officer with Citizenship and Immigration Canada, rendered on December 2, 2011, in which the officer denied the applicant's permanent residency application on humanitarian and compassionate grounds, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-862-12
STYLE OF CAUSE:	PATHMANATHAN NAGAMUTHU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 4, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
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APPEARANCES:

Mr. Micheal Crane	FOR THE APPLICANT
Mr. Charles J. Jubenville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT