Federal Court Cour fédérale

Date: 20150408

Docket: IMM-783-14

Ottawa, Ontario, April 8, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

RANJINITHEVY THANGARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT

UPON CONSIDERING this Application for Judicial Review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], of a decision of the First Secretary of the Immigration Section of the High Commission of Canada in New Delhi, India [Officer], made on October 30, 2013, which determined that the applicant is not a Convention Refugee pursuant to section 96 of the Act, and does not fall within the Convention refugee abroad class or the country of asylum class, pursuant to sections 145 and 147 of the *Immigration and Refugee Protection Regulations*, SOR 2002-227;

AND UPON considering the written and oral submissions of counsel for the applicant and for the respondent;

AND UPON reviewing the Certified Tribunal Record, the Act and the jurisprudence;

THIS COURT'S JUDGMENT is that the application for judicial review is allowed for the following reasons;

The applicant, a Tamil citizen of Sri Lanka, left Sri Lanka for India in 2007 with her husband and two children. The applicant's husband then left for France and sought refugee status in that country, leaving the applicant and her two children in India. In 2009, the applicant and her children applied for refugee protection in Canada as members of the Convention refugee abroad class and as members of the humanitarian-protected persons abroad class.

The applicant and her children fear returning to Sri Lanka for several reasons: the applicant's husband operated a mini-bus service that was compelled to be used by and for Liberation Tigers of Tamil Eelam [LTTE] members; the family was harassed and threatened by the LTTE and the Eelam People's Revolutionary Liberation Front [EPRLF] when they lived in Sri Lanka; and, the applicant is now a single mother with a 21 year old daughter and 19 year old son and she notes that their gender and ethnicity, coupled with the fact that they would be returning as failed asylum seekers, place them at risk.

The Officer's decision was rendered immediately following the interview with the applicant and her children on October 30, 2013. The refusal letter and the CAIPS notes, which documents the interview questions and answers, as well as the Officer's decision and brief analysis, along with the complete record of the documents submitted in support of the application to the Officer have been considered.

The applicant submits that the Officer erred in three respects: the Officer did not apply the correct legal test for determining whether the applicant had a well-founded fear of persecution; the Officer failed to consider the documentary evidence which highlighted the risks faced by returning failed refugees, particularly those associated with or perceived to have been associated with the LTTE; and, the Officer failed to consider the applicant as part of a particular social group as a female returning without her husband and with her 21 year old daughter and 19 year old son, and the risks they would personally face.

The respondent submits that the Officer's reasons, including the notes of the interview, the conclusion and the refusal letter, demonstrate that the Officer understood and applied the correct legal test because the Officer probed the relevant facts and the fears of the applicant in the context of the requirements of section 96 of the Act. The respondent also submits that the Officer is presumed to have considered all of the evidence and the Officer indicates that she did so. On the basis of all the evidence, the Officer reasonably found that the applicant had not established a well-founded fear of persecution. The Officer's finding that the applicant's fears as a female in Sri Lanka were not personalised, because they were faced by all females was reasonable.

The issue of whether the Officer applied the correct legal test is reviewable on the standard of correctness and no deference is owed. The application of the test to the facts is reviewable on the standard of reasonableness.

Although the Officer's questioning of the applicant and her two children probed the well-foundedness of their fears upon return to Sri Lanka, the Officer's analysis and decision do not reflect that the Officer understood or applied the correct legal test to determine whether the applicant had satisfied the test for refugee protection. There is nothing in the notes, the conclusion or the analysis to indicate that the Officer understood that the correct test or evidentiary burden is that of more than a mere possibility of persecution. The Officer repeatedly referred to whether the applicants "would" be persecuted or "would" face arbitrary arrest, which suggests that the Officer was assessing their risk of persecution on a balance of probabilities.

The Officer's decision is not simply a situation of using appropriate grammar or "layman's language" to convey the result. Nor is this a situation where the Officer inadvertently misstates the test but later clarifies the test and demonstrates that the correct test was applied. Unfortunately, based on a complete review of the whole record, I cannot conclude that the Officer applied the correct test.

The test has been described as "more than a mere possibility of persecution" or "a serious possibility of persecution", but never as likelihood of persecution or persecution on a balance of probabilities. In my view, the use of the term "would be persecuted" conveys a likelihood of persecution (more than 50%) or persecution on a balance of probabilities, and this is an error.

The test was established by the Federal Court of Appeal in *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at para 8, [1989] FCJ No 67 [*Adjei*]:

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

Adjei has been cited in numerous cases by this Court, including the cases noted by the applicant (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 120, [1995] SCJ No 78; *Talipoglu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 172 at paras 27-31, 238 ACWS (3d) 194) and remains the authority on this point.

Given that the Officer did not apply the correct test to determine the applicant's claim for refugee protection, there is no need to consider the applicant's other arguments. However, I would have also found that the Officer failed to consider the totality of the evidence and failed to consider the applicant's particular risk profile.

The Officer concluded that the evidence shows that the situation for Tamils is improving in Sri Lanka, that repatriation of citizens is continuing, that the questioning of returning refugees was normal, that the country condition documents indicate that the arbitrary detention of Tamils has decreased, and more generally, that "there doesn't seem to be any reason why you (i.e. the applicant) can't go back".

Although the Officer is presumed to have assessed all the documentary evidence, and the Officer states that she has done so, the applicant highlighted several country condition documents, usually considered to be credible by the Board, that portray a different situation, particularly for returning refugees with a risk profile. For example, the December 2012 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka notes the profiles which expose returnees to greater risks, including of detention and mistreatment. The risk profiles, as noted in previous reports from the UNHCR, include persons perceived to have been associated with the LTTE and "those involved in sheltering or transporting LTTE personnel or the supply and transport of goods for the LTTE". The Officer did not refer to the documentary evidence which indicates the greater risks faced by returnees with such profiles. Rather, the Officer simply dismissed the applicant's evidence regarding her husband's transportation of LTTE members, finding that this *would* not cause the applicant to face similar problems upon return.

Given that the applicant provided updated written submissions to the Officer in December 2012 because her application had originally been made in 2009 and the situation in Sri Lanka had since evolved and that she referred to her ongoing and current fears, including the risks to single women and the risks to returning refugees with perceived association with the LTTE and provided documentary evidence in support of the submissions, the Officer was required to provide some explanation for discounting the contradictory information. The Officer did not even acknowledge that the country condition evidence is mixed, rather she referred only to evidence that the situation in Sri Lanka had greatly improved.

The application must be redetermined by a different Officer and with reference to the correct test for determining refugee protection pursuant to section 96 of the Act.

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is allowed; and

2. No question of general importance is certified.

"Catherine M. Kane"
Judge