Date : 20050310

Docket : IMM-1070-04

Citation : 2005 FC 347

Montréal, Quebec, March 10, 2005

Present : THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN :

FRANCIS SEBAMALAI FIGURADO

Applicant

and

THE SOLICITOR GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision dated December 19, 2003, by S. Morgan, Pre-removal risk assessment officer (the PRRA officer), who concluded that the applicant is not a "Convention refugee" nor a "person in need of protection" within the meaning of sections 96 and 97 of the*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) and accordingly rejected his application for protection.

BACKGROUND

[2] The applicant is a Tamil and a citizen of Sri Lanka. The applicant alleges that in January 1999, both he and his boat were taken by the Liberation Tigers of Tamil Eelam (LTTE) and he was released after five days of detention. Thereafter, the applicant alleges that he was picked up by the Sri Lankan army (the army) and subsequently beaten on suspicion of membership in the LTTE. He was released after three days of detention but had to report weekly to the army. Furthermore, the applicant alleges that his boat was stolen and, a short time later, the army arrested him and beat him once again. The applicant fled for Canada after his release by the army.

[3] The applicant made a claim for refugee protection under the *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act), now repealed, which was rejected in December 1999 by the Convention Refugee Determination Division, Immigration and

Refugee Board (the Board) on the basis that he had not established a well-founded fear of persecution at the hands of the army and the LTTE.

[4] Since the rejection of his refugee claim in December 1999, the applicant remained in Canada. In July 2000, the applicant submitted an application for landing as a member of the post-determination refugee claimants in Canada class (PDRCC) under the *Immigration Regulations, 1978*, SOR/78-172 (the former Regulations), now repealed. However, as of coming into force of the IRPA in June 2002 there had been no determination of whether the applicant was a member of that class. In such a case, subsection 346(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRPA Regulations), provides that the "application for landing" is an "application for protection" under sections 112 to 114 of the IRPA and that those sections apply to same.

[5] As it appears from the additional written submissions addressed to the PRRA officer in autumn 2003, the applicant reiterated his desire to be permitted to apply for and to become a permanent resident in Canada and re-alleged his fear of being killed upon return to Sri Lanka because he is a Tamil and he was detained by both the army and the LTTE. He alleged that the circumstances which led to his departure from Sri Lanka in 1999 were virtually the same in 2003 and in many ways more dangerous because his departure from Sri Lanka would now make him an object of suspicion by both the army and the LTTE.

[6] On December 19, 2003, the PRRA officer determined that the applicant would not be subject to a risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if he returned to Sri Lanka (the PRRA decision).

[7] On January 28, 2004, the applicant was notified in person of the negative PRRA decision. He was advised at the same time that the removal order issued against him was now enforceable. Indeed, a Direction to report on Monday, March 1st, 2004, at 6:30 p.m. to the Canada Immigration Centre, Pearson International Airport, was remitted to the applicant on this occasion.

[8] The applicant seeks to have the PRRA decision set aside and asks that the matter be remitted for redetermination before a different officer. However, in the meantime, on February 16, 2004, this Court dismissed the applicant's motion requesting a stay of the enforcement of the removal order until the present judicial review application could be heard and decided. The Motions Judge considered there was no serious issue raised. The applicant has since been removed from Canada. That said, on September 17, 2004, the Applications Judge granted leave for judicial review.

MOOTNESS ISSUE

[9] Subsection 48(2) of the IRPA provides that a removal order is "enforceable" if it has come into force and is not stayed. Indeed, the removal order is "enforced" where the foreign national departs from Canada. That said, the principal effect (but not necessarily the only one) of a positive PRRA officer's determination is to stay the execution of a removal order (section 114 of the IRPA; paragraph 232(*d*) of the IRPA Regulations). In the case at bar, following the dismissal of his refugee

claim, the conditional removal order made against the applicant became enforceable. However, by virtue of section 232 of the IRPA Regulations, the removal order was "stayed" pending the determination of his PRRA application. That said, the PRRA decision in this case was negative and this Court subsequently refused to stay the execution of the removal order. As a preliminary issue, due to the applicant's removal from Canada, I must therefore decide if the present application is moot and in the affirmative, whether I should exercise my discretion to hear it (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

Parties' positions

[10] Counsel for the applicant maintains the position he originally took in February 2004 when the stay motion was argued, namely that the applicant's removal would render his judicial review moot. That being said, he nevertheless invites the Court to exercise its discretion to hear and decide the matter. In September 2004, another judge of this Court granted leave. Counsel submits, in this regard, that the underlying substantive issue of the PRRA decision - whether or not the applicant faces risk in Sri-Lanka - remains in dispute between the parties and continues to create an adversarial context. Moreover, it is submitted that the need to conserve judicial resources does not weigh heavily against the exercise of discretion in this case. Finally, the issues in this case are those of a regular judicial review and do not threaten the Court's proper function as an adjudicative rather than law-making institution.

[11] If this Court where ultimately to determine that the PRRA officer made a reviewable error, counsel for the applicant further submits that the Court should set aside the impugned decision and order the redetermination of the PRRA application with proper directions to the respondent. Otherwise, the redetermination may prove to be meaningless in view of the fact that the applicant may still be at risk in Sri Lanka. In this respect, while counsel recognizes that the IRPA does not empower the Court with precise authority to order the respondent to return someone to Canada after a removal order has been legally enforced, it is nevertheless submitted that either under subsection 18.1(3)(*b*) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the *Federal Courts Act*) or the Court's inherent jurisdiction, this Court possesses a broad power to make all necessary orders and directions to ensure that redeterminations are meaningful. This includes the power to order the respondent to return the applicant to Canada, and this, possibly at public expense (*Freitas v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 432 at para. 29 (F.C.T.D.); *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 370 (F.C.T.D.) at para. 17; *Lazareva v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1019, [2004] F.C.J. No. 1245 (F.C.) (QL) at paras. 19-22; *Lazareva v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1372, [2004] F.C.J. No. 1661 (F.C.) (QL) at paras. 11-13).

[12] The respondent takes a somewhat different position. Counsel submits that an application for judicial review of a negative PRRA decision is not moot where an applicant has been removed before a final decision is rendered on the judicial review application challenging same; *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (F.C.A.) (QL) at para. 20; *Kim v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 321, [2003] F.C.J.

No. 452 (F.C.T.D.) (QL). In the case at bar, the applicant was unsuccessful on his stay motion in March 2004. The Motions Judge found that there was no serious issue and the applicant was returned to his country of origin, Sri Lanka. If, however, this Court were to ultimately accept the arguments made by the applicant and set aside the PRRA decision, it indeed has jurisdiction to order a redetermination of that PRRA decision.

[13] Counsel for the respondent further submits that the IRPA prescribes the specific circumstances where a person is entitled to come into or return to Canada. The applicant is already outside of Canada and there is no legislative or regulatory provision upon which this Court could order the return of the applicant for the purposes of redetermination if this judicial review application is successful. Indeed, right now the applicant has no right to return to Canada "unless authorized by an officer or in other prescribed circumstances" (subsection 52(1) of the IRPA). Except for the case mentioned at paragraph 42(*b*) of the Act (inadmissible family member), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation was enforced (subsection 226(1) of the IRPA Regulations). Accordingly, the respondent denies any power under subsection 18.1(3) of the *Federal Courts Act* to order the return of the applicant to Canada either for the purpose of the redetermination itself or if the redetermination proved successful.

[14] That being said, despite the fact that the removal order has been legally been enforced, counsel for the respondent nevertheless submits that there is no legal impediment by having a redetermination of the applicant's PRRA done while the applicant remains in Sri Lanka. Therefore, if following a redetermination eventually ordered by the Court, the PRRA application is subsequently allowed and refugee protection is conferred to the applicant by a PRRA officer, Citizenship and Immigration Canada (CIC) would facilitate his entry into Canada (subsection 18(1) of the IRPA). The applicant would then be entitled to apply for permanent residence in Canada (subsection 21(2) of the IRPA). In this context, to the extent a second PRRA assessment is positive, counsel submits that an order of the Court to refer the matter back for redetermination does ultimately have some practical effect, although the Court's power to make directions is somewhat limited in this case. Accordingly, the respondent contests the applicant's central premise that a PRRA becomes nugatory once removal has been effected. It follows that the judicial review of the PRRA is not entirely academic in the respondent's view.

Jurisprudence of this Court and the Federal Court of Appeal

[15] The jurisprudence of this Court and the Federal Court of Appeal is not unanimous on the question of whether the removal of a person from Canada effectively renders an application for judicial review moot or renders nugatory any ensuing remedy the Court would be allowed to make under subsection 18.1(3) of the *Federal Courts Act*. The following decisions are illustrative of the variety and complexity of the opinions (sometimes divergent) that have been expressed on this matter. As will be seen below, many of these decisions have addressed, at a preliminary stage, the issue that removal may render an application moot and whether a stay ought to be granted in such a case.

[16] In *Toth v. Canada (Minister of Employment and Immigration)*, 86 N.R. 302, [1988] F.C.J. No. 587 (F.C.A.) (QL), the applicant, a permanent resident of Canada who had been found to be inadmissible on grounds of serious criminality, was asking the Federal Court of Appeal to stay the execution of a deportation order issued against him pending the determination of his appeal. Same was made against the decision of the Immigration Appeal Board which had dismissed his application to reconsider its previous decision to the effect that the deportation order should be executed as soon as reasonably practicable. Finding that the tri-partite test (serious issue, irreparable harm and balance of convenience) was met, the Federal Court of Appeal ultimately stayed the execution of the deportation order. However, as a preliminary question, the Federal Court of Appeal had to decide first whether it had the power to order a stay. At that time, the authority of the Court to stay the execution of the impugned decision or a related order (such as a deportation order) was still uncertain in view of the fact that precise legislative authority (such as the power now found in section 18.2 of the *Federal Courts Act*) was absent in the former *Federal Courts Act*, R.S.C. 1970, c. 10. The Federal Court of Appeal reaffirmed that it had an implied jurisdiction to stay the execution of a deportation order "where the appeal would otherwise be rendered nugatory" (*New Brunswick Electric Power Commission v. Maritime Electric Company Limited and National Energy Board*, [1985] 2 F.C. 13 (F.C.A.)).

[17] It was determined in *Toth, supra*, that if the applicant was deported, irreparable harm would result as there would be a reasonable likelihood that the family business would fail and that his immediate family as well as others who were dependent on the family business for their livelihood would suffer. However, I note that the fact that the "appeal would otherwise be rendered nugatory", while a necessary implication of the Federal Court of Appeal's reasoning to assume jurisdiction in *Toth, supra*, it is not later expressly mentioned in Heald J.A.'s reasons (which were endorsed by the two other members of the Federal Court of Appeal) as a specific factor going to the establishment of irreparable harm. That said, Robertson J.A. held, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 206 (F.C.A.) that the loss of the benefit of an application can amount to irreparable harm within the meaning of the tri-partite test in *Toth, supra*, and noted at paragraph 16, that "the only reason the Ontario courts have been prepared to entertain concurrent proceedings stems from the fact that the denial of injunctive relief would render the proceedings in the Federal Court moot".

[18] Indeed, in a number of decisions of this Court subsequent to *Toth, supra*, but prior to *Suresh, supra*, where the underlying judicial application would otherwise be rendered nugatory, it had already been judicially understood that this can constitute "irreparable harm" depending on the particular circumstances. For example, in *De Medeiros v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 11 (F.C.T.D.) (QL), Nadon J. (as he then was) stayed the execution of a deportation order issued in circumstances similar to *Toth, supra*, until such time as this Court had rendered its decision with respect to the applicant's application for leave and for judicial review of the decision of the Immigration and Refugee Board Appeal Division (the Appeal Division) pursuant to which the Appeal Division had refused to reopen the applicant's appeal. In this case, it was noted that the equitable jurisdiction to reopen an appeal existed as long as a deportation order had not been executed. Deportation would eliminate the equitable jurisdiction of the Appeal Division.

Therefore, in Nadon J.'s opinion, the applicant "would, no doubt, suffer irreparable harm".

[19] In *Hosein v. Canada (Minister of Employment and Immigration)*, 53 F.T.R. 86, [1992] F.C.J. No. 226 (F.C.T.D.) (QL), this Court dismissed an application for an order staying an inquiry before an immigration adjudicator pending determination of an application for leave to commence judicial review proceedings. In that case, the respondent was contesting the Court's jurisdiction under section 18.2 of the Federal Courts Act, to order a stay, which, it was submitted, was limited to circumstances where leave to commence proceedings for judicial review had indeed been granted. This argument was not accepted by the Court. *Hosein, supra*, is consistent with the approach taken in *Toth, supra*, and stands for the general proposition that the Court's jurisdiction to order a stay is not limited by section 18.2 of the *Federal Courts Act* or by the necessity to apply for leave to seek judicial review, particularly where the issue raised in an application for leave is arguable, but would be moot or the jurisdiction of the Court would be rendered nugatory by failure to grant a stay. That said, in *Hosein, supra*, the Court considered that the applicant had not proved that irreparable harm would automatically result, as the tribunal's hearings had not yet been concluded and the applicant would still have the opportunity to seek judicial review when they were concluded. In this regard, MacKay J. noted:

> In this case I am not persuaded that if proceedings of the tribunal are not now stayed, the opportunity for the Court to review the proceedings of the tribunal will be lost or that jurisdiction in relation to judicial review will be rendered nugatory. Further steps in the process of consideration of the applicant's situation under the Immigration Act are required before he could be excluded from Canada and the opportunity for judicial review, now sought by the application for leave filed, can proceed in the ordinary course. If that process is not completed before steps are taken to remove the applicant from Canada, he may at that time apply for leave, if necessary, to stay implementation of those procedures pending disposition of the application for leave, and any judicial review proceedings arising from that application if granted.
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> (My emphasis)

[20] In *Ramoutar, supra*, the applicant had been deported prior to the date his judicial review application was heard by the Court. He was seeking to quash the decision rendered by an immigration officer not to refer his request to the Governor in Council for an exemption on humanitarian and compassionate (H & C) grounds from the requirement to apply for landed immigrant or permanent resident status from outside of Canada. The refusal letter stated that there were reasonable doubts as to the *bona fide* character of the applicant's marriage to a Canadian citizen, and that he had provided information to the Immigration and Refugee Board, Appeal Division, contradictory to that provided to immigration counsellors. The applicant was alleging that the respondent had applied the wrong standard of proof and that there had been a denial of procedural fairness. Those grounds of review proved ultimately to be well founded. That said, during submissions, counsel for the respondent argued that the entire matter was moot since the applicant had already been deported from Canada. However, the Court considered that a decision decided by referring to the wrong standard of proof and without affording the applicant procedural fairness, could

potentially prejudice the applicant in the future since it was now part of the applicant's record for immigration purposes. There, the immediate prejudice did not flow from the fact that removal had been legally enforced, but from the fact it would be more difficult for the applicant to re-enter Canada or re-apply as a permanent resident. This reasoning is not applicable in the case of a PRRA assessment which necessarily involves a change of circumstances from a previous assessment made by the Board or another PRRA officer.

[21] In *Ramoutar, supra*, Rothstein J. (as he then was) further remarked at paragraphs 15 and 16 of his decision:

> ... The deportation of an individual from Canada, while having negative consequences to the individual, does not eliminate all rights that may accrue to him under the Immigration Act Those rights should not be adversely affected by a decision made by application of the wrong standard of proof and without affording the applicant procedural fairness. I therefore find that this case is not moot.
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> Even if the case were moot, I would exercise my discretion to decide it. The adversarial relationship between the parties continues. There are collateral consequences to the applicant if the decision appealed from is allowed to stand. And this is not a case in which a decision by this Court could reasonably be considered to be an intrusion into the functions of the legislative branch of government.
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> (My emphasis)

[22] However, Rothstein J. did not specify precisely the nature of such "rights that may accrue" under the former Act to an individual who is deported from Canada. That said, as was recognized by the Supreme Court of Canada in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paragraph 27 "Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada". It was done in the IRPA. The "accrued rights" doctrine is difficult to apply in an immigration context. In this regard, no person other than a Canadian citizen and an Indian registered under the *Indian Act*, R.S.C. 1985, c. I-5 has an absolute right to enter and remain in Canada. The right of a foreign national, permanent or temporary resident, or of a protected person to enter and remain in Canada is subject to the particular conditions imposed by the IRPA; one being that such persons are not inadmissible on one of the grounds enumerated in the IRPA. Moreover, pursuant to subsection 52(1) of the IRPA, if a removal order has been enforced, the foreign national shall not return to Canada, "unless authorized by an officer or in other prescribed circumstances." The question therefore becomes whether an application for judicial review of a negative PRRA decision becomes moot when the applicant's removal order has been legally enforced. In my opinion, this question is distinct from the question of whether or not the difficulties experienced by the applicant in conducting litigation from outside Canada constitute irreparable harm for the purpose of seeking a stay of the removal order. The applicant may well be ably represented by counsel while he is outside Canada, but perhaps, the eventual granting of his application for judicial review will not necessarily serve a useful purpose. It is

interesting to note that rights that may accrue from the making of an application for protection are somewhat limited in the case of an applicant who voluntarily leaves Canada, when the applicant's removal order is enforced under section 240 or the applicant otherwise leaves Canada. In such a case, pursuant to paragraph 169(*b*) of the IRPA Regulations, the application for protection "is declared abandoned". This is because the applicant is not legally allowed under the IRPA or the IRPA Regulations to return to Canada "unless authorized by an officer or in other prescribed circumstances".

[23] The "forced" return of a removed applicant to Canada by judicial discretion was possibly "hinted" at by this Court in *Ramoutar, supra*, where Rothstein J. stated: "I do not contemplate that the applicant must be returned to Canada for the purposes of the redetermination. This may be carried out on the basis of written submissions, facsimiles or other communications without the necessity of personal attendance by the applicant." By making this comment, the applicant's counsel suggested that Rothstein J. somewhat considered that the Court may have the power to order the applicant's return had it been necessary. As we will now see, this particular point was directly addressed in the next case.

[24] In *Freitas v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 432, the Court ultimately set aside a decision of the Board finding that the applicant was excluded from being a Convention refugee under Article 1F (c) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6 by reason of the relationship of the conspiracy for which he was convicted to drug trafficking. In the meantime, the applicant had already been removed from Canada and deported to Venezuela by the Minister. As in the present case, removal was enforced by the respondent after this Court had denied the applicant's application to stay the removal order issued against him. That said, the Court subsequently decided that the Board had erred in law in finding the applicant to be excluded from consideration as a Convention refugee in light of the subsequent decision rendered by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. The Court decided that the application for judicial review was not moot considering that, where the decision under review is based upon an error of law, the deportation of an individual does not eliminate all rights that may accrue to him under the former Act. Reference was made in this regard to *Ramoutar, supra*.

[25] Moreover, the Court decided in *Freitas, supra*, that it was not prepared to provide a meaningless remedy in the form of a reference back to the Board for redetermination; that could only be a determination that the applicant is not a Convention refugee because he is not outside the country of his nationality. In this respect, Gibson J. wrote at paragraphs 29, 30, 36 and 44:

> ... In the absence of express words on the face of the Act requiring me to do so, I am not prepared to read the right conferred on the applicant herein by subsection 82.1(1) of the Act in such a manner that it is rendered nugatory by the performance by the respondent of her duty to execute a removal order as soon as reasonably practicable. Nor am I prepared to have the applicant's right indirectly rendered nugatory by the rendering of a decision of this Court that confers a meaningless right to a redetermination by the CRDD. I determine

this application not to be moot in that it continues to present a live controversy. I am satisfied that this conclusion is consistent with the decision of Rothstein J. in Ramoutar, supra.

If I am wrong in determining that a live controversy continues to exist on the facts of this matter, the quotation from Borowski that appears earlier in these reasons makes it clear that I nonetheless have a discretion to depart from the general policy of refusing to hear a matter that is moot...

(...)

... It was not in dispute before me that if I were to determine this matter in favour of the applicant, I have the authority to order the respondent to return the applicant to Canada, at the respondent's expense, in order to render a new determination by the CRDD meaningful. Whether or not such an order would be required is a question that I will turn to later in these reasons.

(...)

I will grant relief in essentially the following terms: this application for judicial review is allowed. The decision of the Convention Refugee Determination Division with respect to the applicant is set aside and this matter is remitted to the Immigration and Refugee Board for redetermination. If the Immigration and Refugee Board determines it necessary that the applicant again appear before the CRDD to allow it to comply with this order, and so advises the respondent, then the respondent is ordered to forthwith make her best efforts to return the applicant to Canada at the respondent's expense. If the Immigration and Refugee Board, without requiring the return of the applicant and working on the assumption that the applicant is in Canada when that is not in fact the case, determines the applicant to be a Convention refugee as against Venezuela, then the respondent is ordered to forthwith make her best efforts to return the applicant to Canada at the respondent's expense.

(My emphasis)

[26] Gibson J. did not state what authority specifically allowed him to make the above order. However, it is apparent from the reasons given in *Freitas, supra*, that it was not disputed by the parties that the Court could order the Minister to return the applicant to Canada, at public expense, in order to render a new determination meaningful. Today, the respondent is not ready to make such a concession. There are a number of decisions of the Federal Court of Appeal that suggest that the Court's general power to make directions under subsection 18.1(3) of the *Federal Courts Act* is somewhat more limited. Particularly if the declaration or the remedy in question would indeed have the effect of conferring Refugee status or protection, or of fettering the Minister's discretion in cases where an application to remain in Canada has been made on H & C grounds. (*Canada (Minister of Employment and Immigration) v. Sharbdeen*, [1994] F.C.J. No. 371 (F.C.A.) (QL) at para. 7; *Canada (Minister of Citizenship and Immigration) v. Forde*, [1997] F.C.J. No. 310 (F.C.A.) (QL) at paras. 9 and 10; *Turanskaya v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 254 (F.C.A.) (QL) at para. 6; *Rafuse v. Canada (Pension Appeals Board)*,

2002 FCA 31, [2002] F.C.J. No. 91 (F.C.A.) (QL) at paras. 13 and 14; *Owusu v. Canada (Minister of Citizenship and Immigration)*, [2004] 2 F.C.R. 635, 2004 FCA 38, [2004] F.C.J. No. 158, (F.C.A.) (QL) at para. 12; *Canada (Minister of Citizenship and Immigration) v. Lazareva*, 2005 FCA 39, [2005] F.C.J. No. 186 (F.C.A.) (QL)).

[27] *Freitas, supra*, was decided under the former Act and before most of the decisions referred to above. It can be said today that the Court's power to order the return of an applicant to Canada is expressly limited by subsection 52(1) of the IRPA, which prescribes in such a case that "the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances". Therefore, while not expressing a definite opinion on this matter, I am inclined to accept the respondent's argument that the Court has no power to order the respondent to return an applicant to Canada. It is also clear that the Court does not have the power to direct the PRRA officer to accept the applicant's application for protection, unless, the negative PRRA decision was perhaps based on some determinative error of law.

[28] In *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403 (F.C.T.D.) (QL), the Court accepted to stay the execution of a deportation order issued against a permanent resident because of his criminal convictions pending the determination of the judicial review application of his failed request to have the deportation order reconsidered by the Immigration Appeal Division. The approach taken by Pelletier J. (as he then was) is consistent with the definition of irreparable harm accepted both in *Toth, supra*, and *Suresh, supra*. Pelletier J. considered that the best interests of the children raised a serious question and raised the possibility of irreparable harm, as this would effectively render the judicial review nugatory. Pelletier J. stated specifically at paragraph 22:

> But for the fact that I have found that the serious issue to be tried in the judicial review application is the consideration to be given to the interests of Mr. Melo's children in the application to reopen the appeal, that would be the end of the matter. The application for a stay would be dismissed. <u>But if that is done, the children's interests will be affected prior to a ruling being obtained on the extent to which their interests must be considered. This will effectively render the judicial review nugatory. It is in circumstances similar to these that Robertson J.A. held in Suresh v. Canada [1999] 4 F.C. 206, [1999] F.C.J. No. 1180 that the loss of the benefit of an application can amount to irreparable harm within the meaning of the tri-partite test in Toth.</u> If there is to be any reality to the judicial review application, the status quo must be maintained. While the benefit in question may appear to be one for the children, it is also a benefit for Mr. Melo. <u>I find that the loss of the benefit of the application for judicial review constitutes irreparable harm for the purposes of this application.</u>
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> (my emphasis)

[29] In *Ero v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1276, [2002] F.C.J. No. 1747 (F.C.T.D.) (QL), the factual background somewhat resembles the present case. The only difference is that the negative pre-removal risk assessment was already conducted under the former Act. There, the applicant was seeking the judicial review of a decision of a Post-claim determination officer

(PCDO) which had determined under the former Regulations, that the applicant was not a member of the PDRCC class. The matter was heard a few months after the coming into force of the IRPA. The Court found that the application for judicial review was rendered moot by the prior removal of the applicant from Canada pursuant to the removal order.

[30] In this regard, Snider J. noted in *Ero, supra*:

> If I had, in this case, accepted the arguments of the Applicant and set aside the decision of the PCDO and referred the matter back for re-determination, that re-determination would have taken place under s. 199 of the IRPA, which provides as follows:
>
> 199. Sections 112 to 114 apply to a redetermination of a decision set aside by the Federal Court with respect to an application for landing as a member of the post-determination refugee claimants in Canada class within the meaning of the Immigration Regulations, 1978.
>
> * * *
>
> 199. Les articles 112 à 114 s'appliquent au nouvel examen en matière de droit d'établissement d'une personne faisant partie de la catégorie de demandeurs non reconnus du statut de réfugié au Canada au sens du Règlement sur l'immigration de 1978 et la décision à prendre en l'espèce est rendue sous son régime.
>
> Sections 112-114 of the IRPA relate to the PRRA. Since the Applicant has returned to Nigeria, this Court cannot order a PRRA, which is essentially a risk assessment that takes place prior to an individual's removal from Canada. As a result, the issues related to procedural fairness have become academic. Even if I were to agree with the Applicant's submissions on the procedural fairness issue, the remedy sought by the Applicant could not be granted. As a result, the decision of the Court on the procedural fairness issue will have no practical effect on the rights of the Applicant. Therefore, the first step in the mootness analysis as set out by the Supreme Court of Canada in Borowski v. Canada (A.G.), [1989] 1 S.C.R. 342 has been met.
>
> (...)
>
> The second step of the Borowski, supra, test concerns whether I should exercise my discretion to hear the case. In my opinion, this question should be answered in the negative. In Borowski, supra, the Supreme Court of Canada set out three factors which would justify the exercise of discretion to hear a moot issue: collateral consequences of the decision for the parties; the issue is of a recurring nature, but brief duration (such as an illegal strike); or the issue is one of public or national importance. None of these factors is present in this case. As addressed above, this Court does not have the power to order the Minister to provide the Applicant with a PRRA. In addition, as pointed out by the Respondent, the Applicant does have a pending H & C application, which could involve a risk assessment that is very similar to the PRRA assessment.

> As a result, the Applicant has an opportunity to receive another risk assessment, regardless of the outcome of this application for judicial review. Consequently, no injustice will be suffered by the Applicant if this application is dismissed on grounds of mootness.
>
> (My emphasis)

[31] It is apparent from the learned judge's comments in *Ero, supra*, that she assumed that a PRRA, by its very nature, can only take place prior to the removal of an individual from Canada. While not expressly mentioned, it seems that she also assumed that a redetermination of the risk assessment under the new PRRA process, if subsequently ordered by the Court, implied that the applicant was still in Canada. That was impossible since he had already been removed. As can be seen from the reasoning quoted above, no direct mention is made to any "accrued rights" under the former Act. Moreover, while section 199 of the IRPA is referred to, the conclusion reached in *Ero, supra*, lies essentially on the Court's firm opinion that it does not have legal power to grant the requested remedy.

[32] In *Kim, supra*, which also presents a similar factual background, except that section 199 of the IRPA did not apply (like in the present case), the Court took a somewhat different position from the one adopted in *Ero, supra*. In *Kim, supra*, the applicant was asking this Court to stay her removal from Canada to South Korea pending the determination of her judicial review application attacking the validity of a negative PRRA. The applicant argued that she would suffer irreparable harm by being sent back to Korea because, *inter alia*, in the event that she were successful on her application for judicial review of the PRRA officer's decision, no remedy would then be available to her at that point. This would render her judicial review application moot. Counsel for the applicant relied on the case of *Ero, supra*. In distinguishing the facts of that case from *Ero, supra*, O'Reilly J. remarked at para. 9:

> Counsel for Ms. Kim argued that she would suffer irreparable harm in being sent back to Korea because, in the event that she were successful on her application for judicial review of the PRRA officer's decision, no remedy would be available to her at that point. Counsel relied on the case of Ero v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 1747, 2002 FCT 1276. There, Snider J. held that the removal of an applicant from Canada had the effect of rendering moot reconsideration of a Post-Determination Refugee Claimants in Canada ("PDRCC") application. That conclusion was based on an interpretation of s. 199 of the Act -- a transitional rule -- and the requirement in s. 112 that an application for protection be made by a person "in Canada." However, that transitional rule has no application here. I see nothing in the Act or the Rules that would interfere with the entitlement of a PRRA applicant, who has been removed from Canada and who is successful on judicial review, to have that application reconsidered.
>
> (My emphasis)

[33] Be that as it may, apparently on a similar background factual situation, in *Resulaj v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1168, [2003] F.C.J. No. 1474 (F.C.) (QL), decided a few months after *Kim, supra*, a stay was

granted by the Court pending the determination of a judicial review application seeking to set aside a negative PRRA. This time, finding that the applicant had raised a serious issue, O'Reilly J. accepted the applicant's counsel's argument that removal would render nugatory any legal remedy that might ultimately be available to the applicant:

> This case involves the question whether the assessment of personal risk to Ms. Resulaj was adequate. Removing her to face that potential risk while the legal issue in her case is explored before the Court would render nugatory any legal remedy that might ultimately be available to her. Such circumstances constitute irreparable harm: Melo v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 403 (QL) (T.D.).
>
> (My emphasis)

[34] I note that O'Reilly J. in *Resulaj, supra*, refers to *Melo, supra*, which explicitly recognized "that the loss of the benefit of an application can amount to irreparable harm within the meaning of the tri-partite test in *Toth, supra*". To the extent that the PRRA officer failed to consider relevant documentary evidence dealing with the country conditions or applied the wrong standard of proof, the right to remain in Canada is certainly affected prior to a ruling of the Court being obtained on these issues. This reasoning is similar to the one adopted by Pelletier J. where the best interests of the child had to be considered. However, the views taken in *Resulaj, supra*, and *Melo, supra*, are not shared by all judges of this Court or the Federal Court of Appeal.

[35] In *Selliah, supra*, prior to the hearing of the applicants' appeal, the Federal Court of Appeal was asked by the applicants to stay their removal from Canada. In that case, this Court had already dismissed their applications for judicial review of the PRRA officer's decision that they were not at risk of persecution if returned to Sri Lanka, and the same officer's refusal of their applications to remain in Canada on H & C grounds. That said, Blanchard J. did not certify a question in respect of the application to review the H & C decision. The Federal Court's dismissal of the application to review the H & C decision was therefore not the subject of the appeal made to the Federal Court of Appeal. The applicants' motion seeking a stay pending the appeal was decided by Evans J.A. who denied the stay.

[36] While, in Evans J.A's opinion, the certified question relating to the burden of proof under section 97 of the IRPA raised an "arguable issue", the motion for a stay should nevertheless fail because the applicants had not met the requirement of showing that, unless their removal is stayed pending the determination of their appeal, they would suffer irreparable harm. In this regard, based on the evidence on record, Evans J.A. first considered that the applicants had not conclusively established that, if returned to Sri Lanka, they would be at risk of one of the forms of persecution identified in subsection 97(1) of the IRPA. Moreover, he dismissed the applicants' argument that the appeal would be rendered nugatory. In this regard, Evans J.A. noted at para. 20:

> Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful, the appellants will

> probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.
>
> (My emphasis)

[37] Thast said, in the present case, counsel for the respondent was not ready to accept at the hearing that if the present judicial review application is successful, the applicant "will probably be permitted to return to Canada at public expense", as assumed by Evans J.A. in *Selliah, supra*. While subsection 52(2) of the IRPA prescribes that the return of a foreign national at the expense of the Minister is warranted in the case where a removal order has been subsequently set aside in a judicial review, subsection 52(2) of the IRPA does not apply in the case at bar since the validity of the removal order, which has already been enforced against the applicant, has never been under attack.

[38] In *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, [2005] F.C.J. No. 189 (F.C.) (QL) Rothstein J.A. dismissed an application for a stay of a removal order pending appeal of a decision of Blais J. of this Court, who had refused to entertain a stay of removal application pending the disposition of the two judicial reviews made by the appellant. One of these judicial reviews was from a negative PRRA decision while the other was from a decision refusing to defer the appellant's removal pending determination of an H & C application. Rothstein J.A. considered that the appellant did not make out a case of irreparable harm. It was argued that the appellant had a child in Canada, that the best interests of the child were relevant and they were not considered in the appellant's risk assessment by the PRRA officer. Although Rothstein J.A. recognized that the best interests of the child were relevant, there was no indication that they were raised on the appellant's risk assessment and it was not obvious to him that the risk assessment was the appropriate forum to have done so. As for the mootness argument, while removal may cause hardship, it was not clear in the particular circumstances of the case "that rendering the appeal nugatory will result in irreparable harm". On this matter, Rothstein J.A. noted at paragraph 8:

> The appellant argues that her appeal will be rendered nugatory if the stay is not granted, resulting in irreparable harm. The difficulty with the argument that an appeal being rendered nugatory amounts to irreparable harm is that if it is adopted as a principle, it would apply to virtually all removal cases in which a stay is sought and would essentially deprive the Court of the discretion to decide questions of irreparable harm on the facts of each case. In some cases, the fact that an appeal is rendered nugatory will amount to irreparable harm. In others, it will not. The material indicates that the appellant's husband may apply to sponsor her return to Canada. While removal will cause hardship, it is not clear that rendering the appeal nugatory will result in irreparable harm.
>
> (My emphasis)

[39] In *El Ouardi, supra*, it does not appear that the appellant's life or security was at risk. Moreover, the balance of convenience clearly favoured the Minister since the appellant's application for judicial review of the PRRA decision was filed out of time and the appellant need not have waited until the day before her scheduled removal to apply for a stay. That said, Rothstein J.A.'s reasoning in *El Ouardi, supra*,

appears to distinguish or restrict the applicability of the general comments made in *Toth, supra*, and *Melo, supra,* with respect to irreparable harm. However, contrary to the view taken by Evans J.A. in *Selliah, supra*, a broad reading of the statements in *El Ouardi, supra,* also suggests that Rothstein J.A. implicitly recognized that removal will undoubtedly render an underlying judicial review application moot or nugatory. However, this fact alone should not constitute the only governing factor in the exercise of the Court's discretion to grant a stay as it would otherwise deprive "the Court of the discretion to decide questions of irreparable harm on the facts of each case". The effects on the individual have to be considered at the same time. This seems to suggest that if there is both a risk to an individual's life or security of the person and a risk that the individual will be deprived of an effective remedy, a stay should be granted if a serious issue is otherwise raised, since this will constitute irreparable harm and the balance of convenience will clearly favour the applicant in such a case.

Determination in this case

[40] The PRRA process was implemented to allow individuals to apply for a review of the conditions surrounding the risk of return prior to their removal from Canada and not after their removal. Indeed, the PRRA emerged as a result of the jurisprudence of the Federal Court of Appeal and the Supreme Court of Canada, which required a timely risk assessment to comply with section 7 of the Charter (*Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646 (F.C.A.) (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3). It is clear that Parliament's primary intention in enacting the PRRA process was to comply with Canada's domestic and international commitments to the principle of non-refoulement, Regulatory Impact Analysis Statement to the IRPA Regulations, *Canada Gazette, Part I*, December 15, 2001, pp. 4550, 4552). Subsection 115(1) of the IRPA, found in Division 3 - Pre-removal risk assessment which comprises sections 112 to 116 of the IRPA, assures that a person shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or at risk of torture or cruel and unusual treatment or punishment. Naturally, this statutory right is subject to the exceptions mentioned at subsection 115(2) of the IRPA (however, for the purposes of the present case, it is not necessary to determine whether such exceptions contravene section 7 of the Charter). Accordingly, the PRRA is closely linked in time to removals and is carried out immediately prior to removal.

[41] The fact that PRRA applicants receive a statutory stay of removal under section 232 of the IRPA Regulations is indicative of the legislative intent to have PRRAs completed before applicants are to be returned to face the risks they allege. The PRRA's fundamental purpose is to determine whether or not a person can safely be removed from Canada without being subject to persecution, torture or inhumane treatment. This purpose ceases to exist upon removal. Further, if the applicant returned and suffered persecution, torture or inhumane treatment, the redetermination of the PRRA may not have any practical effect. In this context, it is understandable that judges of various jurisdiction have stated that in such cases, where a serious issue is raised, a stay should be granted to prevent irreparable harm. As was decided by Lane J. of the Ontario Court (General Division) in *Suresh v. R.* 38 O.R. (3d) 267, where "the evidence shows that [the applicant] will almost certainly be detained and

questioned and exposed to the risks of torture and extra-judicial execution ... there is a strong probability that it will be impossible for the Canadian courts to influence the situation at all. His application will become moot, for any relief he might obtain would be unenforceable". (My emphasis). It follows that the refusal by the Court to grant an applicant a stay pending the determination of his judicial review application "decides the whole case against him" and certainly constitutes an irreparable harm in such circumstances.

[42] Indeed, Lane J.'s reasoning in *Suresh, supra*, was subsequently endorsed by Southes J. in *Suresh v. R.* (1999), 42 O.R. (3d) 797 at page 799, affg (1998), 38 O.R. (3d) 267 (General Division), and by Robertson J.A. in *Suresh, supra*, at paragraphs 13, 14 and 16 (F.C.A.):

> Clearly, the issue of irreparable harm can be answered in one of two ways. The first involves an assessment of the risk of personal harm if a person is deported or deported to a particular country. The second involves an assessment of the effect of a denial of a stay application on a person's right to have the merits of his or her case determined and to enjoy the benefits associated with a positive ruling.
>
> The alternative argument advanced by counsel for Mr. Suresh is that his pending appeal will be rendered "moot" or "nugatory" if he is deported prior to the hearing of his appeal. Assuming that Mr. Suresh is deported and detained in Sri Lanka prior to that proceeding, and assuming that he is successful on appeal, Mr. Suresh's successful constitutional challenge would be a hollow victory, since the Sri Lankan authorities would be unlikely to release him and, therefore, he would be unable to avail himself of the fruits of his victory, most likely, the right to remain in Canada until such time as his case is disposed of in accordance with the Charter. Were he to remain in Canada and be successful on his appeal, I take it for granted that the Minister would be unable to act on the deportation order.
>
> (...)
>
> ... As I read the jurisprudence, the only reason the Ontario courts have been prepared to entertain concurrent proceedings stems from the fact that the denial of injunctive relief would render the proceedings in the Federal Court moot. In this regard, I respectfully agree with the following comments of Justice Southey in Suresh v. R. (1999), 42 O.R. (3d) 797 (Divisional Court, affg (1998), 38 O.R. (3d) 267 (General Division):
>
> It appears to us that, barring the intervention of Lane J., the order made in the Federal Court of Canada on January 16, 1998, carried with it an unjustifiable risk of rendering practically nugatory any remedy available in the judicial review proceeding still alive in the Federal Court.
>
> (My emphasis)

[43] The respondent does not contest the fact that a subsequent judicial decision to order a redetermination of the PRRA cannot eliminate the experience or

suffering if the applicant has been persecuted or tortured upon return to his or her country and cannot have any impact if the latter has been killed. If the individual, in fact, experiences persecution, torture or inhumane treatment upon return, Canada is hardly able to effectively protect the applicant. Logically, this commands that an applicant not be returned in the first place to the country. It is the right not to be returned to a country, where such risk exists, based on the principle of non-refoulement, that can be effectively denied in such a case. The primary purpose of an application for protection made under section 112 of the IRPA is not to gain permanent resident status or to obtain a permanent resident visa once removal has been affected. It certainly becomes more difficult, if not impossible, for Canada to effectively protect an individual who is outside its boundaries pending a redetermination of an application for protection following the Court's conclusion that a negative PRRA decision should be set aside. Therefore, I find that there is considerable force in the applicant's counsel's submission that any ensuing judicial review application directed against a negative PRRA decision becomes somewhat moot once an individual is removed from Canada. Moreover, if the Court cannot effectively order the respondent to immediately return to Canada as a result of a material error made by the PRRA officer, what purpose is served in ordering that a redetermination of the risk nevertheless takes place as if the applicant was still in Canada, while in fact he has been removed a long time ago?

[44] The respondent has submitted that removing an individual who has made an application for protection under section 112 of the IRPA from Canada does not have the effect of rendering nugatory any remedy available. Indeed, the respondent submits that Parliament intended to allow PRRAs to be determined even after applicants had been removed from Canada. According to the respondent, this intent is clear from the fact that Parliament did not make the statutory stay in question last until the judicial review of a PRRA is determined and the fact that there is no statutory stay for subsequent PRRAs. According to the respondent, this shows that Parliament did not intend judicial reviews of PRRAs to be moot upon removal. I do not find this argument very persuasive. There may be cases where, despite a negative PRRA decision, the removal order has not been enforced (section 165 of the IRPA Regulations). In view of the change of circumstances, subject to any prescribed delay, the individual who is still in Canada can make a second application for protection. It is understandable in such a case that he will not benefit from another regulatory stay. While the IRPA Regulations do not accord a stay in all cases where PRRAs are judicially reviewed (sections 163, 165 and 232 of the IRPA Regulations), this position is consistent with Parliament's intention that, once risk has been assessed by a PRRA officer a first time, the removal order is enforceable and should be enforced by the respondent as soon as reasonably practicable (subsection 48(2) of the IRPA). Therefore, Parliament or Government's choice not to grant an automatic stay in such circumstances is a deliberate choice to allow the Federal Court to decide which judicial reviews of PRRA decisions are worthy of stays.

[45] Where there is a serious issue in respect of a negative PRRA decision resulting in exposing the applicant to persecution or subjecting him personally to a danger of torture or a risk to life or cruel or unusual treatment or punishment, for which a stay is sought pending the determination of the underlying judicial review application, irreparable harm will necessarily result and the balance of convenience in such a case will normally favour the applicant. Thus, a stay should normally be

granted by the Court in these circumstances apart from the question of whether the underlying judicial review application may also be otherwise rendered moot if removal is affected. On the other hand, following a negative PRRA decision, where the Motions Judge does not find a serious issue on a stay, there is thus no logical reason to stay the removal order pending the determination of the judicial review application with respect to a PRRA decision which by itself, if positive, amounts to a stay. The applicant is removed and the judicial review application is allowed to become moot on the assumption that if the stay has been refused on the ground that there is no serious issue, then leave will not normally be subsequently granted by the Applications Judge (since it will be difficult in these circumstances to submit that there is a fairly arguable case). However, this basic assumption failed in the particular case resulting in the question now before the Court. This particular feature certainly renders the present case exceptional.

[46] While the question of whether or not the applicant faces risk in Sri-Lanka remains in dispute between the parties and continues to create an adversarial context, this is not the precise question that the Court has to answer in the present case. Rather, the Court must determine whether the PRRA officer breached the rules of procedural fairness or otherwise committed a reviewable error. This is not an appeal from the PRRA decision. The Court is not entitled to render the decision that should have been rendered in the first place. It can only order a redetermination. Indeed, the Court is not invited to substitute its opinion on the issue of risk to that of the PRRA officer. It is not the Court's role to determine, whether in view of the changes in the country's conditions, the applicant was and continues to be at risk in Sri Lanka. This is purely a factual determination falling under the exclusive jurisdiction of the PRRA officer. Even if the Court would ultimately find the PRRA officer's conclusion in this regard to be capricious, arbitrary, unsupported by the evidence or otherwise unreasonable, this would not justify this Court reassessing the evidence and coming to a different conclusion. As already indicated, the Court can only set aside the decision and order that the matter be redetermined by a different PRRA officer.

[47] I am ready to accept that there may ultimately be, some collateral advantage to the applicant pursuing his judicial review application from outside Canada, but same does not directly result from the Court's determination that the PRRA officer made a reviewable error. There is no assurance, if the PRRA decision is set aside and the matter is returned to redetermination by a different PRRA officer, that the applicant's application for protection will indeed be accepted. The second PRRA decision could be the same. It is only where there is a positive reassessment of the risk that the applicant could then ask that authorization be granted to return in Canada and apply for permanent resident status, and this, provided that he satisfies all the other requirements mentioned in the IRPA and its Regulations. But this hypothetical advantage results in adding a supplementary burden to the judicial system and scarce resources already greatly in demand in immigration matters. Although this is apparently not the case here, in other instances, prior or parallel to a PRRA assessment, the Court may have had the occasion to examine the legality of the Board's decision to deny refugee protection or of the Minister's refusal to exempt an applicant from the requirements of the IRPA in situations where risk is also raised as an H & C ground.

[48] Finally, by ordering a PRRA officer to reconsider an application for protection after an applicant has been removed from Canada, I am not certain that in so doing, the Court would not be departing from its traditional role as the adjudicative branch in our political framework. In such a case, it could be said that a redetermination ordered by the Court amounts or comes very close to the establishment of a new category of persons in need of protection, persons removed from Canada who continue to claim outside Canada that they are at risk. I note that section 95 of the IRPA already defines and establishes the categories of "protected persons" to which refugee protection is conferred. In this regard, I note that under the IRPA Regulations, a foreign national who is outside Canada already has the right to apply for a permanent resident visa as a member of the Convention refugees abroad class, the country of asylum class and the source country class (paragraph 70(2)(*c*) of the IRPA Regulations). In these circumstances, it is not unreasonable to infer that refugee protection should be limited to persons outside Canada who fall under one of these categories.

[49] However, considering the rather unusual and exceptional situation in this case (resulting from the fact that leave was granted after stay was denied on the ground of the absence of a serious issue); considering the fact that both parties have insisted that the Court examine the merits of this case; and further considering that divergent opinions have been expressed on the issue of mootness leading to uncertainty in this area of the law in immigration matters, I have chosen to exercise my discretion to hear this case on its merits and decide this underlying judicial review application. This however, despite being of the opinion that: first, for the most part, the issues raised in same are moot; and second, the three criteria mentioned in *Borowski*, *supra* (collateral legal consequences providing the necessary adversarial context; concern for judicial economy; sensitivity to the effectiveness or efficacy of judicial intervention) for exercising the Court's discretion in a case of mootness, are not all met.

MERITS OF THE CASE

[50] The applicant essentially argues before this Court that the PRRA officer's decision was unlawfully made since the PRRA officer failed to properly assess the risk of the applicant at the hands of the LTTE, and failed to take into account relevant evidence submitted by the applicant when he found that there was protection available to the applicant in Sri Lanka. Subject to the additional observations and reasons made in the following paragraphs, I accept the respondent's written arguments that no reviewable error has been made by the PRRA officer and that the applicant is simply seeking a re-weighing of the evidence.

[51] In my opinion, in applying the pragmatic and functional approach, where the impugned PRRA decision is considered globally and as a whole, the applicable standard of review should be *reasonabless simpliciter* (*Shahi v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1826 at para. 13 (F.C.T.D.) (QL); *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274, [2003] F.C.J. No. 1596 (F.C.) (QL) at para. 24; *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 39, [2004] F.C.J. No. 30 (F.C.) (QL) at para. 7). That being said, where a particular finding of fact is made by the PRRA officer, the Court should not substitute its decision to that of the PRRA officer unless it is

demonstrated by the applicant that such finding of fact was made in a perverse or capricious manner or without regard to the material before the PRRA officer (paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended; *Harb v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 39, [2003] F.C.J. No. 108 (F.C.A.) (QL) at para. 14).

[52] It is important to underline the fact that the PRRA process is not an appeal of the Board's decision, but rather is intended to be an assessment based on new facts or evidence which demonstrates that the person at issue is now at risk of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment. In short, the purpose of the PRRA application is not to re-argue the facts which were originally before the Board or to do indirectly what cannot be done directly - e.i. contest the findings of the Board. The Court notes, in this regard, that pursuant to subsection 113(*a*) of the IRPA, "new evidence" is evidence that arose after the rejection of the refugee claim or was not reasonably available at that time, or that the applicant could not have reasonably been expected to have presented in the circumstances. In the case at bar, the PRRA officer's determination of "changed circumstances" is essentially an issue for factual determination (*Yusuf v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 35 (F.C.A.) (QL); *Joseph v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 344, [2004] F.C.J. No. 392 (F.C.) (QL)).

[53] The PRRA officer's decision was based on the following specific reasons at pages 3 and 4:

> Sri Lanka is a democratic republic that has seen violent conflict between its Tamil minority and Sinhalese majority for many years. According to DOS, the government has fought the LTTE, a terrorist organisation fighting for a Tamil state, since 1983. In December 2001, however, cease fires were announced by both sides and the peace talks are ongoing. While I do acknowledge that active negotiations have been stalled for some time, the documentary evidence does indicate that observers have hope for a lasting peace and permanent solution to the ethnic conflict.
>
> [...]
>
> The current documentary evidence indicates that the Sri Lankan government generally respects human rights. "In a press release dated June 29, 2002, Amnesty International, having just ended a two-week visit to the country, stated that the ongoing cease-fire agreement had made a significant impact in reducing human rights abuse in Sri Lanka." (IND July 2003 Operational Guidance Note)
>
> The 23 February 2002 agreement between the Sri Lankan government and the LTTE requires both parties to abstain from hostile acts against the civilian population, including acts of torture, intimidation, abduction, extortion and harassment. The parties also agreed that search operations and arrests under the Prevention of Terrorism Act (PTA) should not be made. During 2002, more than 750 Tamils held under the PTA had their cases dropped and were released, and no new arrests under the PTA occurred. Further improvements

associated with the peace process included: the removal of most barriers, barricades and checkpoints in Colombo, meaning that residents were free to move around unimpeded; and easing of travel restrictions between the north and south of the country including the opening of the strategic A9 highway; and the opening of LTTE political offices in government-held areas (under the terms of the cease-fire agreement LTTE members are able to engage in political activity in areas outside their control provided they are unarmed and out of military-style uniforms). In 21 April 2003 the LTTE suspended participation in the peace talks in protest at the handling of "critical issues", but said that they had no intention of breaking the cease-fire. Some breaches of the cease-fire agreement have occurred and there are reports that the LTTE continues to recruit child soldiers. (Ibid.)

The applicant left Sri Lanka in 1999 after being detained by both the LTTE and the Sri Lankan army. The applicant does not indicate that he is a supporter of the LTTE: he was detained by them after they commandeered his fishing boat. The Sri Lankan authorities detained him in order to question him about his involvement with the LTTE. He was released and required to report weekly. Notwithstanding these difficulties, I find that the country conditions have changed dramatically since the applicant was last in Sri Lanka. The applicant provides insufficient objectively identifiable evidence of his current risk. The documentary evidence does not indicate that ordinary Tamils are targeted for persecution. The applicant does not indicate that he is a political activist or a dissident and he does not indicate that he was anything other than a fisherman.

Counsel asserts that the country conditions are volatile and unstable. The current documentary evidence, however, does not indicate that the cease-fire is being seriously violated or that a peaceful settlement is not achievable. In fact, according to a UNHCR Country Operations Plan for 2004, "the opening of key roads in the North, coupled with eased restrictions on the movement of people and goods, have created a positive environment and enhanced the prospects for peace. The growing confidence in the peace process amongst the general population of Sri Lanka was demonstrated by the continuous spontaneous movement of IDPs and refugee returnees to areas in the North and East of Sri Lanka. Between January 2002 and July 2003, 312,000 persons returned".

While I acknowledge the current political power struggle between the Sri Lankan President and Prime Minister, there has not been a violation of the cease-fire agreement between the Government and the LTTE. A November 14, 2003 BBC News interview quotes the Norwegian Deputy Foreign Minister: "The peace process, by itself, is in a fundamentally good shape". The Norwegians have played a large role in monitoring the cease-fire agreement. The documentary evidence does indicate that people who are in need of assistance for various reasons, including being targeted for persistent extortion by the LTTE can seek help from the Norwegian forces in Sri Lanka. The evidence indicates that there is assistance available from a variety of sources, including the Committee to Inquire into Undue Arrest and Harassment

(CIUAH) and the Sri Lankan Monitoring Mission (SLMM). The SLMM will investigate complaints made by citizens:

[...]

[54] In the case at bar, the Court concludes that the PRRA decision is not reviewable. There is no error of law or breach of a rule of procedural fairness. Clearly, the PRRA officer did not base his decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before him. Moreover, the general conclusion reached by the PRRA officer is reasonable, is supported by the documentary evidence on record and can stand up to a probing examination. In considering the evidence on record, the PRRA officer assessed the applicant's case, the situation in Sri Lanka and established a risk assessment analysis in connection with the removal of the applicant. The PRRA officer relied upon various public documents in order to reach his decision. For example, the PRRA officer relied upon the U.S. Department of State Country Reports on Human Rights Practices- 2002, Sri Lanka, to conclude that since the cease-fire, there has been a sharp reduction in roadblocks and checkpoints around the country, that approximately 220,000 internally displaced persons have returned to their points of origin in the north and east and that numerous investigations were commenced in connection with the questionable actions by the security force personnel. Furthermore, the PRRA officer relied upon the UK Asylum and Appeals Policy Directorate Operational Guidance Notes- Sri Lanka, July 23, 2003, to conclude that human rights were generally respected by both the Sri Lankan authorities and the LTTE. Moreover, the PRRA officer relied upon various public reports, cited at the end of his decision, to conclude that the people who are in need of assistance for various reasons can seek help from the Norwegian forces in Sri Lanka.

[55] As for the applicant's argument in connection with the alleged PRRA officer's error of not assessing the risk of the applicant at the hands of the LTTE, I find that it is unfounded. A simple examination of the PRRA decision allows me to say that the PRRA officer considered the risk of the applicant at the hands of the LTTE. In fact, the PRRA officer clearly demonstrated in the resumé of facts that he understood that the applicant was worried about both sides, the Sri Lankan authorities and the LTTE. Furthermore, the PRRA officer did comment on the general situation in Sri Lanka at pages 3 and 4 of his decision. These comments were clearly involving both the Sri Lankan authorities and the LTTE since they were referring to the consequences of the conflict involving both sides. In other words, the PRRA officer made his decision after analysing the conflict between the two sides which necessarily means that he assessed the risk to the applicant at the hands of both sides. Moreover, the PRRA officer referred to various public documents which indicate that both the Sri Lankan authorities and the LTTE were abstaining from hostile acts against the civilian population. Therefore, the present case is different from *Fabian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1527, [2003] F.C.J. No. 1951 (F.C.) (QL) which is invoked by the applicant. In *Fabian*, *supra*, the PRRA decision was problematic because it stated categorically that "there is no evidence that the LTTE has issued a death threat against Mr. Fabian." From the applicant's perspective, this conclusion was patently unreasonable because it overlooks evidence that the applicant introduced concerning the said threats and provided no explanation as to

why that evidence was not accepted. Clearly, considering the above comments, this is not the case here.

[56] Moreover, I find that the PRRA officer carefully considered the potential risk to the applicant. In his decision, he clearly understood and referred to each of the applicant's allegations of risk. He also analysed the general country's conditions, taking into account all of the public documents mentioned above. A review of the decision establishes that the PRRA officer did not ignore the "contrary evidence." On this matter, it has been held by this Court that, although a decision maker in the immigration process is not required to refer to each piece of evidence that was before him, when there is evidence which directly contradicts their findings, that contrary evidence must at least be acknowledged (*Zheng v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 140 (F.C.T.D.) (QL) at para. 13). Read in its totality, the PRRA decision demonstrates that the PRRA officer was aware of and considered the contradictory evidence; a failure to list, line-by-line, the various statements buried in the documentary evidence that would support the position of the applicant is not an error. *(Thavachelvam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1604, [2004] F.C.J. No. 1944 (F.C.) (QL)) In the case at bar, the PRRA officer considered the applicant's evidence when he assessed the risk of the applicant at the hands of the LTTE and concluded that there was insufficient objectively identifiable evidence to support a finding that the LTTE would still be interested in the applicant, an ordinary Tamil and fisherman, for incidents that occurred before the cease-fire. Therefore, I find that the applicant's argument in connection with his fear of torture at the hands of the LTTE has been specifically addressed within the PRRA officer's decision.

[57] As for the applicant's allegation on the matter of state protection, it is well established that the PRRA officer must weigh the evidence in connection with the state of origin of the applicants (*Canada (Minister of Employment and Immigration) v. Malgorzat*, [1991] F.C.J. No. 337 (F.C.A.) (QL)). The PRRA officer can, in order to make his decision, look at all the evidence with respect to the State's efforts to protect the Sikhs. The Supreme Court of Canada has stated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 724-25:

> ... however, clear and convincing confirmation of a State's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the State protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty.

[58] In the case at bar, this Court finds that the applicant did not succeed in proving the Sri Lankan State's inability to protect him. Moreover, the applicant did not even prove that he was a supporter of the LTTE. In fact, he simply did not establish that he was actively searched for by the Sri Lankan authorities nor the LTTE. Clearly, the PRRA officer was entitled to consider the fact that the applicant is not involved in political or militant activity. Furthermore, according to all the recent public reports mentioned in the PRRA decision, the situation in Sri Lanka is stable for the population including ordinary Tamils. In short, the PRRA officer concluded that

the situation in Sri Lanka has changed since the applicant's departure from Sri Lanka and that his return to Sri Lanka would not pose a risk to his safety since he is only an ordinary Tamil. This conclusion made by the PRRA officer is a factual determination. In my opinion, the PRRA officer determination is reasonable and is in accordance with case law (*Ward, supra*) Therefore, there is no reason for the Court to intervene on this issue.

[59] In conclusion, the applicant did not succeed in proving that he was a high profile person. He simply did not prove that his particular situation was different from the normal situation in Sri Lanka with respect to ordinary Tamils which is described in the public documents. Therefore, this Court finds that the PRRA officer's decision to reject the applicant's allegations with respect to the risk of torture by both the Sri Lankan authorities and the LTTE in the event of his return to Sri Lanka was clearly based on relevant evidence and is reasonable. Consequently, even if this Court had weighed the evidence differently, it cannot intervene since the PRRA officer's decision is based on relevant evidence submitted before him (*Linaogo v. Canada (Solicitor General)*, 2004 FC 335, [2004] F.C.J. No. 336 (F.C.) (QL)).

[60] The applicant has proposed the following two questions for certification:

1) Is an application for judicial review of a PRRA officer's decision moot after an individual has been removed from Canada?

2) Does the Court have the power, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 and/or its inherent jurisdiction, to order the Minister to return an individual to Canada for the redetermination of a PRRA?

[61] In order to be certified, a question must be one which, in the opinion of the Applications Judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application but it must also be one that is determinative of the appeal. (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 (F.C.A.) (QL)) While there is some uncertainty in the case law with respect to the issues of mootness and available remedies in cases where an individual has been removed from Canada, I am not prepared to certify the proposed questions. In my view, the answers would not be determinative of this case, for I have already concluded that the PRRA officer has made no reviewable error in rejecting the applicant's application for protection.

ORDER

THIS COURT ORDERS that this application for judicial review be dismissed. No question of general importance shall be certified.

" Luc Martineau "

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1070-04

STYLE OF CAUSE:

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Applicant

and

THE SOLICITOR GENERAL OF CANADA

Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 14, 2004

REASONS FOR ORDER

AND ORDER: THE HONOURABLE MR. JUSTICE MARTINEAU

DATED: MARCH 10, 2005

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