Date: 20050613

Docket: IMM-3377-04

Citation: 2005 FC 834

BETWEEN:

JASINDAN RAGUPATHY

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER

LUTFY, C.J.:

[1] The applicant, now twenty-three years of age, is a Convention refugee and a citizen of Sri Lanka. In January 1999, he became a permanent resident of Canada. It is agreed that he is now inadmissible on grounds of serious criminality within the meaning of section 36 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The principal issue in this application for judicial review is whether the opinion of the Minister's delegate that the applicant Jasindan Ragupathy is a danger to the public in Canada ("the danger opinion") discloses an error of law. In my view, it does, and the opinion of the Minister's delegate will be set aside for the reasons that follow.

[2] I agree with the respondent that the cessation of refugee protection provisions in sections 108 through 111 of the IRPA have no application in this case. There is no suggestion in the danger opinion or in the Minister's position in this Court that the applicant does not continue to be a Convention refugee. The applicant's suggestion that the danger opinion "bypassed" the section 108 cessation process is not well-founded.

[3] As a Convention refugee, the applicant cannot be removed from Canada, even though he is inadmissible on grounds of serious criminality, unless the Minister or his delegate concludes that the applicant constitutes a danger to the public in Canada. The relevant statutory provisions are subsection 115(1) and paragraph 115(2)(a) of the IRPA:

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de

be returned 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 political opinion or at risk of torture or cruel and unusual treatment or punishment.	son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

These provisions implement Canada's obligations under article 33 of the 1951 *Convention relating to the Status of Refugees*. Paragraph 115(2)(b) concerning a person who is a danger to the security of Canada has no application to Mr. Ragupathy.

[4] In my view, it must be apparent from the opinion of the Minister's delegate that a determination has been made that the Convention refugee is "a danger to the public in Canada", as that term has been interpreted in the case law under both the former and the current immigration legislation. For example, it has been held that the phrase "danger to the public" means "a present or future danger to the public": *Thompson v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. no. 1097 (QL) (T.D.).

[5] The removal from Canada of a person with the status of a Convention refugee is an exception to the principle of *non-refoulement* enshrined in article 33 of the Convention and subsection 115(1) of the IRPA. The danger opinion is the *sine qua non* to the removal from Canada of a Convention refugee. Without a valid danger opinion, the Convention refugee cannot be removed from Canada.

[6] It is only a valid danger opinion, as required by paragraph 115(2)(a) and made on the basis of an assessment of the applicant's criminal record, which removes from the applicant the protection of *non-refoulement* in subsection 115(1).

[7] In my view, the danger opinion contemplated by paragraph 115(2)(a) is to be made in the first instance on the basis of criminality and without regard to any of the risk factors which the Convention refugee may face if returned to the country from which refuge was sought. In other words, the Convention refugee must be established to fall within paragraph 115(2)(a) before other considerations become relevant.

[8] There are two possible determinations that can be made. The Minister's delegate may conclude that the Convention refugee is not a danger to the public in Canada. In that instance, the protection from *refoulement* in subsection 115(1) remains and any analysis of the risk factors associated with deportation has no relevance.

[9] Alternately, the Minister's delegate may conclude initially that the Convention refugee's criminal record justifies a determination that the person is a danger to the public in Canada and comes within paragraph 115(2)(a). Such a finding, however, will not in and of itself allow the removal of the applicant from Canada. According to *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, a case concerning a person said to be a danger to the security of Canada, section 7 of the *Canadian Charter of Rights and Freedoms* requires a balancing of the risks faced by the person as a consequence of deportation to the country from which refuge was sought against the adverse effects to the community in Canada of that person remaining here.

[10] I continue to hold the view that the Minister's delegate must develop "a clear, distinct and separate rationale" as to whether the applicant is a danger to the public in Canada: *Akuech v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 337 at paragraph 7. This initial determination must be made independently from any consideration and balancing of the competing interests concerning the Convention refugee's presence in Canada or the injustice that could be caused to the individual upon deportation.

[11] In August 2000, Mr. Ragupathy was convicted of related offences of attempted theft under $5,000 and was sentenced to a concurrent term of imprisonment for twenty days and probation for eighteen months. In July 2001, while still on probation, Mr. Ragupathy was convicted of aggravated assault under subsection 268(2) of the *Criminal Code of Canada* and sentenced to imprisonment for three years. He was simultaneously convicted of a related offence concerning the possession of a weapon and was sentenced to a concurrent one-year term of imprisonment.

[12] In this case, the danger opinion begins with a recitation of the relevant statutory provision. There is then a short recitation of the facts of the case. This is immediately followed by a two-fold risk assessment: the first part is a summary of the submissions from the applicant and the second part is a summary from the current country conditions. The Minister's delegate then continues her reasons for determination with a danger assessment which is immediately followed by a short section on humanitarian and compassionate considerations. The rationale for

the decision is then explained immediately prior to the recitation of the decision itself. The danger opinion concludes with a statement of the material consulted.

[13] In *Suresh*, the Supreme Court of Canada made clear that courts should exercise deference to the Minister's choice of procedures on how best to make a danger opinion. It is not for this Court to dictate to the Minister or his delegates on how best to structure a danger opinion. However, I am concerned that a danger opinion that begins with risk assessments prior to a clear, distinct and separate rationale that the applicant is in fact a danger to the public in Canada will lead to confusion.

[14] In the last paragraph of the section of her reasons concerning danger assessment, the Minister's delegate states:

> In summarizing the danger Mr. Ragupathy poses to Canadians, I must rate it as high. I am cognisant of the work of Mr. Ragupathy has done while incarcerated, and I applaud his efforts. On the other hand, these offences are very serious. I note that this is not his first conviction since his arrival in Canada, and that he was on probation when this most recent offence occurred.
>
> Despite the able submissions of Mr. Provart, I am not satisfied that this paragraph is a clear determination that the applicant is a danger to the public in Canada, let alone that he represents a present and future danger to the public. The language is equivocal and falls short of being a definitive statement that the applicant represents a danger to the public of Canada within the meaning of paragraph 115(2)(a).

[15] The lack of explicitness is further exacerbated by the subsequent analysis of the Minister's delegate.

[16] Under the heading "Rationale", the Minister's delegate reviews in her first paragraph her analysis of the risks which the applicant might encounter upon his return to Sri Lanka. In her second paragraph, she reviews the applicant's criminal record and the reports from correctional officers. She expresses no opinion in this section of her decision.

[17] It is in her penultimate paragraph of the danger opinion that the Minister's delegate makes the following determination:

> After fully considering and balancing all facets of this case, including the humanitarian aspects and the need to protect Canadian society, I find the latter outweighs the former. The interests of Canadian society outweigh considerations around Mr. Ragupathy's continued presence in Canada. I therefore, find that Mr. Ragupathy constitutes a danger to the public in Canada and I have signed the attached decision to that effect. [Emphasis added]
>
> I can only understand the phrase "considering and balancing all facets of this case"as being a reference by the Minister's delegate to both the danger for the public if the applicant remains in Canada and the risk factors to him if he is deported. I am not certain as to the meaning intended by the Minister's

delegate in stating "the latter outweighs the former." One is left with the impression that "humanitarian aspects" include risk factors related to deportation.

[18] The Minister's delegate was required to provide a clear, distinct and separate rationale as to whether the applicant was a danger to the public in Canada. Until she reached such a determination, there could be no issue of the applicant being returned to Sri Lanka as a Convention refugee. It was only upon the preliminary determination that he is a danger to the public in Canada, and thereby comes within paragraph 115(2)(a), that an analysis of the risks he would face upon his return to Sri Lanka and the balancing of those risks against the danger to the public in Canada as the result of his ongoing presence here was required under the decision in *Suresh* and section 7 of the *Charter*.

[19] In summary, after extensive consideration of the reasons for decision, I have not found that they disclose a clear, separate and distinct rationale that the applicant is a danger to the public in Canada. Also, I have not been able to conclude that the Minister's delegate understood the necessity of providing such a rationale, pursuant to paragraph 115(2)(a), unrelated to her consideration and balancing of the risk factors. The balancing of competing interests is only relevant upon her determination that his continued presence in Canada would be a danger to the public in this country.

[20] For these reasons, because of the error of law disclosed on the face of the record, an order will be issued setting aside the danger opinion. The matter will be referred for redetermination by a different Minister's delegate. The respondent will want to ensure that this matter is dealt with expeditiously. The parties may file submissions within seven days of the date of these reasons for order if they wish to suggest the certification of a serious question.

"Allan Lutfy"

C.J.

Montréal, Quebec

June 13, 2005

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3377-04
STYLE OF CAUSE:	JASINDAN RAGUPATHY
Applicant	
and	
THE MINISTER OF CITIZENSHIP	
AND IMMIGRATION	
Respondent	
PLACE OF HEARING:	Toronto and Ottawa, Ontario
DATE OF HEARINGS:	March 23, 2005 and April 29, 2005
REASONS FOR ORDER:	LUTFY C.J.
DATED:	June 13, 2005

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