Federal Court  Cour fédérale

Date: 20150505

Docket: IMM-2619-14

Citation: 2015 FC 584

Toronto, Ontario, May 5, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

THANGARASA SRIGNANAVEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Summary

[1] This is an application for judicial review by Thangarasa Srignanavel [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a decision by an immigration officer [the Officer] of Citizenship and Immigration Canada, dated October 31, 2013 and communicated to the Applicant on April 1, 2014, wherein the Officer

refused the Applicant's pre-removal risk assessment application [PRRA] and determined that he was not a Convention Refugee or a person in need of protection. The Applicant's solicitor failed to file written submissions in support of the Applicant's PRRA. The application is granted for the reasons that follow.

II. Facts

[1] The Applicant was born on August 18, 1974. He is a citizen of Sri Lanka of Tamil ethnicity from the North. The Applicant fled Sri Lanka to live in India with his wife and child between November 2007 and January 2011. With the help of an agent, he returned to Sri Lanka while his wife and child stayed in India and began his journey to Canada in February 2011.

[2] The Applicant arrived in Canada on April 1, 2011 and immediately claimed refugee protection, alleging persecution from the Sri Lankan Government and the pro-government paramilitary group Eelam People's Democratic Party [EPDP]. The Immigration and Refugee Board of Canada, Refugee Protection Division [RPD] rejected the Applicant's claim on January 16, 2012. The determinative issues were the Applicant's lack of credibility and lack of objective fear of persecution at the hands of the Sri Lankan police army and the EPDP. The Applicant filed an application for leave and judicial review of the RPD's decision on February 16, 2012, which was dismissed on June 1, 2012 (IMM-1648-12).

[3] Having been advised by the Canadian Border Services Agency [CBSA] that his removal was imminent, the Applicant requested a deferral of removal on December 4, 2012, alleging that country conditions in Sri Lanka had deteriorated significantly since the refusal of his refugee

claim by the RPD. The Applicant again requested a deferral of removal on December 11, 2012 after he was formally served by the CBSA, on December 6, 2012, with a Direction to Report for removal scheduled for December 29, 2012 at 18:25 pm.

[4] On December 21, 2012, the Applicant filed a request with this Court for a *mandamus* ordering CBSA to process and issue a decision regarding his request for a deferral of removal and a motion to stay his removal from Canada to Sri Lanka (IMM-13055-12). On December 24, 2012, CBSA refused the Applicant's request for deferral. On December 28, 2012 this Court stayed the Applicant's removal.

[5] On January 2, 2013, because CBSA had refused to defer the Applicant's removal and a stay had been granted, the Applicant discontinued his request for a *mandamus* and filed an application for leave and judicial review of the CBSA's decision, which was dismissed July 4, 2013 (IMM-22-13).

[6] The Applicant filed a PRRA application on May 9, 2013. The due date for written submissions was May 25, 2013. The Applicant's counsel failed to record the due date for written submissions and consequently failed to file written submissions in support of the PRRA application.

[7] Counsel's failure was a pure, inadvertent, clerical error and not any form of misconduct, or disregard for the best interests of the client. Systems were in place, no one caught the fact that

there was a due date, the date was missed, and as a result the PRRA – which required the filing of new evidence – was dismissed.

[8] The solicitor quite correctly contacted his professional governing body, the Law Society of Upper Canada, to self report this problem. The solicitor sought the law society's advice which he acted upon, including of course explaining the matter to his client and obtaining the client's consent to continue his representation.

[9] Because no submissions were filed, the Officer dismissed the Applicant's PRRA on October 31, 2013. This decision was communicated to the Applicant on April 1, 2014. He filed an application for leave and judicial review of that decision in this Court on April 4, 2014.

[10] On April 10, 2014, the Applicant was served with a Direction to Report for removal scheduled for May 5, 2014 at 18:30 pm. On May 1, 2014 this Court ordered a stay of the Applicant's removal to Sri Lanka pending the determination of his application for leave and for judicial review of the PRRA Officer's decision, and leave for judicial review was granted on January 28, 2015.

III Decision under Review

[11] The PRRA Officer noted that a PRRA was not a review of the RPD's decision and noted some of the RPD's findings. He noted that the Applicant's application for leave and judicial review of that decision had been dismissed by this Court. For the purpose of his assessment, the

Officer reviewed and considered the Applicant's PRRA application and the RPD's decision and reasons.

[12] The PRRA Officer noted that the Applicant had not enumerated any risks and instead stated "please see counsel's submissions". The Officer noted that no submissions were received and that they were due on May 25, 2013. On that basis, the Officer found that the Applicant had presented insufficient evidence to persuade him to come to a conclusion different than that of the RPD (that the Applicant is not a Convention refugee or a person in need of protection).

IV Issue

[13] This matter raises the issue of whether a breach of natural justice occurred as a consequence of the failure by the Applicant's counsel to file written submissions in support of his PRRA application.

V Standard of Review

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."

[15] Issues of procedural fairness and natural justice are reviewable under the correctness standard of review: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at

para 43; *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 53-55. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI Submissions of the Parties and Analysis

[16] The issue before me goes to the Applicant's right to fully present his case. This is an issue of natural justice and procedural fairness. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22, the Supreme Court of Canada emphasized that:

> the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker [emphasis added].

[17] Relying on *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FCR 51 (FCA) [*Shirwa*] and *R v GDB*, 2000 SCC 22 [*GDB*], this Court held in *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 at paras 55-56 that the incompetence or negligence of counsel will amount to a breach of procedural fairness in only limited circumstances as outlined below:

> [55] In order to establish that the incompetence of one's counsel resulted in a breach of procedural fairness, the Supreme Court of

> Canada in *GDB* […] held that (1) , it must be established that counsel's acts or omissions constituted incompetence; and (2) the Applicant must demonstrate that a miscarriage of justice has resulted. The Supreme Court of Canada also confirmed that the onus is on an applicant to establish the acts or omissions of counsel that are alleged to have been incompetent and "the wisdom of hindsight has no place in this assessment."
>
> [56] In proceedings under the *Immigration and Refugee Protection Act*, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances." With respect to the performance component, at a minimum, the incompetence or negligence of the applicant's representative [must be] sufficiently specific and clearly supported by the evidence. It must also be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial results having been compromised. In this regard, the Applicant must demonstrate that there is a reasonable probability that the result would have been different but for the incompetence of the representative. [emphasis added]

I emphasize the need to find "a reasonable probability that the result would have been different".

[18] However, in *Thamotharampillai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 438, at paras 9 and 10 [*Thamotharampillai*], this Court set out a slightly different test, namely that the Applicant has the burden is to establish a "fairly arguable case" only, not "a reasonable probability that the result would have been different":

> [9] In order to succeed in this judicial review, the applicant must establish the facts on which the claim of incompetence is based, that the consultant was incompetent, and that the incompetence resulted in a miscarriage of justice (*Robles v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 374, 2 Admin LR (4th) 315, and *Hallatt v Canada*, 2004 FCA 104, [2004] 2 CTC 313).
>
> [10] The first two elements are not in issue. The fact of the matter is that the immigration consultant failed to carry out his instructions to file representations. The only question is whether this incompetence resulted in a miscarriage of justice. It is

> common ground that it is not enough to submit that a competent consultant would have filed further representations. The issue is whether those representations would have had any effect on the Minister's Delegate's decision. Mr. Thamotharampillai submits that the onus upon him has been discharged if he has made out a fairly arguable case. The Minister submits there has to be a reasonable probability that this material would have made a difference.

The Court later determined the Applicant's burden at paragraph 13: "The burden is to establish a fairly arguable case, not to establish on the balance of probabilities that one would be successful."

[19] In my view, the correct test depends on the fault involved. It must take into account the context of the error.

[20] On the facts of this case, while falling short of professional negligence or incompetence in the normal usage of the word, the clerical and inadvertent error for which the Applicant's solicitor does and must accept responsibility is a species of negligence and/or incompetence, albeit at the very low end of the range. I say this because proper systems were in place all of which unfortunately failed.

[21] In these circumstances, I find that the Applicant must establish a fairly arguable case that but for the error the result might have been different. It not necessary to establish on the balance of probabilities that the applicant would be successful. The latter test would impose far too high a price for inadvertent clerical error.

[22] I do wish to emphasize that it is not enough to simply point to inadvertent, clerical error or a variant thereof and obtain a rehearing of the matter in relation to which the error was made. In this case the Applicant must make out a fairly arguable case he or she would be successful regarding the missing document(s). In my view, the Applicant has met that test for the following reasons.

[23] The Applicant is a Tamil from the North of Sri Lanka, and has twice established before this Court (on the two motions for stay of removal) that he would suffer irreparable harm if he was to be deported. The Applicant filed with this Court country condition documents suggesting a change in risk, which of course is for a PRRA officer and not this Court to more fully assess. In the case at bar, the issue is also one nonfeasance and not malfeasance, although I say this without fully relying upon the distinction.

[24] Conditions in Sri Lanka have changed and are continuing to change. The Court takes judicial notice of its earlier decision (*Navaratnam v Canada (Minister of Citizenship and Immigration*) 2015 FC 244 at paras 13 to 16 [*Navaratnam*]) where the deterioration of conditions in Sri Lanka between 2012 was noted. Both the RPD in this case and in *Navaratnam* relied on out of date 2010 UNHCR documents. In *Navaratnam* I wrote:

> [13] I raised with both parties at the hearing the Court's concern about relying on outdated decisions in deciding this judicial review. I appreciate the general rule is that judicial review is conducted on the record subject to the filing of admissible new evidence. And while the RPD makes a comprehensive assessment under sections 96 and 97, the PRRA Officer on his or her subsequent review must also assess risk. But it is well known that the situation in Sri Lanka is changing. The original RPD decision was made in what might be called the after-glow of the peace. On December 17, 2010 the RPD identified a persuasive decision

relaxing its position concerning the return to Sri Lanka of Tamil males from the North. However, this early optimism was misplaced as evidenced by Canadian and other refugee authorities. In December 2012 the UNHCR replaced its 2010 Guidelines for Tamils returning to Sri Lanka because the circumstances for Tamils returning to Sri Lanka had deteriorated. In the case at bar, the RPD's 2011 decision relied on the 2010 UNHCR Guidelines which while then current, are now no longer current.

[14] The PRRA Officer also relied on the 2010 UNHCR Guidelines to the extent he relied on the earlier RPD country condition findings, although by then they no longer applied. I must add that the PRRA Officer was under a duty to consult up to date country condition documents. The fact that the PRRA Officer failed to identify, assess or even mention the 2012 UNCHR Guidelines requires that this decision, made as it was in August 2013, be set aside.

[15] Since the change in the UNHCR Guidelines, the situation for Tamils returning to Sri Lanka appears to have deteriorated further. In April, 2013 the Prime Minister of Canada's special envoy to Sri Lanka, after his investigation, reported that what was happening to Tamils in Sri Lanka was "soft ethnic cleansing". In October 2013, the Prime Minister of Canada boycotted the Commonwealth Heads of Government Meeting hosted by Sri Lanka because of Sri Lanka's human rights issues including treatment of Tamils. The Swiss ceased removals to Sri Lanka in later 2013. In terms of the position adopted by Canadian refugee authorities, I find it very noteworthy that on November 7, 2014 the RPD revoked its 2010 Tamil-related persuasive decision: see *Policy Note: Notice of Revocation of Persuasive Decision VA9-02166*. These are all matters of public record.

[16] I appreciate that all these new developments were not before the PRRA Officer. However, a major point of a PRRA is to make sure Canada has got its risk assessment right before a claimant is deported. The PRRA Officer is the last line of risk assessment, subject to the removal officer's limited decision. There is no point in having a PRRA if it is to proceed on information known to be incorrect. Given this and the fluid situation in Sri Lanka concerning Tamils generally and returning failed asylum seekers specifically, in remitting the matter for redetermination by a different PRRA officer, in my view it is appropriate that new evidence be filed.

[25] I am satisfied that the Applicant has met the burden he has to meet, and has shown a fairly arguable case concerning new risk which now is for the PRRA officer to consider on a fresh PRRA application.

[26] Neither party proposed a question to certify and none arises.

VII Conclusion

[27] The application is allowed, no question is certified and there is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is granted, the PRRA Officer's decision is set aside, the matter is remitted to a differently constituted PRRA officer for re-determination in respect of which new evidence may be filed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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