Federal Court  Cour fédérale

Date: 20190802

Docket: IMM-6400-18

Citation: 2019 FC 1041

Ottawa, Ontario, August 2, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SARATHRAJBABU KUMARARAJAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by a Minister's Delegate to issue an exclusion order against the Applicant on December 6, 2018.

II. Background

[2] The Applicant is a 34-year-old citizen of Sri Lanka.

[3] In 2017, the Applicant alleges that he was forcibly taken by the army on two separate occasions, and that he was beaten and suffered degrading treatments while detained. He was only released in exchange of a promise to pay a specific sum of money, being made to understand that more beatings would otherwise take place, if the money was not provided.

[4] Unable to put together the required amount of money, and fearing for his life and safety, the Applicant explains that he decided to make arrangements to leave Sri Lanka with the assistance of an agent.

[5] The Applicant arrived in Canada via the United States on December 6, 2018, and made a refugee claim upon arrival. In his written documents, as well as during his interview, the Applicant declared that he did not have "family members" in Canada, as defined in section 159.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations or IRPR]. During the interview, the agent listed all the categories of relatives that are included in the definition of "family member", and the Applicant answered "no" to each one, including when asked about having an uncle or an aunt in Canada. He alleges that he was advised by the agent who assisted him in leaving Sri Lanka to only mention his sister-in-law, and thus he did not answer the question truthfully when asked.

[6] Because the Applicant arrived through the United States, a country to which the Safe Third Country Agreement applies, the Applicant could not make a refugee claim in Canada, unless he had a family member in Canada, in accordance with the exception found in section 159.5 of the Regulations.

[7] Since the Applicant had reported having no family members in Canada; and, he did not hold a visa or other document required under the Regulations, a report was issued in accordance with subsection 44(1) of the IRPA, stating that the Applicant is inadmissible pursuant to paragraph 41(a) of the IRPA. This prompted the Applicant to modify his answers and to declare that he has an uncle and an aunt in Canada. The agent stated that this information was provided too late and a Minister's Delegate issued an exclusion order against the Applicant.

[8] The Applicant was deported to the United States, but he returned to Canada, without reporting at the border, on December 13, 2018. He was arrested and detained for not having respected Canadian immigration law.

III. Decision under Review

[9] The Applicant is challenging the exclusion order issued by the Minister's Delegate. The issuance of the exclusion order is based on the fact that the Applicant failed to comply with the IRPA, more precisely 1) with the requirements of paragraph 20(1)(a), which requires that a foreign national – other than those referred to in section 19 of the IRPA – establish that a visa or other document is held as required under the IRPR in order to enter or remain in Canada; and

2) with the requirements of section 6 of the IRPR, under which "a foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa".

IV. Positions of the Parties

A. *The Applicant's Arguments*

[10] The Applicant submits that, because of the grave consequences of a removal order, a greater duty of fairness must be afforded to individuals who come to Canada from the United States to seek asylum.

[11] The Applicant further claims that both the officer of the Canada Border Services Agency [CBSA Officer] and the Minister's Delegate "breached procedural fairness by not allowing him to clearly explain that he had in fact family members, as per defined in regulation 159.1 of IRPR". He contends that he should have been given a chance to include his uncle and aunt in his application once he understood the consequences of this omission.

[12] In his affidavit, the Applicant also indicates that he was not allowed to have a lawyer to give him advice (Applicant's affidavit, paragraph 25); however, this point was not argued in his memorandum of argument.

B. *The Respondents' Arguments*

[13] The Respondents submit that there was no breach of procedural fairness: the Applicant was told that he had to answer the questions truthfully, and he was clearly asked about his family

members; yet, he opted to listen to the advice of the agent who had helped him escape Sri Lanka rather than answer the questions truthfully. His telling the truth, once he realized the consequences of not having declared that he has family members in Canada was too late.

[14] With regard to the Applicant's point that he was not afforded the right to consult a lawyer at the border, although this argument was not made in the Applicant's memorandum, the Respondents, nevertheless submitted that "[t]he jurisprudence is clear that applicants do not have a right to a lawyer at the interview" (Respondent's Memorandum of Argument, at p 5; reference is made to *Mbulu v Canada (Citizenship and Immigration)*, 1994, 94 FTR 81 at para 5).

V. Issues and Standard of Review

[15] This judicial review raises the following questions:

1. Did the CBSA Officer and the Minister's Delegate breach the Applicant's procedural fairness?
2. Did the Minister's Delegate err in issuing an exclusion order?

[16] The question of procedural fairness must be reviewed using the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at para 43 and *Kone v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 845 at para 27).

[17] With regard to the applicable standard of review for the second question, the Court agrees with Justice Simon Noël that the reasonableness standard applies:

> An immigration officer's decision that a refugee claim is ineligible to be referred to the RPD because the applicant arrived in Canada via a third safe country is a question of mixed fact and law that must be reviewed on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*]; see, for example, *Mutende v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1423, [2011] FCJ No 1732). The Court must limit its intervention to situations where the immigration officer's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).
>
> (*Biosa v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 431 at para 17 [*Biosa*].)

VI. Relevant Dispositions

[18] The following dispositions from the IRPA are relevant in this case:

Obligation on entry	**Obligation à l'entrée au Canada**
20 (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
Application for judicial review	**Demande d'autorisation**
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1,	**72** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1,

commenced by making an application for leave to the Court.	subordonné au dépôt d'une demande d'autorisation.
Ineligibility	**Irrecevabilité**
101 (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101** (1) La demande est irrecevable dans les cas suivants :
(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or	e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
Regulations	**Règlements**
102 (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions	**102** (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment :
(a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;	a) la désignation des pays qui se conforment à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture;

The following dispositions from the IRPR are also relevant:

Definitions	**Définitions**
159.1 The following definitions apply in this section and sections 159.2 to 159.7.	**159.1** Les définitions qui suivent s'appliquent au présent article et aux articles 159.2 à 159.7.
family member, in respect of a claimant, means their spouse or common-law partner, their	**membre de la famille** À l'égard du demandeur, son époux ou conjoint de fait, son

legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece.	tuteur légal, ou l'une ou l'autre des personnes suivantes : son enfant, son père, sa mère, son frère, sa sœur, son grand-père, sa grand-mère, son petit-fils, sa petite-fille, son oncle, sa tante, son neveu et sa nièce.
Non-application — claimants at land ports of entry	**Non-application — demandeurs aux points d'entrée par route**
159.5 Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that	**159.5** L'alinéa 101(1)e) de la Loi ne s'applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l'un de ceux visés aux alinéas 159.4(1)a) à c) démontre, conformément au paragraphe 100(4) de la Loi, qu'il se trouve dans l'une ou l'autre des situations suivantes :
…	[…]

VII. Analysis

A. *Did the CBSA Officer and the Minister's Delegate breach the Applicant's procedural fairness?*

[19] No breach of procedural fairness took place. The Applicant was to respond truthfully to questions asked in respect of his family members in Canada. The Applicant did not do so.

[20] "The principles of fundamental justice do not include a right to counsel in these circumstances of routine information gathering" (*Deghani v Canada (Employment and Immigration)*, 1995, 94 FJR 81 at para 50).

B. *Did the Minister's Delegate err in issuing an exclusion order?*

[21] The decision of Justice Noël above in *Biosa* does demonstrate clearly that it is reasonable to issue an exclusion order under general circumstances as outlined by the Respondents; however, in this case, it appears that the Applicant did finally specify in the course of conversation, otherwise. Therefore, the responses of the Applicant, at that late part of the interview, were not taken into account. Thus, in conclusion, the Applicant did mention relatives which under the legislation would have been acceptable for the pursuit of the Applicant's refugee claim in Canada. The Court is of the view that the file must be considered anew, as, in final analysis, the Applicant did specify, although very late, that he did have an adequate family relative, as required by law. (The accuracy of the family relationship, in Canada, as specified by the Applicant, can be verified by the Minister's Delegate, as to the assertion of the Applicant.)

VIII. Conclusion

[22] For all the reasons above, the Court orders that the judicial review be granted and that the matter be considered anew in recognition of the information as per the relative specified.

JUDGMENT in IMM-6400-18

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter be considered anew. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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