Federal Court  Cour fédérale

Date: 20220119

Docket: IMM-37-20

Citation: 2022 FC 66

Ottawa, Ontario, January 19, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ELAGUNATHAN THAMILSELVAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Elagunathan Thamilselvan, was born in Sri Lanka and later fled. He is a citizen of the United Kingdom where he sought and was granted refugee protection. His spouse and two minor children are Canadian citizens.

[2] The Applicant's spouse applied to sponsor him for permanent residency as a member of the family class. Following an interview with a Canadian immigration officer [Officer], the High Commission of Canada, Immigration Section refused the sponsorship application in 2010.

[3] The Officer found the Applicant was a member of the Liberation Tigers of Tamil Eelam [LTTE] and thus, had "reasonable grounds to believe" he was inadmissible pursuant to subsection 34(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. See Annex "A" below for relevant provisions.

[4] The Applicant's spouse submitted a second sponsorship application in 2014. A Senior Immigration Officer [SIO] also denied the second application more than five years later in 2019. Similarly, the SIO concluded the Applicant was inadmissible under s 34(1)(f) of the *IRPA* for having been a member of the LTTE.

[5] The Applicant seeks judicial review of the SIO's December 5, 2019 decision [Decision]. At issue are whether there was a breach of procedural fairness and whether the SIO's finding of LTTE membership was reasonable. There is no dispute, however, that the LTTE is a terrorist organization.

[6] Having considered the parties' written material, as well as their oral submissions, I find that the determinative issue is breach of procedural fairness. For the more detailed reasons below, I thus grant this judicial review application.

II. Additional Background

[7] In connection with the second sponsorship application in 2014, the Applicant received a procedural fairness letter in June 2019 [PFL]. The PFL provided him an opportunity to respond to the inadmissibility under the *IRPA* s 34(1) because of self-admitted involvement with the LTTE, an organization deemed to have committed terrorism.

[8] Upon the request of the Applicant's counsel for the disclosure of all material that gave rise to the inadmissibility concern, the Respondent forwarded five pages of notes from the Officer's 2010 sponsorship interview. The final page of the interview notes mentions the Applicant's UK asylum statement and indicates that the Applicant did not dispute its content. The asylum statement itself, however, was not included as part of the disclosure. Nor did the disclosure include the paragraph 34(1)(f) inadmissibility assessment of the National Security Screening Division [NSSD] of the Canada Border Services Agency [CBSA] dated May 21, 2019 [NSSD Report]. The NSSD Report only came to light in the context of the Applicant's judicial review application.

[9] The Applicant sought clarification whether the Respondent would rely on the asylum statement in the inadmissibility determination. The Respondent indicated in reply that they would not rely on the statement because they did not have a copy of it.

[10] On August 15, 2019, the Applicant provided detailed submissions in response to the PFL including a sworn affidavit, character references, and evidence that his spouse was working two jobs to support their family because of the Applicant's lack of status/work permit.

[11] One week later, the Respondent sent an item of new disclosure described as "a transcript of information that you had previously provided to the UK Home Office as part of your asylum claim."

[12] The Applicant argued that this new disclosure violated his right to procedural fairness as he had been told explicitly that the asylum statement would not be relied upon. The Officer responded that the transcript was not of the UK asylum statement, but the Applicant's 2010 interview with a Canadian visa officer (that is, the Officer). To correct this error, the Applicant sent portions of the UK asylum statement matching the new disclosure. In response, the Respondent advised that the procedural fairness requirements were met and they would be relying on the asylum statement.

[13] Subsequently, on December 5, 2019, the Officer denied the spousal sponsorship application on the basis of inadmissibility pursuant to paragraph 34(1)(f) because of the Applicant's past membership with the LTTE.

III. Standard of Review

[14] There is no disagreement in the case before me regarding the applicable review standard. Breaches of procedural fairness in administrative contexts have been considered subject to a

"reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* factors: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.

IV. Analysis

[15] I agree with the Applicant that in the circumstances of this case, the failure to disclose the NSSD Report, is a determinative breach of procedural fairness. The Respondent argues that the duty of fairness is not breached if the Applicant had an opportunity to respond to concerns in SIO's mind "by the documents," even documents not given to the applicant: *Jahazi v Canada (Citizenship and Immigration)*, 2010 FC 242, at paras 51-55.

[16] The PFL indicates that the Applicant's "self-admitted involvement in the …LTTE" may result in the Respondent having to refuse the Applicant's permanent residence application because of inadmissibility to Canada under the *IRPA* s 34(1). The PFL describes the LTTE as a deemed terrorist organization. It further states that "some members may be found inadmissible to Canada" and points to the Applicant's responsibility to demonstrate that he is not a member.

[17] The NSSD Report does more, however, than simply summarize the Applicant's declarations made during his 2010 interview in the UK, including his alleged forced involvement

with the LTTE. It makes determinations about the nature of the tasks performed by the Applicant and concludes that he "improved the efficiency of the LTTE by providing functional support." The NSSD Report concludes that the Applicant was a member of the LTTE, an organization that has engaged in terrorism, and that as such, he is inadmissible to Canada pursuant to paragraph 34(1)(f) of the *IRPA*. The NSSD therefore recommends that there are "reasonable grounds to believe the applicant is inadmissible to Canada at this time" and notes that the inadmissibility decision rests solely with the decision maker.

[18] This Court has held that "[p]rocedural fairness in the context of someone who seeks to become a permanent resident requires that the information the government relies on be made available to the applicant, and that she be able to respond": *Moghaddam v Canada (Citizenship and Immigration)*, 2018 FC 1063 [*Moghaddam*] at para 44, citing *Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883 [*Maghraoui*] at paras 22-23, 438 FTR 163. The Court states in the latter decision that "the principles of procedural fairness require that an applicant be provided with the information on which a decision is based so that the applicant can present his or her version of the facts and correct any errors or misunderstandings": *Maghraoui*, at para 22.

[19] Apart from the Applicant's self-admitted involvement in the LTTE, the PFL does not disclose the specific information on which Respondent relies as the basis for concluding the Applicant might be a member of the LTTE. As the Court found in *Moghaddam,* at para 48, I similarly find that the NSSD Report "articulates concerns in significant details, details that were not shared with the applicant."

[20] Further, the Federal Court of Appeal has enumerated the following factors to be considered in determining whether the disclosure of a document such as the NSSD Report was necessary to ensure the person concerned had a reasonable opportunity for meaningful participation in the decision-making process:

(i) the nature and effect of the decision within the statutory scheme,

(ii) whether, because of the expertise of the writer of the report or other circumstances, the report is likely to have such a degree of influence on the decision maker that advance disclosure is required to "level the playing field,"

(iii) the harm likely to arise from a decision based on an incorrect or ill-considered understanding of the relevant circumstances,

(iv) the extent to which advance disclosure of the report is likely to avoid the risk of an erroneously based decision, and

(v) any costs likely to arise from advance disclosure, including delays in the decision-making process.

See *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 [*Bhagwandass*] at para 22.

[21] Justice Dawson, as she then was, considered the *Bhagwandass* factors in the context of an undisclosed CBSA memorandum recommending an inadmissibility determination under section 34 of the *IRPA*: *Mekonen v Canada (Citizenship and Immigration)*, 2007 FC 1133 [*Mekonen*]. In considering factors (i) and (iii), Justice Dawson points to a higher duty of procedural fairness where there is no appeal mechanism in the statute and where an inadmissibility finding would

prevent, as in the case before me, the family from reuniting in Canada (absent extraordinary ministerial relief): *Mekonen*, at paras 14 and 21.

[22] Regarding *Bhagwandass* factor (ii), and tellingly, the NSSD Report in my view is not simply informational. Rather, notwithstanding the statement that the inadmissibility decision rests solely with the decision maker, I find that the NSSD Report is "an instrument of advocacy designed… to have such a degree of influence on the decision maker that advance disclosure is required to 'level the playing field'": *Mekonen*, at para 19. This is especially the case where no national security or similarly serious concerns have been shown that would militate against the document's disclosure.

[23] Regarding factor (iv), unlike the situation in *Mekonen*, the NSSD Report contains discussions of what the NSSD considers "terrorism" and "membership." Although the PFL points to the membership issue, I find that the Applicant was deprived of the opportunity to consider and respond to the NSSD's perception of these concepts that underpin the NSSD's conclusion the Applicant was a member of the LTTE, notwithstanding the Applicant's assertion he was forced to perform certain tasks.

[24] Finally, given the length of time the Applicant's second sponsorship application was pending, in my view relatively little, if any, cost or delay would have been occasioned by providing the Applicant with the NSSD Report, especially had this been done in response to the Applicant's request for the disclosure of all material that gave rise to the inadmissibility concern.

[25] I also find the SIO's piecemeal disclosure problematic because the Applicant made submissions in response to the PFL based on the express statement that SIO would not rely on the UK asylum statement. The SIO indicated essentially that he did not have a copy of the UK asylum application and, therefore, could not examine it. That said, I am not persuaded that the SIO's subsequent reliance on that portion of the UK asylum statement provided by the Applicant himself represents a breach of procedural fairness.

[26] The SIO confirmed on November 12, 2019 that he would rely on the very UK asylum statement that the Applicant provided to the SIO (to correct the SIO's misapprehension about interview notes between the Officer and the Applicant, that in fact were excerpts from the Applicant's interview with UK asylum officers). Although not ideal, the Applicant had several weeks, before the decision was rendered on December 5, 2019, to make additional submissions, further to his PFL response in mid August, to address the UK asylum statement. He did not do so, however, as demonstrated by the November 29, 2019 letter from the Applicant's counsel briefly reiterating procedural fairness concerns.

[27] I find that the back and forth correspondence between the parties from the late summer and throughout the fall of 2019 until the SIO's decision of December 5, 2019 resulted in the correction of the SIO's misapprehension about the UK asylum statement that the Applicant had in his possession: *Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 134 at para 36; *Micourt v Canada (Citizenship and Immigration)*, 2014 CanLII 97726 (FC) at page 5.

[28] Based on the foregoing, I find the SIO breached procedural fairness by failing to disclose the NSSD Report to the Applicant but did not do so by relying on the UK asylum statement that the Applicant himself provided to the SIO. In light of my determinative finding of breach of procedural fairness, I decline to consider the remaining issues, including the reasonableness of the SIO's December 5, 2019 decision.

V. Conclusion

[29] The Applicant's judicial review application is allowed. The SIO's December 5, 2019 decision is set aside and the matter is to be remitted to a different officer or decision maker for redetermination.

[30] Neither party proposed a serious question of general importance for certification and I am satisfied that none arises in the circumstances.

JUDGMENT in IMM-37-20

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is allowed.
2. The Senior Immigration Officer's December 5, 2019 decision is set aside and the matter is to be remitted to a different officer or decision maker for redetermination.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**
***Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27**

Rules of interpretation **33** The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**Interprétation** **33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Security **34 (1)** A permanent resident or a foreign national is inadmissible on security grounds for … **(f)** being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**Sécurité** **34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants : … **f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

FEDERAL COURT

SOLICITORS OF RECORD

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