Date: 20070731

Docket: IMM-1852-06

Citation: 2007 FC 804

Ottawa, Ontario, July 31, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

TRACY-ANN SPENCER

Applicant

and

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

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision of a panel of the Immigration Division of the Immigration and Refugee Board (the Board), dated March 22, 2006, wherein it was determined that Ms. Tracy-Ann Spencer (the Applicant) is inadmissible, pursuant to s. 36(1)(a) of the *Immigration and Refugee Protection Act* (*Act*), on the grounds of serious criminality.

[2] For the reasons that follow, I am satisfied that the issues raised by this application have been finally disposed of in an earlier decision by Justice Blais in *Spencer v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 990. Accordingly, this application will be dismissed.

[3] The Applicant is a citizen of Jamaica who has been a permanent resident of Canada since 1993. On September 13, 2002, the Applicant was convicted of importing cocaine, contrary to s. 6(1) of the *Controlled Drugs and Substances Act* and, ultimately, was sentenced to 20 months imprisonment. The Applicant does not dispute that her conviction meets the definition of serious criminality set out in s. 36(1)(a) of the *Act*. That is, she acknowledges that she was convicted of an offence punishable by a maximum term of imprisonment of at least 10 years, for which a term of imprisonment of more than six months was imposed.

[4] As a result of this conviction, the Respondents began a process of determining whether the Applicant should be declared inadmissible to Canada and deported.

[5] Immigration Officer Ron Legault interviewed the Applicant on July 27, 2005, at the Vanier Centre for Women in Milton, Ontario. The purpose of the interview was to determine if the applicant was inadmissible and whether or not the officer should write a report pursuant to s. 44(1) of the *Act*. Officer Legault, in a decision dated August 31, 2005, wrote a s. 44(1) report (the s. 44 report) indicating that the Applicant was inadmissible for reasons of serious criminality pursuant to s. 36(1)(a) of the *Act*. The s. 44(1) report was then considered, and a s. 44(2) referral for an admissibility hearing was made.

[6] As required by the Act, the next step was the holding of an Admissibility Hearing before the Board. That hearing took place over a number of days from November 8, 2005 to March 22, 2006. Two overarching issues were before the Board. Specifically, the Board was called on to decide: (a) whether the Applicant had been afforded procedural fairness in the preparation of the s. 44 report; and, (b) whether the Applicant was inadmissible pursuant to s. 36(1)(a) of the *Act*. The Board responded affirmatively to each of these questions in a decision delivered orally on March 22, 2006. This is the decision that is the subject of this judicial review.

[7] The Applicant commenced two applications for leave and judicial review. The first was in respect of the decision of Officer Legault where he refused a request by the Applicant to reconsider his s. 44(1) report. The Applicant sought, in that application, to have the s. 44 report quashed. Leave was granted and the matter heard by Justice Blais of this Court on August 9, 2006. Justice Blais dismissed the application for judicial review (*Spencer v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 990). The key issue raised by the Applicant was whether the Applicant had been afforded procedural fairness in the preparation of the s. 44 report. Of particular importance to this application, Justice Blais made the following findings in response to the issues raised:

- Officer Legault did not err in his exercise of discretion in that he did take humanitarian and compassionate considerations into account.

- Officer Legault met the duty of fairness to the Applicant. Specifically, Justice Blais found that the officer did explain the purpose of the interview to the Applicant and its possible

outcome and that the Applicant was given an opportunity to make submissions opposing her removal from Canada.

- Officer Legault did not ignore evidence.

[8] The second application for judicial review – the one that is now before me – is directed to the decision of the Board. Thus, on its face, it appears to be a different application and would warrant a separate review. However, a careful reading of the application and the issues raised by the Applicant in this second application indicates that it is, in fact, a request that the Court consider the same issues as were decided by Justice Blais.

[9] In this application, the Applicant sets out three issues:

1. Did the Board err in its finding that the Officer afforded procedural fairness to the Applicant?

2. Did the Board err by ignoring or misinterpreting evidence?

3. Was there a breach of natural justice because the transcript of the Applicant's testimony was lost and not available?

[10] Each of these issues relates solely to the determination by the Board that the Applicant had been afforded procedural fairness by Officer Legault in the preparation of the s. 44 report. This is

exactly the issue that was before Justice Blais and was decided by him. No separate issue has been raised.

[11] The Respondents submit that, as a matter of judicial comity, I should follow the decision of Justice Blais. The Applicant asserts that the record before me is different and that, therefore, comity is not warranted. On the facts of this application, I do not agree with the Applicant.

[12] In the hearing before Justice Blais, all of the evidence now before me was or could have been placed before that Court. In particular, the Board's decision was presented as evidence. Had the Applicant wished to challenge the reliability of that evidence, she could have done so. In my view, the Applicant is simply re-arguing the same issues as were before Justice Blais. In an attempt to obtain a different result, she has provided further evidence to bolster her arguments. However, having examined this evidence, I conclude that there is absolutely no evidence that was not in the hands of the Applicant at the time of the hearing by Justice Blais. For example, the transcripts were provided to the Applicant in May 2006, some four months prior to the hearing. The fact that no transcript was available for one day of the admissibility hearings was also known to the Applicant and her counsel.

[13] In sum, the parties are the same, the issues as to Officer Legault's s. 44 report are exactly the same, the counsel are the same for both parties, and there is no evidence now before me that could not have been presented to Justice Blais. In these circumstances, I am not prepared to reach a different conclusion.

[14] This is not just an issue of comity; it is a question of the finality of decisions. Justice Blais determined that there was no breach of procedural fairness in the decision of Officer Legault. That was a final decision on the matter and should not be changed simply because the Applicant brings forward further (but not new) evidence or arguments in a parallel proceeding.

[15] For these reasons the application for judicial review will be dismissed. Although the Applicant proposed the certification of a question relating to the merits of her application, that question is not determinative and will not be certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Judith A. Snider"

_____

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1852-06
STYLE OF CAUSE:	TRACY-ANN SPENCER v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 26, 2007
REASONS FOR ORDER AND ORDER:	Snider J.
DATED:	July 31, 2007

APPEARANCES:

Mr. Timothy Wichert	FOR THE APPLICANT
Ms. Negar Hashemi	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jackman and Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS